

SUPPLEMENTAL AGENDA REPORT

Ordinance: Ordinance Adopting By Reference Oakland Municipal Code Sections 13.08.590 through 13.08.620 With Modifications and Requiring Port Tenants to Comply with Such Modified Municipal Code Regulations Regarding Private Sewer Laterals.

(Engineering/Legal)

MEETING DATE: 4/26/2018

AMOUNT: N/A

PARTIES INVOLVED: Port of Oakland, City of Oakland, East Bay Municipal Utility District

SUBMITTED BY: Chris Chan, Director of Engineering
Danny Wan, Port Attorney

APPROVED BY: J. Christopher Lytle, Executive Director

ACTION TYPE: Ordinance

EXECUTIVE SUMMARY

Both the East Bay Municipal Utility District (“EBMUD”) and the City of Oakland (“City”) have adopted ordinances regulating the inspection, maintenance, repair, and replacement of private sewer laterals. These ordinances were intended to reduce inflow and infiltration of ground water and storm water into sanitary sewer mains and to minimize the potential for sanitary sewer overflows. Due to the unique nature of properties owned or governed by the Port, there have been ambiguities in the application of these ordinances to lands owned by the Port. To clarify how these ordinances would apply to Port properties, staff requests Board adoption of an ordinance adopting by reference Oakland Municipal Code Sections 13.08.590 through 13.08.620 with certain modifications that would require Port tenants to comply with the private sewer lateral regulations established by the City and EBMUD whenever the Port tenant’s actions trigger the application of those ordinances. The proposed Port ordinance (“PSL Ordinance”) would require Port tenants to be responsible for inspecting, maintaining, repairing, and replacing sewer laterals in accordance with the City’s and EBMUD’s respective ordinances whenever the actions of Port tenants on Port lands trigger the application of the City’s and EBMUD’s ordinances. There are two types of activities by a Port tenant that could trigger application of the City’s and EBMUD’s ordinances: (i) Construction or Remodeling – Whenever a Port tenant applies for any permit or other approval for construction, remodeling, modification or alteration of any structure with a building sewer where the cost of the work is estimated to exceed \$100,000 applying for a building or development permit where the cost of the work is estimated to exceed \$100,000, and (ii) Change in Water Services – Whenever a Port tenant applies for any permit or other approval from the EBMUD for an increase or

~~decrease in size of its water meter~~ ~~an application to increase or decrease the size of the water meter or for a new water meter that serves the Port tenant's premises.~~ On a parallel track, the Port will also develop a condition assessment plan ("CAP") and a corrective action work plan ("CAWP") for any laterals that would not be addressed by Port tenants.

BACKGROUND

Sanitary sewer overflows ("SSOs") pose a threat to the environment and potentially public health and have been the subject of increased regulations and lawsuits in the San Francisco Bay Area. Cracked sewer mains and laterals, leaky manholes, and improperly connected storm drains can increase the risk of SSOs by allowing inflow and infiltration ("I/I") from groundwater and storm water into the sanitary sewer system. For reasons described below, it is in the Port of Oakland's ("Port's") best interest to adopt and implement regulations to prevent SSOs.

The Environmental Protection Agency ("EPA"), the State Water Resources Control Board ("State Water Board"), and the San Francisco Regional Water Quality Control Board ("Regional Board") regulate discharges into the San Francisco Bay, pursuant to the federal Clean Water Act and the California Water Code. In 2006, the State Water Board adopted the Waste Discharge Requirements ("WDRs") for Sanitary Sewer Systems, Water Quality Order No. 2006-0003, requiring any public entity that owns and operates a sanitary sewer collection system with more than one mile of pipes to create and implement an SSO reduction program. The Port owns, operates, and maintains a sewer collection system with more than 40 miles of pipes that convey sewage to the City's collection system and to EBMUD's Wastewater Treatment Facility. The Port's sewer collection system serves the Port tenants, customers, employees, and the general public in the seaport, airport and commercial real estate areas.

In 2009, the EPA, the State and regional water boards, and two other community organizations sued the City, EBMUD and six other public agencies (the "Named Defendants") citing violations of the Clean Water Act and the California Water Code by discharging raw or partially treated wastewater into surface waters of the State. In response to the lawsuit (hereafter, the "EPA Lawsuit"), EBMUD adopted a Regional Private Sewer Lateral Ordinance in 2010 and the City subsequently amended its municipal codes to enforce the provisions of EBMUD Regional PSL Ordinance. EBMUD has subsequently amended its Regional Private Sewer Lateral Ordinance, and as amended, it is referred to herein as the "EBMUD Ordinance." The relevant portions of the City's municipal code are found in Sections 13.08.590 through and including 13.08.620 and as amended from time to time, is referred to herein as the "City Codes." The EBMUD Ordinance establishes regulations for the inspection, testing, repair, replacement, and ongoing maintenance of PSLs within EBMUD's service area, and the City Codes adopt by reference the EBMUD Ordinance.

