ALSTON&BIRD LLP

333 South Hope Street
16th Floor
Los Angeles, CA 90071-1410

213-576-1000
Fax:213-576-1100
www.alston.com

Jocelyn Thompson **Direct Dial: 213-576-1104** **E-mail: jocelyn.thompson@alston.com**

July 10, 2015

VIA E-MAIL & HAND DELIVERY

Honorable Mayor Garcia and Council Members
City of Long Beach
333 W. Ocean Boulevard
Long Beach, CA 90802

Re: Appeal of CEQA Determinations by Board of Harbor Commissioners re Mitsubishi Cement Corporation's Terminal Modernization Project, July 14, 2015 Meeting, Agenda Item 5-0633

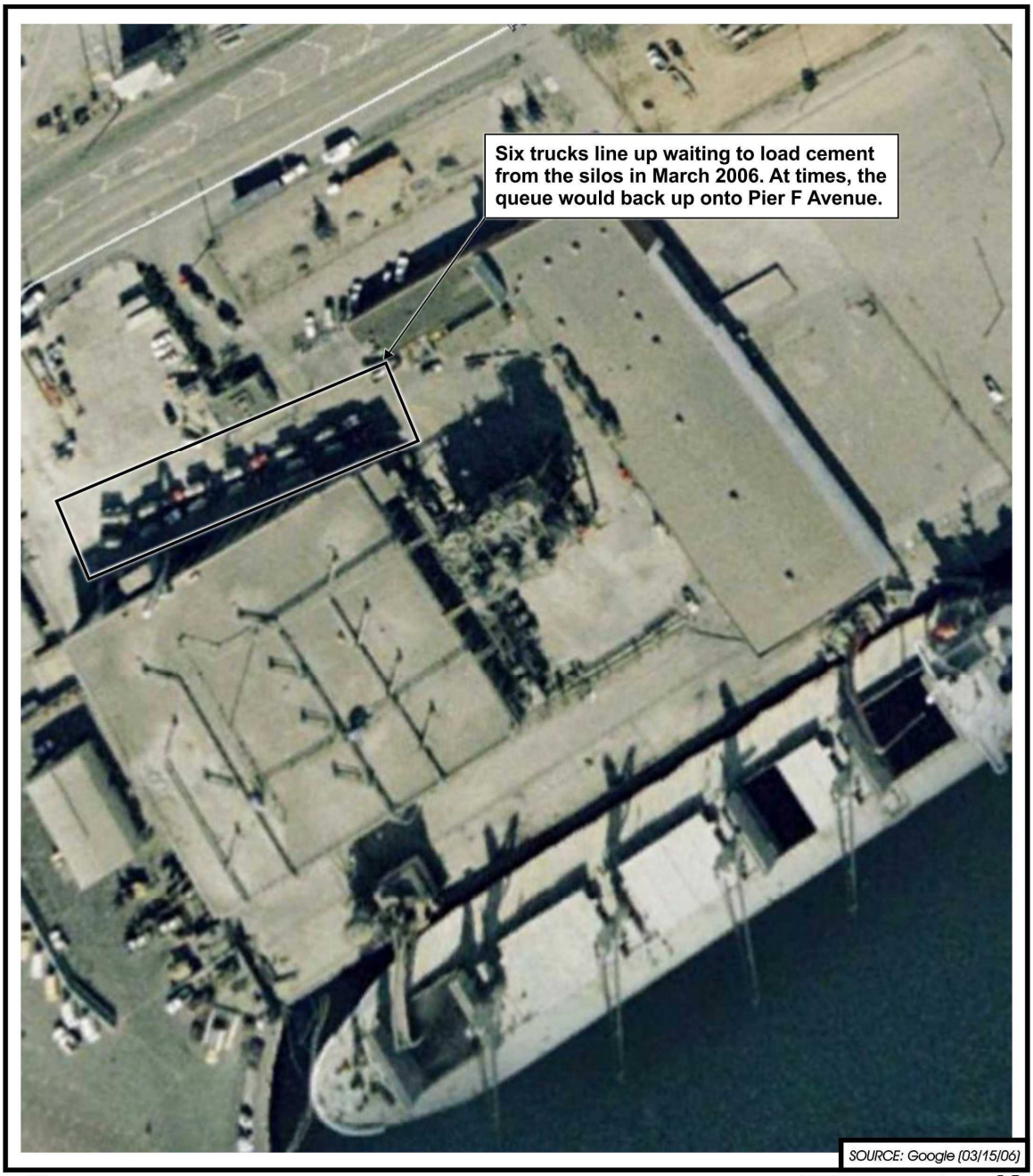
On May 11, 2015, the Long Beach Board of Harbor Commissioners unanimously approved Mitsubishi Cement Corporation's proposal to upgrade and modernize its existing cement terminal in the Port of Long Beach. The Board's approvals have been appealed to Council by a group of organizations led by Coalition for a Safe Environment and a group of organizations led by Earthjustice. On behalf of Mitsubishi Cement, we respectfully request that you deny the appeal and uphold the decision of the Board. It is the correct outcome under the California Environmental Quality Act (CEQA). The project also is precisely the type of project the Port should encourage. Key project objectives and terminal features include the following:

Efficiency Improvements:

- The project will add surge storage capacity, but not increase throughput.
- Added capacity will ***avoid the demurrage cost and air emissions from ships*** waiting to unload, which occurs when the existing warehouse is already full.
- Conversely, added capacity will ***reduce truck queuing and congestion*** which occurs when the existing warehouse is nearly empty and trucks have to wait for cement as it is being unloaded from the ships.

Air Pollution Control for Ship Emissions:

- The most effective emission control for ships at berth is to use shore power.
- Mitsubishi's terminal is ***fully equipped to supply shore power to ships***.
- Not all ships are capable of using shore power 100% of the time.
- This project adds an alternative ***mobile emission control system*** to capture and treat ship emissions when the ships cannot plug into shore power.



AERIAL VIEW OF MITSUBISHI CEMENT CORPORATION
LONG BEACH TERMINAL

Project No. 2387

Figure 1

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I. SHORE POWER AND THE DoCCS

Mitsubishi Cement supplies Portland cement and cement products to customers across the southwestern United States by way of its cement import terminal here at the Port of Long Beach and its manufacturing plant in Lucerne Valley, California. The cement import terminal is located at 1150 Pier F Avenue, within the highly industrialized inner Port Complex on land owned by the Port. With the project, the terminal will expand onto an adjacent parcel. The additional space will allow Mitsubishi Cement to construct new bulk cement storage silos, add a new vacuum bulk cement unloader, retrofit an existing vacuum unloader to state-of-the-art efficiency standards, and complete the first commercial installation of a dock-side emission control system (DoCCS) to control ship emissions when ships cannot plug in to shore-power.

The added capacity provides surplus storage for bulk cement, thereby reducing the inefficiencies that can occur due to irregular ship deliveries and fluctuations in cement demand. Since cement deliveries to the facility are ordered months in advance, changes in the demand for cement can occur after the order has been placed. There have been periods when the warehouse was full and ships calling at the facility could not unload upon arrival. The vessels had to wait at berth or anchor until sufficient warehouse capacity was available for the ship to offload the entire ship's load. This delay resulted in additional ship exhaust that would not otherwise have occurred. (Table 1, included here as Attachment A, shows emissions from delays occurring in 2006.) Conversely, there have been periods where local demand was high, but there was insufficient cement product at the facility. Queuing trucks, waiting for ships to unload, would back up onto Pier F Avenue, increasing congestion in the Port complex. (See photo presented as Figure 1, preceding page). Along with reducing demurrage costs to Mitsubishi Cement, stabilizing supply at the terminal through adequate storage capacity minimizes unnecessary air emissions by allowing efficient loading and unloading.

A. Mitsubishi Cement's Award-Winning Cold-Ironing Innovation.

The Mitsubishi Cement terminal was among the first San Pedro Bay terminals to be equipped with shore power to avoid air emissions from ships at berth. Moreover, it has achieved this distinction without any modifications to the ships arriving at its terminal. For its pioneering approach to cold-ironing, in 2009 the Ports of Long Beach and Los Angeles honored Mitsubishi Cement with the Clean Air Action Plan Award.[1]

[1] See the Port-produced mini-documentary video showing the shore power installation at Mitsubishi Cement's Long Beach facility: https://www.youtube.com/watch?v=69Wi943puYU (last accessed July 7, 2015). Mitsubishi Cement also has received numerous awards for environmental programs at its mine and cement plant in Lucerne Valley, California. Over the past 15 years, this recognition includes Mojave Desert Air Quality Management District Exemplar Awards (1997, 2000, 2004 and 2007); the Global Cement Corporation Award for Environmental Impact Abatement in 2006; the California EPA's Integrated Waste Management Board's Waste Reduction Awards Program (WRAP) Winner (2000, 2002); Certificate of Recognition of Efforts to Reduce Waste by San Bernardino Board of Supervisors (2001); and the

Ships burning marine diesel are a substantial source of air emissions in the South Coast Air Basin. Ocean-going vessels are equipped with primary engines for transit, and auxiliary engines to power ship infrastructure and systems such as lights, air conditioning, and power-driven components like doors, lifts, and on-board cranes. While at berth, ships typically shut down their main engines but continue to operate one or more auxiliary engines. These at-berth emissions can be avoided if a ship can be connected to shore power. Therefore, where feasible, shore-side power is the most effective method of avoiding ship emissions while at berth. (Supplying shore power to ships is also variously referred to as cold-ironing or alternative marine power.)

The Clean Air Action Plan adopted in 2006 by the Ports of Long Beach and Los Angeles established objectives for increasing the use of shore power. Measure OGV-2 set timetables and requirements for conversion to shore power for selective categories of terminals. It was generally understood that cold-ironing involved substantial investments of capital, as it required both sufficient on-shore infrastructure and retrofits to each of the ships to accommodate the switch from auxiliary engines to shore power. Because of the hurdles and costs, the CAAP required cold ironing only for four classes of terminals: major container and cruise terminals in the Port of Los Angeles (cold ironing within 5 years) and all container terminals and one crude terminal at the Port of Long Beach (within 5 to 10 years). These classes of terminals typically receive the same ships again and again, often because the ships are owned or controlled by the terminal operator. Thus, the Ports envisioned that these terminal operators would be able to gradually convert their dedicated fleets to be compatible with shore power. The CAAP did not require any other classes of terminals to implement shore power because of the obstacles and costs.

In 2007, CARB approved the "Airborne Toxic Control Measure for Auxiliary Diesel Engines Operated on Ocean-Going Vessels At-Berth in a California Port" Regulation, commonly referred to as the At-Berth Regulation.[2] Similar to the CAAP measures, the At-Berth Regulation applies to dedicated container ships, refrigerated-cargo ships, or passenger ships.[3] The regulation provides vessel fleet operators visiting these ports two options to reduce at-berth emissions from auxiliary engines: 1) turn off auxiliary engines and connect the vessel to some other source of power, most likely grid-based shore power; or 2) use alternative control technique(s) that achieve equivalent emission reductions. Again, the state regulation does not require bulk cargo terminals such as Mitsubishi Cement to implement cold ironing.

Portland Cement Association's National Land Stewardship Award (2001) and National Energy Efficiency Award (2003).

[2] 17 Cal. Code Regs. 93118.3.

[3] The At-Berth Regulation applies to container ships and refrigerated-cargo ships with more than 25 annual visits to a California port; passenger ships come within the rule if they make 5 or more visits.

While the Mitsubishi Cement terminal did not fall under the CAAP shore power measure or the CARB At-Berth Regulation, the air permit for the terminal does require cold-ironing. This permit condition presented significant obstacles. Unlike container terminal operators, who typically own their own fleet and can invest in retrofitting their ships as needed, Mitsubishi Cement does not own or operate the ships calling on the terminal. Since it does not own or operate the ships, it cannot retrofit them or require them to be taken out of service and retrofitted to accommodate shore power using conventional switching technology.

Additionally, the bulk ships serving Mitsubishi Cement rarely made repeat visits to the terminal. From 1998 to 2008, a total of 165 ships visited the Terminal a total of 218 times. During this period, approximately 82% of the ships visited just one time, 12% visited twice, and only 6% visited 3 or more times. During five of those years, not a single ship was a repeat visitor. See the Table 1, showing ship visits by year. [4] Clearly, it would be infeasible to retrofit an ever-changing population of ships owned and controlled by others.

Table 2

Number of Visits/Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
1 time	13	8	11	14	18	18	23	28	25	19	9	135
2 times	0	0	0	0	1	2	2	2	2	1	0	20
3 times	0	0	0	0	0	0	1	0	2	1	0	3
4 times	0	0	0	0	0	0	0	0	0	0	0	3
5 times	0	0	0	0	0	0	0	0	0	0	0	2
6 times	0	0	0	0	0	0	0	0	0	0	0	2
total ships	13	8	11	14	19	20	26	30	29	21	9	165
Percentages												
1 time	100%	100%	100%	100%	95%	90%	88%	93%	86%	90%	100%	82%
2 times	0%	0%	0%	0%	5%	10%	8%	7%	7%	5%	0%	12%
3 times	0%	0%	0%	0%	0%	0%	4%	0%	7%	5%	0%	2%
4 times	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	2%
5 times	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	1%
6 times	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	1%

Source: Mitsubishi Cement data

As it wrestled with this seemingly impossible challenge, Mitsubishi Cement conceived the novel idea to bring power from its onsite power source to a ship's dry-dock breaker. All ships have an on-board "dry dock breaker" through which the ship receives power

[4] The table was prepared by Mitsubishi Cement's consultant, Ms. Marcia Baverman of Environmental Audit, Inc. Ms. Baverman's CV is included here as Attachment B.

Photographs Provided by MCC

Figure 2

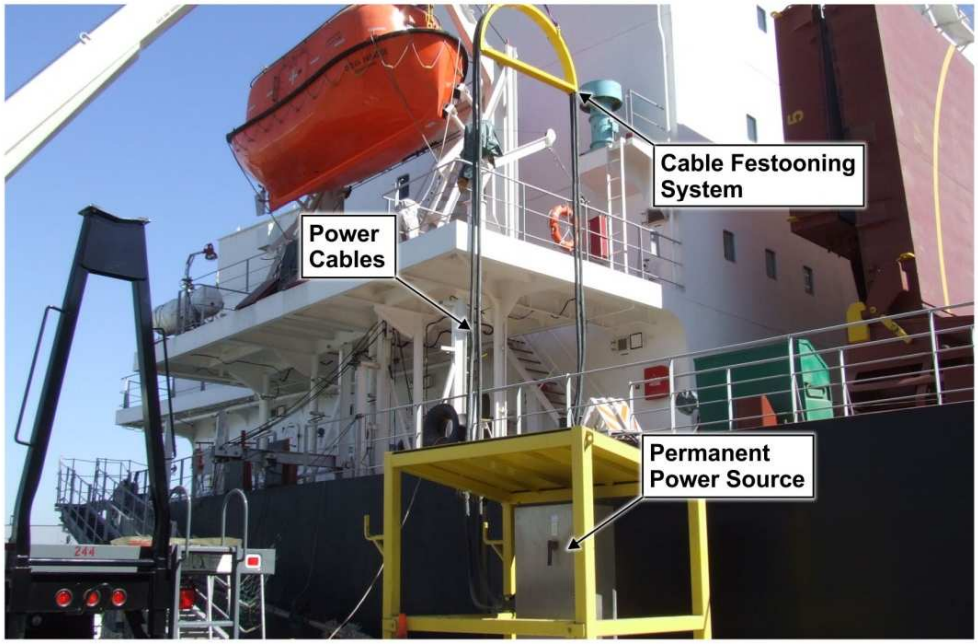


Figure 3

Note: Dry Dock Breaker On Ship Not Visible

while it is in dry dock. Initially, Mitsubishi Cement had to call out an electrical contractor to meet each ship and make the necessary connections, and had to convince each individual, skeptical captain to shut down the auxiliary engines. Once it demonstrated that this approach could work, Mitsubishi Cement obtained a Port permit to install permanent modifications consisting of a permanent power source to the dock and cable festooning system to hook up the power on the ship. Mitsubishi Cement then negotiated a clause in its charter parties committing the captains to cooperate with cold-ironing where feasible. Photographs of the modifications and cold-ironing in process are on the preceding page, presented as Figures 2 and 3.

The Mitsubishi Cement terminal began cold-ironing ships in 2005 (i.e., even before the adoption of the CAAP or the At-Berth Regulations). In 2006, of those ships Mitsubishi Cement sought to cold-iron, 80% of at berth hours were supplied with shore power.[5] Mitsubishi Cement was one of the earliest Port tenants to successfully incorporate routine use of shore power, and accomplished this without any public monies. The CAAP award recognized this achievement.

