SUPPLEMENTAL

PMSA
PACIFIC MERCHANT SHIPPING ASSOCIATION

December 19, 2018

Hon. Cestra Butner, President
Board of Port Commissioners
Port of Oakland
530 Water St.
Oakland, CA 94607

Re: Port Trustee Obligations with Respect to the Oakland A's Proposed Housing/Stadium Complex

Dear President Butner:

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we respectfully submit this letter to memorialize our interest in ensuring that the Port is fully embracing and executing its trustee and fiduciary duties within the scope of the State Tidelands Trust with respect to an agreement regarding Howard Terminal and the proposed Oakland A's Housing/Stadium Complex.

PMSA is concerned about the Port's duties within the scope of trust management because of the nature of the proposed Oakland A's Housing/Stadium Complex and the related procedural steps being taken to facilitate its consideration by the Port and City of Oakland.

This project may do all of the following:

- authorize construction of a significant housing and commercial development which is inconsistent with the public trust doctrine,
- entitle a project which will more likely than not constrain the Port of Oakland's ability to maximize the use of and revenues from its granted tidelands,
- create significant and ongoing negative impacts on current operations of the tenants at the Port of Oakland and therefore both frustrate trust uses and depress long-term revenues to the trustee,
- put at risk existing revenue bond indebtedness underwritten against these revenues from trust-supporting projects,
- be intended to pursue collateral benefits to third party non-beneficiaries at the expense of both the trustee itself and the beneficiary,
- primarily generate revenues to municipal and private sources for non-trust purposes well in excess of renumeration to the trust property, and,
- place a non-trustee public agency in charge of a CEQA process for a project on public trust lands which will be principally carried out by the Port of Oakland in its capacity as trustee.

The tradition of the state's interests in its tidelands and long-standing American law governing what trustees and other fiduciaries can do to manage their beneficiaries' properties are inexorably intertwined. As the Legislature has made plain, "[a] grantee may fulfill its fiduciary duties as trustee by determining the application of ... duties, all of which are applicable under common trust principles" and "the trustee's duties shall be interpreted and determined by principles and rules evolved by courts of equity with respect to common trust principles." (Pub. Res. Code §6009.1(c)-(d)).

By common law, a trustee must abide by fiduciary duties of loyalty, prudence and care, and therefore act for the exclusive benefit of its beneficiary, considering solely the interests of its beneficiary, without regards for collateral benefits to third parties. With respect to the public trust property including the granted lands at the Port of Oakland, this means that the Port must put the interests of the purposes of the trust first, the interests of the state first, and must actively eschew and guard against the temptation to manage property for municipal or other local interests.

The very consideration of collateral benefits to third parties violates the Port's duty of loyalty and duty to "administer the trust solely in the interests of the beneficiaries." This is a well-understood and time-honed rule under U.S. legal traditions in common law for trustees and fiduciaries. A trustee is not bound by or compelled to only one particular course of action for management of its granted lands, but it must always be motivated solely by a reasonable belief that the strategy or investment in a project that it has chosen will improve the interests of the trust and its beneficiaries.

Likewise, a trustee may not use other people's money to pursue collateral benefits to third parties, no matter how well-intentioned. For the Port to maintain its lawful duties as trustee, it must be loyal solely to the purposes of the trust and it must affirmatively avoid using trust property "for any other purpose unconnected with the trust" and to never engage in transactions which will impede trust purposes or the success of trust investments. This is a corollary of the trustees' fiduciary duties to control, preserve, and make productive trust assets "in furtherance of the purposes of the trust" as well as to defend against actions which may result in a loss to the trust.

For a trustee, both the facts AND the trustee's motives matter. As a fiduciary, a trustee needs to act impartially in managing its assets and must have a reasonable and well-informed factual basis for approving projects and making investments that satisfies the requirement that it is managing the trust property for the sole benefit of beneficiaries.

As a trustee, when considering any project, and especially one with no obvious trust benefits, the Port has an obligation to affirmatively ask itself numerous primary questions to ensure that it is fulfilling these duties in fact and by motive. For example, the Port could be asking itself any of the following:

- Is the improvement of property for my beneficiary the sole purpose for this transaction?
- Am I eliminating and mitigating all risks and burdens to my existing trust-serving revenue streams?
- Am I furthering the interests of a third party unconnected with the trust instead of the interests of my existing tenants which are trust-compliant?
- Will I be in control of my trust assets under this arrangement?
- Have I subrogated any statewide interests in maritime property in order to facilitate municipal or private interests?

Finally, a trustee has a fiduciary duty "to not delegate to others the performance of acts that the trustee can reasonably be required to perform" and "to not transfer the administration of the trust." Given the myriad of interests, moving parts, future regulatory approvals, and contingent rights that will inevitably be involved in putting together any project at Howard Terminal, it is imperative that the Port jealously guard this duty during the decision-making process.

Of particular concern in this regard, the Port has already seemingly given up control for the administration of the EIR for the proposed Oakland A's Housing/Stadium project to the City. This seems to have occurred while the Port has not yet even come to terms with the Oakland A's regarding this proposal, and despite the fact the rights, obligations, and duties for existing property management and development reside with the Port, the ENA for the property is with the Port, and all project-specific mitigation will most likely be principally carried out by the Port, in addition to the retention of the Port's fiduciary duties as grantee of the property.

Not only is the misidentification of a lead agency a potential violation of CEQA and a basis for invalidation of an EIR, it can also be construed as a violation of a trustee's fiduciary duty if it is indeed a delegation of the duty to administer the trust property. PMSA intends to raise this issue directly with the City of Oakland as well during their public comment period in response to the scoping of the NOP of a Draft EIR for the Howard Terminal proposal. We implore the Port to clarify its rights and responsibilities in this regard going forward.

Of course, a trustee's duties are always present, but it is even more imperative in situations like this for the Port to actively consider and examine every aspect of any proposed project with respect to its trustee obligation. This evaluation should ensure that the letter and spirit of each of the affirmative fiduciary duties the Port holds as a trustee are being upheld and ultimately rely on these examinations to assure itself and the public that the Port will be guarding and honoring the trust and acting as a deterrent against the misuse of any public trust resources.

We understand that given the size, scope, scale, revenues, jobs, and civic-pride represented by the proposed Oakland A's Housing/Stadium Complex the Board of Port Commissioners will be under tremendous pressure from commercial, municipal, community, labor, and many other well-meaning and the most well-intentioned and passionate local interests to approve a project. PMSA respectfully submits that it is precisely when a trustee is placed in this type of situation that the need for active demonstration of fidelity by a trustee to its fiduciary duties is of greatest importance.

PMSA stands ready to assist the Port in any of its considerations of the Oakland A's Housing/Stadium Proposal in this regard. Please do not hesitate to contact me or John McLaurin to discuss any of these issues, or any other issues of interest to you and the Harbor Commissioners, at any time.

Best,

Mike Jacob
Vice President & General Counsel

cc: Members, Board of Port Commissioners
Danny Wan, Acting Executive Director
John Driscoll, Maritime Director

PMSA
PACIFIC MERCHANT SHIPPING ASSOCIATION

January 16, 2019

Zachary Wasserman, Chair
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Delivered via E-Mail to linda.scourtis@bcdc.ca.gov

OPPOSE: Bay Plan and Seaport Plan Priority Use Area Designation Removal from Howard Terminal [Bay Plan Amendment No. 2-19][Oakland Athletics, Applicant]

Dear Chair Wasserman and Commissioners,

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we respectfully Oppose approval of the Application by the Oakland Athletics (Applicant) to initiate the process of considering a possible amendment to the Seaport Plan to delete the Port Priority Use area designation at Howard Terminal in the Port of Oakland and to schedule a public hearing on December 5, 2018 to consider the proposed amendment.