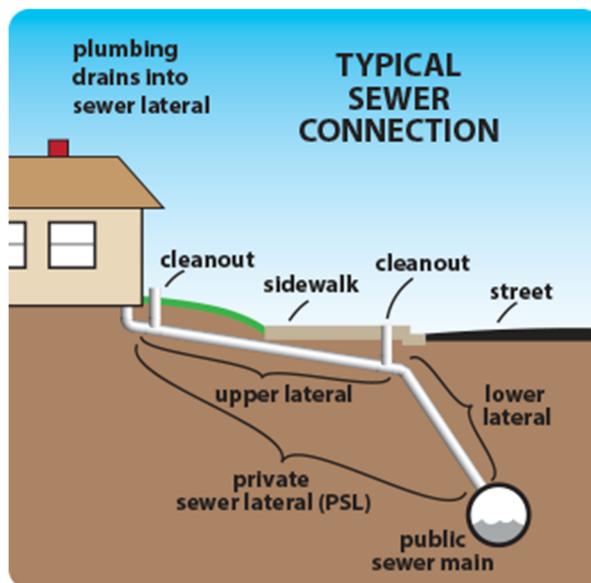
On September 22, 2014, after years of negotiation to settle the EPA Lawsuit, the parties entered into the Consent Decree for a term of 22 years, which was approved in the U.S. District Court for the Northern District of California (Consolidated Case Nos. C 09-00186-RS and C 09-05684-RS.) The federal consent decree requires each of the Named Defendants,

to take specific actions to more actively manage, inspect and repair sanitary sewer systems, including private sewer laterals within their respective service areas, to upgrade the system and to reduce the potential for SSOs. Although the Port is not a Named Defendant and is not a party to the consent decree, the Port could be subject to similar legal actions. Since 2014, Port staff and legal counsel have been collaborating with City and EBMUD to develop strategies to ensure appropriate Port participation in the existing and evolving regulatory framework. The proposed Port PSL Ordinance would be considered a “Local Ordinance Requirement” as defined in the EBMUD Ordinance and would help to reduce potential I/I into the sanitary sewer system by fixing defective private sewer laterals that would reduce the chance of SSOs and protect the San Francisco Bay.

ANALYSIS

As a responsible steward of public lands on or near the waterfront, the Port supports the objective of reducing I/I into the sanitary sewer system and reducing the possibility of SSOs that may result in improper discharges into the Bay. The proposed ordinance, if adopted, clarifies how the EBMUD Ordinance and the City Codes would be applied and enforced on Port-owned properties.

A private sewer lateral (“PSL”) is defined as a pipe or pipes that carries sewage and liquid waste from the buildings and structures to the sewer main or trunk line. A typical PSL includes the upper and lower sewer laterals that serve one or more structures within a leasehold interest and, in most cases, benefit only that particular leasehold interest owner. Both the EBMUD Ordinance and the City Codes place the responsibility of compliance with their respective provisions upon the “property owner.” However, the Port is not considered a “property owner” under the EBMUD Ordinance, and tenants are not expressly covered under either the EBMUD Ordinance or the City Codes. To more accurately reflect the ownership and control Port tenants have over PSLs in lands owned by the Port, the proposed Port PSL Ordinance would expand the definition of “Property Owners” to include any person or party using or occupying any lands or other real property owned by the Port pursuant to any property lease, space assignment agreement, license and concession agreement, temporary rental agreement, contract or any other tenancy or occupancy agreement between the Port and a tenant (collectively “Leases”)¹.



¹ This definition includes the different property relationships the Port has with its various tenants to avoid missing any key tenants on Port properties. We anticipate that the Port PSL Ordinance will not affect most smaller, temporary Port tenants as they are unlikely to hit either of the two compliance triggers: (a) upgrades of over \$100,000 or (b) changes to the water meter.

A Port tenant who has a Lease with the Port (“Port tenant”) shall be responsible for inspecting building sewers, obtaining all required permits, performing all necessary building sewer repair or replacement, scheduling inspections with EBMUD, passing a verification test witnessed by EBMUD, and obtaining and filling with the City a compliance certificate from EBMUD as set forth in the EBMUD Ordinance (and incorporated by reference in the City Codes) for the building sewer lateral (upper building sewer lateral and lower building sewer lateral), if that Port tenant’s actions under the Lease trigger application of either the EBMUD Ordinance or the City Codes. A Port tenant could trigger such application in one of two ways: (1) Construction or Remodeling – Whenever a Port tenant applies for any permit or other approval for construction, remodeling, modification or alteration of any structure with a building sewer where the cost of the work is estimated to exceed \$100,000 – a Port tenant submits an application for a City Building Permit or a Port Development Permit for new construction or remodel work exceeding \$100,000.00; or (2) Change in Water Services – Whenever a Port tenant applies for any permit or other approval from the EBMUD for an increase or decrease in size of its water meter a Port tenant submits an application for any permit or other approval from EBMUD to increase or decrease the size of their water meter or for a new water meter pursuant to the requirements of Oakland Municipal Codes Section 13.08.600. For a Lease with sanitary sewers totaling greater than 1,000 feet in length, a Port tenant would have one year from the occurrence of any triggering event to submit for EBMUD approval, a condition assessment plan with a schedule to perform testing to assess the condition of all sewer laterals within the Port tenant’s leasehold boundary. Within six (6) years of triggering compliance requirements, the Port tenant shall complete all condition assessment and testing and submit a corrective action work plan for EBMUD’s approval. A Port tenant may be exempted by written agreement between said Port tenant and the Port, by which either the Port or another party expressly agrees to assume responsibility for compliance with the EBMUD Ordinance and the City Codes as specifically stated within the subject tenancy agreement with the Port.