B. Experience Shows that 100% Cold Ironing Is Not Feasible For This Terminal Because Mitsubishi Does Not Control The Ships.

Mitsubishi's experience from 2005 to 2008 demonstrates that it is not feasible to achieve 100% cold-ironing with the ships that deliver bulk cement to the terminal. For most ships, the dry-dock breaker has a limited capacity to receive electricity. The capacity is sufficient to run the ship's lights, ventilation, computers and other ancillary equipment. But the dry-dock breaker usually cannot receive sufficient power to run the ship's on-board cranes. Near the end of the unloading process at the Mitsubishi Cement terminal, a ship must use its on-board cranes to lift a "power squeegee" from the dock into the ship's holds (and from hold to hold) to complete the clean-out process. This is shown in the photo below (Figure 4), and described in detail in the Port's responses to the appeals. The cranes require more electricity to power than can be safely transmitted through the dry-dock breaker. To meet these power demands, most ships must terminate cold ironing near the end of the unloading process and resume operation of their auxiliary engines to power the on-board cranes.

Having perfected a system for cold-ironing a non-captive fleet, Mitsubishi Cement intends to continue to rely on shore power whenever feasible. Environmental Control Measure AQ-2 will require a minimum of 66% hours cold-ironing. This is less than the 80% cold ironing achieved in the best year to date because of the variability in ships and

[5] The EIR describes Mitsubishi Cement as having achieved closer to 66% cold-ironing in 2006; however, that is because there were three ships which were intentionally not cold-ironed because Mitsubishi Cement was conducting emissions testing in the ships' uncontrolled state. The Port included those ships when calculating total cold-ironing percentage of at-berth hours in 2006.

their dry-dock breaker capacity, and Mitsubishi Cement's lack of control over which ships deliver the product. However, shore power remains Mitsubishi Cement's preferred means of avoiding at-berth ship emissions, and the company expects to exceed the 66% requirement.

Figure 4

Source: FEIR, p. 10-77, Figure 1

C. The DoCCS Is Complementary To Shore Power And Designed For The Specific Needs Of The Mitsubishi Cement Terminal.

Again, the primary emission control strategy for the Mitsubishi Cement Terminal has been and will continue to be shore power. However, Mitsubishi Cement proposes to employ the DoCCS to reduce at-berth emissions when a ship cannot cold iron. The DoCCS was designed to complement the primary shore-power emission control strategy, and to address the specific needs and constraints of the Mitsubishi Cement terminal site.

To design and fabricate the DoCCS, Mitsubishi Cement contracted with the company that fabricated the pneumatic cement unloading equipment currently installed at the facility and that will provide the upgrades and new unloader included in the project. Mitsubishi Cement specified that the armature used to position the capturing hood over the ship

exhaust stack be the same as the same armature used in the vacuum unloaders. In this way, Mitsubishi ensured that the vendor would be using known and proven equipment that will be familiar to Mitsubishi Cement's equipment operators. In addition, the DoCCS will treat NOx emissions using selective catalytic reduction (SCR) technology. For decades, SCR has been effectively implemented in a wide variety of applications to control NOx from fuel combustion.

The DoCCS also will include equipment to control particulate emissions. While diesel particulate filters are more common now than when this project was initially proposed nearly 10 years ago, they are not commonly used to treat ship exhaust. Following start-up of the DoCCS, Mitsubishi will perform testing of the ship exhaust to properly design the particulate control, and then install and test it. The demonstration project will be focused in particular on assessing performance in light of the variability of metals and other contaminants in marine fuels and lubricants, which can affect performance. If the particulate control performs well, it will remain in place permanently.

The DoCCS is nimble: it moves on wheels and has a small footprint. This is important because of space constraints at the Mitsubishi Cement terminal. Currently, the terminal site is only 4.21 acres, and there is not sufficient space even for the small footprint of the DoCCS. With the proposed project, the site will increase to 5.92 acres, but this increase must accommodate the extension of the rails for the vacuum unloaders, the additional storage capacity, and the ship emissions control system. The layout also must allow for safe transit of the bulk cement trucks and other equipment. The DoCCS was designed to maneuver through Mitsubishi Cement's space-constrained facility, which at any time may have bulk cement trucks circulating within truck lanes, pneumatic unloaders moving on berth-side tracks, sweepers, "power squeegees" or payloaders, and other activities. In addition, because it is mobile, it can be positioned away from the dock when not needed.

In sum, the DoCCS is perfectly suited to this site and this project.

D. The AMECS Is Neither An Alternative To Or An Impediment to Installation of the DoCCS at the Mitsubishi Terminal.

The AMECS is neither necessary nor appropriate for the Mitsubishi Cement terminal.

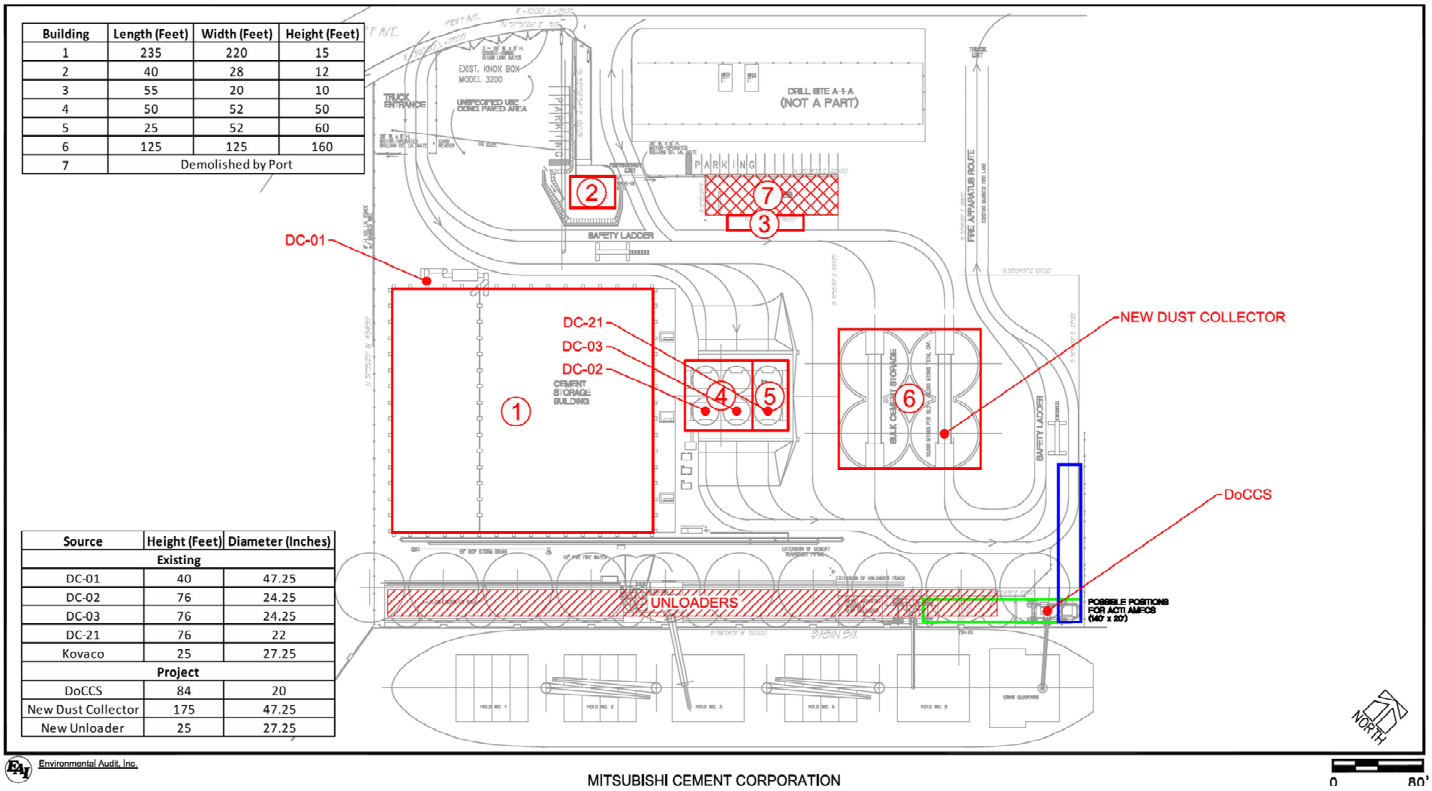
1. The AMECS is Not Well-Suited to Mitsubishi's Terminal.

As described above, the DoCCS was custom designed – using known components and proven technology – to accommodate Mitsubishi Cement's unique facility and use. Mitsubishi selected the DoCCS after considering various emissions treatment options in the early stages of the project, including the AMECS. However, after reviewing information provided by ACTI, the manufacturer, it was concluded that the AMECS was not the best solution for Mitsubishi Cement's terminal.

The AMECS had a large footprint that simply could not be accommodated on the Mitsubishi Cement terminal site. The AMECS footprint was approximately 140 feet by 20 feet, compared with the DoCCS footprint of only 26 feet by 56 feet.[6] Whether oriented parallel or perpendicular to the dock, the AMECS would have obstructed either the unloaders or the truck traffic pattern and fire access.

Figure 5 below shows the post-project site and the AMECS footprint outlined in blue and green in two different possible orientations.[7] Installed parallel to the dock (shown in green), the AMECS would interfere with unloading the number 5 ship hold. Installed perpendicular to the dock (shown in blue), it would directly block truck circulation because, after exiting the silos, the trucks are already making the minimum safe turning radius requiring the least amount of cross traffic on the facility.

Figure 5



[6] FEIR at. 10-62.

[7] Figure taken from FEIR at 10-78.

2. AMECS Is Not Required by CEQA.

The DoCCS is a fundamental component of the terminal modernization project, and Mitsubishi has been seeking approval to install this system for nearly 10 years. Under CEQA, the lead agency's charge is to evaluate the environmental impacts of the proposed project, determine whether they will be significant, and – if so – to identify feasible mitigation that would avoid or substantially reduce the significant impacts.

The Final EIR concludes that even if the air quality analysis assumed installation of the AMECS at the performance level ACTI claims it can achieve, it would not change the impact analysis and significance determinations. For example, NOx emissions primarily come from vessel main engines while a ship is approaching and maneuvering through the harbor, before any emissions control technology can attach. In sum, use of the AMECS here would not make any meaningful difference in the analysis, and would not reduce any significant impacts to levels below the CEQA significance thresholds.[8]

3. The ACTI Patent Issues Raised in the Appeal are Meritless and Irrelevant.

Appellants allege that the DoCCS infringes on intellectual property rights of ACTI, the AMECS developer. Mitsubishi Cement completely disagrees with this allegation. Moreover, intellectual property disputes are highly specialized legal matters far outside the scope of CEQA. ACTI has not brought any action against Mitsubishi Cement relating to the DoCCS. If ACTI did bring such an action, that matter would be the subject of independent evidentiary proceedings between ACTI and Mitsubishi. The Appellants would not be participants in the litigation and they are not qualified to offer expert opinion on the status of the patents.[9] The City Council should refrain from opining on or basing a decision on allegations of patent infringement made by these unrelated third parties with no apparent credentials or expertise in patent prosecution and defense. Even so, Mitsubishi Cement offers the following context regarding the patent issues raised in the appeals.

Over the past decade, there has been increasing focus on controlling air emissions from ships. The Port of Long Beach Green Port Initiative, the Port of Los Angeles No Net Increase Task Force, and the Clean Air Action Plan adopted by both Ports, among other initiatives, have prompted many companies to explore ways to reduce marine vessel emissions in the San Pedro Bay. Mitsubishi Cement and ACTI are not alone in developing approaches to capture and treat ship exhaust. Another company, San Pedro-

[8] FEIR at p. 10-65 to 10-66.

[9] Unlike in lawsuits under CEQA, which may be filed by almost anyone, patent infringement actions may only be brought by a person who has the rights to the patent. 35 U.S.C. §100; 35 U.S.C. §261; see, e.g., *Intellectual Prop. Dev. Inc. v. TCI Cablevision of Cal.*, 248 F. 3d 1333 (Fed. Cir. 2001).

based Clean Air Engineering Maritime, Inc., also has done so. In fact, on June 26, 2015, the Clean Air Engineering ship exhaust treatment system became the first system certified by the California Air Resources Board as an alternative to shore power for container terminals and other terminals subject to CARB At-Berth Regulation.[10]

While there is no litigation between Mitsubishi Cement and ACTI, ACTI did assert that Clean Air Engineering infringed on its patents, and ACTI lost that lawsuit. The trial court held that ACTI's patent claim regarding a device for securing the bonnet to an exhaust stack was invalid based on clear and convincing evidence that the claimed technology had previously been created by others. This means that ACTI cannot assert this patent claim against anyone, including Mitsubishi Cement. With respect to the remainder of ACTI's claims, the trial court found that Clean Air Engineering's technology did not infringe on the patent. Since there was no infringement, there was no need for the court to evaluate whether the remaining patent claims are valid. A copy of the trial court decision is Attachment C to this letter.[11]

A court-ordered prohibition on constructing the DoCCS is highly improbable. First, a patent dispute would need to be initiated by the patent owner (not Appellants or another third party who would lack standing). Second, a federal court would need to find that ACTI's patents are infringed and not invalid – a claim that one court has already cast serious doubts on. Third, even if a court were to find ACTI's patents are infringed and not invalid, ACTI would need to obtain an injunction to prevent the construction and operation of the DoCCS.[12] It is very difficult to obtain permanent injunctions in patent infringement cases following the United State Supreme Court's 2006 decision in the *eBay* case.[13] Additionally, courts are unlikely to enjoin a potentially infringing activity if it could adversely affect public health and welfare.[14] When courts balance the equities to determine whether to grant injunctive relief, they must consider "[h]ow the public interest will be affected."[15] Here, the DoCCS will provide a public health benefit by capturing

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[10] *CARB Executive Order AB-15-01 - Clean Air Engineering-Maritime, Inc.,* approving Clean Air Engineering's Exhaust Treatment System-1 as alternative control technologies which can be used for compliance with the airborne toxic control measure for Auxiliary Diesel Engines Operated on Ocean-going Vessels At-Berth in a California Port ("At-Berth Regulation"), available at: http://www.arb.ca.gov/ports/shorepower/eo/ab-15-01.pdf (last accessed July 7, 2015). As described on page 4 of this letter, the At-Berth Regulation (17 Cal. Code Regs. 93118.3) does not apply to the Mitsubishi Cement terminal.

[11] *Clean Air Engineering Maritime Inc. v. Advanced Cleanup Technologies*, USDC Case No. 2:12-cv-08669 (2014); currently on appeal.

[12] Indeed, the court denied ACTI's request for an injunction against Clean Air Engineering. A copy of the relevant court order is included here as Attachment D.

[13] *eBay Inc. v. MercExchange, L.L.C.* (2006) 547 U.S. 388.

[14] See, e.g., *Milwaukee v. Activated Sludge, Inc*., 69 F.2d 577, 593 (7th Cir. Wis. 1934).

[15] *Shiley, Inc. v. Bentley Laboratories, Inc*., 601 F. Supp. 964, 970 (C.D. Cal. 1985).

ship emissions and using established and proven SCR technology to scrub the emissions when ships cannot connect to shore power while at berth. Thus, even if ACTI were to sue and win – an unlikely event – the outcome may be simply an award of monetary damages based on a reasonable royalty.

Either way, the mere specter of litigation between these private parties should not influence City policy. Indeed, the California Air Resources Board was not deterred by ACTI's litigation when it recently certified Clean Air Engineering's system for use in compliance with CARB's At-Berth Regulation.

II. THE APPEALS RAISE OTHER ISSUES OUTSIDE THE SCOPE OF CEQA AND NOT GERMANE TO THE COUNCIL'S REVIEW OF THE PROJECT

In addition to issues raised under CEQA, Appellants raise concerns about the project that are far outside the scope of CEQA review and would not properly be considered in a CEQA action to challenge the sufficiency of an agency's CEQA determination. Nonetheless, Mitsubishi Cement briefly addresses these issues here for the record.

A. Labor Issues are Outside the Scope of CEQA.

Appellants claim that the project should include a project labor agreement requiring 100% union jobs associated with construction. Appellants provide no legal authority for their position.

As Mitsubishi Cement has repeatedly stated in its communications with the Port and with the public, union labor will be well represented in both operation and construction. Mitsubishi Cement must still complete detailed engineering for the project, and will not be able to state with certainty what types of construction labor will be required until the detailed engineering is completed.