PMSA represents ocean carriers, marine terminal operators, and various other maritime interests which conduct business on the U.S. West Coast, including at the Port of Oakland. All of the Port's current Marine Terminal Operator tenants, as well as the overwhelming majority of the ocean carriers calling at these terminals, are members of and represented by PMSA.

The Application should be denied as premature and improper. BCDC should delay any consideration of a Seaport Plan amendment to remove Howard Terminal until after the Port itself has concluded its own negotiations with the Oakland A's regarding the property, the details and scope of the project are clearly presented, and the A's have a vested entitlement interest in the Howard Terminal property. BCDC is also being asked to proceed with Plan amendments now, but only to make them conditionally effective upon the actual acquisition of a vested interest by the Applicant. This is a highly irregular request which is inconsistent with the nature and integrity of the BCDC Planning Process, puts the entitlement process on its head, and confirms the improper prematurity of action.

The Application should be denied based on inaccurate claims and material omissions. BCDC should studiously avoid any action based on the inaccurate claims of the Application that: the current Howard Terminal site is somehow "currently not used" or underutilized based only on its leasing status; the proposed project furthers trust interests or that the proposed uses are compliant with the public-trust; the very conspicuous absence of any mention of the need for hazardous materials mitigation in the CEQA process and the Hazardous Materials Deed Restriction on the site which limits it to port-industrial uses; or, that the Housing and Commercial aspects of the proposal are "ancillary" to the stadium component of the project. Finally, the Commission should avoid taking any action based on the highly improbable prediction that the project will have the benefit of an EIR completed by December 5, 2019.

The Present Uses of Howard Terminal Under the Seaport Plan

The Howard Terminal facility is currently operated by the Port of Oakland as an active seaport terminal facility consistent with the port priority use area designation in the Seaport Plan. These present uses are intensive, essential support activities for intermodal under the current post-2014 operational configuration include all of the following:

- Intermodal Truck Terminal. During late 2016 to late 2017, ***Howard Terminal handled approximately 324,492 annual gate transactions into and out of the facility*** by trucks conducting business at the Port. This number is estimated by the Port to be fairly consistent from 2014 to 2018.

- Vessel Berthing. Howard Terminal has served as an essential facility for numerous vessels seeking continuous berthing services at a quay with requisite MARSEC controls and criteria. The Port notes that this service has ebbed and flowed with vessel demands, but total times at-dock for all ***vessels utilizing the berthing services of Howard Terminal were approximately 28 weeks in 2014, 36 weeks in 2015, 74 weeks in 2016, 32 weeks in 2017, and 8 weeks in 2018***.

- Longshore Training Facility. Howard Terminal is occupied by a Pacific Maritime Association operation which is used as an ILWU longshore labor training facility. PMA has previously requested a long-term lease for the training facility that they currently use.

In addition, the Port of Oakland has received numerous inquiries and proposals from a broad spectrum of maritime interests with respect to potential utilization of Howard Terminal for alternative uses to the current post-2014 operational configuration. The Port has reported the following types of inquiries regarding future maritime uses at Howard Terminal since the termination of the prior Matson lease:

- Container vessel operators
- Marine terminal operators
- Institutional vessel berthing/operations
- Car carrier vessel and yard operations
- Bulk vessel and yard operations
- Tug, fuel scrubber barge & fueling barge berthing space and operations

In short, although the prior usage of Howard Terminal as a ship-to-shore intermodal terminal has not been reprised since the termination of the prior lease, it remains in constant and valuable service to the maritime industry and customers of the Port. The Terminal's business utilization level is robust despite the absence of a traditional marine terminal operator at the facility, and it is providing a location at which the vital and supporting role to the trucks, vessels, and the labor force of the Port can be concentrated. For trucks this equates to hundreds of thousands of gate transactions on the terminal annually and many hundreds of moves daily. These existing uses are undertaken under the existing Seaport Plan and are consistent with the current designation of the property as a Port Priority Use Area in the Plan.

Seaport Plan Amendment is Premature and Improper for Howard Terminal

Action on the proposed Seaport Plan Amendment should be delayed. The Oakland A's have submitted the Application which is the subject of this Item. But the Applicant has no vested rights in the public property at Howard Terminal, has reached no agreement with the Port of Oakland to acquire or develop a facility at Howard Terminal outside of a preliminary and non-substantive Exclusive Negotiating Agreement, and, given the lack of an agreement with the current property grantee/trustee, has only a vague and generalized description of what development or project would occur at this location.

The fact that the Oakland A's are in talks with the Port of Oakland under an ENA to potentially acquire future rights to a development at Howard Terminal does not create a cognizable right or interest in the property. Since no development agreement (conditional or otherwise) has been reached at this time, no rights have been conveyed, and the Applicant has no ownership interest in Howard Terminal.

Without any rights to the property, the derivative representations of expected project terms, scope, or scale of all aspects of the Application are all necessarily speculative. And, the terms which are included in the Application are presently conceptual and of exceptionally dubious accuracy.

The Oakland A's acknowledge their own lack of clarity regarding such basic questions as what portions of the Site they might control or have development rights to, if only conditionally, in their answer to Question 3 of the Application (pp. 4-5):

> "*It is the intention of the Oakland Athletics that (i) the proposed amendments would apply only to those portions of the Project Site that will be developed and used for Project-related purposes, and … It is the intention of the proposed amendment that, if the Project does not proceed or if executed documents between the Port and the Oakland Athletics necessary to implement the project are terminated before portions of the Project are developed, the current Port priority use designation should be reinstated on the undeveloped portions of the Project Site for which the Port documents have terminated without further Commission action*."

This is a highly irregular request which is inconsistent with the nature and integrity of the BCDC Planning Process. The Seaport Plan is not a document which alters its land use designations based on who owns what portions of the waterfront. Indeed, this very concept would upset the entitlement process by placing it on its head – and this only confirms the improper prematurity of action here. It is incumbent on landowners and contractual parties to assign rights amongst themselves (even if conditional and with rights vesting under options in contract based on entitlements and planning clearances) in the context of governmental land use planning, not the other way around.

To the extent that BCDC is being asked to proceed with Plan amendments now, but only to make them conditionally effective upon the actual acquisition of a vested interest by the Applicant, this is an admission of <u>prematurity</u> by the Applicant. Ironically, it is the Oakland A's who control whether or not this is a problem – because the simple solution is for the potential developer to wait to submit an Application until their rights are clear, the physical boundaries and basic project parameters are set, and there is a clear and well understood description of the project proposed.

Material Omissions and Implied Facts Should Not Form the Basis of Action on the Application

Given the implied facts and the material omissions of the Application submitted in support of the amendment to the Seaport Plan, BCDC should reject the requested Action.

The most fundamental of all the claims underpinning the Application is the assertion that Howard Terminal has ceased operating as a marine terminal:

- "**2. Specific Reasons for Requesting the Amendment.** State the background and specific reasons for requesting the proposed amendment.

