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Attorney-Client Privileged Communication

February 20, 2018

Jennifer Lucchesi
Executive Officer
California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, California 95825-8202

Dear Ms. Lucchesi:

This letter concerns a butane and propane storage facility that Rancho LPG Holdings LLC operates near the Port of Los Angeles in San Pedro, California and a nearby railroad spur located on property that the Port owns. Rancho LPG transports products to and from its facility over this rail spur. Members of the public have raised safety concerns about the facility and its operations.

On behalf of the California State Lands Commission, you have requested this office's legal advice concerning whether the Commission has a legal basis for taking direct administrative action concerning either the Rancho LPG facility or the Port-owned rail spur that serves it. Commission staff previously concluded that neither falls within the Commission's direct jurisdiction over ungranted tidelands. (See Commission Meeting Calendar Items dated June 19, 2014 (no. 91), October 14, 2014 (no. 109), August 17, 2017 (no. 80).) For the reasons discussed below, our opinion is that Commission staff correctly so concluded.

As background, California acquired title to all tidelands, submerged lands, and the beds of all inland navigable waters within its borders as an incident of its sovereignty when it was admitted to the Union on September 9, 1850. (See, e.g., *Oregon ex rel. State Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 373-374; *Marks v. Whitney* (1971) 6 Cal.3d 251, 258; accord, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434; *Citizens for East Shore Parks v. Cal. State Lands Com.* (2011) 202 Cal.App.4th 549, 570; Pub. Resources Code, § 6009, subd. (a).) Tidelands are those lands lying between the lines of mean high tide and mean low tide. Lands seaward of the line of mean low tide are submerged lands. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478, n. 13.) The State owns these tidelands and submerged lands as a trustee for, and the public holds an easement over these lands for, statewide public purposes. (*Citizens for East Shore Parks v. Cal. State Lands Com.*, *supra*, 202 Cal.App.4th at p. 570; Pub. Resources Code, § 6009, subd. (a).) The Legislature

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has delegated to the Commission exclusive jurisdiction over all State-owned tidelands and submerged lands. (Pub. Resources Code, § 6301.)

The common law public trust doctrine traditionally defined these public trust uses as water-related commerce, navigation, and fishing. (*Marks v. Whitney, supra*, 6 Cal.3d at p. 259; Pub. Resources Code, § 6009, subd. (a).) California courts have since recognized bathing, swimming, boating, and other recreational purposes, as well as preservation of public trust lands in their natural state for scenic, scientific study, open space, and habitat values, as additional public trust uses. (*Marks v. Whitney, supra*, 6 Cal.3d at p. 259; *National Audubon Society v. Superior Court, supra*, 33 Cal.3d at pp. 434-435.) California law entrusts administration of the public trust to the Legislature. (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707-708.)

The Legislature may grant tidelands and submerged lands in trust to local entities. Granted lands remain subject to State supervision. Under such grants, the State acts as both the trustor and the representative of the people, the people are the trust beneficiaries, and the local grantee acts as trustee. (Pub. Resources Code, § 6009.1, subds. (a), (b).) Grantees must manage granted lands in a manner “consistent with the terms and the obligations of their grants and the public trust ...” (Pub. Resources Code, § 6009, subd. (d).) As a result, grantees may neither use state-granted lands for non-trust purposes nor apply revenues generated by such lands for non-trust purposes. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 209-211; *City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 257-258; Pub. Resources Code, § 6009.1, subd. (c)(7).)

A legislative grant of sovereign lands does not place the lands beyond the State’s supervision. Instead, the State has a continuing duty to protect the public trust on behalf of all of the people of California. (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452-453; *City of Coronado v. San Diego Unified Port Dist.* (1964) 227 Cal.App.2d 455, 474.) The Legislature has delegated to the Commission all jurisdiction that remains in the State as to granted tidelands and submerged lands. (Pub. Resources Code, § 6301.)

The facts here, as Commission staff have explained them to us, are as follows:¹ In 1911, the Legislature granted certain filled and unfilled sovereign public trust lands to the City of Los Angeles. (Stats. 1911, chap. 651, as amended.) Under the City’s charter, the Port of Los Angeles, acting through its Board of Harbor Commissioners, manages the City’s granted lands located within the Port. The Legislature made this grant for the “establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation ...” (*Id.* at § 1(a).)

¹ Our office has not independently researched these facts or pertinent underlying public records, nor has the Commission requested us to do so.

