NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 1, 2009

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

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

Via Email and Hand Delivery at the December 1, 2009 City Council Meeting

Re: Agenda Item 13, December 1, 2009 Special Meeting of the Long Beach City Council

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

On behalf of the Natural Resources Defense Council ("NRDC") and its members in Long Beach and neighboring cities, this letter provides comment on Agenda Item 13 at the December 1, 2009 Special Meeting of the Long Beach City Council. That item is described on the published agenda as follows:

> Recommendation to request City Attorney and Port of Long Beach to provide an "on agenda" report to the City Council regarding the Stipulated Settlement between the Port of Long Beach and the American Trucking Association involving the Clean Trucks Program and the Natural Resources Defense Council's appeal of the Stipulated Settlement and the Board of Harbor Commission Resolution No. HD-2538.

NRDC has filed *three* separate appeals in connection with the Port of Long Beach Board of Harbor Commissioners' ("Board") settlement with the American Trucking Associations, Inc. ("ATA"). Each appeal is attached hereto as Exhibits 1, 2 and 3. The Long Beach City Attorney summarily rejected the first of these appeals and prospectively rejected the others, in violation of Long Beach Municipal Code Section 21.21.507 and California Public Resources Code 21151(c). This letter is attached as Exhibit 4. **We write to ask that our appeals be heard by the City Council as required by the Municipal Code and by state law.**

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As discussed below, our three appeals, and the City Attorney's unilateral rejection of them, go to the heart of the City Council's authority to act on behalf of its constituents. Indeed, there are three important issues now on the table for the City Council:

1. Is Long Beach's settlement agreement with ATA a permissible exercise of municipal authority given that provisions within that agreement contract away the City and Board's police power?

2. Did the City Attorney act properly under the Municipal Code by summarily denying three separate appeals under Long Beach Municipal Code Title 21, Division V, Section 21.21.507 and California Public Resources Code Section 21151, including denying in advance two appeals that had not yet been filed?

3. Regardless of the wisdom of the Board's settlement, did the Board violate CEQA when it failed to conduct any CEQA review for its adoption and implementation of the settlement, abandoning the concession agreement, when the Board argued in federal court the concession agreement will have a substantial effect on the environment?

I. BACKGROUND

A. The Long Beach/ATA Settlement Agreement and the Board's Implementation of that Agreement.

As the City Council is aware, in July, 2008, ATA sued the Cities and Ports of Long Beach ("POLB") and Los Angeles claiming that the concession agreement component of both ports' respective Clean Trucks Programs ("CTP") was preempted by the Federal Aviation Administration Authorization Act ("FAAAA") and in violation of the Commerce Clause of the U.S. Constitution. Throughout the litigation, Long Beach maintained that without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined.

On October 19, 2009, the Board of Harbor Commissioners, purporting to act on the City's behalf as well as on their own, entered into a settlement agreement with ATA.[1] Under the settlement, Licensed Motor Carriers ("LMCs") will not be required to have a concession to perform trucking services at POLB. Instead, LMCs are required to "register" with POLB prior to conducting port drayage services and enter into a "registration agreement."

As detailed in our appeal letters, the settlement and registration agreements result in a fundamentally weaker CTP by failing to hold LMCs accountable for meeting the port's environmental, safety and security standards. Moreover, under the settlement, any

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

attempt by the port or City to require LMCs to meet more stringent environmental, safety or security requirements than those set out in the registration agreement would be a breach of the settlement agreement and authorize ATA to reinstate its lawsuit against Long Beach. For instance, if the City of Long Beach decided to require LMCs to create vehicle maintenance plans to ensure sophisticated diesel particulate filters are well-maintained and functioning properly, the City would likely be in breach of the settlement. This restriction ties the City's hands to address current and future environmental threats. Please review our appeal letters for a more detailed discussion of the settlement's defects.

To implement its settlement agreement with ATA, the Board separately adopted a Resolution and an Ordinance to align the port's CTP with the settlement agreement. The Resolution temporarily amended the program, while the Ordinance made these amendments permanent. The Board adopted its Resolution on November 2, 2009, and performed its first and second readings of the Ordinance that was identical to the Resolution on November 16, 2009 and November 23, 2009, respectively.[2]

Of particular relevance here, the Board failed to conduct any CEQA review whatsoever before it entered into its settlement with ATA. Additionally, in adopting the Resolution and Ordinance, the port claimed three CEQA exemptions: CEQA Guidelines Section 15273 (rates, tolls, fares, and charges), Section 15301(d) (restoration or rehabilitation of mechanical equipment), and Section 15061(b)(3) (no possibility of significant adverse effect on the environment).

B. The Pending Appeals

NRDC filed three separate appeals in relation to Long Beach's settlement with ATA. Each appeal relates to an improper environmental determination made by the Board, and is authorized under Long Beach Municipal Code Section 21.21.507 and California Public Resources Code 21151(c).

