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DISCUSSION ON THE RELATIONSHIP BETWEEN MITIGATION OF PORT OPERATIONAL IMPACTS AND THE PUBLIC TRUST DOCTRINE

INTRODUCTION

At the request of Lieutenant Governor Garamendi, staff has prepared the following informational report discussing the relationship between the Public Trust Doctrine and mitigating port impacts. This report will provide background on the legal status of public trust lands and revenues, discuss the California Environmental Quality Act, and use the Port of Los Angeles as a case study to examine how the Public Trust Doctrine and the mitigation of port impacts interface with each other. To help facilitate the discussion is the attached memo, by Frank O'Brien on behalf of the TraPac Appellants, on near-port impacts (Exhibit A).

The five major ports of California can all trace their origins back to a statutory trust grant to a local government of State owned sovereign tide and submerged lands (hereafter described as "public trust lands"). Beginning in 1911, the people of the State of California, acting through the California Legislature, entrusted to these local jurisdictions the State's public trust lands for the primary purpose of developing commercial ports. The State ensured that these public trust lands would be held by the grantees for the benefit of all of the people of the State and would be developed for port purposes by placing them in an express statutory trust. Since then, the lands making up the ports have been held by the local jurisdictions as trustees of the State of California. As with a private trust, the public trustees must utilize the State's lands and their revenues solely for trust purposes, pursuant to the Common Law Public Trust Doctrine and the respective statutory trust grants.

California's ports are a vital component to our State's and nation's economic well-being. California's ports, particularly the four major ports of Oakland, Los Angeles, Long Beach and San Diego, contribute significantly to the local, regional, state and national economies. Within the language of the Coastal Act, the Legislature found that "The ports of the State of California…constitute one of the state's primary economic and coastal resources and are an essential element of the national maritime industry."

As California ports are faced with an ongoing need to accommodate growth and increase cargo throughput, port operations impact the environment and local communities surrounding these operations. These impacts can have a positive effect on the surrounding communities by providing much needed high paying jobs and generating significant local tax revenues. However, these impacts can also have significant negative effects on the surrounding communities through increased air and water pollution, increased traffic and other environmental impacts.

Since its enactment in 1970, the California Environmental Quality Act (CEQA) has required that California's ports mitigate the negative impacts of their proposed projects on the environment. Importantly, it is essential to distinguish between 1) CEQA-required mitigation, 2) discretionary mitigation that is not CEQA mandated but sufficiently justified in mitigating port impacts (i.e. the Port of Los Angeles' Clean Truck Program) and 3) proposals that a port is asked to pay for that are not mitigation, as they are not associated with any one particular port project, were not required by CEQA and for which no CEQA-like analysis has drawn a nexus.

Ports should and need to be good neighbors to their surrounding communities. Many past industrial, commercial and other projects undertaken by public and private entities have resulted in substantial negative impacts on the environment. The recognition of these impacts led to the enactment of the National Environmental Policy Act in 1969 and CEQA the following year. The relatively recent adoption of environmental justice policies by many entities and the inclusion of environmental justice in the enactment of AB 32 in 2006 indicate the importance of this issue in considering future projects that may place an undue burden on particular communities. The California State Lands Commission (Commission) and its staff are committed to "the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (State Lands Commission Environmental Justice Policy, adopted on October 1, 2002).

The question that arises is can there be proper and effective non-CEQA required mitigation that complies with both CEQA-type analysis and the local government's fiduciary obligations under the Public Trust Doctrine and California Constitution? Can a port conduct itself as a good neighbor to its surrounding communities, while also serving as a trustee of state assets on behalf of the citizens of the State of California? As described in this staff report, Commission staff believes the answer to these questions is a clear yes, but that there are limits to what constitutes lawful expenditures of public trust revenues.

An example of how these questions translate in the real world is the Port of Los Angeles (Port). There is no dispute that the Los Angeles harbor has expanded over the years. While recently celebrating its official 100th anniversary, its history as a harbor can be traced from Cabrillo's discovery in 1542 and its role as a maritime trading port beginning in 1805, to subsequent development in the 19th and 20th centuries. The coal burning ships and trains of the 19th Century have been replaced with diesel burning ships and trains of the 20th. The expansion of the port over the last 200 years has resulted in the port today facilitating the transportation of the highest number of container cargo shipments in the United States. Obviously over the last two centuries enormous changes have taken place in the Port, as well as throughout other areas of southern California. The question then is not just whether there have been impacts to the environment since the days southern California was in a natural state, but what are the quantifiable impacts attributable to the Port and is the Port responsible for mitigating those impacts?