Some of the detailed engineering yet to be completed involves the new cement storage silos. These concrete silos will use a "slipform" method of construction. This highly specialized construction involves the continuous pouring of cement within a mold or form. The form is lifted vertically on hydraulic jacks around the structure. Generally, the slipform is raised at a rate which permits the concrete to harden by the time it emerges from the bottom of the form. This requires precise timing to ensure that the poured concrete has sufficiently hardened by the time the form is raised to support the pour occurring at the next level.[16] Once construction starts, it often must continue around the

[16] Several short but illuminating videos are available on YouTube which illustrate this process. See, e.g., https://www.youtube.com/watch?v=Z8ORXBJ1z9Y and https://www.youtube.com/watch?v=kKXmlAwEyLE (both accessed last on July 7, 2015. Mitsubishi Cement has no affiliation with the companies in the videos; these are purely for illustration purposes).

clock until the slipformed component of the structure is completed. There little room for error in timing, and workers must ensure that the pour is sufficiently smooth. Therefore, slip form construction workers must be knowledgeable about the properties of the cement with which they are working, and generally have extensive slipforming experience. In short, it is highly specialized labor that may not be available locally or with a union on Mitsubishi Cement's schedule.

Mitsubishi Cement expects to employ union labor where it can, and the project has support from unions.[17]

B. The Board Acted Properly in Conducting the May 11, 2015 Hearing.

Appellant CFSE makes the odd allegation that the Board of Harbor Commissioners proceedings were improper because the Board should have allowed CFSE to "rebut" Mitsubishi Cement's comments during the May 11, 2015 hearing. Appellant cites no legal authority in support of this allegation, and there is none.

A public hearing is for the purpose of allowing the public to address the Board and to hear the Board deliberate; it is not designed for debate between two members of the public. Under California's Brown Act, the legislative body of a local agency may set limitations on public comment at a public hearing. Limitations may be placed, for example, upon the discussion of items already considered at a public hearing,[18] as well as the length of time that an individual speaks.[19] The Board followed all relevant procedures in conducting the hearing. It invited members of the public to speak, and speakers were given up to three minutes apiece to comment.

Mr. Jesse Marquez, representing CFSE, took advantage of the opportunity to speak during the May 11 hearing. He raised several issues that had not been raised in prior written comments, and also misinformed the Board about allegedly available technologies when he emphatically stated that certain "ready-mix" cement trucks should have been considered. Thereafter, I, as Mitsubishi Cement's attorney, briefly addressed the Board to clarify that Mitsubishi Cement's project does not use "ready-mix" cement trucks.[20] Mr. Marquez never asked the Board for additional time to respond. The Board might have given him more time, but having already used his allotted minutes, the Board also might have declined the request. Either way, there was no procedural impropriety.

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[17] FEIR at pp. 3.3-7; 10-1; and 10-133 to 10-134; see also May 11, 2015 Hearing (Tr. 25:18-26:20; 27:18-28:8; 29:24-25:6; 31:4-32:5; 38:18-39:8).

[18] Cal. Govt. Code §54954.3(a).

[19] Cal. Govt. Code §54954.3(b).

[20] May 11, 2015 Hearing (Tr. 34:1-12; 36:16-25).

In addition, Mr. Marquez himself undermined the public process. He submitted a lengthy comment letter to commissioners only minutes prior to the start of the hearing, without providing copies for staff or the applicant, Mitsubishi Cement. I asked Mr. Marquez to share a copy of the letter with Mitsubishi Cement, but Mr. Marquez stated that he would not provide Mitsubishi Cement with a copy, nor let Mitsubishi Cement view the letter, until after the hearing concluded, thereby thwarting the public review process. The only chance Mitsubishi Cement or the public had to correct misinformation in Mr. Marquez's comments was after Mr. Marquez spoke at the podium. Had the comment letter been circulated to the public and Mitsubishi Cement beforehand, Mitsubishi Cement would have addressed it in its initial presentation.

III. THE BOARD OF HARBOR COMMISSIONER'S COMPLIED WITH CEQA IN APPROVING THE RESOLUTION CERTIFYING THE EIR

A. Scope of the Appeal.

The only issue on appeal is whether the Board of Harbor Commissioners complied with CEQA in approving the project.[21] In answering this question, the Councilmembers must consider the facts before it and determine whether the Final EIR is adequate under CEQA.[22] The law does not require perfection, but rather "adequacy, completeness, and a good faith effort at full disclosure."[23] In assembling information for and drafting the EIR, the lead agency need not conduct every recommended test or perform all requested research.[24] An EIR is not required to address all of the variations of the issues presented or raised in comments.[25] CEQA does not demand impossibilities, given realistic limitations on time, energy, and funds; a "[c]rystal ball inquiry is not required."[26] And an EIR need not attempt to predict future environmental consequences when future development is unspecified and uncertain.[27] In approving the project's Final EIR, the Board of Harbor Commissioners made the correct determination under CEQA.

[21] See Memo from City Attorney Charles Parkin to Mayor and City Councilmembers re Mitsubishi Cement Appeal, dated July 1, 2015 ("City's Appeal Memo").

[22] Id.

[23] 14 Cal. Code Regs. §15151(a); see also City's Appeal Memo.

[24] *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal. 3d 376, 410; 14 Cal. Code Regs §15204(a).

[25] *National Parks & Conserv. Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1365.

[26] *Residents Ad Hoc Stadium Comm. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286.

[27] *Environmental Protection Info. Ctr. v. California Dep't of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 502.

B. All Environmental Issues Raised in the Appeals Were Addressed by the Board During the Proceedings.

Appellants raise no new environmental issues in their appeals. Each of the issues they raise has been thoroughly addressed in the EIR, or elsewhere in the administrative record. In fact, all issues raised in the Earthjustice comment letter are issues that the Natural Resources Defense Council ("NRDC") raised in its November 18, 2014 comment letter on the Draft EIR. Each of the issues raised by NRDC is addressed extensively in Chapter 10 of the Final EIR. Nonetheless, for the benefit of the City Council, Mitsubishi Cement has drafted a table (included here has Attachment E) which charts the environmental issues raised in the appeals, and documents where in the EIR or the administrative record each issue has been previously addressed.

As Attachment E shows, the administrative record contains substantial evidence supporting the Board's approval of the project and related CEQA documents. Appellants do not offer any evidence to contradict the Board's determinations. The Port does an excellent job responding to each appeal letter in Attachments 7 and 9 in the July 14, 2015 agenda packet. To avoid repetition, the Attachment E matrix supplements the Port's responses. However, Mitsubishi Cement would like to highlight for the Council the following points that merit special consideration.

1. Mitsubishi Cement's Evergreen Truck Measure is Unprecedented and Exemplary.

Mitsubishi Cement continues to be an environmental leader in the Port with its commitment to ensure that 90 percent of the trucks serving its facility are "evergreen," i.e., with engines five years old or newer, or the emissions equivalent. Under AQ-2, <u>all</u> trucks serving the Mitsubishi Cement facility must meet the requirements of the Clean Truck Program, and must be registered with the Port of Long Beach and Los Angeles Clean Truck Program Drayage Truck Registry and the CARB Drayage Truck Registry. But the vast majority of trucks calling on Mitsubishi Cement's facility will meet <u>more stringent standards</u> than the Port's existing Clean Truck Program. CAAP emissions requires 2010 emissions or better, and ours will always be 5 years or newer. This ensures the lowest emissions possible not only at the terminal but throughout the basin, whether the trucks are traveling for this project or others. No other facility in the Port can boast this level of commitment to maintaining such a young fleet.

Figure 6

Figure A-2-6. Maximum 24-Hr PM10 Mitigated Project minus CEQA Baseline Impacts (ug/m3).

2. Air Quality Impacts Are Extremely Localized.

Air quality has been exhaustively addressed in the EIR. For mass emissions, NOx is the only pollutant that exceeds the CEQA significance threshold.[28] Modeled impacts show an exceedence of the significance thresholds for 1-hour NOx as well as standards for particulate matter (PM) 10 and PM2.5.[29] But these impacts are very localized.

As shown in Figure 6 on the preceding page, taken from Appendix A-2 of the Final EIR, the footprint of the PM exceedences, which are also representative of NOx, extend only a few hundred meters beyond the proposed project terminal boundary. The impacts do not extend beyond Pier F. This area consists of entirely industrial operations, and there are no residents here. Figure 6 illustrates the levels of potential impacts from PM10, as derived from the conservatively modeled data. The blue line represents the SCAQMD significance threshold – impacts within that blue line are considered significant. The numbers on the lines represent the concentration of the particulate matter in micrograms per meter squared; the higher the number, the higher the concentration and the greater the potential impact. The area of significant impact remains on Pier F, and essentially follows the roadway until the turn. To be conservative, the air quality modeling used to make the significance determination did not quantify or otherwise account for the implementation of several mitigation measures, including the evergreen truck measure and the DoCCS DPF measure. Actual emissions are expected to be lower.

The HRA completed for the EIR (Section 3.2.2.3) includes an evaluation of the effects of all emissions from the project and those effects are less than significant.

3. Mitsubishi Cement's Contribution to the GHG Mitigation Fund Is Appropriate and Consistent With Port Policy and Practice.

To mitigate increased GHGs from the project, Mitsubishi Cement will make a one-time contribution of $333,720 to the Port's GHG Emissions Reduction Grant Program (mitigation measure GCC-3). This amount was not chosen arbitrarily. The calculations are based on established Port programs that have, themselves, received lengthy consideration and public input. Moreover, the project's total GHG emissions – the figure used to calculate the contribution amount – include third party emissions from electricity generation. In other words, Mitsubishi Cement's increased use of shore power – the preferred method of controlling ship emissions – means that some of Southern California Edison's GHG generation is attributed to this project and considered in calculating the contribution to the fund.

[28] Table 3.2-11 at FEIR p. 3.2-25.

[29] Table 3.2-13 on FEIR p. 3.2-28.

The Board of Harbor Commissioners uses a set of guidelines that establish a framework to provide grant funding to help offset the impacts of impacts of Port operations. To determine how to fund these programs, the Port relied on guidelines that had already been approved through the public process and were appropriate for the region. The Port's use of its guidelines is the result of considerable study and analysis, including public dialogue with stakeholders and others. The Port's calculation of Mitsubishi Cement's contribution amount was made in accordance with these guidelines.[30]

The formula applied to calculate the contribution amount to Mitsubishi Cement's project is the same formula that has been applied to other Port projects subject to these guidelines. GHG emissions are measured in terms of carbon dioxide equivalent (CO_2e), and the formula uses the factor of $15 per metric ton of CO_2e. [31] The project's CO_2e was conservatively based on anticipated emissions from a future peak year.[32] Under the guidelines followed by the Port, the resulting $333,720 contributed by Mitsubishi Cement will be used to fund projects and programs that produce continuous GHG emissions reductions benefits. The Port has been successful at securing funding to provide for meaningful GHG reduction projects in the community.[33] The guidelines used by the Port in calculating and securing these funds are a result of careful consideration, analysis, and public involvement, and it would be inappropriate to undermine them by using an arbitrary number or formula to calculate a fund contribution.

Port and state policies strive to increase the use of shore-power – but Mitsubishi Cement's contribution to the GHG Fund is a reminder that our electricity often comes from somewhere else. Table 3.3-2 in the FEIR shows the activities that contribute to the project's GHG emissions in a peak year. More than one-third of the project's estimated peak year GHG emissions come from offsite electrical generation. Because Mitsubishi Cement will be increasing its use of shore power compared to the EIR baseline, it will increase its electricity use, thereby increasing the amount GHG generation from offsite electricity providers. Mitsubishi Cement is not only purchasing additional power from Southern California Edison to accomplish cold-ironing more ships – the preferred means of controlling ship emissions – but it is also paying a mitigation fee for *Edison's* GHG emissions generated from creating the power in the first place.

Considering the $333,720 in this context, the sum is appropriate

[30] May 11, 2015 Board of Harbor Commissioner's Hearing (Tr. 58:22-62:23).

[31] Tomley Letter, Sec. III.

[32] FEIR at 3.3-9. It also should be noted that the total GHG contribution attributed to the project is based on conservative calculations because it uses total potential throughput capacity, rather than the lower throughput requested by Mitsubishi.

[33] May 11, 2015 Board of Harbor Commissioner's Hearing (Tr. 60:14-18).

4. Appellants Offer No Evidence that Additional Mitigation Measures are Available to Reduce Potentially Significant Impacts to Whales.

The FEIR identifies that there could be a cumulative potentially significant and unavoidable impacts to biological resources from the possibility of whale strikes because of the increased vessel traffic stemming from the project, and the limited measures available to avoid these rare occurrences. The EIR identifies vessel speed as a primary factor related to the severity of injury or mortality to whales, and the potential for serious injury to whales is reduced by compliance with the Port's Vessel Speed Reduction Program required in mitigation measure EC BIO-1. However, as the May 11, 2015 CEQA Findings and Statement of Overriding Considerations recognizes, there remains no feasible mitigation to fully eliminate the risk of whale strikes outside the Port.

Appellants assert that the Port failed to impose other feasible measures which could mitigate the potential cumulative impacts to whales. In conversations with Mitsubishi Cement,[34] Appellants have suggested that use of a smartphone "app" designed to spot whales could somehow be implemented as a mitigation measure. Mitsubishi Cement has independently investigated this "app" and, as described below, finds that use of this "app" would not be feasible mitigation here.

Ships approaching and departing the Port must stay within shipping lanes specified by the Coast Guard. To reduce the risk of whale strike, ships coming to the Mitsubishi Cement terminal will reduce speeds as required by the EIR. The "whale alert app" is not feasible as additional mitigation. It was not designed to be used by each individual ship captain to chart the ship's route. Rather, the app "is intended to be used by researchers, commercial ship operators, charter fishing boat operators, whale watching naturalists, and recreational and commercial fishers to document whale sightings in real time. The data will provide NOAA with information they need to request the US Coast Guard's Vessel Traffic Service to ask ship operators to slow down or change course as they approach areas where whales have been sighted."[35] The app will be used to record sightings; NOAA – the agency with whale expertise – will review the information and consult with the Coast Guard if it thinks ship speeds or routes should be adjusted; and mariners must continue to comply with Coast Guard directives. This makes sense because the app can't show the real time location of any whale.

[34] June 18, 2015 conversation with Messrs. Jesse Marquez, Angelo Logan and Mark Lopez at Mitsubishi Cement's facility.

[35] http://westcoast.whalealert.org/index.php?page=download-spotter (last accessed July 5, 2015).

IV. CONCLUSION

Mitsubishi Cement has won recognition for its commitment to environmental stewardship, and was one of the earliest Port tenants to facilitate the use of shore-power for a non-captive vessel fleet. In so doing, Mitsubishi Cement significantly reduced emissions from vessels idling at berth, earning the Port's Clean Air Action Plan award for this pioneering innovation. Mitsubishi Cement's current project continues the company's investment in state-of-the-art emissions technologies and its engagement in efficient and environmentally sustainable port operations. The terminal improvements will further Mitsubishi Cement's valuable contribution to the Port and to the community. The Port has conducted a thorough environmental review of this project, and the record demonstrates substantial evidence to support the Board's approval of the EIR. For all of the foregoing reasons, we request that the appeal be denied.

Respectfully submitted,

Jocelyn Thompson
ALSTON & BIRD LLP

JT:amm
cc: Adrian Martinez, Earthjustice
Angelo Logan, East Yards Communities for Environmental Justice
Jesse N. Marquez, Coalition for a Safe Environment
Patrick H. West, Long Beach City Manager
Charles Parkin, Long Beach City Attorney
Poonam Davis, Long Beach City Clerk
Jon W. Slangerup, Chief Executive Officer, Port of Long Beach
Richard D. Cameron, Managing Director of Planning and Environmental Affairs, Port of Long Beach

Attachments:

A. Table 1, emissions from cement ships at anchor in 2006

B. CV of Marcia Baverman

C. Trial court decision in *Clean Air Engineering Maritime Inc. v. Advanced Cleanup Technologies*

D. Court order denying ACTI's request for an injunction

E. Mitsubishi Cement's chart of environmental issues raised in the appeals

ATTACHMENT A

Table 1
Mitsubishi Cement Corporation
Emissions from Ships at Anchor in 2006

Total Emissions	Annual (lb/yr)
VOC	505.91
CO	1339.30
NOx	24567.12
SOx	50788.75
PM10	2537.95
PM2.5	2030.36

CO_2EQ	Annual (tonnes/yr)
Ship Emissions	222.66

Based on reported time of arrival to time at berth less maneuvering time.