  Howard Terminal, consisting of Berths 67 and 68, is an approximately 55-acre site that ceased operating as a marine terminal in 2014 when Matson terminated its lease and moved to the former APL Terminal at Berths 60 through 63. Existing uses and activities … [are] all operating under short term agreements with the Port of Oakland." (Application at pp. 2-3)

- *"***8. Consistency with McAteer-Petris Act.** For proposed changes to the *… San Francisco Bay Area Seaport Plan* … provide a description of how the proposed amendment is consistent with the findings and declaration of policy of the McAteer-Petris Act…

  The proposed amendment is consistent with the McAteer-Petris Act because removal of the Seaport priority use designation will not adversely affect the Bay nor public access to or enjoyment of the Bay. The approximately 55-acre Howard Terminal is currently not used as a marine terminal. …" (Application at pg. 6)

- **"10. Effect on Existing Findings, Policies, and Map Designations.** Provide a statement describing the effect that the proposed plan change would have on all existing findings, policies, and map designations of the plan proposed to be amended or changed.

  The Proposed Lands for Deletion constitute approximately 62-acres of lands within the Port Area that and [sic] *are currently not used as a marine terminal. …"* (Application at pg. 6)

The Application's implication is that after the expiration of a marine terminal lease in 2014, Howard Terminal is surplusage, "currently not used" for any significant purpose, and, therefore, temporal uses and the property itself can be removed from the Seaport Plan with little consequence. This is certainly not a tautological conclusion as a matter of law, nor is it correct based on the facts. Marine terminal operations can occur without a long-term lease and, like at many of the other Ports in the Bay Area, maritime businesses without long-term leases still enjoy the protection of the Seaport Plan.

No additional staff investigation is necessary to conclude that just because there is not a traditional ship-to-shore marine terminal operating lease in place – and may not be for some time – that this alone renders Howard Terminal surplusage for the Port. Even without use of the ship-to-shore cranes, Howard Terminal can still provide berthing services to vessels, provide intermodal services to truckers, and be utilized for many purposes conducive to the purposes of the Seaport Plan; and, indeed, it does.

With respect to preservation of state interests, the Application is mostly silent. The A's propose that "BCDC would consider the proposed amendment only after the Project has obtained all of its initial local discretionary approvals..." (Application at pg. 4) However, the Application does not mention the need for potential direct State Interests in the site to be addressed prior to BCDC moving forward with any amendments to the Seaport Plan.

One primary state interest is to ensure that Howard Terminal and the Port of Oakland, and therefore the Seaport Plan amendment, act consistently with the public-trust impressed on the property. To this issue, the Application asserts that it will serve those ends by providing "public access" to the location, "a viewing space" of the estuary, "maritime history" and "educational opportunities" based on preservation of the existing gantry cranes, and Bay Trail enhancements. However, the Application proposes no public-trust preservation action, despite proposing a project with intensive private, non-trust usage, and non-visitor serving, housing and office uses.[1] This is in addition to the Application's proposal to seek BCDC action only after "local" discretionary approvals, with no mention of any interests to be cleared prior to any Seaport Plan Amendment by the State Lands Commission.

Another principal state interest in the Howard Terminal property, and very conspicuous by its absence in the Application is any mention of the current hazardous materials Deed Restrictions on the location which are held by the state Department of Toxic Substances Control (DTSC). The Deed Restrictions prohibit non-Port Industrial usage of the Howard Terminal, including housing and commercial uses such as those sought for approval here, yet they are materially omitted in the description of the project site. The Application fails to address the DTSC Deed Restriction issue and a timeline for its resolution. The Application also fails to explain why the Seaport Plan should be Amended to allow a use which is currently prohibited by the State, but remove from the Plan the current uses which are DTSC authorized.

Finally, the Application acknowledges that action should only be taken "… after completion of the current environmental review efforts being undertaken by the City of Oakland," (Application at pg. 4), but omits any basis for BCDC to conclude that it will have an EIR completed by December 5, 2019. Certainly the Applicant desires an expedited environmental review, but the City NOP makes no such prediction. To the contrary, the NOP confirms it has not yet even conducted an Initial Study, the NOP rejected many of the Applicant's own bases for non-impact claims (for instance, its claim that Air Quality will actually improve), and confirmed that "the EIR will evaluate the full range of environmental issues contemplated for consideration under CEQA and the CEQA Guidelines…" There is no objective basis to claim expedited EIR completion for this project and certainly no reason for a December 5, 2019 hearing.

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[1] The Application describes the housing, office and retail developments as an "*Ancillary Development Program*" to the stadium and public access improvements (Application at pg 4). This is far from the case. In fact, the most intense construction and usage proposed for the Howard Terminal site is Housing and Commercial construction. The expected 6+ million square feet of these private uses (approximately 4,000,000 square feet of new housing [4,000 units at approximately 1,000 square feet per unit] and 2,000,000 square feet of office commercial space, 200,000 square feet of retail) dwarf the baseball stadium (for comparison with other new baseball stadiums with integrated community development, see Atlanta's new SunTrust Park which is approximately 1.1 million square feet). The intensity of development by square footage is compounded by intensity of use, which for housing and office spaces will be in constant usage 24 hours a day, 7 days a week, 365 days a year, while the ballpark use is on a limited basis for the 81-games of home games plus various additional baseball and non-baseball events.

The prematurity and uncertainty of project specifications which burden this Application apply equally to the immediate CEQA process which has been initiated with the City of Oakland regarding this same project. PMSA and a wide array of Port, supply chain, and maritime industry stakeholders have provided wide-ranging, substantive and procedural comments in response to the NOP, and many of these comments have already been provided to BCDC staff. It is our expectation that the process for compiling an EIR for this project will be as thorough and detailed as the CEQA processes for developing any other waterfront development project – and it is our experience that those are exhaustive, intensive and time-consuming.

In conclusion, BCDC should not initiate the process of considering a possible amendment of the Seaport Plan to remove Howard Terminal from the Port of Oakland's port priority use area designation, not schedule a public hearing on December 5, 2019, and deny the Application to consider the Amendment. The Oakland A's can timely resubmit an Application without prejudice when they have completed their negotiations with the Port of Oakland, have rights (whether vested or conditional) to the real property in question, and have a clear, unambiguous, and non-conditional Seaport Plan Amendment request.

PMSA respectfully submits these comments as supplement to those of Schnitzer Steel and PMSA on the Bay Plan Amendment items Nos. 1-19, 2-19, et al.

If you have any further questions regarding this or any other Port and maritime industry issues, please do not hesitate to contact me or anyone else at PMSA at your earliest convenience.

Sincerely,

Mike Jacob
Vice President & General Counsel

cc: Larry Goldzband, Executive Director
Linda Scourtis, Coastal Planner
Danny Wan, Acting Executive Director, Port of Oakland
Peterson Vollmann, Planner, City of Oakland
Dave Kaval, President, Oakland Athletics

January 17, 2019

Lawrence J. Goldzband, Executive Director
Linda Scourtis, Coastal Planner
Commissioners and Alternates
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455 Golden Gate Avenue, Suite 10600
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Submitted Electronically to linda.scourtis@bcdc.ca.gov

COMMENTS IN RESPONSE TO JANUARY 17, 2019 COMMISSION MEETING AGENDA, ITEMS 8 AND 9 (BAY PLAN AMENDMENT Nos. 1-19 AND 2-19) AND ITEM 10 (COMMISSION CONSIDERATION OF A CONTRACT WITH THE OAKLAND ATHLETICS TO CONSIDER REMOVAL OF THE BAY PLAN AND SEAPORT PLAN PORT PRIORITY USE AREA DESIGNATION FROM HOWARD TERMINAL)

Dear Director Goldzband, Commissioners and Alternates,

These comments are submitted on behalf of Schnitzer Steel Industries, Inc. (Schnitzer Steel) & Pacific Merchants Shipping Association (PMSA) in response to the Tentative Agenda for the January 17, 2019 Commission Meeting and incorporated January 4, 2019 Staff Reports for proposed amendments to the San Francisco Bay Plan ("Bay Plan") and San Francisco Bay Area Seaport Plan ("Seaport Plan"), including deletion of the port priority use area designation from Howard Terminal in Oakland to facilitate the Oakland Athletics' proposal for a new major league baseball park and mixed-use development (the "Project") on and near the Howard Terminal site in the Port of Oakland.