While, in the past, projects throughout California had unmitigated impacts on the environment, the enactment of CEQA set forth obligations to mitigate those impacts. Pre-CEQA, the Port of Los Angeles focused on expanding its operations with minimal mitigation resulting in impacts on the environment. However, it has more recently made and continues to make significant strides in improving the environment surrounding its operations. This is true in terms of air and water quality, and also with increased and improved public access and water-related, visitor serving recreational opportunities that both complies with the Public Trust Doctrine and provides direct and incidental benefits to the local communities of San Pedro and Wilmington. There are only a select few projects that have been proposed outside of CEQA required mitigation for port impacts that the State Lands Commission staff believes are not consistent with the Public Trust Doctrine and the California Constitution.

DISCUSSION

In discussing the relationship between mitigating port impacts and the Public Trust Doctrine, it is helpful to begin with some background on the legal status of sovereign public trust lands and revenues and to what uses these trust lands and assets may be put. Following that background, some guidelines on what CEQA requires with respect to mitigating impacts associated with a project will be discussed. And finally, a case study of the Port of Los Angeles will help tie the two concepts of mitigation and the Public Trust Doctrine together.

PUBLIC TRUST LANDS AND REVENUES

Traditional public trust uses are considered to include water-related commerce, navigation, and fisheries. Harbor development is an example of a classic public trust use, potentially encompassing all three. And, although courts have recognized that the Public Trust Doctrine is flexible and have recognized that it includes water-related public serving and recreational uses, as well as environmental protection, open space, and preservation of scenic areas, the overarching principle of the Public Trust Doctrine is that trust lands and trust assets belong to the statewide public and are to be used to benefit the statewide public rather than for local community or municipal purposes.

The same holds true for legislatively granted public trust lands and assets managed by a local government. Commencing in 1851 and continuing to the present, the California Legislature has periodically transferred sovereign public trust lands to local governmental entities for management purposes. The great majority of tideland grants are held in trust for public trust purposes, including water-related commerce, navigation and fishing. However, the terms of these grants can vary. As to any particular trustee, the terms of the trust must be derived from both the original and all supplementary and amendatory legislation, as well as general legislation applying to all such trust grants. The usual granting language utilized by the Legislature has the effect of conveying the State's legal title to the described tide and submerged lands, subject to certain terms and conditions and subject to the statutory and Common Law public trusts. The grantee is a trustee, both as to the lands themselves and as to the proceeds derived therefrom. ***City of Long Beach v. Morse***, 31 Cal. 2d 254, 257 (1947). The trust is for the benefit of the entire State. ***Mallon v. City of Long Beach***, 44 Cal. 2d 199, 209 (1955).

The effect of the legislative grant is, therefore, to create a trust in which the grantee is trustee, and the State is the trustor, and the people of the State are the beneficiaries of the trust. The legal consequence of this relationship is that the proper use of public trust lands and public trust revenues is a statewide affair. ***Mallon v. City of Long Beach***, supra at 209. Public trust revenues are subject to the same trusts as the trust lands themselves. And, the use of trust lands and revenues derived therefrom for non-trust purposes is a violation of the trustee's fiduciary duty to the trust and its beneficiaries.

In addition to the Common Law judicial protections given public trust lands and assets laid down by both federal and state courts, the people of California have adopted several Constitutional restrictions on the state and local governments in their handling of these statewide public assets. Specifically, **California Constitution Article X §3** (adopted in 1879 as Article XV, §3) prohibits the grant of tidelands within two miles of a city to private parties. **Article XVI, § 6** prohibits the state from making a gift of public monies or thing of value to any municipal corporation. *Mallon* at 211.

Whether a particular use constitutes a proper use of trust lands and/or its revenues has been determined by various court decisions. Each time, the court's analysis of the question has focused on the relationship of the proposed project to those uses authorized by the statutory trust and the Public Trust Doctrine. For example, in ***City of Oakland v. Williams*** (1929) 206 Cal. 315, the court made it clear that in order to receive judicial approval the lease for a port storage warehouse facility had to be construed in connection with the tidelands grant to the city and thus could allow only those uses designed to benefit the port and stimulate commerce and navigation through the port. In ***Oakland v. Larue Wharf & Warehouse Co.*** (1918) 179 Cal. 207, a lease of tidelands for wharf and warehouse purposes received court approval only after the court examined these uses and found them to be an aid to harbor development, and thus an aid to navigation and commerce.