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The Rancho LPG butane and propane storage facility is located on private property in San Pedro, not on sovereign lands granted to the Port. In 1994, the Port purchased a 20-foot railroad spur and the land underlying it using trust revenues generated by the Port's operations on its separate granted lands. Like the Rancho LPG facility, the railroad spur does not lie within the boundaries of sovereign tide and submerged lands granted to the Port. The spur is a separate real property asset that the Port owns. Rancho LPG operates the rail spur under a permit the Port issued to it in 2011, as a successor permit to one the Port issued in 1974 to Rancho LPG's predecessor. Butane, which is a byproduct of refined petroleum (and some of which is refined nearby), is transported to and from Rancho LPG's facility by rail to the Pacific Harbor Line.

Based on these facts, our advice – like Commission staff's conclusion – is that neither the Rancho LPG facility, nor the rail spur that serves it, falls within the Commission's direct jurisdiction over ungranted tidelands under Public Resources Code section 6301. As a result, the Commission lacks jurisdiction to take direct administrative action to address safety concerns about these facilities.

Instead, the Commission's jurisdiction in this case would be limited to that which it exercises in a supervisory capacity – as trustor and representative of the people – over a grantee's use of revenues from public trust lands. The Port here acquired the land under the rail spur with revenues generated by operations on the Port's separate granted lands. As discussed above, the Port must manage granted lands subject to the public trust and the terms of its grant. Under the authorities cited above, grantees like the Port cannot use revenues generated by granted lands for non-public trust purposes. (See *Mallon v. City of Long Beach*, *City of Long Beach v. Morse*, *supra*.) The Commission has previously taken the position in exercising its supervisory jurisdiction that private lands acquired with trust revenues become assets of the trust created by the statutory grant. (See Commission Meeting Calendar Items dated October 16, 2008 (no. 60), December 2, 2013 (no. 114), June 19, 2014 (no. 91), October 14, 2014 (no. 109), February 20, 2015 (no. 98), August 17, 2017 (no. 80); see also Stipulation for Entry of Judgment, dated February 2, 2005 in *People of the State of California ex rel. Lockyer, et al. v. The City of Oakland, et al.*, Alameda County Superior Court case no. RG05196720.) As a result, grantees are required to manage such lands in accord with the grant's terms and the public trust.

The Commission's remedies for addressing a non-trust use of revenues generated by granted lands, if it occurs, do not include direct administrative action by the Commission. Rather, the Commission has two options for how to proceed.

First, the Commission is empowered to institute litigation against a grantee like the Port for violating the terms of a grant or its fiduciary duties. The Commission has not asked us for our legal advice on the likelihood that such litigation would succeed. An analysis of that question is therefore beyond the scope of this letter. But we offer a general observation. The public trust doctrine permits uses that do not by themselves qualify as recognized public trust uses, as long as they are incidental to, or support, recognized public trust uses. (*People v. City of Long Beach* (1959) 51 Cal.2d 875, 879-880; *Haggerty v. City of Oakland* (1958)

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161 Cal.App.2d 407, 413-414.) In connection with the Port in particular, the Commission has previously recognized uses such as the operation of a marine museum and a freezer warehouse as uses that further waterborne commerce and navigation and thus comport with the State's grant to the Port and with the public trust. (See Calendar Items dated October 28, 1976 (no. 22), February 28, 1985 (no. 23).) Here, Rancho LPG transports butane using the rail spur. Butane is a byproduct of petroleum refineries that operate nearby. The processing of oil brought into California's ports for refinement supports waterborne navigation and commerce. Transporting byproducts of such refinement for storage could arguably so qualify as well.

Second, if the Commission cannot prove a public trust violation, its only other recourse to challenge the Port's operation of the rail spur would be to report the Port's activities to the Legislature. In that case, the Legislature would be empowered to revoke or amend the 1911 granting statute. Assessing the likelihood of the Legislature doing so is beyond the scope of this letter. But suffice it to say that the Commission would have no present power to take direct administrative action to address the rail spur while the Legislature assesses the appropriate path forward (assuming the Legislature takes up this question in the first place).

Therefore, for the reasons discussed above, our advice is that the Commission has no jurisdiction to take direct administrative action concerning the Rancho LPG facility or the Port-owned rail spur. We appreciate the opportunity to provide this letter to you. Please let us know if you have any questions.

Sincerely,



ANDREW M. VOGEL
Deputy Attorney General

For XAVIER BECERRA
Attorney General