The signatories to this letter will be directly affected by the proposed project. For example, Schnitzer Steel owns and operates a heavy industrial 26.5-acre metals recycling yard and marine terminal at 1101 Embarcadero West adjacent to the Howard Terminal site.[1] PMSA represents

[1] Schnitzer Steel opened the metals recycling facility and deep-water port in 1965, and in 2006 completed installation of a mega-shredder to meet increasing demand for recycled metal. Schnitzer Steel purchases scrap metal in North America, processing it for reuse and selling it to steel mills and foundries globally. The Oakland facility is close to efficient rail, truck, and critical marine transportation networks. By recycling scrap metal, the company diverts and reuses millions of tons of materials each year that might otherwise be destined for landfills. In addition, processed metal is utilized to manufacture new metal-based products, conserving natural resources and significantly reducing greenhouse gas emissions.

ocean carriers, marine terminal operators, and various other maritime interests which conduct business on the U.S. West Coast, including at the Port of Oakland. All of the Port of Oakland's current Marine Terminal Operator tenants, as well as the overwhelming majority of the ocean carriers calling at these terminals, are members of and represented by PMSA.

The current Bay Plan and Seaport Plan designate "water-related industry," including that operated by Schnitzer Steel, as a priority use for the port, including the Howard Terminal site. The signatories to this letter and members of the public are very concerned that any amendments to the Bay Plan and Seaport Plan must continue to prioritize port property for water-related industry in order to protect the maritime economy, to protect the Bay from development that could lead to increased fill, and to account for Public Trust issues.

We believe there must be thorough and balanced planning in the Bay and Port of Oakland, and in particular a meaningful environmental review of the Bay Plan amendments and the proposed Project and all associated actions. We submit that the Commission's allotted planning and environmental review process – with time for environmental assessment from "mid-2019" to a meeting date on December 5, 2019 with documentation published 30 days in advance – appears inappropriately hurried as a means to expedite the Applicant's proposed baseball stadium. Environmental assessment under the Commission's California Environmental Quality Act-equivalent program (Public Resources Code Section 21000, et seq.) ("CEQA") of a project of this magnitude with potentially far-reaching significant impacts – including traffic and transportation, land use conflicts, degradation of air and water quality, and others – should not be rushed and instead should be reasoned, considered, and with full disclosure to the public and affected parties from the outset.

Agenda Item 8: Proposed Brief Descriptive Notice for Possible Bay Plan Amendment No. 1-19 to Review and Possibly Revise Bay Plan and Seaport Plan Port Findings, Policies and Designations and Proposed Public Hearing on December 5, 2019

The proposed Descriptive Notice states the proposed amendment would "involve a thorough review and possible revision of the Plans' Port Findings, Policies, and Designations." Notice at 1.[2] The attached Staff Report elaborates that the Commission is seeking a forecast of the volume of different cargo types that are expected to be handled at Bay Area Ports to update the plan forecast that expires in 2020 and other "background information," including the potential effects of rising sea level on the Ports. Staff Report at 1-2. In turn, the updated forecast and information may affect the Commission's port designations and be used to respond to future amendment requests. *Id*. Formal applications for land use changes at Bay Area Ports (such as that proposed here by the Applicant) would be processed with this amendment. Staff Report at 2.

The signatories to this letter welcome the opportunity to develop and provide technical detail regarding the volume and nature of cargo handled at the Port facilities. As noted above, global demand for metal processed at Schnitzer's facility has been increasing and the deep-water port is an important link in the company's global transportation network. Water-related industry at the

[2] http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA1-19.pdf

Port of Oakland and throughout the Bay Area should retain priority-use designation and be protected from inroads, such as the change in priority use designation at Howard Terminal proposed by the Applicant.

Protections for Water-Related Industry

The McAteer-Petris Act (Gov. Code §§ 66650, *et seq*.) ("MPA") declared the Legislative intent that "certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area," and that these uses include ports and "water-related industries." Gov. Code § 66602.[3] Thus, the MPA requires that the "San Francisco Bay Plan should make provision for adequate and suitable locations for all these uses, thereby minimizing the necessity for future bay fill to create new sites for these uses." *Id*.

The Bay Plan defines water-related industries as those that "require a waterfront location on navigable, deep water to receive raw materials and distribute finished products by ship, thereby gaining a significant transportation cost advantage." Bay Plan, Water-Related Industry, Findings(a).[4] Further, the "navigable, deep water sites around the Bay are a unique and limited resource and should be protected for uses requiring deep draft ship terminals, such as water-related industries and ports," in particular because "waterfrontage with access to navigable, deep water is scarce in the Bay Area" and many other industries compete with water-related industries for waterfront sites. *Id*., Findings (b) – (c). Bay Plan Policies for water-related industry include the following:

1. Sites designated for both water-related industry and port uses in the Bay Plan should be reserved for those industries and port uses that require navigable, deep water for receiving materials or shipping products by water in order to gain a significant transportation cost advantage.

2. Linked industries, water-using industries, and industries which gain only limited economic benefits by fronting on navigable water, should be located in adjacent upland areas . . .

3. Land reserved for both water-related industry and port use will be developed over a period of years. Other uses may be allowed in the interim that, by their cost and duration, would not preempt future use of the site for water-related industry or port use.

4. Water-related industry and port sites should be planned [so that] . . .

   . . .

[3] All further statutory references are to the Government Code unless otherwise noted.
[4] http://www.bcdc.ca.gov/plans/sfbay_plan#20

> d. Any new highways, railroads, or rapid transit lines in existing or future water-related industrial and port areas should be located sufficiently far away from the waterfront so as not to interfere with industrial use of the waterfront. New access roads to waterfront industrial and port areas should be approximately at right angles to the shoreline, topography permitting.[5]

The Seaport Plan port priority use area designation also is "intended, in part, to preserve adequate upland areas for port uses" and thus "help minimize the need for additional Bay fill." Staff Report at 1. Although the Staff Report notes that the Bay Plan cargo forecast has not been updated, the Seaport Plan (as recently amended in January 2012) recognizes (for example) the continuing increase in scrap metal exports at Schnitzer Steel via shipping:

> "The shift to container shipping of goods will likely increase in the future. Recycling of materials, such as steel scrap and cement, has increased because of state laws requiring local governments to reduce the volume of materials going to landfills, and because of growth in the overseas market for scrap iron and steel. Scrap metal exports are growing at Schnitzer Steel." (Seaport Plan at 6.)