Later, leases for structures incidental to the promotion of a port have also received court approval. ***Haggerty v. City of Oakland*** (1958) 161 Cal.App.2d 407, involved the construction and lease of a convention and banquet building in Oakland's port area. In approving such a use, the court emphasized that commerce of the port would be promoted through the activities conducted in the convention building. A second basis for the court's conclusion was that the convention hall was also incidental to the public's enjoyment of public trust property. The court in ***Haggerty***, for the first time, examined the proposed structure in terms of whether it was also necessary to fulfill public enjoyment of trust property.

In ***People v. City of Long Beach*** (1959) 51 Cal.2d 875, the construction of an Armed Services YMCA on tidelands was found to be incidental to harbor operations, as the facility was found appropriate to accommodate the visiting soldiers and sailors whose ships were docked on tidelands. In addition, in ***Martin v. Smith*** (1960) 184 Cal.App.2d 571, the court upheld a lease of tidelands in Sausalito which included a restaurant, a motel, shops and a parking area in conjunction with a yacht harbor, reasoning that these uses provide broad public access to the tidelands.

The seminal case guiding what constitutes a proper use of public trust revenues is ***Mallon v. City of Long Beach***. In 1951 the California Legislature passed a statute (Chapter 915) freeing tens of millions of dollars of tidelands revenue from the statutory and public trust restrictions. In 1953 the Legislature by concurrent resolution approved a city charter amendment authorizing the City of Long Beach to spend certain past and future tideland revenues for municipal purposes. The California Supreme Court had earlier ruled in ***City of Long Beach v. Morse*** (1947) 31 Cal 2d 254 that a city charter amendment approved by the Legislature authorizing the use of tidelands trust revenues for municipal purposes was a violation of the trust. The California Supreme Court in the ***Mallon*** decision not only affirmed this decision that use of trust funds for municipal purposes unconnected with the purposes and uses of the trust was a violation of the trust, but also violated **California Constitution Article IV, §Section 31** (now **Article XVI, § 6**). Specifically the Court determined that expenditures of tideland trust revenues outside granted lands by the City of Long Beach for uses such as a fire alarm system, a public library, public hospitals, public parks, off-street parking facilities, city streets and highways, storm drains and a city incinerator were not expenditures of state-wide interest for which state funds could properly be appropriated. The Supreme Court, in holding that "there being no benefit to all people of the state… it would be a gift of public monies and thus prohibited by the Constitution," rejected the argument that expenditures of trust revenues for municipal purposes should be permitted since they would be for "public" purposes. As a result of ***Mallon***, funds that were intended for the local government were returned to the State General Fund. If the Legislature determines that the Port used its revenues for non-authorized purposes the Legislature could decide to revert the revenues to the State for uses that have a greater statewide benefit.

From these Supreme Court and appellate court decisions it is clear that in order to constitute proper trust uses of public trust lands and proper expenditures of trust revenues, the use or expenditure must (1) either directly benefit the port and stimulate commerce and navigation through the port or be necessarily incidental to such purposes, or (2) the use must promote the statewide public's enjoyment of these trust lands as authorized in the statutory trust grant. Therefore, when analyzing the consistency of expenditure of public trust funds for specific uses, the trustees of public trust lands must exercise caution so as not to violate their fiduciary duties to the trust or violate the Constitution. The State Lands Commission has been charged by the Legislature with oversight of the trustee's use of public trust funds and has, in the past, sought redress from the appropriate court to prevent the improper use of trust lands and revenues by the State's trustees.