ATTACHMENT B

RESUME

MARCIA R. BAVERMAN
Project Manager

EDUCATION

B.S., Chemical Engineering with Mathematics Minor, San Jose State University, 1984

REGISTRATION

Registered Chemical Engineer, California, No. 5089

CERTIFICATION

CARB Accredited Lead Verifier, Oil and Gas Specialist, Process Emissions Specialist, Greenhouse Gas Reporting, No. H-15-010
Former Certified OSHA 501Trainer

AREAS OF EXPERTISE

Air Quality
Environmental Document Preparation
Hazardous Waste Management
Policy Manual Preparation
Environmental and Safety and Health Auditing
Regulatory Compliance

EXPERIENCE

present:
Project Manager/Senior Engineer, Environmental Audit, Inc. (EAI). Responsibilities include project management, air dispersion modeling, health risk assessment preparation, CEQA document preparation, emission inventories development for industrial facilities, air and wastewater permit application preparation, conducting compliance audits for industrial facilities, environmental report preparation to provide support to environmental litigation, expert testimony, and addressing RCRA compliance issues.

1993 to 1999
Loss Control Specialist, Staff Engineer, Environmental Specialist, Unocal Corporation. Responsibilities included air emission inventory audit resolution, agency negotiations to minimize level-of-effort in underground storage tank remediation, regulation interpretation, hazardous waste management compliance, training, site safety officer, policy manual preparation, project management, contractor management, compliance and management systems auditing, participation in Western States Petroleum Association regulatory reform task forces, and environmental issues resolution.

1992 to 1993
Partner, Environment. Responsibilities included compliance auditing, environmental Phase I and Phase II assessments, third-party document review, and agency liaison for clients. Responsibilities also included all aspects of managing small firm including marketing, accounting, clerical, purchasing, and subcontractor management.

1986 to 1992
Staff, Project, and Senior Engineer: Safety Officer; Project Manager; Corporate Board Member, M.B. Gilbert Associates. Responsibilities included environmental compliance auditing, environmental Phase I and Phase II assessments, technical consultation to attorneys, safety training provider, OSHA program requirements implementation, and environmental document preparation including Spill Prevention, Control and Countermeasure Plans; Part B Hazardous Waste Storage Facility Permit Applications; Contingency Plans; Waste Minimization Plans, and Emergency Preparedness Plans. Responsibilities also included researching, writing, and publishing award-winning environmental education booklet for the California Department of Real Estate.

1985 to 1986
Industrial Hygienist, Project Manager, Med-Tox Associates. Responsibilities included indoor air monitoring, contractor oversight, building inspections, industrial hygiene monitoring for air contaminants and noise, and training.

1980 to 1982
Internships in Environmental Quality and Safety Engineering, Qualifications and Standards Engineering, and Facilities Engineering, General Electric. Responsibilities included preparation of Environmental Protection Agency required documents, Material Safety Data Sheet management, revision and preparation of updated safety operating procedure manual for chemical cleaning operations, training on noise pollution and hearing conservation. Additional responsibilities included operating a data acquisition computer during seismic qualification of nuclear control room safety-related parts, and collecting and analyzing data obtained from ambient conditions monitoring in a metallurgical stress laboratory.

REPRESENTATIVE PROJECTS

The following is illustrative of representative projects managed by Ms. Baverman based on designated areas of expertise. Additional project references are available upon request.

Air Quality

Work completed includes the calculation and preparation of emission inventories for criteria pollutants, toxic air contaminants, and greenhouse gases; preparation of air permit applications; analysis of emission inventories for conformity to emission budgets and

CEQA significance determinations; preparation of health risk assessments of facility and project emissions; preparation of air quality assessments; and, justification of reported air emissions for emission fees for facilities that include petroleum refineries, electroplating facilities, hazardous waste treatment facilities, defense contractors, military installations, marine terminals, engine manufacturers, paper products manufacturers, pesticide manufacturers, religious facilities, housing developments, and federal facilities. Performed air quality impacts analysis using multiple versions of the EMFAC emissions model for mobile sources, multiple versions of the URBEMIS emissions model for new development projects, emissions modeling using the U.S. EPA ISCST3 and AERMOD dispersion modeling software and CALINE for mobile sources, health risk assessment modeling software including ACE2588, HARP, and IRAPView.

Environmental Impact Reports

Work completed includes the preparation of Environmental Impact Reports (EIRs) and Negative Declarations for the expansion of a solid waste disposal facility for Jet Propulsion Laboratory, multiple refinery, terminal, and pipeline modifications at facilities in Southern California, cogeneration plants at a paper products manufacturer, refineries, and a mineral mine, and preparation of Environmental Resource Documents for federal facilities. Document preparation included environmental topics (e.g., aesthetics, air quality, hazards, noise, traffic, hydrology and water quality, etc.) impact analyses, calculation of emissions, preparation of health risk assessments for toxic air contaminants, and compliance with ambient air quality standards. Prepared technical analyses on behalf of the project applicant to support EIRs prepared by the lead agency for marine terminal operations, sand and gravel mines, and petroleum pipelines.

Assisted in the preparation the EIRs for the South Coast Air Quality Management District (SCAQMD) 2003, 2007, and 2012 Air Quality Management Plans (AQMPs) as well as EIRs and Negative Declarations for various Air Districts throughout the state for District Attainment Plans and proposed Rules. The AQMPs and Attainment Plans provide control measures and strategies to reduce air emissions and allow the Air Districts to comply with state and federal ambient air quality standards. The lead agency for these projects was the SCAQMD, Bay Area Air Quality Management District, Sacramento Metropolitans Air Quality Management District, and San Joaquin Valley Air Pollution Control District. Major issues included air quality, energy, hazards and hazardous materials, hydrology and water quality, and solid and hazardous wastes.

Environmental Document Preparation

- **Naval Facilities in California and Nevada**

  Prepared the Spill Prevention Control and Countermeasure Plans for 7 Naval facilities in California and Nevada. Prepared a Part B permit application for hazardous waste treatment and storage facility at a Naval Air Station in California.

- **Purified Water Products Facility, Los Angeles, California**

  Evaluated wastewater treatment plant at a purified water resin regeneration facility in Los Angeles, California. Recommended plant modifications, prepared operations manual, negotiated alternative wastewater disposal during 180-day disconnection from the industrial sewer, and managed 24-hour per day operation of plant during the disconnection.

- **Industrial Lighting Manufacturer, Wilmington, California**

  Review design of wastewater treatment system for an industrial lighting manufacturer in Wilmington, California. Additional responsibilities included writing operations manual, training personnel on operation and monitoring procedures, and performing startup activities for washing system connected to wastewater treatment system.

- **Toyota Motor Sales, U.S.A., Inc. Facilities**

  Prepared operations manuals for wastewater treatment facilities, stormwater management plans, and Spill Prevention Control and Countermeasure Plans at automobile import, engine design, and manufacturing facilities.

Hazardous Waste Management

- **Unocal Corporation, Brea, California**

  Provided in-house consulting to approximately 100 field personnel on hazardous waste regulations in 45 states. Prepared and presented Resource Conservation and Recovery Act required hazardous waste management training. Coordinated and prepared submittals required for hazardous waste generation in California.

- **Furniture Manufacturing Facility, Vernon, California**

  Provided technical expertise to attorneys on hazardous waste characterization and management regulations during preliminary hearing for alleged hazardous waste

management violations related to activities at a furniture manufacturing facility in Vernon, California. Managed remediation activities associated with electroplating operations.

Site Remediation Management

- **Champion Oil, Dominguez Oil Field, Dominguez Hills, CA**

  Delineated drilling mud sump contamination, oversaw landfarming remediation of excavated material.

- **Various Active and Former Service Stations, Orange County, CA**

  Managed remediation activities including quarterly groundwater sampling, soil excavation, vapor extraction, groundwater treatment, and underground storage tank removal at 40 service stations throughout Orange County. Interfaced with agency representatives from the Santa Ana Regional Water Quality Control Board, Orange County Health Care Agency, and Fire Departments in Fullerton, Santa Ana, Orange, Garden Grove, and Buena Park.

- **Unocal Redevelopment of Imperial Golf Course, Brea, Fullerton, and Placentia, CA**

  Provided technical and regulatory support during the closure and redevelopment of the Imperial Golf Course into a 700+ housing development. Activities included site safety officer, routine environmental audits of contractors, and technical support for oil well abandonment contaminant issues.

Policy Manual Preparation

- **Unocal Corporation, Brea, California**

  Prepared Loss Control Policy manual for environmental and real estate group of Unocal. Revised and produced Contractor Loss Control Policy Handbook issued to the group's contractors.

- **Jet Propulsion Laboratory, Fort Irwin, California**

  Prepared Environmental Protection Policy and Procedures Manual for Goldstone Deep Space Communications Complex, For Irwin, California.

Environmental and Safety and Health Auditing

Work completed has included environmental due diligence audits, regulatory compliance audits, and Phase 1 property transfer audits. Conducted audits for NASA, military installations, circuit board manufacturers, banks, geothermal energy production facilities, property redevelopment projects.

Regulatory Compliance

Work completed has included preparing city permit applications to construct remediation facilities; sanitation district permit applications; working with local agencies to modify existing operations; and, developing and presenting training to comply with the Toxic Substances Control Act, asbestos management and abatement activities, and Hazardous Waste Operations and Emergency Response regulations.

DBS:WORD:PROPOSAL:Resumes:Marcia Baverman (rev 1).doc

ATTACHMENT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
Title	Clean Air Engineering-Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING BENCH TRIAL RE VALIDITY OF CLAIM 19 OF U.S. PATENT NO. 7,258,710**

I. INTRODUCTION

Plaintiff Clean Air Engineering-Maritime, Inc. ("Clean Air" or "Plaintiff") brought this declaratory relief action against Defendants Advanced Cleanup Technologies, Inc. and Advanced Environmental Group, LLC ("Advanced Cleanup" or "Defendants"). Plaintiff seeks a determination that United States Patent Nos. 7,258,710 (the "'710 Patent") and 8,327,631 (the "'631 Patent") are invalid and not infringed by Plaintiff's products, systems, and services. Second Amended Compl. ("SAC"), Dkt. 50. Defendants brought counterclaims for patent infringement. Dkt. 47. In a prior order, the Court granted Plaintiff's motion for summary judgment, concluding that, with the exception of '710 Patent claim 19, all asserted claims were not infringed, but that triable issues remained as to the infringement and validity of claim 19. Order Granting in Part and Den. in Part Pl.'s Mot. for Summ. J. ("SJ Order"), Dkt. 120 at 30.

The parties stipulated to a bench trial of all issues, Dkt. 106, and the Court bifurcated the trial to address initially the validity of claim 19. SJ Order, Dkt. 120 at 1. The parties submitted direct testimony for the bench trial by written declarations that were filed on October 20, 2014. Dkts. 133, 134, and 136. The parties filed their respective evidentiary objections to the direct testimony declarations on October 27, 2014. Dkts. 137 and 138. The Court issued written rulings on those objections on October 30, 2014. Dkt. 140.

The bench trial proceeded on November 18, 2014, when the Court heard live cross-examination and redirect examination. Dkt. 155. The parties filed their written closing statements on December 10, 2014. Dkts. 158 and 159. "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). For the reasons stated in the findings of fact and conclusions of law set forth in this Order, the Court concludes that '710 Patent claim 19 is invalid.[1]

[1] Defendants filed a Request for Judicial Notice in Support of Closing Argument Brief, seeking notice of four

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
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II. FACTUAL AND PROCEDURAL BACKGROUND

A claim construction order issued on December 18, 2013. Dkt. 65. Defendants sought a temporary restraining order on February 25, 2014 in connection with the then-upcoming Trans Pacific Maritime Conference. Dkt. 73. The Court denied the application for a temporary restraining order on February 28, 2014. The Court concluded that, although Defendants had shown a likelihood of success in proving infringement, Plaintiff raised substantial questions regarding validity, and Defendants failed to demonstrate irreparable injury, that a balancing of hardships tilted in their favor or that the public interest supported the issuance of the requested injunctive relief. Dkt. 79.

On May 23, 2014, Plaintiff filed a motion for summary judgment as to non-infringement of all asserted claims and invalidity as to claim 19 of the '710 Patent. Dkt. 97. The Court took this motion under submission on June 20, 2014. Dkt. 116. An order granting that motion in part and denying it in part was issued on July 28, 2014. SJ Order, Dkt. 120. The order held that Plaintiff did not infringe any asserted claims, with the possible exception of '710 Patent claim 19, and denied the motion insofar as it sought a declaration that '710 Patent claim 19 was invalid as anticipated. *Id.* at 30. Thus, the order concluded that factual questions remained with respect to whether U.S. Patent No. 6,185,934, to Teboul ("Teboul") discloses each element of '710 Patent claim 19 as arranged in that claim. *Id.* at 13-19. In light of the summary judgment order, the potential for liability depended on the validity of '710 Patent claim 19.

The summary judgment order concluded that, although both Teboul and claim 19 disclosed securing a bonnet over an exhaust outlet to capture exhaust, drawing the captured exhaust through a duct to an emissions control unit and processing the exhaust, Teboul disclosed its system in the context of "any motor vehicle whatsoever," including a "boat." In contrast, claim 19 is limited to the context of an "Ocean Going Vessel" ("OGV"). *Id.* Questions concerning the issue of "how one of ordinary skill in the art would understand the relative size of a genus or species," *i.e.*, a "boat" relative to an "Ocean Going Vessel," were not fully resolved on the summary judgment record. *Id.* at 18 (quoting *Osram Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 706 (Fed. Cir. 2012)). These are the issues that were presented at the bench trial.

III. SUMMARY OF TRIAL TESTIMONY

government documents: (1) 40 C.F.R. § 94.2 (2014); (2) an EPA regulatory announcement from 2003 titled "Emissions Standards Adopted for New Marine Diesel Engines;" EPA420-F-03-001, (3) draft definitions from the California Air Resources Board ("CARB") Commercial Harbor Craft Workgroup Meeting on August 5, 2005; *available at* http://www.arb.ca.gov/ports/marinevess/meetings/080504definitions.pdf, and (4) a CARB survey of "Ocean Going Vessels" published in September 2005, *available at* http://www.arb.ca.gov/regact/marine2005/appc.pdf. Dkt. 159-1. That request came after the close of evidence. Defendants did not explain their failure to make this request in a timely manner. However, there will be no prejudice to Plaintiff if the request is granted. Indeed, Plaintiff did not oppose it. Accordingly, the Request for Judicial Notice is GRANTED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
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Plaintiff's expert, Marko Princevac, holds a B.Sc. in Mechanical Engineering and Naval Architecture and a Ph.D. in Mechanical Engineering. Princevac Direct Testimony Decl. ("Princevac Direct"), Dkt. 136 at ¶ 3. He is a professor at the University of California, Riverside. *Id.* at ¶ 4. His research focuses on "urban dispersion (pollutants or toxic releases, industrial disasters or terrorist attacks) and parameterizations of turbulence within urban canyons." *Id.* at ¶ 9. Princevac teaches a class in the mechanical engineering department concerning the environmental impacts of energy production. *Id.* at ¶ 10. He has researched hydrogen injection in marine diesel engines for the California Air Resources Board ("CARB"), and has tested tugboat emissions in the Port of Los Angeles. *Id.* at ¶¶ 11-12. Princevac testified in a straightforward manner and was credible.