The Seaport Plan further states the need to maintain operations at Schnitzer Steel:

> "Schnitzer Steel is an active, privately-owned, dry bulk marine terminal used for recycling and exporting scrap steel. Because the site is located on the Inner Harbor Channel within the Port of Oakland, it could be developed into a two-berth container terminal <u>if and when not needed for its present use</u>." (*Id*. at 24, emphasis added.)
>
> "Schnitzer Steel <u>is and should remain designated as an active dry bulk terminal</u> as long as the facility is used for this purpose. At such time as the site is no longer needed for recycling scrap steel or other <u>bulk shipping operations</u>, it should first be considered for conversion to a container terminal." (*Id*. at 26, emphasis added.)[6]

We submit that the Bay and Seaport Plans' water-related industrial Findings, Policies, and Priority Use Areas should not be amended in any way that would undermine the importance and priority of water-related industries. Indeed, any such amendment would be contrary to the MPA and would unnecessarily interfere with established water-related industrial operations, including the Schnitzer Steel metals recycling facility and deep-water port opened in 1965 and constituting a protected use under Section 66654.[7]

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[5] http://www.bcdc.ca.gov/plans/sfbay_plan#20

[6] http://www.bcdc.ca.gov/seaport/seaport.pdf

[7] "Within the area of the commission's jurisdiction under subdivisions (b), (c) and (d) of Section 66610, any uses which are in existence on the effective date of this section may be continued, provided, that no

Standards for Plan Amendment

As stated in the Staff Report, to "consider removing a port priority use area designation, the Commission must evaluate the impact of the deletion on the region's capacity to handle the total amount of ocean-going cargo projected to pass through the Bay Area ports. Therefore, to approve a designation change, the Commission must determine that eliminating a potential future use of an area for port purposes will not negatively affect the region's overall cargo handling capacity and will not increase the need to fill the Bay for future port development." Staff Report at 2.[8] That is only part of the analysis. The Commission may change the boundaries of water-oriented priority land uses only in the manner provided in Section 66652 and BCDC regulations. § 66611 (Bay Plan maps); § 66651. Any change "shall be consistent with the findings and declarations of policy" contained in the MPA. § 66652.[9] We also note that changes to a policy or standard require the affirmative vote of two-thirds of the Commission members, which is consistent with the significant nature of such amendments. *Id*.; *see also* Bay Plan, Applying and Amending the Bay Plan (same).

As discussed above, removal of the water-related industrial priority use designation for the Howard Terminal is inconsistent with the MPA. § 66602 (water-related industries essential to public welfare and the Bay Plan "should make provision for adequate and suitable locations for all these uses" and avoid necessity of creating new sites for such uses). Amendments to the Seaport Plan must also be consistent with the Metropolitan Transportation Commission ("MTC") rules for amending the Regional Transportation Plan, and proposed amendments should be reviewed first by the Seaport Planning Advisory Committee. The overall purpose of the Seaport Plan is to ensure "the continuation of the San Francisco Bay port system as a major world port and contributor to the economic vitality of the San Francisco Bay region," to maintain or improve environmental quality of the Bay and its environs, to efficiently use and operate marine terminals, to provide integrated and improved surface transportation, and to reserve "sufficient shoreline areas to accommodate future growth in maritime cargo, thereby minimizing the need

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substantial change shall be made in such uses except in accordance with this title." § 66654 (Added by Stats. 1969, Ch. 713).

[8] The Staff Report appears to focus on one of several inquiries: "Deletions of the port priority use and marine terminal designations from this plan should not occur unless the person or organization requesting the deletion can demonstrate to the satisfaction of the Seaport Planning Advisory Committee that the deletion does not detract from the regional capability to meet the projected growth in cargo. Requests for deletions of port priority or marine terminal designations should include a justification for the proposed deletion, and should demonstrate that the cargo forecast can be met with existing terminals." Seaport Plan at 7. That fact tends to highlight the nature of the proposed amendments to expedite the Oakland proposed baseball stadium project. Individual projects are evaluated as to their effect on the entire Bay (Section 66601), however, that is not a limitation on Commission evaluation.

[9] A Commission approval resolution must contain specific findings of fact to support the legal conclusion that the amendment conforms to all relevant policies of the MPA Sections 66600 through 66661. 14 Cal. Code Regs. § 11006.

for new Bay fill for port development." Seaport Plan at 1. Land use designations and policies are employed to achieve those goals. *Id*. Port priority use areas are reserved for port-related and other uses that will "not impede development of the sites for port purposes." *Id.* Within those areas, marine terminals are reserved for cargo handling operations. *Id*. Growth in waterborne cargo can be accommodated by constructing new marine terminals – which requires some fill and dredging—or increasing the rate and volume of cargo moved through existing marine terminals. *Id*. at 2.

Here, removing the priority use designation from Howard Terminal moves farther away from achieving each of the Plan's goals. As noted in the Seaport Plan, ports require a "flat, expansive waterfront location on navigable, deep water channels with excellent ground transportation access and services." *Id*. at 8, Findings. Such sites in the Bay Area "are limited, and are a regional economic resource that should be protected and reserved for port priority uses, such as marine terminals and directly related ancillary activities . . ." *Id*. Development of Howard Terminal as proposed by the Oakland Athletics would preempt future water-related industry, port or marine terminal use, thereby increasing the possibility of future construction of new marine terminals and generally requiring at least some Bay fill. Nor does the proposal qualify as the type of "small-scale commercial recreational establishment" that could provide a public benefit "until such time as the area is developed as a marine terminal." *Id*. at 9. Instead, it would impair existing or future use of the area for port purposes, contrary to Seaport Plan policies.

In addition to the inconsistencies described herein, the Amendments are not consistent with applicable local plans, policies, and zoning. Indeed, the Applicant has had to seek planning amendments from the City of Oakland on a similarly-truncated environmental review schedule. Respectfully, environmental and planning review of the proposed Amendments should not be short-circuited.

Environmental Assessment and Analysis

The Commission should allow sufficient time for thorough analysis and consideration of environmental issues. The proposed time for environmental assessment from "mid-2019" to a meeting date on December 5, 2019, with documentation published 30 days in advance, is unnecessarily truncated. Staff Report at 2. For example, the Commission approved the smaller, discrete Pier 39 aquarium project after a review "lasting over 30 months and involving 12 public hearings." *Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Com.* (1992) 10 Cal.App.4th 908, 918.

The Commission must consider the potential environmental impacts of the proposed Bay Plan and Seaport Plan amendments under its certified regulatory program, including far-ranging impacts related to traffic and transportation, land use, hazardous materials, and air and water quality. While BCDC itself is not required to prepare an Environmental Impact Report ("EIR") under CEQA, under its certified "functionally equivalent" program the Commission is required to conduct substantive environmental review of proposed actions having a significant effect on the environment. When BCDC is lead agency and the Executive Director has determined that a

proposed activity may have an individually or cumulatively substantial adverse impact on the environment, the Commission must prepare an Environmental Assessment ("EA"), which is the process to be followed here. 14 Cal. Code Regs. § 11511(c). The EA must include, among other things, all substantial adverse environmental impacts that the Project may cause; any feasible mitigation measures that would reduce those impacts; any feasible alternatives to the Project that would reduce substantial adverse environmental impacts; and "other information that the Executive Director believes appropriate." 14 Cal. Code Regs. § 11521; *see also* 14 Cal. Code Regs. § 11003. The Staff Report must also include "a summary of and responses to all significant environmental points raised up to the time the staff planning report is mailed." *Id*.