As detailed in Exhibit 1, on November 16, 2009, NRDC, Coalition for a Safe Environment, Communities for Clean Ports, Greater Long Beach Interfaith Community Organization, Los Angeles Alliance for a New Economy, Long Beach Coalition for a Safe Environment, San Pedro Democratic Club, and Students United for Justice appealed the Board's determination (or lack thereof) that the settlement agreement with ATA was not subject to CEQA, and that the Board's November 2, 2009 Resolution was exempt from CEQA. We provided compelling grounds, including the port's own statements, for why POLB was required to perform a CEQA analysis before entering into its settlement

[2] The Ordinance permanently amends Ordinance No. HD-1357, designated Tariff No. 4 ("Tariff No. 4"). Tariff No. 4, among other things, defines the circumstances under which terminal operators can permit drayage trucks to access port terminals. The Ordinance amends Tariff 4 by providing that drayage trucks can access port terminals if they are registered under a "registration agreement." (Before this amendment and the Board's November 2, 2009 Resolution adopting temporary amendments, access was only granted to trucks that were registered under a concession).

agreement with ATA. Additionally, we outlined why the Board's claimed CEQA exemptions do not apply to the Resolution.

As detailed in Exhibit 2, on November 20, 2009, NRDC, Californians for Justice, Coalition for a Safe Environment, Coalition for Clean Air, Communities for a Better Environment, Communities for Clean Ports, West Long Beach resident Theral Golden, Long Beach Alliance for Children with Asthma, Los Angeles Alliance for a New Economy, San Pedro Democratic Club, Students United for Justice, and the Teachers Association of Long Beach appealed the Board's November 16, 2009 environmental determination in its first reading of the Ordinance that the amendments to Tariff 4 are exempt from CEQA. In this appeal, we once again refuted that any of the Board's claimed exemptions apply. We also explained that Long Beach Municipal Code "Section 21.21.507(F) prevents the Board from holding a second reading on the Ordinance until this appeal is resolved." However, the Board voted to adopt the second reading of the Ordinance at its November 23 Board meeting.

As detailed in Exhibit 3, on November 25, 2009, NRDC appealed the environmental determination by the Board made on November 23, 2009 that related to the second reading of the Ordinance. We explained once again why CEQA review was required and why none of the claimed exemptions applied.

C. The City Attorney's November 20, 2009 Letter Denying Then-Existing And Future Appeals.

Notwithstanding the plain text of Municipal Code Sections 21.21.507(G) ("The city clerk *shall* set a hearing on the appeal . . .") and 21.21.507(I) ("The appellant *shall* have an opportunity to present its grounds for contending that the environmental determination does not comply with CEQA . . .") (emphasis added), and the provisions of California Public Resources Code 21151(c),[4] on November 20, 2009, the Long Beach City Attorney wrote to NRDC and purported to "reject" NRDC's then-existing appeal of the Board of Harbor Commissioners' environmental determinations regarding implementation of the ATA settlement without a hearing. The letter also purported to deny all future appeals of such Board determinations. This letter is attached as Exhibit 4.

[4] Public Resources Code 21151(c) provides: "If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any."

II. NRDC'S APPEALS RAISE THREE ISSUES THAT GO TO THE HEART OF THE CITY'S POLICE POWERS

There are three important issues now before the City Council:

First, is Long Beach's settlement agreement with ATA a permissible exercise of municipal authority given that provisions within that agreement contract away the City and Board's police power?

Second, did the City Attorney act properly under the Municipal Code by summarily denying three separate appeals under Long Beach Municipal Code Title 21, Division V, Section 21.21.507 and California Public Resources Code Section 21151, including denying in advance appeals that had not yet been filed?

Third, regardless of the wisdom of the Board's settlement, did the Board violate CEQA when it failed to conduct any CEQA review for its adoption and implementation of the settlement agreement when these changes to the Clean Trucks Program will have a substantial effect on the environment according to the Board's own arguments to the federal courts?

Each of these issues present key questions, the resolution of which will define the authority of the City Council for years to come.

A. The Board of Harbor Commissioners Contracted Away the City's Police Power to a Private Entity in the ATA Settlement Agreement.