He testified, in part, as to the following:

- To a person of ordinary skill in the art in 2004, the difference between the words "boat" and "OGV" is the strength of construction of the vessel. Thus, the construction of a "boat" may not be sufficiently strong to make the vessel seaworthy. In contrast, the construction of an OGV is sufficiently strong for this use. *Id.* at ¶ 44.
- A person of ordinary skill in the art in 2004 would not distinguish between a "boat" and an "OGV" based on their forms of propulsion. *Id.* at ¶ 49.
- The '710 Patent itself discloses that its emission control invention is not limited to application on an OGV, but can also be used for "control of emissions from land based equipment." *Id.* at ¶ 57 (citing '710 Patent at 7:8-11).
- Other patents cited on the face of the '710 Patent teach that changes in the sizes of the parts can be made, and that the size of assemblies can be appropriately scaled up or down. *Id.* at ¶¶ 56, 58 (citing U.S. Patent No. 4,338,784 at 17:57-61; U.S. Patent No. 5,980,343 at 6:29-34).
- The '710 Patent itself teaches that a variety of sizes can be used, specifically teaching a duct between 12 and 36 inches, *i.e.*, a difference of a factor of three. Trial Tr. II, Dkt. 160 at 16:13-17:14.
- When reviewing Teboul, a person of ordinary skill in the art would not look to regulatory enactments to envision what a "boat" discloses, unless Teboul were designed for a particular regulated use or within a particular regulated jurisdiction. Trial Tr. II, Dkt. 160 at 18:13-19:24.
- In 2004, a person of ordinary skill in the art viewing Teboul's "boat" would have envisioned the "OGV" of claim 19 for the following reasons: "(1) 'boat' was understood to one of ordinary skill in the art to refer to both seaworthy and non-seaworthy vessels; (2) Teboul makes no distinction [relating] to sea worthiness . . . ; (3) size, weight, propulsion mechanism and amount of pollution are irrelevant to the determination of whether a 'boat' is an 'OGV'; and (4) Teboul and the '710 Patent both disclose that the size of the physical components of the inventions may be adjusted as needed." Princevac Direct, Dkt. 136 at ¶ 59.
- A marine engineer or naval architect envisioning the genus "boat" would only consult the CARB regulations if working on a California-specific project. Trial Tr. II, Dkt. 160 at 19:9-24.
- When considering the "boat" in Teboul, a person of ordinary skill in the art would have envisioned an ocean going vessel. Trial Tr. II, Dkt. 160 at 11:19-13:1.
- It would take a person of ordinary skill in the art two or three days to produce full blueprints for Teboul's system scaled up for a large ocean going vessel. Trial Tr. II, Dkt. 160 at 17:23-18:11.
- Teboul does not demonstrate the use of its pollution control mechanism on an airplane, space

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Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
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shuttle, helicopter, submarine or diesel tank, but any engineer could apply Teboul to a diesel tank. Trial Tr. I, Dkt. 153 at 35:4-37:22. From the perspective of an engineer, a space shuttle would be outside the category of "vehicles" as that term is used in Teboul. *Id.* at 38:22-39:6.

- The "motor vehicle" genus in Teboul has a few dozen species. *Id.* at 39:15-25.

Defendant's first witness, Robert Sharp, holds a B.S. in Mechanical Engineering and a B.S. in Engineering Science with a focus on Electrical Engineering. For the last nine years, he has been designing and engineering systems for capturing and treating air pollutants that are emitted from large displacement engines on OGVs. Declaration of Robert Sharp Re: November 18, 2014 Phase 1 Bench Trial ("Sharp Direct"), Dkt. 134 at ¶¶ 6, 8. He is the Vice President of Technology at Defendant Advanced Cleanup Technologies, Inc. Trial Tr. II, Dkt. 160 at 24:15-17. Sharp appeared uncomfortable while testifying. Some of his answers were not directly responsive to the questions posed. Others seemed evasive. Sharp did not cause the Court to conclude that he was not testifying forthrightly. Rather, it appeared that his discomfort with the process caused Sharp to be unduly guarded in answering questions. This resulted in the impression that his answers did not always reflect all that he knew about a particular topic. He also was not a person of ordinary skill in the art at the time of the invention. However, his work in the field over the past nine years appears to have given him certain insights about what a person of ordinary skill in the art at that time would have understood.

Sharp testified, in part, as to the following:

- In his maritime experience, OGVs and boats are within entirely separate genera, with "boats" typically defined as small vessels on various bodies of water, while "ships" are a group of larger vessels capable of transoceanic voyages. Sharp Direct, Dkt. 134 at ¶ 13.
- If the typical boat is equivalent to an average automobile, an OGV is thousands to tens of thousands of times larger, in terms of size, weight, carrying capacity, engine displacement/ power output, and exhaust emissions rate. *Id.* at ¶ 15.
- From a maritime perspective, and in colloquial use, "boat" and "ship" are separate and distinct, and it is commonly said that a boat can be carried by a ship, but not vice-versa. *Id.* at ¶ 16.
- Teboul provides no direction for how its invention can be adapted for or used on a "boat" or other "vessels." *Id.* at ¶ 30.
- In the emissions control industry that involves Ocean Going Vessels, the CARB defines "Ocean Going Vessel" based on the size of the ship or its engine.[2] Similarly, at the time of the invention,

[2] The CARB uses the following definition:

> "Ocean-Going Vessel" means a commercial, government, or military vessel meeting any one of the following criteria:
> (A) A vessel greater than or equal to 400 feet in length overall . . .
> (B) A vessel greater than or equal to 10,000 gross tons . . .
> (C) A vessel propelled by a marine compression ignition engine with a per-cylinder displacement of greater than or equal to 30 liters.

Dkt. 99 at 21 (quoting California Code Regs. § 93118.3). This regulation was not enacted until after the time of the invention, but Defendants' witnesses testified that it is consistent with the understanding of an "ocean going vessel"

people in the industry would have distinguished between a "boat" and an "Ocean Going Vessel." The meaning of "Ocean Going Vessel" did not change "significantly" between 2005 and 2010. At most, it changed somewhat. Trial Tr. II, Dkt. 160 at 32:16-35:10; 41:3-23.

- Sharp is a named inventor on U.S. Patent No. 8,402,746. *Id.* at 38:23-39:8. That patent relates to an exhaust gas capture system for ocean going vessels while at berth or anchor. *Id.*at 39:16-40:2. That patent states that "the terms 'vessel' and 'OGV' mean one and the same, namely, an ocean going vessel used to transport cargo or people," and does not state that a vessel is an OGV only if it meets the specific length, size, or engine displacement requirements of the CARB definition. *Id.* at 43:3-22; 60:11-61:6 (quoting U.S. Patent No. 8,402,746 at 7:23-25).

Defendant's second witness, John Powell, is one of the three inventors of the '710 Patent. He holds a B.S. in physics. Since 2004, he has worked for Defendant Advanced Cleanup Technologies, Inc., and is presently its Manager of Emission Control Systems. Declaration of John Powell Re: November 18, 2014 Phase 1 Bench Trial ("Powell Direct"), Dkt. 133 at ¶¶ 2-6. Powell testified in a straightforward manner and was credible. His testimony included the following:

- By April 2004, the EPA had promulgated 40 C.F.R. § 94.2, which set forth three categories of marine diesel engines based on their propulsion capacities and displacements. *Id.* at ¶ 9. A Category 3 engine in the EPA classification is defined as having a per-cylinder displacement at or above 30 liters. Trial Tr. II, Dkt. 160 at 47:17-20.
- A per-cylinder displacement of greater than or equal to 30 liters is an industry standard definition of an OGV. Powell Direct, Dkt. 133 at ¶ 12.
- Although some may believe the terms "boat" and "ship" are interchangeable, "ships are usually (a) much larger, (b) intended to be navigated across a different operational area (such as the ocean or the high seas), (c) intended to be operated for longer durations (e.g., necessary to cross oceans) and therefore requiring heavier machinery and more advanced navigation systems; (d) equipped with larger engines; and (e) dependent on different fuel (such as bunker fuel), which can be cheaper but more polluting than the fuel used to power small watercraft." *Id.* at ¶ 16.
- Although in 2004, the CARB had not promulgated the regulation that later defined "ocean going vessel" based on engine displacement, that working definition was being used by the CARB in 2004. Trial Tr. II, Dkt. 160 at 48:16-23.
- It took three engineers working full-time approximately 60 days to prepare the patent application that resulted in the issuance of the '710 Patent and to respond to a request for proposal by the Port of Los Angeles based on the invention. Trial Tr. II, Dkt. 160 at 49:20-50:4.

It was clear from Powell's testimony that his work for Defendants was focused on emissions control systems for very large ocean going vessels, including container ships.

IV. ANALYSIS

at the time of the invention.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
Title	Clean Air Engineering-Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

A. Legal Standard

"In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. . . . Judgment must be entered under Rule 58." Fed. R. Civ. P. 52(a)(1). "If a party has been fully heard on an issue during a nonjury trial and the court finds against that party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." Fed. R. Civ. P. 52(c).

"Because a patent is presumed to be valid, the evidentiary burden to show facts supporting a conclusion of invalidity is one of clear and convincing evidence." *Auto. Techs. Int'l, Inc. v. BMW of N. Am., Inc.*, 501 F.3d 1274, 1281 (Fed. Cir. 2007). "To show that a patent claim is invalid as anticipated, the accused infringer must show by clear and convincing evidence that a single prior art reference discloses each and every element of a claimed invention." *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 607 F.3d 784, 796 (Fed. Cir. 2010).

B. Findings of Fact

The '710 Patent was filed on April 29, 2004. It describes a system for capturing the exhaust emitted from engines on ships. This system is illustrated in its Figure 2B, which is reproduced below. Figure 4 from the '710 Patent, which is also reproduced below, is a detailed view of one embodiment of the "Exhaust Intake Bonnet" ("bonnet"), labeled 14 in Figure 2B.

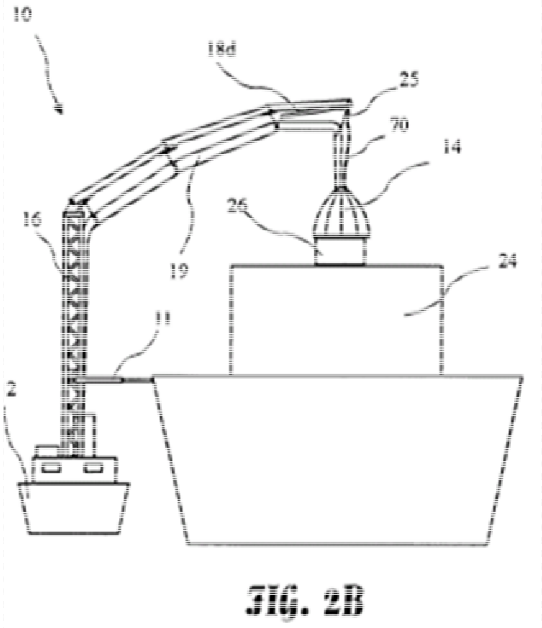


FIG. 2B

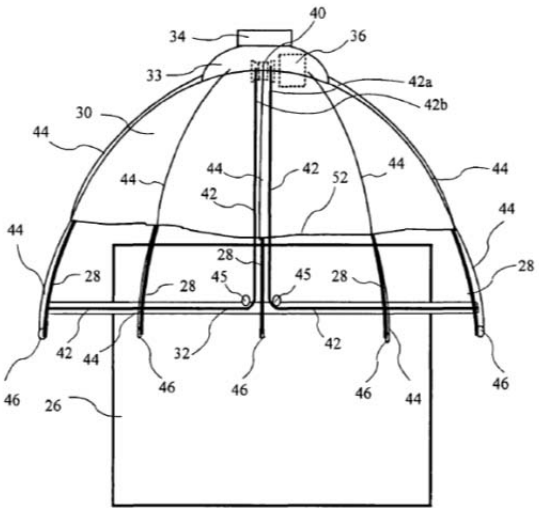


FIG. 4

'710 Patent Figures 2B and 4 show the bonnet secured over the exhaust stack of the ship. Claim 19 of the '710 Patent reads:

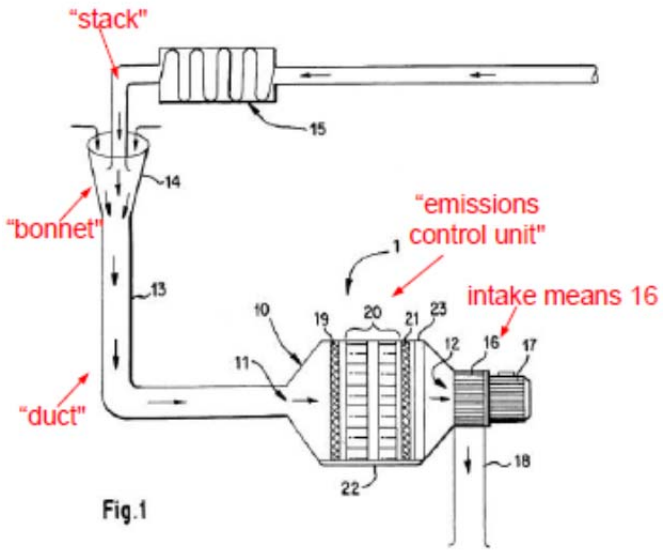
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 13, 2015
Title	Clean Air Engineering-Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

19. A method for emissions control, the method comprising:
securing a bonnet over a stack of an Ocean Going Vessel (OGV) to capture exhaust;
drawing the exhaust captured by the bonnet through a duct to an emissions control unit; and
processing the exhaust by the emissions control unit.

The anticipatory reference, U.S. Patent No. 6,185,934, to Teboul ("Teboul"), teaches a pollution control device of the following form:



Teboul Fig. 1 (annotations added).

Teboul teaches all of the elements of '710 Patent claim 19, except that it does not mention an "Ocean Going Vessel." Further, it illustrates the claimed invention in the context of an automobile, although it teaches that it can be used on "any motor vehicle whatsoever," including a "boat." Teboul at 5:17-19; *see also* SJ Order, Dkt. 120 at 14-19.

A person of ordinary skill in the relevant art would have (1) at least a B.S. degree in mechanical or environmental engineering (or equivalent formal education) and at least two years of work or research experience involving diesel emissions or related art; or (2) an M.S. degree in one of these fields and at least one year of relevant work or research experience. Pl.'s Mem. of Contentions of Fact and Law, Dkt. 135 at 4; Defs.' Mem. of Contentions of Fact and Law, Dkt. 132 at 3-4.

Based on the testimony at trial, when reading Teboul's teaching that its pollution control device could be used with "any motor vehicle whatsoever," including a "boat," a person of ordinary skill in the art would envision, among a small number of maritime vessels, an "Ocean Going Vessel." In that context, the term "Ocean Going Vessel" would be understood to mean a large ship with a large engine and a large amount

of exhaust. The vessels envisioned by a skilled artisan would include those with engines meeting the "Category 3" criteria as defined by the EPA in 40 C.F.R. § 94.2, i.e., "with a specific engine displacement greater than or equal to 30 liters per cylinder." This is not a conclusion that a "boat" is synonymous with a "ship" or with an "Ocean Going Vessel." Rather, it is the finding that, given Teboul's broad teaching that its pollution control device had many transportation applications, including "boats," a skilled artisan would envision the larger class that includes "Ocean Going Vessels."

This conclusion follows from the trial testimony for three principal reasons. First, it is unlikely that a person of ordinary skill in the art reading Teboul would immediately think of the EPA or similar regulation. Second, even if a person of ordinary skill in the art would immediately think of the EPA regulation, that would most likely have been an idea triggered by the word "boat." This undermines the idea that a "boat" is a category to which the EPA regulations do not apply. Thus, the skilled artisan would not also believe that Teboul's teaching did not apply to the largest category of vessels described in such a regulation, if it was brought to mind. Third, the genus of maritime vessels with internal combustion engines is small enough, or the species of container ships and cruise ships prominent enough within that genus, that a person of ordinary skill in the art would immediately envision those large ocean going vessels when reading Teboul's teaching that its system for the capture and treatment of emissions could be used on a "boat."

C. Conclusions of Law

Other than the conclusions specific to the claim term "Ocean Going Vessel," the conclusions regarding the presence of each element of claim 19 in Teboul are found in the S.J. Order., Dkt. 120 at 14-19. That Order, which is incorporated by this reference, determined that, with the possible exception of the "Ocean Going Vessel" limitation, there are no structural distinctions between '710 Patent claim 19 and Teboul's pollution control device. *Id.*

The recitation in claim 19 of an Ocean Going Vessel, in contrast to Teboul's use of the word "boat," does not avoid a finding of anticipation. "[W]hether a generic disclosure necessarily anticipates everything within the genus . . . depends on the factual aspects of the specific disclosure and the particular products at issue." *Osram Sylvania, Inc. v. Am. Induction Techs., Inc.*, 701 F.3d 698, 705 (Fed. Cir. 2012) (quoting *Sanofi–Synthelabo v. Apotex, Inc.*, 550 F.3d 1075, 1083 (Fed. Cir. 2008)). Here, the particular product at issue in the '710 Patent -- a pollution capture device for "Ocean Going Vessels" -- is anticipated by Teboul's disclosure of such a device for boats. Again, the focus of both Teboul and the '710 Patent is a pollution control device, and Teboul teaches that its pollution control device has a wide range of applications.

Although "disclosure of a broad genus does not necessarily specifically disclose a species within that genus, *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1377 (Fed. Cir. 2005), the genus in this case is not so broad. For the reasons discussed in the findings of fact, a person of ordinary skill in the art considering the genus of boats with polluting engines, could readily, if not immediately, envision a large ocean-going vessel. "[W]hen a genus is so limited that a person of ordinary skill in the art can at once envisage each member of this limited class, a reference describing the genus anticipates every species within the genus." *Abbvie Inc. v. Mathilda & Terence Kennedy Inst. of Rheumatology Trust*, 764 F.3d

1366, 1379 (Fed. Cir. 2014) (citations, quotations, and other marks omitted).