These regulations make clear that when determining whether to approve Plan amendments, the Commission must allow sufficient time to thoroughly consider potential environmental impacts and cumulative impacts caused by the proposed amendments. The Descriptive Notice generally describes potential amendments to Plan Findings, Policies and Designations, which could result in significant changes and far-ranging significant adverse environmental impacts. Indeed, in light of the scope of the proposal that the amendments would facilitate—a mixed-use Project featuring a 35,000-person capacity stadium, thousands of residential units, over 2 million square feet of mixed-use development, a 3,500-capacity performance venue, hotel, possible modifications to an existing power plant, and other elements—potential impacts of the Project would be substantial if not unmitigable. The Commission should carefully analyze all potentially significant impacts. Of course, the Commission should also consider waiting for the full-blown EIR that the City of Oakland has committed to prepare for its planning and zoning amendments.

Violation of Public Trust Doctrine

Amendments to the existing Plans' policies and priority use designations—such as removing the priority use designation at Howard Terminal to facilitate a large mixed-use project—would impair traditional Public Trust uses at port locations such as navigation and water-based commerce.

The Bay Plan's Public Trust policies require that when BCDC takes any action affecting lands subject to the public trust, "it should assure that the action is consistent with the public trust needs for the area." Bay Plan, Public Trust Policy. "The purpose of the public trust is to assure that the lands to which it pertains are kept for trust uses, such as commerce, navigation, fisheries, wildlife habitat, recreation, and open space." *Id*., Public Trust Findings (d).

Under California's Public Trust doctrine, the State is required to hold title to all submerged lands beneath navigable waters in trust for the people of the State for the traditional purposes of commerce, navigation and fisheries. *National Audubon Society v. Superior* Court (1983) 33 Cal.3d 419, 434; Cal. Civ. Code § 670.[10] Permitted Public Trust uses include purely commercial

[10] Accordingly, the State may not alienate Public Trust lands, such as through sale to private parties. *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 537; s*ee also* Cal. Const. art. X, § 3 (withholding

activities that facilitate water-related commerce, such as the building of wharves, docks and other structures and "ancillary or incidental uses" that directly promote trust uses. Non-permitted public trust uses "are those that are not trust use related, do not serve a public purpose, and can be located on non-waterfront property, such as residential and non-maritime related commercial and office uses."[11]

The Oakland Athletics' Project under consideration is not compliant with the Public Trust. In addition to a privately-owned baseball stadium, the Project includes up to 4,000 residential units and approximately 2.27 million square feet of adjacent mixed-use development, including retail, commercial and office uses. Non-maritime related retail and office use and residential uses are generally understood to be incompatible with the Public Trust. *See City of Berkeley, fn. supra*, at 538; Cal. Attorney General Opinion 95-901 (1996)[12] (recognizing "long term residential uses which do not benefit the public at large" as inconsistent with Public Trust doctrine). As envisioned in the Bay Plan, housing is neither a water-oriented use nor a Public Trust use under the MPA. *Mein v. San Francisco Bay Conservation etc. Com.* (1990) 218 Cal.App.3d 727, 733-734. Generally, mixed-use developments containing elements that are not Public Trust-compliant should not be approved absent a connection to water-related activities that provide statewide public benefits. SLC Public Trust Policy at 9. Here, the Project as a whole would also interfere with traditional Trust uses at the Port such as water-based commerce and navigation.

Agenda Item 9: Public Hearing and Possible Vote on Issuing a Brief Descriptive Notice to Possibly Remove the Bay Plan and Seaport Plan Port Priority Use Area Designations from Howard Terminal, Bay Plan Amendment No. 2-19

The two proposed Amendments (No. 1-19 and 2-19, respectively), and the accompanying staff reports raise many of the same issues. They also appear to be inter-related (i.e., the Oakland Athletics' proposal will be considered as part of Amendment No. 1-19). Accordingly, we incorporate by reference the discussion of Agenda Item No. 8 above. We also add that the Seaport Plan states BCDC and MTC should consider amending the Plan upon the request of a property owner, local government, or government agency. Seaport Plan at 45. The Oakland Athletics do not satisfy any of those categories and do not to our knowledge have an interest in the Port property.

Nonetheless, as to Agenda Item No. 9, the Commission stated its intent to hold a possible vote on the application from the Oakland Athletics to delete the port priority use area designation in the Bay Plan and the Seaport Plan from Howard Terminal in Oakland. As discussed above, removal of the port priority use would facilitate the proposal for a new major league baseball park and

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from grant or sale all tidelands within two miles of any incorporated city, county or town); Pub. Res. Code § 7991 (withholding from sale tidelands between the ordinary high and low water mark).

[11] *See* Cal. State Lands Commission Public Trust Policy ("SLC Public Trust Policy") (2001), available at: http://archives.slc.ca.gov/Meeting_Summaries/2001_Documents/09-17-01/Items/091701R88.pdf

[12] https://oag.ca.gov/system/files/opinions/pdfs/95-901.pdf

mixed-use development. The proposed Descriptive Notice states that the "proposed amendment would remove the port priority use area designation at the Howard Terminal as shown on Bay Plan Map 5. The change would reflect the removal of the designation from the terminal at the Port of Oakland." Descriptive Notice at 1.[13]

We note that Figure 2 of the Notice, "Proposed Change to the Port of Oakland Priority Use Area," Plan Map 5, fails to reflect water-related industry in the inner harbor including the location of the Schnitzer Steel facility. That could be a function of the scale of the map since the facility is elsewhere mentioned in the Plan as distinct from a generic analysis of Port uses. As the Bay Plan states that its policies and maps are "necessarily general in nature," and the Commission is authorized to clarify, interpret, and apply them as necessary, there should be clarification that policies and maps – existing and subsequent to any proposed amendment – must maintain the water-related industry priority uses including for the Schnitzer Steel facility.

Agenda Item 10: Commission Consideration of a Contract with the Oakland Athletics for Staff to Conduct the Analysis Required for the Commission to Consider Removal of the Bay Plan and Seaport Plan Port Priority Use Area Designation from Howard Terminal

We understand that the Commission will consider authorizing the Executive Director to enter into a contract with the Oakland Athletics for payment of the full cost of work required for the Commission to process and act upon an amendment to the Bay Plan and the Seaport Plan. *See, e.g.*, 14 Cal. Code Regs. § 11008 (applicant payment of costs of processing of an amendment to a Commission Planning Document). However, removal of the Bay Plan and Seaport Plan priority use designation from Howard Terminal could unnecessarily foreclose port priority uses on the limited available port land in the Bay solely to accommodate the Oakland Athletics' ballpark and mixed-use proposal that is speculative at this stage and prior to environmental review conducted by the City of Oakland.

The Project proposed by the Oakland Athletics would require a permit as a substantial change in use at Howard Terminal. § 66632; 14 Cal. Code Regs. § 10125(b) (a "substantial change in use" includes construction, alteration or other activity with a cost of $250,000 or more, change in the general category of use of land, or substantial change in the intensity of use). Commission regulations provide that BCDC will not accept a major permit application under the MPA until a project has received all discretionary local land-use approvals. 14 Cal. Code Regs. § 10310(f)(1) (or "(2) for subdivisions or other land divisions requiring a Commission permit for which final local approval or disapproval has not been granted, a statement that the local government either favors the project, with or without conditions, or does not favor the project"). Section 66632(b) requires permit applications to "include measures to assure that the city or county which has jurisdiction over a project may consider and act on all matters regarding the project that involve a discretionary approval before the commission acts on an application." Numerous approval actions will be need for this project by the Port and the City of Oakland, as well as other regulatory agencies, the outcome of which is unknown at this stage.