For all laterals that would not be addressed by Port tenants, including all Port-owned and Port-maintained sewer lines on Port property (“Port Controlled Laterals”), and sewer lines within a leasehold property that serve more than one tenant, the Port will develop a Port condition assessment plan (“CAP”) to determine whether the Port Controlled Laterals comply with standards set forth in Section 5 of the EBMUD Ordinance and OMC Section 13.08.610 (collectively “Compliance Standards”). Staff will present the CAP to the Board for approval no later than June 30, 2019. Once the Port has implemented the CAP, Staff will prepare a corrective action work plan (“CAWP”) for Board approval which shall describe the type, quantity and schedule of work needed to bring all Port Controlled Laterals into compliance with the Compliance Standards. Staff will present such CAWP to the Board no later than June 30, 2023 for consideration and approval. After the Board approves the CAWP (as presented or revised), staff shall implement the approved CAWP, as part of the Port’s capital improvement program, subject to annual budget approval by the Board.

BUDGET & STAFFING

The condition assessment costs and staffing related to Port Controlled Laterals will be included in FY2019 Operating Budget and future fiscal year operating budgets, which is now under development. Based on the assessment, as well as available funding and staffing,

projects in the CAWP will be included in the Port's Capital Improvement Plan, subject to Board approval of the CAWP.

MARITIME AVIATION PROJECT LABOR AGREEMENT (MAPLA)

The matters contained in this Agenda Report do not fall within the scope of the Port of Oakland Maritime and Aviation Project Labor Agreement (MAPLA) and the provisions of the MAPLA do not apply.

STRATEGIC PLAN

The action described herein would help the Port achieve the following goals and objectives in the Port's Strategic Business Plan 2018-2022. <https://www.portofoakland.com/wp-content/uploads/Port-of-Oakland-Strategic-Plan.pdf>

- Goal: Improve Customer Service
- Goal: Modernize and Maintain Infrastructure
- Goal: Care for Our Environment

LIVING WAGE

Living wage requirements, in accordance with the Port's Rules and Regulations for the Implementation and Enforcement of the Port of Oakland Living Wage Requirements (the "Living Wage Regulations"), do not apply because the requested action is not an agreement, contract, lease, or request to provide financial assistance within the meaning of the Living Wage Regulations.

SUSTAINABILITY

Port staff have reviewed the Port's 2000 Sustainability Policy and did not complete the Sustainability Opportunities Assessment Form. There are no sustainability opportunities related to this proposed action because it does not involve a development project, purchasing of equipment, or operations that presents sustainability opportunities.

ENVIRONMENTAL

The proposal to adopt the City Codes, and the EBMUD Ordinance incorporated therein, as modified herein and to apply it to the Port Area and all Port owned property in the City of Oakland was reviewed in accordance with the requirements of the California Environmental Quality Act (CEQA) and the Port CEQA Guidelines. The proposal is categorically exempt from CEQA pursuant to Section 15308 of the Port CEQA Guidelines, which exempts regulatory actions taken, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the

regulatory process involves procedures for the protection of the environment. Construction activities are not included in this action or the categorical exemption and would be addressed during project-specific permitting and CEQA review.

GENERAL PLAN

This action does not change the use of any existing facility, make alterations to an existing facility, or create a new facility; therefore, a General Plan conformity determination pursuant to Section 727 of the City of Oakland Charter is not required.

OWNER-CONTROLLED INSURANCE PROGRAM (OCIP)

The Owner Controlled Insurance Program (OCIP) does not apply to the matters addressed by this Agenda Report as they are not capital improvement construction projects, however OCIP coverages and provisions would apply to Capital Improvement Plan construction projects generated by the CAWP.

OPTIONS

Staff has identified the following two options for the Board's consideration:

1. Adopt the proposed Port PSL Ordinance adopting by reference Oakland Municipal Code Sections 13.08.590 through 13.08.620 with modifications, requiring Port tenants to comply with City of Oakland and East Bay Municipal Utility District Private Sewer Lateral Regulations as described in this Agenda Report. This is the recommended option.
2. Do not adopt the proposed Port PSL Ordinance and direct staff to alter some or all of the proposed provisions of the Ordinance.

RECOMMENDATION

Staff recommends that the Board:

Adopt the proposed Port PSL Ordinance, which adopts by reference Oakland Municipal Code Sections 13.08.590 through 13.08.620 with modifications and requires Port tenants to comply with City of Oakland and East Bay Municipal Utility District Private Sewer Lateral Regulations.