"To serve as an anticipating reference, the reference must enable that which it is asserted to anticipate." *Elan Pharms., Inc. v. Mayo Found. for Med. Educ. & Research*, 346 F.3d 1051, 1054 (Fed. Cir. 2003). Here, Plaintiff's expert testified that it would take a person of ordinary skill in the art two or three days to produce full blueprints for Teboul's system scaled to be used on an ocean going vessel. Trial Tr. II, Dkt.160 at 15:22-18:11. Although Defendants spent substantially more than that amount of time in the development of their system, it features many details that are not required by claim 19. Indeed, other claims of the patent require specific structural elements not required by claim 19: a bonnet contractable around the ship stack to sufficiently grasp the ship stack to hold the bonnet in place (claim 1), a segmented articulating arm with pivoting joints (claim 5), a cage-and-shroud bonnet design with downwardly reaching curved ribs (claim 9), a pulley-and-cord system that pulls the shroud over the ribs (claim 13), a foam belt to provide an air seal and to retain a bonnet in place on the stack (claim 25), a capture ring assembly with a self-aligning locking mechanism for cooperation with an articulating arm (claim 28), a constant-torque motor for tightening the cord and belt (claim 31), and a pressure sensor for the bonnet that provides a pressure measurement to regulate the speed of a blower assembly to maintain a constant negative pressure within the intake duct (claim 34).

In contrast, claim 19 is a simple one; it does not require any particular levels of performance or any structural features. In place of the many structural details just recited that could distinguish certain of the '710 Patent's claims from Teboul, claim 19 requires only: "securing a bonnet over a stack of an Ocean Going Vessel (OGV) to capture exhaust; drawing the exhaust captured by the bonnet through a duct to an emissions control unit; and processing the exhaust by the emissions control unit." For these reasons, Teboul is enabling at the level of detail found in claim 19.

V. CONCLUSION

Plaintiff has demonstrated by clear and convincing evidence that '710 Patent claim 19 is anticipated by Teboul. Therefore, '710 Patent claim 19 is invalid. Plaintiff is ORDERED to meet and confer with Defendants to seek to agree on a form of judgment consistent with this Order within 10 days of its entry. If the parties are able to agree on the form of the proposed judgment, it shall be lodged by Plaintiff within 14 days of the entry of this Order. If the parties are not able to agree, Plaintiff shall lodge a proposed judgment within 14 days of the entry of this Order, and Defendants shall submit any objections to the proposed within five days thereafter.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak

ATTACHMENT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANT'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND OSC RE PRELIMINARY INJUNCTION TO PREVENT PLAINTIFF FROM OFFERING TO SELL ITS INFRINGING SYSTEM AT LONG BEACH TRADE SHOW STARTING MARCH 2ND AND FOR OTHER RELIEF (Dkt. 73)**

I. Introduction

The Court has received the "Application for Temporary Restraining Order and OSC re Preliminary Injunction to Prevent Plaintiff From Offering to Sell its Infringing System and Long Beach Trade Show Starting March 2nd and for Other Relief" (the "Request") filed by Advanced Cleanup Technologies, Inc. ("Defendant"). Defendant seeks a temporary restraining order ("TRO") that would prevent Clean Air Engineering-Maritime, Inc. ("Plaintiff") from presenting its Maritime Emissions Treatment System (the "System"), which Defendant contends infringes on its patents, at the Trans Pacific Maritime Conference ("TPM Conference"). The TPM Conference is scheduled to begin on March 2, 2014. Dkt. 73 at 2. Defendant also seeks the issuance of an Order to Show Cause for a Preliminary Injunction, as well as the designation of a date for a hearing on Defendant's request for such relief. Plaintiff filed an Opposition to the Request, Dkt. 75, and Defendant filed a Reply in Support of the Request. Dkt. 78.

For the reasons stated in this Order, Defendants' application for a TRO is DENIED; its request for the issuance of an Order to Show Cause re Preliminary Injunction will be discussed at the March 3, 2014 Post-Mediation Status Conference.

II. Factual Background

In early 2004, Defendant began developing technology designed to reduce emissions from maritime vessels. Declaration of Ruben Garcia ("Garcia Decl."), Dkt. 73-3, ¶ 4. Defendant holds several patents with respect to a maritime emissions control system. Declaration of Edward Quon ("Quon Decl."), Dkt. 73-5, ¶ 2, Exh. A. The relevant patent at issue here, U.S. Patent 7,258,710 (the "'710 Patent") was issued on August 21, 2007. *Id*. Defendant contends that, between 2003 and 2006, Nicholas Tonsich ("Tonsich"), who is an attorney, represented Defendant and its founder, Ruben Garcia ("Garcia"). Garcia Decl. ¶ 10. Plaintiff contends that Tonsich represented Garcia's hazardous waste spill cleanup businesses in

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

collection cases brought by creditors, but was involved in Garcia's emissions control projects only as a business partner. Declaration of Nicholas Tonsich ("Tonsich Decl."), Dkt. 77, ¶ 5. Defendant contends that, in 2006, Tonsich formed Plaintiff in order to compete directly with Defendant in the emissions control marketplace. *Id.* ¶ 15.

Defendant contends that, in 2006, Plaintiff began using Defendant's intellectual property and trade secrets to compete with Defendant. Garcia Decl. ¶ 17.[1] Plaintiff also claims that, between 2008 and 2012, Plaintiff obtained a grant from TraPac, a container terminal operator at the Port of Long Beach, to provide it with emissions control services. *Id.* ¶¶ 17-20. In or about May 2012, the City of Los Angeles Board of Harbor Commissioners approved an agreement with TraPac to fund a project to demonstrate Plaintiff's System. *Id.* ¶ 20. At that point, Defendant informed Plaintiff of its alleged infringement of the '710 Patent. *Id.* ¶ 21. On October 10, 2012, Plaintiff initiated this action for a declaration of non-infringement and invalidity of the '710 Patent. Dkt. 1. Defendant filed a counterclaim asserting, among other things, a claim for patent infringement. Dkt. 47.

Defendant contends that, since October 2012, in order to attract customers, Plaintiff has been offering products on its website that infringe the '710 Patent. Garcia Decl. ¶ 23. Defendant also contends that, pursuant to a regulation (the "Regulation") promulgated by the California Air Resources Board (the "CARB"), as of January 1, 2014, vessels that intended to dock at California ports were to satisfy certain emissions reduction requirements or face monetary penalties. *See* Garcia Decl. ¶ 25, Exh. B. Defendant contends that it has the only emissions reduction system that has been approved by the CARB. *Id.* ¶ 26. As a result, Defendant claims that it expects to sell its products to numerous customers at the TPM Conference. *Id.* ¶ 29. Defendant also claims that, because Plaintiff also plans to participate in the TPM Conference to promote its competing, and allegedly infringing, products, the requested emergency relief is necessary. *Id.*

In support of its position, Defendant recites the following chronology of events:

- October 3, 2013: Defendant inspected Plaintiff's System. Declaration of Michael Eveloff ("Eveloff Decl."), Dkt. 73-4, ¶ 4.
- January 30, 2014: Plaintiff claimed it had redesigned its System to preclude a claim of infringement of the '710 Patent. Quon Decl. ¶ 6, Exh. E.
- February 7, 2014: Defendant inspected the System and was not able to discern that any redesign had occurred. Eveloff Decl. ¶ 5; Declaration of Robert Sharp ("Sharp Decl."), Dkt. 73-4, ¶¶ 7-8.
- February 10, 2014: Defendant observed Plaintiff installing the System on a barge. Eveloff Decl. ¶ 6.
- February 20, 2014: Defendant observed that additional components had been added to the System. Eveloff Decl. ¶ 7.
- February 25, 2014: Defendant filed this Request.

In Plaintiff's response to the Request, it asserts, among other things, that it has not registered for the TPM Conference either as an attendee or as a demonstrator. Dkt. 75 at 6. It also states that it "has no intention of attending, appearing at, or demonstrating any technology at the upcoming March 2-5 TPM Conference

1 Defendant does not clearly state when it first became aware of this alleged infringement and misappropriation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

in Long Beach." Tonsich Decl. ¶ 2.

III. Analysis

A request for a TRO must, in general, meet the same standards that apply to a request for a preliminary injunction, with the additional requirement that the moving party must show that, absent immediate injunctive relief, it will suffer irreparable injury. *Alaska ex rel. Yukon Flats School District v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988). The applicable factors are next addressed.

A. Likelihood of Success on the Merits

Defendant has failed to demonstrate a likelihood of success on the merits. As to infringement, the Request is premised on the particular bonnet that is used on Plaintiff's product. Defendant argues that, despite its representations to the contrary, Plaintiff did not redesign its bonnet to remove the contractible elements. Dkt. 73-1 at 6. The declaration of Defendant's Technical Director, Robert Sharp, describes his inspections of Plaintiff's equipment on October 3, 2013 and February 7, 2014. The declaration also includes a claim chart comparing claims 1 and 19 of the '710 Patent to Plaintiff's system. Declaration of Robert Sharp ("Sharp Decl.") Dkt. 73-4 at ¶¶ 5-7.

It is significant that Sharp did not inspect the entire system at one time. Instead, he inspected the mobile crane and attached ducts at one location, and the capture system at another. *Id*. at ¶¶ 5-6. During the second inspection, Sharp could not identify any components that constituted the design of the bonnet. *Id*. at ¶ 6. He did observe a "cone-shaped adapter," which he believed served "to connect the capture system to the treatment system." *Id*. at ¶ 8. Thus, in the claim charts that are presented with Sharp's declaration, the contractible bonnet photographed at the inspection is sitting in a pile of ducting, and the photograph of it installed over a ship stack is an undated image from Plaintiff's website. *Id*., Ex. A at 4. Similarly, Defendant's consultant, Michael Eveloff, who attended both inspections and made additional observations of Plaintiff's system being prepared and installed on a barge on February 10, 2014 and February 20, 2014, does not state that he saw a bonnet attached to the system, and none is visible in the photographs submitted with his declaration. Decl. of Michael Eveloff ("Eveloff Decl."), Dkt. 73-2. Nor did either Sharp or Eveloff observe the system in operation*, i.e.,* the steps of claim 19 being performed: securing the bonnet over the stack of an Ocean Going Vessel to capture exhaust, drawing the exhaust captured by the bonnet through a duct to an emissions control unit, and processing the exhaust by the emissions control unit.

Plaintiff's technical consultant, who is responsible for the design of the devices used to capture the emissions from a ship stack, explains that Plaintiff had, over time, two types of bonnets. Decl. of Larry Reeves ("Reeves Decl."), Dkt. 76 at ¶¶ 2-7. Reeves refers to the "old design" ("SafeConnect Design") and the new design ("Straight Hose Design"). *Id*. at ¶5. The former has contractible plates that Reeves refers to as a "colander" design, while the latter has a solid steel "inverted funnel." *Id*. at ¶¶ 5-7:

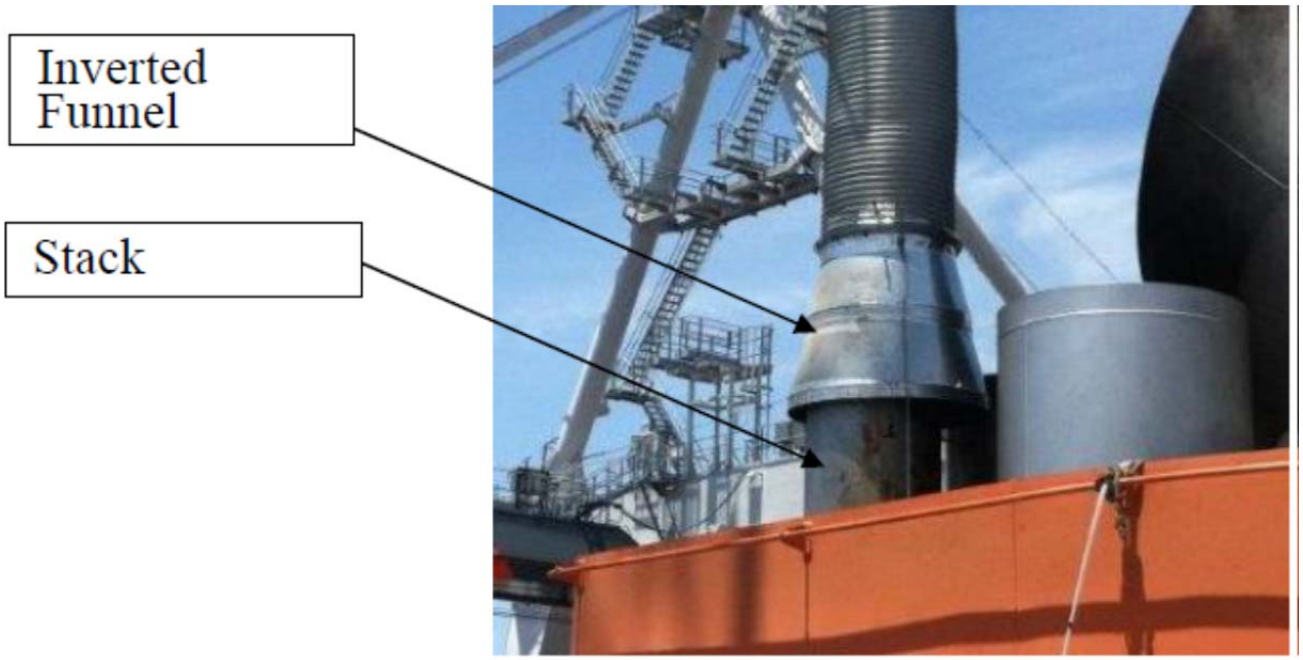
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

Safe Connect Design (Old Design)

Straight Hose Design (New Design)



In his declaration, Reeves states that the old, contractible design has not been used since 2012, *id*. at ¶ 8; none of Defendant's witnesses controverted that testimony. Thus, Defendant is unable to show a likelihood of success of establishing infringement of claim 1, which requires that the bonnet be contractible about the ship stack.

It appears that certain of the issues raised in the Request could have been addressed more efficiently by a more comprehensive meet and confer process -- one that could have at least narrowed the scope and nature of the Request. Thus, on January 30, 2014, Plaintiff's counsel, Michael A. Molano ("Molano") sent an email to Defendant's counsel, in which he stated that Plaintiff "has redesigned its exhaust capture device in light of the Court's December 18, 2013 Markman Order to be clearly non-infringing." Quon Decl., Ex. E, Dkt. 73-5. Notwithstanding that other more informative photographs, which were submitted with Plaintiff's Opposition, were apparently then available, Molano's January 30 email included the following image:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

Reeves, who has been consulting with Plaintiff since November 2009, has declared that the contractible bonnet that is the subject of the Request "was used only once in testing Clean Air's system on a ship in October 2012" and was "never used on a ship again since exhaust capture testing determined that the [contractible] design was no more efficient than a simpler 'inverted funnel' design made of steel." Reeves Decl., Dkt. 76 at ¶¶ 8-9. He also states that the redesigned, non-contractible bonnet was first tested in May 2013 on a ship in Long Beach. *Id*. This makes unclear whether these statements are in complete harmony with Molano's January 30, 2014 email stating that Plaintiff "redesigned its exhaust capture device in light of the Court's December 18, 2013 Markman Order . . . ." Quon Decl., Ex. E, Dkt. 73-5. If this is a reference to some other aspect of the system, it may have been appropriate to have been more clear about the timing of the redesign of the bonnet.

As to method claim 19, which does not require that the bonnet be contractible around the stack, Plaintiff argues that it does not perform the step of "securing a bonnet over a stack." Opp'n, Dkt. 75 at 11-13. Plaintiff's argument relies on claim interpretations that were either rejected in the Court's Claim Construction Order, Dkt. 65, or not raised in that context, and thus waived. Therefore, Defendant has shown a likelihood of success in proving infringement, notwithstanding that it has not shown that Plaintiff presently operates the complete system. *See Paper Converting Mach. Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 20 (Fed. Cir. 1984). (finding infringement where "significant, unpatented assemblies of elements [were] tested during the patent term, enabling the infringer to deliver the patented combination in parts to the buyer, without testing the entire combination together as was the infringer's usual practice."). However, "[a] preliminary injunction should not issue if an alleged infringer raises a substantial question regarding either infringement or validity, i.e., the alleged infringer asserts an infringement or invalidity defense that the patentee has not shown lacks substantial merit." *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1050 (Fed. Cir. 2010).