[13] http://www.bcdc.ca.gov/cm/2019/0117DescNoticeBPA2-19.pdf

Although we understand the Oakland Athletics have not yet applied to BCDC for a permit, the contract and analysis proposed here comprise one part of the entire action proposed by the Athletics and should not circumvent the requirement for prior local land-use approval and associated planning and environmental review.

NOTICE REQUEST

This submission shall also serve as an official written request of Notice for any and all meetings upon which the public has access and/or noticing rights.

Respectfully submitted,

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May 13, 2019

Hon. Cestra Butner, President
Board of Port Commissioners
Port of Oakland
530 Water St.
Oakland, CA 94607

OPPOSE: Proposed Term Sheet for Proposed Howard Terminal Housing/Stadium Complex

Dear President Butner:

On behalf of the undersigned organizations, we respectfully OPPOSE the proposed Term Sheet agreement regarding Howard Terminal. This is yet another premature and unnecessary step towards the adoption of an Oakland A's Housing/Stadium Complex on the waterfront, and is an endorsement of a framework for moving forward with a project which presents a significant threat to the Seaport and its maritime customers, employees, tenants, and their business partners throughout the supply chain.

Adoption of this Term Sheet is a statement by the Port Commission that it is OK with the proposition that Howard Terminal might be turned into 3,000 units of dense, luxury housing, plus thousands of offices, a hotel, and a 35,000 seat stadium. A complex of this magnitude at this location would jeopardize the long-term financial health and viability of the Seaport. Not to mention that building housing here is not allowed under the provisions of the tidelands trust, the Seaport Priority plan designation, and the DTSC Deed Restrictions on the property.

If adopted, the Port is saying that it agrees with a framework for proceeding with a project that would give the Oakland A's the rights to do all of the following:

- Build a significant housing and commercial development in the middle of a working Seaport
- Remove productive maritime and maritime-auxiliary property from the waterfront and replace it with non-waterfront dependent or enhancing uses
- Entitle a project which will constrain the Port of Oakland's ability to grow future cargoes and to maximize the use of existing marine terminals
- Impair truck and vessel access to and from marine terminals with crippling new congestion
- Create significant and ongoing negative impacts on current operations of the tenants at the Port of Oakland and therefore frustrate new investment in terminals, jobs, and equipment
- Put at risk existing revenue bond indebtedness underwritten against these terminal revenues
- Hand-cuff future Turning Basin expansion into arbitrary and potentially unrealistic 5-year and 10-year windows

While we appreciate the many reservations of future discretion by the Port in this document, the adoption of a Term Sheet as a framework to continue discussions is not simply a preliminary agreement to continue to discuss options; if it were, the parties could have simply extended the existing Exclusive Negotiating Agreement. Instead, this is a road map that puts the A's on a path to their new complex.

This roadmap is problematic because the Term Sheet does not provide for a process to require in the lease that the Oakland A's abide by their promises to assure that there will be no negative impacts on the Port's maritime business. There is simply no leasing mechanism to enforce the future costs of providing assurances or mitigating impacts to the maritime community. If the Port had wanted to provide such assurances, it would have structured such provisions, just as it has for the Community Benefits Agreement section, up-front and in the lease provisions, enforceable against the A's.

If maritime competitiveness is still truly the Port's primary business focus, then the Port should make the elimination of any impacts on maritime business the principal focus of its negotiation with the A's.

However, aside from some of the progress made on the turning basin, maritime business impacts are put on a second tier in the Term Sheet, addressed well after the project has been entitled and lease terms decided and only at the building permit phase. There is no reason to believe that maritime business impact mitigation will be adequately funded, ongoing, or enforceable at a ministerial stage of the backend of project delivery. Instead, the Port should exercise its discretion in the best interests of its existing tenants, customers, employees, shippers, and the supply chain that relies on the Port now, when it has maximum leverage and unlimited discretion, rather than left to a future stage after the creation of rights and entitlements.

Of additional concern in this regard, the Port is now in this Term Sheet officially giving up its appropriate Lead Agency control of the Environmental Impact Report for this project. This is despite the fact that the rights, obligations, and duties for existing property management and development reside with the Port, the ENA for the property was entered into the Port creating the first action on this project, the revenues for the project are with the Port, the obligation to issue building permits are with the Port, the obligation to ask for a zoning or general plan conformity of the City are with the Port under the City Charter and such requests are limited under their applicability to state-granted lands managed in trust on behalf of the state regardless, most project-specific mitigation will most likely be principally carried out by the Port. These EIR responsibilities exist in addition to the Port's fiduciary and trustee duties as grantee of state property, which also are implicated by the lack of control over this EIR and project.

We respectfully ask that the Board of Port Commissioners refrain from approving the proposed Term Sheet for Howard Terminal at this time.

Sincerely,
American Waterways Operators
California Trucking Association
Customs Brokers and Fowarders Association of Northern California
Harbor Trucking Association
Pacific Merchant Shipping Association
Schnitzer Steel Industries
Transportation Institute

cc: Members, Board of Port Commissioners
Chris Lytle, Executive Director
Danny Wan, Port Attorney

PMSA
PACIFIC MERCHANT SHIPPING ASSOCIATION

January 14, 2020

Hon. Larry Reid, Vice Mayor
Chair, Community & Economic Development Committee
City Council
City of Oakland
250 Frank Ogawa Plaza
Oakland, CA 94612
Delivered via Hand and Electronic Mail

OPPOSE: Howard Terminal Memorandum of Understanding (MOU)
Item #3, Special Community & Economic Development Committee Meeting, 1/14/20

Dear Chair Reid and Committeemembers,

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), we respectfully offer these comments in *Opposition* to the Proposed Howard Terminal Memorandum of Understanding (MOU) for the potential mixed use project by the Oakland A's at the Port of Oakland. The rules for development of the waterfront are well-established and clear under state law and the Oakland City Charter and they cannot and should not be changed, managed, or avoided just for the benefit of one project developer.

The City and Port serve inherently different and distinct administrative purposes and have clearly allocated land use authority amongst themselves under state laws and the City Charter in order to protect and to achieve these administrative and substantive ends. But, as the Staff Report for the MOU plainly admits, its goals are "to avoid administrative duplication" and "to allocate regulatory land use authority between the City and the Port" with respect to their effort to "regulate the development of the [Howard Terminal] Project" – in other words, the MOU intends to rewrite the governance of the City's development rules for the exclusive benefit of just this one project. This is untenable.

The MOU cannot reallocate regulatory authority or remove administrative requirements without either voiding the provisions of state law which govern how the City and Port interact as a trustee/grantee of tidelands property or doing an end run on the explicit granting of near plenary authority of the Port of Oakland in the City Charter or both. Neither can the MOU rewrite the provisions of the California Environmental Quality Act with respect to the process for the determination of lead agency status.

To be sure, the management of the waterfront is a complicated affair – full of regulatory hoops, multiple overlapping jurisdictions, duplicative authority, and frustrating limitations on development. Such limitations exist by design and are reflected not just in the substance of the rules themselves, but in the nature of the multi-layered multi-agency administrative processes by which those rules are protected and administered. As such, those roles must be respected, not avoided or undone by an MOU.

The Oakland A's knew these rules prior to their ENA with the Port and prior to their request for a Development Agreement with the City. They now need to proceed under those rules, and the original authorities of those entities who control and execute those rules, as they exist under the City Charter and state law. Moreover, the City should not change them solely to the benefit of a single project.