As in CEQA and other regulatory mechanisms that require developers to provide mitigation for impacts of their projects, a nexus of the mitigation to the impact must be drawn. When determining the extent of such a nexus, it is useful to look to the *Nollan-Dolan* approach as set forth by the United States Supreme Court. The Court held that there must be an "essential nexus" between the exaction and a legitimate state interest that it serves (***Nollan v. California Coastal Commission*** (1987) 483 U.S. 825), and the exaction must be "roughly proportional" to the nature and extent of the project's impact (***Dolan v. City of Tigard*** (1994) 512 U.S. 374). While these cases dealt with issues of **United States Constitution, Fifth Amendment** takings, the rational set forth by the Court is relevant to determining what kind of connection is necessary in order to achieve a sufficient nexus to port operations for compliance with a trustee's fiduciary duties to the State and **California Constitution, Article XVI, § 6**.

This does not mean, as some have suggested, that an appropriate off-site project can never have the required nexus to Port operations. Neither does it mean that the Port may not acquire lands or improve property to mitigate impacts of Port operations. An example is the Alameda Corridor. In this situation, the Ports of Los Angeles and Long Beach used trust funds to acquire land and build the Alameda Corridor to mitigate the increase in traffic at and around the Ports. In this case, there is a sufficient nexus because port traffic is directly facilitated by the operation of the Alameda Corridor. This directly promotes Port operations and helps to mitigate traffic impacts resulting from those operations. Likewise, public parks and open space may be used to offset a port's operational impacts on parks and open space. However, there must be a nexus that can be justified, documented and that is proportional to a port's impacts and/or operations and the proposed off-site project. The Port has spent tens of millions of dollars acquiring lands that it is now developing for waterfront parks and open space and a buffer, outside of CEQA required mitigation, for uses that have both a direct and indirect benefit to the communities of Wilmington and San Pedro. However, these projects are either trust consistent and enhance the use of trust lands or, in the case of a buffer, are direct mitigation of Port impacts to surrounding communities.

What some have suggested is that the Port is responsible for activities by third parties that take place off of port property. One example often raised is that certain companies are storing containers on private property in the vicinity of the Port, thereby causing blight and negative aesthetic impacts to the community. This impact they attribute to the Port. What this approach fails to acknowledge is that the Port and Board of Harbor Commissioners have no control over these activities. The City of Los Angeles and its City Council establish and enforce laws involving zoning and business operations. When the City permits a particular project or use at a particular location the City is obligated to comply with CEQA and mitigate for impacts associated with that use. Activities by third parties on property not under control of the Port are the responsibilities of local, state and federal government bodies with jurisdiction over those activities.

CEQA AND THE PUBLIC TRUST DOCTRINE

CEQA was conceived primarily as a means to require public agency decision makers to document and consider the environmental implications of their actions. Public Resources Code Sections 21000, 21001. CEQA compels government first to identify the significant environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. ***Sierra Club v. State Board of Forestry*** (1994) 7 Cal.4th 1215, 1233.

However, CEQA does not require analysis of every imaginable alternative or mitigation measure; its concern is with feasible means of reducing environmental effects. ***Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District*** *(1994) 24 Cal.App. 4th 826, 841.* CEQA does require public agencies to identify mitigation measures, which avoid or substantially lessen such significant effects, or will mitigate or avoid the significant effects on the environment of projects they decide to approve, unless it is infeasible to do so. Public Resources Code Section 21002, 21002.1. The feasibility of a mitigation measure includes the legal authority, the technical feasibility, the economic feasibility, the social and political feasibility and the timing of the mitigation to the project build-out.

Mitigation measures should be capable of: (a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; or (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. CEQA Guidelines, Section 15370.

A mitigation measure that has been developed in response to a proposed port project's potential impact and has been sufficiently justified and documented pursuant to CEQA will be consistent with Public Trust Doctrine as it is mandated by law and is necessary in facilitating a public trust project.

PORT OF LOS ANGELES – A CASE STUDY

As general background, the State's tide and submerged lands within the Los Angeles harbor area were legislatively granted, in trust, to the city of Los Angeles and are managed by the Port. The Port has also acquired various adjacent upland parcels using public trust funds. These upland parcels are assets of the trust and are considered after-acquired trust land, subject to the same use restrictions as the tidelands. The Los Angeles Board of Harbor Commissioners (Board), through the City's Charter, operates and manages Port public trust lands in accordance with the Public Trust Doctrine and its statutory trust grants. The Port of Los Angeles borders the communities of San Pedro and Wilmington.