Plaintiff has raised substantial questions regarding validity of claim 19, Opp'n 13-19, and Defendant has not had the opportunity to show that they lack substantial merit. Given the expedited nature of this proceeding and that the request for a TRO fails on other grounds, the Court declines at this time to analyze further the issues of alleged invalidity.

B. Irreparable Harm

Defendant has failed to demonstrate that it will suffer irreparable injury absent immediate injunctive relief for three primary reasons.

First, Defendant has based its Request for emergency relief on the claim that Plaintiff will be presenting its allegedly infringing product at the TPM Conference on March 2, 2014. However, Plaintiff has submitted the declaration of Nicholas Tonsich in support of its position that it will neither attend, nor make any demonstration as part of, the Conference. Declaration of Nicholas Tonsich, ("Tonsich Decl."), Dkt. 77, ¶ 2. Therefore, the premise of Defendant's request has not been established. And, as a result, no emergency has been shown. Dkt. 75 at 7.[2] In Reply, Defendant recasts the need for the TRO, arguing that, although Plaintiff will not be attending or presenting at the conference, its system is on a barge "just 5 minutes from the Long Beach Convention Center where the TPM Conference is held," and that conference attendees "will be touring the ports on a boat, and will be able to see everything around the port" and "will be able to view CAEMI's infringing system." Dkt. 78 at 3. In support of this position, Defendant provides the following annotated aerial photograph:

2 Although an application for a TRO is exempt from Local Rule 7.3, a more robust meet and confer process would have, at a minimum, narrowed the issues raised in the Request. The parties are reminded of their respective obligations to use such processes in connection with future disputes.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV12-08669 JAK (VBKx)	Date	February 27, 2014
Title	Clean Air Engineering Maritime, Inc. v. Advanced Cleanup Technologies, Inc.		

This evidence is too speculative to warrant the issuance of a TRO. Rather, it is unpersuasive as a fallback position in a request for emergency relief. Exhibiting at a trade show is materially different from the nearby physical presence of a barge that some attendees might observe while on a boat tour of the Ports of Long Beach and Los Angeles. Thus, the Port of Los Angeles:

> encompasses 7,500 acres of land and water along 43 miles of waterfront. It features 24 passenger and cargo terminals, including automobile, breakbulk, container, dry and liquid bulk, and warehouse facilities that handle billions of dollars' worth of cargo each year.
>
> Against the backdrop of international trade and shipping, the Port of Los Angeles also boasts the World Cruise Center, quaint Ports O' Call Village, welcoming Vincent Thomas Bridge, signature Fanfare Fountains and Water Features, historic Angels Gate Lighthouse, vintage Waterfront Red Car Line, and new green space at 22nd Street and Wilmington Waterfront parks. The Port is now home to two historic U.S. Naval ships open for public tours: the SS Lane Victory and USS Iowa. Also new to the LA Waterfront are WWII-era warehouses that have been transformed into CRAFTED at the Port of Los Angeles, a permanent craft marketplace, featuring local artists and designers.

http://www.portoflosangeles.org/idx_about.asp.

Second, Defendant's argument that its Request should be granted because the Regulation became

effective on January 1, 2014, is also unpersuasive. Defendant admits that enforcement of the Regulation has been stayed "during the first few quarters of 2014" and it is "unknown when CARB will start imposing significant penalties for noncompliance." Dkt. 73-1 at 19. Defendant also asserts that its product is the only one that satisfies the requirements adopted by the CARB. Therefore, Defendant argues that Plaintiff's actions threaten to interfere with Defendant's exclusive market position. Dkt. 73-1 at 18-19. This is an insufficient basis for emergency injunctive relief. Further, if Defendant holds the only CARB approval, then it enjoys market exclusivity irrespective of the outcome of the Request.

Third, Defendant has been aware of the allegedly infringing product since at least October 10, 2012, when Plaintiff filed this action. Dkt. 1. Indeed, Defendant has provided evidence to support its claim that, since that time, it has known that Plaintiff has been offering allegedly infringing products on Plaintiff's website to attract potential customers. Garcia Decl. ¶ 23. Further, the declarations submitted by Defendant in support of its Request, confirm that it contends that Plaintiff has been selling emissions control services that allegedly infringe the '710 Patent for more than two years. *See* Garcia Decl. ¶¶ 17-20. In light of this history, Defendant's failure to act sooner undermines both the basis for its present request for emergency relief and the claims that irreparable harm will occur absent the granting of such relief. *See Alcaraz v. Union Bank of Cal.*, 2008 WL 5427621 at *2 (C.D. Cal. Dec. 29, 2008) (denying injunctive relief where the movant was on notice "for at least four months"); *see also Nutrition 21 v. U.S.*, 930 F.2d 867, 872 (Fed. Cir. 1991) (delay of six to seven months is sufficient to negate irreparable harm).

C. Balance of Hardships

Defendant contends that the balance of hardships favors granting a TRO because Plaintiff's cost of compliance would be minimal, whereas Defendant has invested over 1,500 hours of testing its product. Garcia Decl. ¶ 33. Plaintiff asserts that that it has invested $6.5 million in its product, which is now in the testing phase, and a TRO would disrupt its relationships with its partner TraPac. Tonsich Decl. ¶¶ 21-22. Plaintiff contends that Defendant's system is still in the "proof of concept" stage. Id. ¶21, Exh. I.

Defendant also contends that Tonsich's alleged breach of fiduciary duty and misappropriation of its trade secrets weighs in favor of granting the TRO. Garcia Decl. ¶¶ 16-19. Plaintiff disputes Defendant's characterization of Tonsich's actions. *See* Tonsich Decl. ¶¶ 5-13, 15 (Tonsich's representation of Plaintiff was limited to claims regarding Garcia's hazardous waste spill cleanup business; Defendant's system is not based on Plaintiff's designs or patents).

Both parties claim to have invested substantial time and funds in their respective maritime emissions systems, each of which is in the development phase. In light of this evidence, Defendant has failed to establish that the balance of hardships tips in its favor.

D. Public Interest

Defendant has not demonstrated that the public interest supports granting the TRO. There is a public interest in enforcing valid intellectual property rights*, Abbott Labs v. Andrx. Pharms., Inc.*, 452 F.3d 1331, 1333 (Fed. Cir. 2006). However, for the reasons stated above, Defendant has not established a likelihood of success on the merits of such claims. The public also has an interest in the reduction of emissions in

the Ports of Los Angeles and Long Beach. But, the evidence does not establish whether Plaintiff or Defendant will first finalize its product as a viable commercial one, or that the ruling on the TRO will have a material, adverse effect on such efforts. Therefore, this factor does not weigh in favor of the Request.

IV. Conclusion

For the foregoing reasons, a balancing and consideration of all of the applicable factors shows that Defendant has not shown a sufficient basis for the requested TRO. Accordingly, that portion of the Request is DENIED. Defendant's request with respect to setting future proceedings on its Motion for a Preliminary Injunction will be discussed with counsel during the Post Mediation Status Conference on March 3, 2014.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer ak

ATTACHMENT E

Issue	Allegation	Response	FEIR page	Other Administrative Record
1	**Baseline:** The comment states that the 2006 baseline used in the EIR is inappropriate because it does not represent "existing conditions" at the time of the 2011 NOP since by 2011 there was little activity at the facility.	The EIR utilized 2006 as the baseline year because that was the last full year of normal operations before the recession. This is appropriate under CEQA, and courts have recognized that the existing conditions may properly consist of historically achieved levels. Additionally, the Port chose not to apply 2006 emissions rates to the 2006 activity levels because that would improperly credit the project with emissions reductions achieved by rules and regulations adopted between 2006 and 2011. Therefore, the Port applied stricter 2011 emissions rates to the 2006 activity levels to most accurately capture representative activities without unduly crediting the project with emissions reductions.	3.0-2 to 3.03 3.2-13 to 3.2-15 10-45 to 10-53	May 11, 2015 Letter from Heather Tomley to Board of Harbor Commissioners ("Tomley Letter"), Sec. I; August 2011, Notice of Preparation ("NOP"); Port's Response to the Appeals ("Response") Att.7, pp. 11-12;
2	**Baseline:** The Port's use of 2006 activity levels artificially inflates the baseline for purposes of comparing the impact of the project.	The 2006 activity levels are an appropriate baseline because the existing facility, as it has been operating, already underwent CEQA review prior to MCC's proposal to modernize the facility in the current project. It would be contrary to CEQA to analyze the modernization project as if the project involved construction of a totally new facility. Once a project has been assessed under CEQA and approved, later modifications to the project do not trigger reassessment of the previously studied and authorized operations. Here, MCC's project is modernize and upgrade a facility which has previously undergone CEQA review; the 2006 baseline appropriately reflects actual activity levels from the last full year of operations.	3.0-2 to 3.03 3.2-13 to 3.2-15 10-45 to 10-53	Tomley Letter, Sec. I. NOP Response, Att. 7, pp 7-15
3	**Baseline**: Caselaw does not allow an agency to use "hypothetical conditions that could have existed under applicable permits." (Citing *Communities For A Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal. 4th 310, 320-322 and *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 510).	In *Communities for a Better Environment*, the California Supreme Court observed that "[n]Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." The *Smart Rail* case also acknowledged that an agency's discretion in selecting the baseline even extends so far as to allow the omission of an existing conditions analysis altogether if the use of such a baseline would be misleading or without informational value.	10-45 to 10-46)	Tomley Letter, Sec. I. Response, Att. 7, pp 7-15
4	**Baseline:** Since MCC's lease began in 2002, the terminal has experienced "little to no activity" and the activities "ceased entirely" in 2010. Therefore, the year 2006 does not reflect representative operations at the facility.	The history of MCC's operation of the facility was taken into account when determining the baseline. Moreover, the existing facilities had previously been fully studied under CEQA, prior to being leased to MCC. It would be contrary to CEQA to assess the modifications to the facility as if they were resulting in a totally new facility that had not previously been analyzed under CEQA, constructed, and operated under approvals issued by the Port and the South Coast Air Quality Management District. Once a project has been assessed under CEQA and approved, later modifications to the project do not trigger the reassessment of the previously studied and authorized operations.	1-4 to 1-5 (project history) 3.0-2 to 3.03 10-49 (citing legal authorities to support this point)	Tomley Letter, Sec. I. Response, Att. 7, pp 7-15

Issue	Allegation	Response	FEIR page	Other Administrative Record
5	**Air Quality:** Ocean Going Vessels ("OGVs") are the main contributors of NOx to the project, and the Port is incorrect to state that there are no feasible mitigation measures available to reduce NOX to below significant and unavoidable levels (citing FEIR at pp. 3.2-23 and 3.2-24).	The bulk of the NOx emissions generated by OGVs occur when the OGVs are traveling in the outer waters of the South Coast Air Basin. The Port has limited jurisdiction over OGVs when they are in the outer waters. The Project air quality analysis assumes that unmitigated OGVs that call at the Project terminal in the future would have main engines that comply with the MARPOL Annex VI Tier 1 NOx standard. Engines meeting the stricter Tier 2 or Tier 3 NOx emission limits would reduce NOx emissions from the engines of Project OGVs by about 15 or 80 percent, respectively. The implementation years for these Tier 2/3 NOx standards are in 2011 and 2016. Because MCC does not own the OGVs that would call at the project terminal and they have no active charter party agreements or dedicated fleet, it would be infeasible to require implementation of Tier 2 or 3 engines on a more accelerated schedule. That said, by the time MCC begins receiving ships, it is expected that Tier 2 and Tier 3 engine OGVs would enter the OGV fleet. As explained in the FEIR, retrofitting OGV engines is also infeasible.	3.2-8 to 3.2-9, and 3.7-7 (explaining MARPOL authority) 3.2-14 3.2-22 to 3.2-24	May 11, 2015 CEQA Findings & Statement of Overriding Considerations ("CEQA Findings") pp. 12-13 Response, Att. 7, pp. 7-15
6	**Air Quality:** The Port is incorrect to state that there are no feasible mitigation measures available to reduce NOX to below significant and unavoidable levels. The AMECS is a feasible mitigation measure that would minimize significant adverse impacts from NOx.	The AMECS would not reduce project NOx emissions to a level below the CEQA threshold of significance. Therefore, even if AMECS were implemented, NOx emissions from the project would remain significant and unavoidable. This is because the bulk of NOx emissions from OGVs occur when the vessel is transiting in the outer waters and AMECS, like MCC's DoCCS, is only able to capture emissions when the ships are at berth.	10-61 to 10-67	May 11, 2015 Hearing (Tr. 54:17-25 to 55:18) Response, Att. 7, pp. 10-11 Response, Att. 9, pp. 3-7
7	**Air Quality: "**Substantial evidence does not support the FEIR's reliance on DoCCS as the primary mitigation measure available to address OGV NOx emissions."	The FEIR does not claim that DoCCS is the "primary mitigation measure" to address NOx emissions from OGV. The FEIR states that shore power, or "cold-ironing," is the primary and preferred means of controlling OGV emissions while the vessel is at berth. This has been restated throughout the comment period and again by staff at the May 11, 2015 hearing. Mitigation Measure AQ-2 expressly states that shore power shall be used no less than 66 percent of the time a ship is at berth, and the "DoCCs shall be used for the portion of time at berth that OGVs are not using ship-to-shore power."	1-9; 3.2-19; 10-59 to 10-61; 10-63; 10-66 to 10-67; 10-73; 10-165 to 10-166	May 11, 2015 Hearing (Tr. 37:1-24; 55:3-8) MMRP-4 October 22, 2014 hearing, pp. 5-6 Response, Att. 7, pp. 7-11 Response, Att. 9, p. 19
8	**Air Quality:** The effectiveness of the DoCCS is uncertain.	The DoCCS will use established, proven SCR technology to treat NOx emissions, and will employ the latest technology in its demonstration project for particulate matter.	1-9; 10-64 to 10-65	May 11, 2015 Hearing (Tr. 58:13-18) Response, Att. 7, pp. 7-15
9	**Air Quality:** The Port has "committed only to its [the DoCCS'] short-term use via a demonstration."	The DoCCS it a fundamental component of the project and its installation is one of the project objectives. It is important to recognize that the DoCCS is not mitigation – it is the project. The only component which will be in demonstration phase is the DoCCS diesel particulate filter ("DPF"). Indeed, the alternatives (except for the no project alternative) were required to include installation of the DoCCS because it is such a fundamental part of the project objectives.	1-5; 1-6; 1-9; 1-12 to 1-14; 1-16 and elsewhere throughout the FEIR	May 11, 2015 (Tr. 37:1-34) CEQA Findings, pp. 1-2,12-13, 23, 25 Response, Att. 7, pp. 7-15 Response, Att. 9, pp.7-8
10	**Air Quality:** "The FEIR does not describe how the DoCCS is powered."	The FEIR explains that "the DoCCS is powered by electricity and natural gas; it has no diesel components."	10-64	
11	**Air Quality:** The DoCCS demonstration "will take a minimum of 3 years to install…"	The DoCCS will be one of the first project components completed and put in operation. MCC assumes the appellants refer to the DoCCS DPF demonstration program. This issue was previously addressed in the FEIR. Mitigation Measure AQ-3 states that within three months after the start-up/initial use of the DoCCS, MCC shall submit a proposed plan, budget, and schedule to the Port for the DPF demonstration project. After the Port reviews and approves MCC's proposal, MCC shall install the DPF and begin the demonstration project within 6 months of the Port's approval. The installation of the DPF on the DoCCS could occur within a year from start-up/initial use of the DoCCS, depending on the time it takes to design, procure, and permit, and the time for Port approval.	10-67	Response, Att. 7, p. 8