It is well-settled that a California municipal entity cannot legally contract away its police powers to a non-governmental entity. The police power is broadly defined in California to include "the protection of peace, safety, health and morals," *Mott v. Cline*, 200 Cal. 434, 446 (1927), and includes actions taken to protect the environment. *See, e.g., Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 86 Cal. App. 4th 534 (2001). "It is settled that a government entity may not contract away its right to exercise the police power in the future." *Avco Cmty. Developers, Inc. v. S. Coast Regional Comm'n* (1976) 17 Cal.3d 785, 800, 132 Cal.Rptr. 386, 553 P.2d 546; *see also County Mobilehome Positive Action Comm'n, Inc. v. County of San Diego* (1998) 62 Cal. App. 4th 727, 736–39, 73 Cal.Rptr.2d 409; *Alameda County Land Use Ass'n v. City of Hayward* (1995) 38 Cal. App. 4th 1716, 1724, 45 Cal.Rptr.2d 752. A contract that purports to do so is invalid as against public policy. *County Mobilehome*, 62 Cal. App. 4th at 736, 73 Cal.Rptr.2d 409; *Cotta v. City & County of San Francisco*, 157 Cal. App. 4th 1550, 1556–57 (2007).

Under the settlement, the Board agreed to allow ATA to reinstate its lawsuit against the City if material changes are made to the registration agreement. As a result, the Board has given ATA veto power over any changes in the Registration Agreement—including

any changes that the City Council may want to make at any time in the future. This is plainly an unlawful delegation of Long Beach's police powers to a trade association—a powerful national association that has opposed regulations of truck-related air pollution and greenhouse gas emissions. What's more, giving away the City's discretionary powers in closed session, in the guise of settlement, violates state law. *See Trancas Property Owners Ass'n v. City of Malibu*, 61 Cal.App.4th (1998).

B. The City Attorney's Unilateral Decision to Deny NRDC's Appeals Violates State Law and the Long Beach Municipal Code, and Robs the City Council of its Authority to Remedy CEQA Violations.

State law provides the right to appeal an environmental determination by a non-elected body to the supervising elected body. California Pub. Res. Code Section 21151(c). That right exists whether the Long Beach City Charter or Municipal Code provides for it or not, and explicitly applies to a determination that a project is exempt from CEQA. Nothing in state law permits a person or entity other than the Long Beach City Council to resolve the appeals brought by NRDC and others.

Likewise, Long Beach Municipal Code Section 21.21.507 also provides for appeals to the City Council of environmental determinations made by appointed City bodies—including appeals from a determination "that a project is not subject to the California Environmental Quality Act," which is precisely what happened here. Nothing in the Municipal Code permits the City Attorney—or the City Council—to deny such an appeal without a full hearing before the Council.

Moreover, the only substantive argument made in the City Attorney's letter—that the federal court's approval of the settlement insulates implementation of the settlement from review under state law—is incorrect on its face. The settlement was presented to the federal court on an *ex parte* basis and there was no hearing or opportunity for hearing or briefing on it. Suppose the settlement had contained a clause requiring the port to take tidelands money and fund a casino in Long Beach, off port property. Would the City Attorney contend that this is legal if a federal court signed off on an *ex parte* application to dismiss a complaint? Certainly not. Indeed, if state law could be trumped in this fashion, it would be an open invitation to land developers and others to bring collusive litigation in order to settle their way out of local planning and zoning requirements as well as state law obligations under CEQA, AB32 and the like. That is exactly what the *Trancas Property Owners* case forbids.

Lastly, regardless of the Council's position on the wisdom of the settlement agreement, California law subjects the settlement agreement and its implementation to certain procedural requirements, including CEQA. As detailed in our appeal letters, the Board failed to comply with CEQA when it entered the settlement agreement, and when it adopted its Resolution and Ordinance to implement the settlement. The City Attorney's dismissal of our appeals precludes the City Council from rectifying the Board's conduct,

and thus, from protecting the City from not only environmental harm but also potential litigation.

CONCLUSION

The Board's actions are an affront to the rights and powers of the City Council. On behalf of NRDC, I ask that the City Council accept the pending appeals for review and set a prompt hearing as provided for in the Long Beach Municipal Code.

Thank you for your consideration of this letter.

Sincerely,

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

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

Enclosures:

Exhibit 1: Letter from David Pettit, Natural Resources Defense Council, et al., to Long Beach City Clerk Mr. Larry Herrera and Members of the Long Beach City Council, re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507 (Nov. 16, 2009) (attachments not included)

Exhibit 2: Letter from David Pettit, Natural Resources Defense Council, et al., to Long Beach City Clerk Mr. Larry Herrera and Members of the Long Beach City Council, re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507 (Nov. 20, 2009) (attachments not included)

Exhibit 3: Letter from David Pettit, Natural Resources Defense Council, to Long Beach City Clerk Mr. Larry Herrera and Members of the Long Beach City Council, re: Appeal of City of Long Beach Harbor Department Environmental Determination Pursuant to Long Beach Municipal Code Title 21, Division V, Section 21.21.507 (Nov. 25, 2009) (attachments not included)

Exhibit 4: Letter from Robert Shannon, City Attorney, to David Pettit, Natural Resources Defense Council, re: November 16, 2009 Appeal Under Municipal Code Section 21.21.507 (Nov. 20, 2009)