As can be seen in the previous discussion, the definition of mitigation depends largely on the context in which it is being used. For example, under CEQA, mitigation has a very specific definition which occurs within the context of a specific proposed project. This case study attempts to highlight the spectrum of mitigation that ports may fund. In summary, ports, pursuant to CEQA, are required to mitigate for impacts associated with a specific project and such mitigation, whether it occurs on port property or off port property, is appropriate. Project specific mitigation, pursuant to CEQA, is generally consistent with the Public Trust Doctrine, if the mitigation is truly mitigating the impacts and is proportional to the impacts.

Beyond project specific mitigation, discretionary mitigation not mandated by CEQA and projects that are proposed to offset impacts from general operations of the ports and/or impacts that have been accumulating over years must comply with the Public Trust Doctrine and the Constitution, by establishing a nexus between port operations and impacts and the proposed project, using a CEQA-like analysis. As discussed above, a CEQA-like analysis would determine the impacts and the appropriate proportional mitigation.

As previously mentioned, in the past, expanding operations and growing the Port of Los Angeles was the primary focus of the Board of Harbor Commissioners. However, within the past few years, that mindset has changed. Today, the Port of Los Angeles, along with its sister port, the Port of Long Beach, have taken steps towards expanding in an environmentally responsible manner by developing and implementing some significant environmental initiatives, in addition to CEQA mandated mitigation, with positive environmental justice results. The Port has committed to expending over $1.6 Billion to mitigate air quality impacts alone. In addition, the Port has taken important steps towards creating a waterfront that will have a major positive impact on the communities of San Pedro and Wilmington by providing public access, open space and water-related recreational opportunities to their respective waterfronts.

One of the major milestones of this change in mindset was the amendment of the Port's granting statutes to allow for developments that went beyond just traditional port industrial and commercial maritime operations. Prior to the enactment of Assembly Bill 2769 (Statutes of 2002, Chapter 1130), the Port of Los Angeles' granting statutes provided that the tidelands may be used "…solely for the establishment, improvement, and conduct of a harbor…" (Statutes of 1911, Chapter 676, as amended). With the passage of AB 2769, the uses allowed on lands granted to the Port of Los Angeles have been expanded to include water-related recreational uses, open space and visitor-serving facilities, among other uses.

This amendment to include the full panoply of public trust uses has led to the planning for the San Pedro Waterfront Project, the Wilmington Waterfront Project, and the Waterfront Red Car Line, just to name a few. The San Pedro Waterfront Project, comprising approximately 400 acres, will include new public open spaces such as promenade areas, parks, plazas, de-industrialization of certain port lands, upgrades to and expansion of retail and commercial uses, three new harbor basins and a new outer harbor cruise terminal. The San Pedro Waterfront Project is estimated to cost at least $1 billion. The Wilmington Waterfront Project, comprising approximately 58 acres, will include a waterfront park and promenade, open space and a commercial/retail development. The Wilmington Waterfront Project is estimated to cost $225 million. These two major development projects provide significant benefits to the local communities of San Pedro and Wilmington, while remaining consistent with the Public Trust Doctrine and Constitutional restrictions.

In 2006, the Port of Los Angeles, in partnership with the Port of Long Beach, embarked upon an array of environmental initiatives aimed at reducing the effects of Port operations on the environment. The most significant is the Clean Air Action Plan (CAAP), a comprehensive plan that addresses emissions created by the trucks, oceangoing vessels, trains, terminal equipment and harbor craft that service the Port and includes aggressive strategies to reduce emissions. Such strategies include a vessel speed reduction program ($1 million budgeted for FY 2008/2009) and low-sulfur fuel incentives ($8 million budgeted for FY 2008/2009). The most significant strategy is the Clean Truck Program, which will replace or retrofit high-polluting diesel trucks with models that meet 2007 EPA emissions standards. The Clean Truck Program, implemented on October 1st, is estimated to cost $1.6 billion mentioned above by the end of 2012. It is anticipated that the Clean Air Action Plan will reduce emissions created by various sources servicing the ports by 50% by 2011.

Commission staff has not objected to the expenditures or questioned the public trust consistency of any of these waterfront development projects or the CAAP program. The waterfront development projects, with the passage of AB 2769, are generally consistent with the Port's granting statutes, as well as the Common Law Public Trust. In partnership with the California Air Resources Board, the justification for the CAAP program has been adequately documented as mitigating for port operational impacts. These are significant projects, proposed by the Port outside the CEQA process, which benefit the local communities surrounding the Port and which may also be considered mitigation for past port operational impacts.