Issue	Allegation	Response	FEIR page	Other Administrative Record
12	**Air Quality**: "The AMECS is more feasible for immediate use."	Currently, there is only one AMECS unit—a prototype—that is undergoing demonstration and emissions testing on container vessels. ACTI has not yet commercialized the AMECS – it is only in the demonstration phase.	10-65 to 10-67	May 11, 2015 Hearing (Tr. 37:1-34; 54:16-58:18) Response, Att. 7, p. 10
13	**Air Quality:** The AMECS is superior to the DoCCS.	This claim was addressed extensively in the FEIR. AMECS is not superior to the DoCCS for this installation. The MCC terminal requires stack emissions control as a back-up to shore power, the device must fit within a space-constrained site, and it must be mobile so that it can be moved away from the dock when not needed. The DoCCS is best suited to MCC's site.	10-61 to 10-68	May 11, 2015 Hearing (Tr. 37:1-34; 54:16-58:18) Response, Att. 7, pp. 7-11 Response, Att. 9, pp. 3-6
14	**Air Quality:** MCC should be required to use more than 66% shore-power.	A similar statement was made in comment NRDC-11. The FEIR explains why 100% cold ironing is not feasible at the facility, and that 66% is a *minimum* requirement. The 66% commitment for shore power is the minimum level that MCC must meet to ensure that it uses shore power at least as frequently as it did during prior operations. MCC is not precluded from using a higher percentage of shore power.	1-4; 3.2-18; 3.3-10; 10-21; 10-73; 10-165 to 10-166	Response, Att. 7, pp. 11-13
15	**Air Quality:** It should be feasible for MCC to negotiate with vessel owner/operators to equip ships to use shoreside power because it has done so in the past.	A similar statement was made in comment NRDC-11. The FEIR clarified that MCC did not negotiate to retrofit vessels to be able to use shore power. In 2006, MCC succeeded in getting a clause added to charter party agreements that says the ship captains will cooperate with cold ironing using MCC's award-winning dry-dock breaker approach. However, the ships were not designed or constructed to cold iron in a conventional manner, and the international bulk transport fleet of ships of the relevant size (owned by many different shipping companies) has not been retrofitted to be compatible with shore power.	1-4; 3.2-18; 3.3-10 to 10-61	CEQA Findings, p. 12. Response, Att. 7, p. 12
16	**Air Quality:** There is no substantial evidence to support the statement that ships cannot unload the entirety of their cargo using shore-to-ship power.	The FEIR thoroughly explains in its response to comment NRDC-11 why shore power cannot be used continuously throughout the unloading process. When unloading from ships which have not been equipped to use shore power, MCC has to connect the ships to shore power through a circuit breaker designed to be used when the ship is in dry dock, and most of these breakers have a limited capacity. Most of the ships are not capable of receiving enough power through their dry-dock breakers to run the crane to lift the payloader into the ship hold to complete the unloading process.	1-4; 3.2-18; 3.3-10; 10-59 to 10-61; 10-169 to 10-170	May 11, 2015 Hearing (Tr. 3:20-22; 11:14-12:16) Response, Att. 7, p. 7-13
17	**Air Quality:** Because the mitigation measure AQ-2 requires that only 90 percent of trucks meet one of the three modernization criteria, the remaining 10 percent will not meet the Port's Clean Truck Program.	Mitigation Measure AQ-2 states that in addition to the requirements applying to 90 percent of the truck fleet, <u>all trucks</u> calling at the MCC facility must still meet requirements of the Port's Clean Truck program (because <u>all</u> trucks calling on the Port must meet this), must be registered in the Port of Long Beach and Los Angeles Clean Truck Program Drayage Truck Registry and the CARB Drayage Truck Registry. In short, the Port's Clean Truck program represents the <u>minimum</u> standards that trucks calling on MCC's facility must meet; 90 percent of trucks calling on MCC will meet the additional requirements of AQ-2.	10-70	Response, Att. 7, p. 13-15
18	**Air Quality:** The Port should have required additional mitigation measures implementing zero to near-zero emissions truck technology (including CNG and LNG), and this technology is feasible.	There are currently no zero or near-zero emissions trucks commercially available that are feasible substitutes for trucks calling on the MCC facility. As the EIR explains, trucks serving MCC's facility travel an average of 60 miles round trip between the terminal and the cement's destination (FEIR 3.2-15). While there are ongoing testing programs for such zero/near-zero emissions trucks, they are not suitable for commercial applications such as MCC's. The Port's response to comment NRDC-18 explains these testing programs in greater detail. Even if there were commercially available CNG trucks meeting MCC's requirements, they would not be economically feasible for MCC's operations.	10-68 to 10-69	May 11, 2015 Hearing (Tr. 35:1-12; 36:16-25) Response, Att. 7, p. 13-15 Response, Att. 9, p. 10-11
19	**Air Quality:** Periodic technology review intervals are too infrequent	As explained in detail at the May 11 hearing, the five year interval used in the Periodic Techonology Review mitigation measure (AQ-6) is designed to correspond with the periodic lease renegotiations, i.e. the financial reopener.		May 11, 2015 Hearing (Tr. 9:11-10:9; 44:13 - 46:14) Response, Att. 7, p. 10
20	**Air Quality:** The project will not comply with SCAQMD Rule 1157.	MCC's air permit requires compliance with all SCAQMD rules applicable to the project. MCC's existing terminal is fully permitted, it has received no notices of violation for Rule 1157, and appellants have produced no evidence to the contrary.	3.0-2 to 3.0-3	Response, Att. 9, p. 12

Issue	Allegation	Response	FEIR page	Other Administrative Record
21	**Air Quality:** The project should use an electric payloader, and such a payloader is commercially available.	As explained previously in the Port's response to comments NRDC-26 and NRDC-28, there is no compatible electric payloader available for MCC's facility. In that comment, it was suggest that a John Deere Model 644K payloader, which uses hybrid technology, would be preferable to MCC's payloaders. However, as the FEIR explains, the 644K is larger and has a bigger engine than the payloaders historically used at MCC. The size would be problematic because it limits maneuverability within the ship's holds. Also, use of the 644K could result in emissions *increases* when compared to the smaller payloaders MCC will employ. MCC will use Tier 4-certified engines in its payloaders as required by the EIR. The 644K is Tier 4-certified, but with its bigger engine, there would be no emissions benefit and likely an emissions increase.	10-72 to 10-74	Response, Att. 9, p. 13
22	**Air Quality:** The EIR's assumption that all of the fugitive dust is on MCC's property is incorrect because some of it would go in the prevailing wind direction and impact the water. Therefore, there should be additional mitigation to reduce dust from the facility.	No additional fugitive dust mitigation is needed. The facility is required to use emission control devices on all dust emission sources (i.e., pneumatic unloaders, warehouse and silos). The comment is correct that some of the emissions from the facility will blow offsite. However, if the analysis were performed the way the appellants suggest, it would show that the likely emissions downwind of the facility are much lower than the impacts described in the EIR. This is because air pollutants disperse (spread out) with distance. The ambient air quality modeling in the EIR used assumptions designed to show the highest possible pollutant concentrations from the facility. For the EIR, it was assumed that all the emissions would fall on the terminal pavement where the dust could be kicked up by the trucks on site.	3.2-12; 3.2-14 to 3.2-47; 10-57 to 10-59; 10-114 to 10-115; 10-145 to 10-149	Response, Att. 9, p. 15
23	**Air Quality:** MCC should conduct a demonstration project for shrouds on the holds during ship unloading.	Hold shrouds are old, outdated and unsafe technology. Shrouds were proposed years ago to control emissions from a different type of unloading system – screw conveyors – that were notoriously dusty. The pneumatic technology employed by MCC is superior at reducing emissions. By using a vacuum to unload the cement, MCC's unloaders create a downward airdraft into the hold, which reduces the generation of dust. Particles that may become temporarily airborne during the unloading process are essentially vacuumed up before they can escape the hold. This is in stark contrast to the screw-conveyor unloading method, for which hold shrouds were designed: with a screw conveyor, an auger churns the cement and generates dust as the cement is mechanically lifted out of the hold, often resulting in "sloughing" or cave-ins of the bulk cement as the auger moves laterally through the material. Moreover, shrouds over the holds have been deemed unsafe by regulating agencies because they obscure the payloader operator's view of the equipment within the hold.	10-57 to 10-59; 10-114	Response, Att. 9, p. 15-16
24	**Air Quality:** The reference in the FEIR to the AMECS's first source test is misleading.	The FEIR provides context for the initial source test by also discussing the subsequent source test, and explains that the AMECS system is still in the demonstration phase. The AMECS demonstrations use public monies, and the source test results are public records that may be considered in assessing the AMECS technology as it is being developed and tested.	10-64 to 10-66	Response, Att. 9, p. 16-17
25	**Air Quality:** A Health Impact Assessment (HIA) should have been performed instead of a Health Risk Assessment (HRA).	As explained in detail in response to comment CSE-6, a HIA is beyond the scope of the CEQA process. The HRA performed in connection with the Draft EIR follows protocols and criteria recommended by the CARB and SCAQMD and provides an adequate evaluation of potential health impacts from the proposed Project for CEQA purposes, as discussed in the Response to Comment CSE-5.	10-113 to 10-115	Response, Att. 9, p. 17-18
26	**Air Quality:** The project does not comply with Health & Safety Code 39000-39002	The two code sections cited are general and do not contain prohibitions of any sort. They simply are the legislature's policy statements recommending regional approaches to air quality regulation. The FEIR takes into account applicable local, regional and state air quality rules and regulations.	3.2-10 to 3.2-13	Response, Att. 9, p. 18
27	**Air Quality:** MCC should test the cement to assure the cement doesn't contain toxics such as heavy metals.	This would be unnecessary and unduly burdensome, and would not serve any purpose because there is little to no exposure of cement dust to anyone offsite. As the EIR describes, even assuming all cement dust falls directly on the facility (i.e., the highest possible concentration), the location of significant impact extends only a few hundred meters offsite, and there are no sensitive receptors in that area.	3.2-12; 3.2-14 to 3.2-47; 10-57 to 10-59; 10-114 to 10-115; 10-145 to 10-149	Response, Att. 9, p. 19

Issue	Allegation	Response	FEIR page	Other Administrative Record
28	**GHG:** The GHG mitigation measures are inadequate, and the FEIR overlooks various measures that can be implemented to reduce GHG.	The examples of GHG mitigation measures provided in the appeal have all been addressed in the FEIR. For reasons explained in #14-16 above, shorepower cannot be used 100% of the time. Solar panels cannot be implemented immediately, as the FEIR explains in detail in the response to comment NRDC-25. There are no electric cranes and payloaders suitable for MCC's application, as explained in response to comment NRDC-26. (Appellants also have not provided the names of any manufacturers with suitable cranes, despite promises to MCC to do so.)	10-72 to 10-73	Att. 7, pp. 15-16
29	**GHG:** A one-time payment to the GHG mitigation fund is insufficient.	Additional payments beyond the one-time contribution are not appropriate, for reasons previously explained by MCC and the Port. First, the annual GHG emissions estimate for the facility is conservative because it uses total potential throughput capacity, rather than the lower throughput requested by MCC. Second, the contribution is made pursuant to Green Port programs currently in place, and the projects being funded are ongoing projects which achieve continuous emissions reductions. The Port applied the funding requirement to MCC in the same way it has been applied to other Port projects. MCC's project already contains numerous green components and furthers Green Port policies; it is unfair and unnecessary to ask MCC to make additional payments to the GHG Mitigation Fund beyond what it is already required to do by the Port.	3.3-11 10-45 to 10-53 10-55 to 10-56 10-71 10-74	Tomley Letter, Sec. III. May 11, 2015 Hearing (Tr. 8:21- 9:10) CEQA Findings, pp.14-15, 25 Response, Att. 7, pp. 15-16 Response, Att. 9, pp. 14-15
30	**Environmental Justice:** The Port should have analyzed environmental justice impacts.	Environmental justice analysis is not required by CEQA. The FEIR, which squarely addressed this issue in its response to comment NRDC-35, explains how the legislative history of Government Code §65040.12, which discusses environmental justice, reveals the intent of the legislature <u>not</u> to require CEQA analysis of environmental justice impacts.	10-75 to 10-76; 10-119	Tomley Letter, Sec. II. Response, Att. 9, p. 14
31	**Environmental Justice:** Presence of environmental justice communities near the Port warrants an analysis in light of significant impacts on air quality.	First, CEQA does not require environmental justice analysis. Second, As the EIR describes, even assuming all cement dust falls directly on the facility (i.e., the highest possible concentration), the location of significant impact extends only a few hundred meters offsite, and there are no sensitive receptors in that area.	10-75 to 10-76; 10-119	Tomley Letter, Sec. II. Response, Att. 9, p. 14
32	**Induced Demand/Lifecycle:** The FEIR should have analyzed the lifecycle of cement, from manufacturing to transportation to use of the material, and the induced demand for cement caused by the project's making the material available.	As the FEIR explains at length, such an analysis goes far beyond the scope of CEQA review of the project. The proposed terminal modifications involve no increase in the throughput limitations currently imposed upon the facility by SCAQMD. The appellants present no evidence to suggest that disapproval of the proposed terminal modifications would reduce the number of projects constructed in the region. If the MCC facility was not modernized or expanded, some bulk cement shipments would be diverted to other West Coast ports with existing facilities. Diverting cargo to other West Coast ports, other than POLA, would result in bulk cement needing to be transported back to the Los Angeles area by less efficient land-based transportation, resulting in increases in cost and air emissions. The FEIR explained that this latter alternative was considered, but it was not carried forward for analysis because it did not meet project objectives to improve operational efficiency and capacity of the MCC facility and was therefore infeasible.	1-9; 1-12; 4-3; 5.2 to 5.3 10-53 to 10-56	Tomley Letter, Sec. IV. CEQA Findings, pp. 25-26 Response, Att. 7, pp. 16-19
33	**Traffic:** The FEIR failed to properly analyze direct and indirect traffic impacts because the scope of the traffic analysis was only a 3-mile radius.	The traffic study and FEIR assessed direct and cumulative traffic impacts related to construction and operation activities. CEQA specifically requires that analysis be focused on impacts within the project area. Here, the area of influence for vehicle traffic consists of the streets and intersections that could be affected by automobile or truck traffic to gain access to and from the Project site. The projects that appellants suggest should have been considered in the cumulative analysis are far outside the reasonable geographic scope of this project. Moreover, appellants' own caselaw reinforces the discretion afforded to the lead agency to determine the scope of the environmental analysis. Finally, the FEIR determined that there is <u>no significant direct or cumulative impact</u> on those intersections <u>closest</u> to the project. As traffic disperses away from the project across the L.A. basin, trips attributed to the project also become dispersed and have less adverse impact. The Congestion Management Plan analysis (Apdx B., p. 24-27) for the project looked at trips attributed to the project traveling certain segments of the 710 and 110 freeways, and also determined there would be no significant impact on traffic caused by the project.	3.6-1 to 3.6-15; 10-5 to 10-9; 10-54 to 10-55; 10-119; Appendix B (in its entirety, but see especially p. 24-27).	CEQA Findings, p. 8. Response, Att. 7, pp. 19-21 Response, Att. 9, pp. 8-10

Issue	Allegation	Response	FEIR page	Other Administrative Record
34	**Biology:** There should be additional mitigation to prevent whale strikes over and above vessel speed reduction, such as use of the available whale app that allows you to see where whales have been spotted, so that further speed reduction or rerouting could occur.	Ships approaching and departing the Port must stay within shipping lanes specified by the Coast Guard. To reduce the risk of whale strike, ships coming to the MCC terminal will reduce speeds as required by the EIR. The "whale alert app" is not feasible as additional mitigation. It was not designed to be used by each individual ship captain to chart the ship's route. Rather, the app "is intended to be used by researchers, commercial ship operators, charter fishing boat operators, whale watching naturalists, and recreational and commercial fishers to document whale sightings in real time. The data will provide NOAA with information they need to request the US Coast Guard's Vessel Traffic Service to ask ship operators to slow down or change course as they approach areas where whales have been sighted." (http://westcoast.whalealert.org/index.php?page=download-spotter) So the app will be used to record sightings; NOAA – the agency with whale expertise – will review the information and consult with the Coast Guard if it thinks ship speeds or routes should be adjusted; and mariners must continue to comply with Coast Guard directives. This makes sense because the app can't show the current location of any whale.	3.5-3 to 3.5-15; 5-1; 6-1; 10-117 to 10-118; 10-171	CEQA Findings, p. 17, p.24, p. 43 May 11, 2015 Hearing (Tr. 6:22-7:3) Response, Att. 9, pp. 18
35	**Vessel Traffic:** The FEIR did not analyze whether the Port has the capacity to accommodate the project's additional 64 annual vessel trips.	The purpose of the project is to move ships more efficiently through the Port to and from MCC's terminal. Previously, because of the need to order cement shipments months in advance, mismatches in could occur between loading and unloading space availability, occasionally resulting in long ship or truck queues. The project aims to reduce or eliminate that inefficiency, and the increase in vessel trips is small relative to Port traffic. Based on the Port's annual emissions inventory, vessel movements within the Port, which varies from year to year, has been as high as 2796 movements (2006) and as low as 1921 (in 2013). Thus, there is adequate capacity to handle the small annual increase in vessel trips attributed to the project.	Sec. 3.7 10-166 to 10-168	May 11, 2015 Hearing (Tr. 13:14-24) Response, Att. 9, pp. 18