However, two container terminal projects proposed by the Port of Los Angeles, China Shipping and TraPac, and settlements of disputes raised by the community, which involve two different mechanisms designed to have the Port fund projects beyond and outside of the CEQA process for asserted impacts raise issues regarding consistency with the Public Trust Doctrine.

China Shipping Settlement

In 2001, the Natural Resources Defense Council (NRDC), San Pedro and Peninsula Homeowners Coalition, San Pedro Peninsula Homeowners United, Inc., and the Coalition for Clean Air, Inc., filed suit against the Port alleging that the Port failed to prepare an adequate environmental impact report (EIR) and analysis when it approved a project to construct and lease a three-phase container terminal to the China Shipping Holding Co., Ltd. Following the Second District Court of Appeal decision in favor of the plaintiffs, the Port and plaintiffs decided to settle their disputes by agreement and stipulated judgment.

The Stipulated Judgment, provided, among other things, for the establishment of a Port Community Advisory Committee (PCAC) as an advisory panel to the Board. It also provided for a general mitigation payment allocation which included $10 million to the Gateway Cities Program (involving port related diesel powered on-road trucks), $20 million to air quality mitigation (reduction of air quality impacts from Port operations affecting San Pedro and Wilmington), and $20 million to community aesthetic mitigation (reduction of aesthetic impacts from Port facilities and operations). In 2004, the parties amended the Stipulated Judgment, which included, among other things, a refined procedure for evaluating the use of the aesthetic mitigation fund monies.

As of June 2008, the total deposits for the China Shipping Mitigation funds are over $70 million (initial settlement deposit of $50 million plus deposits for excess TEUs each fiscal year). Of those total deposits, just under $40 million are identified for air quality mitigation projects (including the Gateway Cities Program in which 313 trucks have been funded and all monies spent). The remaining $30 million is now identified for aesthetic mitigation.

While the Commission was not a party to this settlement or the 2004 amendment, through an agreement with the Port, staff has been involved in monitoring and commenting on the process of selecting which projects will receive monies from the community aesthetic mitigation fund. Staff has not been involved in the Gateway Cities Program or the air quality mitigation fund portion of the settlement. While staff does not have the authority to approve or disapprove of any one project, through the procedure for funding the community aesthetic mitigation, Commission staff is able to comment to both the PCAC and the Board as to whether any particular project is consistent with the Public Trust Doctrine and the Ports statutory trust grants.

As of June 2008, there was $30,123,976 available for Community Aesthetic Mitigation projects to be split between the San Pedro and Wilmington communities equally. This amount consists of $20 million from the initial settlement; $3.5 million dedicated for open space/parks in San Pedro; $1,544,820 due to excess TEUs in CY 2005; $2,306,976 in excess TEUs in CY 2006, and $2,772,180 in excess TEUs in CY 2007. Of this total amount, $10.9 million has been approved by the Board for the Northwest San Pedro Beautification Project, the Wilmington Youth Sailing Center, Friends of the Banning Museum Transportation Exhibit, and the Wilmington YMCA Aquatic Center leaving just under $20 million available for other proposals. Commission staff approved all of these projects and more.

In summary, pursuant to the Amended Stipulated Judgment, Commission staff has received 23 total project proposals amounting to approximately $67,225,000. Commission staff approved 7 of these proposals in full, amounting to approximately $24.8 million. CSLC staff approved certain elements of another 7 proposals. These 7 proposals amount to approximately $12 million, of which the Port could pay for portions of the project on a proportional basis, conservatively amounting to approximately $3.5 million. It should be noted that of the 23 total projects, 17 were submitted pursuant to a "Request For Proposals" (RFP) issued by the Port requesting proposals specifically benefiting the Wilmington community. The Port will be issuing a second RFP for proposals specifically benefiting the San Pedro community within the next year. One project, the San Pedro Plaza Park, initially determined by Commission staff as being inconsistent with the public trust, was later incorporated as mitigation in the subsequent China Shipping EIR.

Commission staff generally believes that the process described above has worked within the context of the China Shipping settlement of litigation and could be appropriate in other contexts as well. As described above, over a third of the projects were approved by Commission staff as consistent with the public trust. The disagreement on the standard by which staff holds these projects is exemplified by two projects in particular - the San Pedro Welcome Park and the Wilmington Greenbelt. These two proposals were determined by Commission staff as being inconsistent with the public trust because both were located a significant distance from port property, were long planned community parks and there was no documentation put forward that established a nexus between impacts of port operations and these parks as mitigation. Because of this lack of nexus, the use of public trust funds for these projects would have constituted the use of trust monies for purely municipal purposes found impermissible by the California Supreme Court in ***City of Long Beach v. Morse*** and ***Mallon v. City of Long Beach.***

TraPac Memorandum of Understanding

The MOU (between the Board of Harbor Commissioners and various non-governmental organizations and local community groups, the TraPac Appellants) resulted from the TraPac Appellants December 2007 appeal to the Los Angeles City Council of the approval of the TraPac Final EIR by the Board. This appeal was based on a number of alleged inadequacies of the EIR. In exchange for withdrawing their appeal and allowing the TraPac terminal expansion project to proceed, the TraPac Appellants and the Port entered into an MOU.

The MOU provides for the creation of a Community Mitigation Fund that will be initially funded with $12.04 million of Port trust funds. New levies tied to cargo volumes would then be added to the fund. It is anticipated that $50 million of trust funds would be available for the non-CEQA required mitigation over the next five years. This is in addition to the measures to mitigate specific project related impacts identified in the EIR. The MOU calls for the $50 million Community Mitigation Fund to be administered by a third-party, non-profit organization. In addition, the agreement also provides for the Port to fund a study to analyze off-port impacts which would help identify impacts caused by Port operations and document and justify mitigation measures that mitigate these off-port impacts. Once the non-profit entity has been established a second, more expansive study would be conducted. Finally, the agreement provides for the Port to place a deed restriction on the Wilmington buffer (lands acquired by the Port with trust revenues and therefore an asset of the trust) to ensure the property remains as public open space in perpetuity.

Commission staff has serious concerns with the MOU, specifically involving its implementation as it relates to the Wilmington buffer dedication, the funding of the Community Mitigation Fund and the creation of the third party non-profit organization to manage this fund. Specifically, the Wilmington buffer dedication causes concern because one trustee, i.e. the current Board of Harbor Commissioners, does not have the authority or the power to permanently dedicate trust lands to a specific use, even if it may be a trust consistent use. Second, the MOU does not adequately describe the relationship between the funding amounts and the mitigation needs or nexus associated with port specific impacts. Finally, through a creation of a third party to manage this fund, the Port is unlawfully delegating its fiduciary duties and powers as a trustee for the State of California.

While lacking in detail, Commission staff does not generally oppose the projects identified for funding in the MOU, however Commission staff is especially concerned by the process in which these projects are to be funded, as described above. Both prior to the Board's approval of the MOU and after, Commission staff has repeatedly offered, to no avail, to meet with Port staff to discuss the concerns revolving around the MOU, along with its willingness to assist the Port in implementing the MOU legally (see Exhibit B). As recently as last month, Commission staff offered to work with Port staff to address the concerns outlined above. To date, the Port has not implemented any of the terms of the MOU. While Commission staff believes that the MOU, as currently written, presents serious legal questions, Commission staff is willing to assist the Port in implementing the MOU consistent with the Public Trust Doctrine, the California Constitution and the Port's fiduciary duties as trustee for the State.

CONCLUSION

In conclusion, as legislative trustees of State public trust lands, ports have the duty to be good stewards of these unique and scarce lands. Towards that end, ports clearly have not only the right, but pursuant to the California Environmental Quality Act (CEQA), the obligation to mitigate impacts on the surrounding communities stemming from port projects. Further, ports also have a responsibility to act as good neighbors to their surrounding communities. Commission staff strongly supports ports mitigating their impacts. However, ports also have a fiduciary duty, as trustees for the people of the State, to manage their trust lands and assets in a manner consistent with the Public Trust Doctrine and the California Constitution. Projects that buffer the local communities from port operations by creating open space and parks that provide public access to the waterfront are notable amenities for adjacent communities and are generally consistent with the Public Trust Doctrine. However, projects, which are removed from the port and function solely as community or local amenities rather than buffers or appropriate legal CEQA mitigation measures, thus serving primarily the local citizenry and do not relate directly to the port or its documented impacts, may not be supported with tidelands revenues that are held in trust by the ports for the benefit of the statewide public.