Tidelands Trust Restrictions on MOU

The Howard Terminal property is located within and is subject to granted state lands. The Port, as grantee manager designated by the City Charter, is the trustee of these lands and must jealously guard the reservation of the scope of its trust management. As trustee, the Port owes a duty of loyalty and fidelity to the beneficiaries, the people of the state of California.

The rights of the State in this property are paramount and unyielding. The management of the state's tidelands is not subject to compromise for the purposes of municipal or local benefits, goals, or improvements. Likewise, the trustee responsible for the management of these properties must always be motivated by the interests of the beneficiary and solely act in management of its assets for the betterment of its beneficiaries on a statewide basis.[1]

In addition, a trustee may not cede authority over trust assets to third parties and may not pursue collateral benefits to third parties, no matter how well-intentioned such actions or courses of management may seem. The affirmative duties to not delegate the performance of its own acts and to not transfer the administration of trust assets are settled common law requirements of trustees, generally. They are also mandated duties established by statute with respect to the administration of granted tidelands by the State of California. PMSA is concerned with the protection of these trustee obligations as they underlie billions of dollars of private investments by our member companies in the publicly-owned seaport infrastructure in California.

Yet, with respect to these fundamental issues of control, intent and management, the MOU is completely silent. The Staff Report is also silent on the topic and does not so much as even acknowledge the presence of state trust limitations on the project or on the Port's ability to delegate authority or enter into an MOU. We are therefore left presume[2] that either the City has simply forgotten to analyze the most obvious legal issues which may limit its ability to control the project as proposed under the MOU or the City has affirmatively ignored the issues surrounding the trust with respect to project management.

These interests of the maritime community are well known. With respect to this project in particular the Port of Oakland has been advised by PMSA of its interest in the preservation of the Port's trustee

[1] A municipality cannot enforce local land use regulations on state property. It is a general principle of land use planning that "[a] city may not enact ordinances which conflict with general laws on statewide matters." *Hall v. City of Taft* (1956) 47 Cal. 2d 177, 184. Similar to the other provisions which govern the relationship between various levels of state and local government, "the state, when creating municipal governments does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control." *Id.,* at 183. The tidelands trust is such an example of reserved state authority. Even when this authority is exercised through local trustees, this is still the management of statewide interests "through the medium of other selected and more suitable instrumentalities. How can the city ever have a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have." *Id.*

[2] While possible, PMSA does not presume that the City has come to the conclusion that the MOU is legally problematic but failed to include that in the staff report and is withholding that conclusion from the City Council and the public.

and grantee duties. Unfortunately, the Staff Report admits that no effort was made to reach out to the public on this issue other than the publication of the notice for this CED Committee meeting today.

In any event, the proposed MOU should not move forward until the relationships with respect to the Port's role as a granted lands trustee have been further discussed and evaluated with interested stakeholders and the public vis-à-vis the control which would be ceded to the City.

Oakland City Charter Restrictions on MOU

In addition to the State Tidelands Trust law, the City Charter limits the general authority of the City on Port property. The City Charter's provisions in this regard are explicit and not subject to future negotiation between the Port and the City on a project-by-project basis, or contingent on an MOU, or even subject to amendment by a duly enacted Ordinance.

Article VII of the City Charter with respect to administrative control and jurisdiction is explicit:

> *"To have control and jurisdiction of that part of the City hereinafter defined as the 'Port Area' and enforce therein general rules and regulations, to the extent that may be necessary or requisite for port purposes and harbor development." Oakland City Charter §706(4)*

> *"No franchise shall be granted, no property shall be acquired or sold, no street shall be opened, altered, closed or abandoned, and no sewer, street, or other public improvement shall be located or constructed in the 'Port Area,' by the City of Oakland, or the Council thereof, without the approval of the Board." Oakland City Charter §712*

And, even with respect to the implementation of a project in conformity with a General Planning designation made by the City, the development and use of the property is specifically reserved to the Board of Port Commissioners:

> *"The Board shall develop and use property within the Port Area for any purpose in conformity with the General Plan of the City. Any variation therefrom shall have the concurrence of the appropriate City board or commission." Oakland City Charter §727*

The Port and the City cannot now, by MOU, rewrite the relationship between the Port and City which is written into the Charter. The Staff Report does not analyze the City Charter's limitations on the MOU other than to recognize that the Port still controls its building permits under §708 of the City Charter.

Again, as noted above, It is not enough to note that this relationship as required in current law may result in some duplicative regulatory action or inefficiencies that may be suffered by the Oakland A's as a project developer. These protections are established by design. They are intended to protect the waterfront from such developments being forced through hastily, even if politically popular, without additional scrutiny and review across multiple layers of land use regulation and review.

California Environmental Quality Act Restrictions on MOU

With respect to the California Environmental Quality Act, the MOU raises procedural and substantive concerns regarding circulation and content of the Project's Draft EIR (DEIR).

As the Staff Report explicitly details on page 3, this MOU is intended to address questions regarding the Scope and Content of the DEIR of the Project. However, this staff report and MOU have not been noticed or circulated to any parties who had requested in the NOP process official written Notice for any and all meetings which may impact CEQA processes upon which the public has access and/or noticing rights. PMSA and numerous other entities requested these Notices in both written and email format to the addresses and contacts of record, yet no notice was provided here.

As argued and acknowledged in the Staff Report, the MOU is substantive in this regard with respect to DEIR preparation, and therefore the proposed MOU is directly relevant to the preparation of the DEIR, because it is intended to specify the bounds and nature of the agreement by which the City officially and formally acts as the Lead Agency for this project.

This is substantive and significant because the misdesignation of Lead Agency is not harmless error, and it can be prejudicial to a CEQA adequacy determination, result in the creation of a defective EIR, and ultimately result in a necessity for the preparation of an entirely new EIR by the proper Lead Agency. *Planning and Conservation League v. Dept. of Water Resources* (2000) 100 Cal.Rptr.2d 173.

Moreover, the MOU intends to assign Lead Agency status in a manner which is inconsistent with the explicit state statutes and regulatory guidelines which clearly define the bases upon which Lead Agency status may be evaluated amongst multiple public agencies with interest in a project. Those sections of CEQA law are not evaluated by the Staff Report and the CED Committee has not been advised of the legal risks and implications of the MOU with respect to the manner in which the MOU proposes to assign a Lead Agency designation to the City by deviation from the state's rules for doing so.

In short, CEQA defines a "Lead agency" as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment" at Public Resources Code §21067, and the CEQA Guidelines set forth specific criteria at 14 CCR §15051. With respect to the A's Application to the City, the Port remains the public agency with principal responsibility for carrying out or approving the proposed project which is envisioned at Howard Terminal, not the City.

The City and Port have actual and constructive notice of this issue, as it was raised by PMSA and other parties in previous comments on the NOP for this DEIR. (see January 14, 2019 letter attached)

For good order's sake, we formally submit these comments to the record by cc to the City of Oakland Bureau of Planning and Deputy City Administrator below, and respectfully request that these comments be considered as supplemental to our positions and concerns regarding the procedural aspects of the current California Environmental Quality Act (CEQA) process as expressed in correspondence submitted regarding this Project [Case # ER-18-016].

In conclusion, the proposed MOU is violative of the letter and spirit of the well-established and clear rules which govern waterfront development. While we understand that the Howard Terminal Project proponents, and perhaps City staff, may wish to avoid some administrative and jurisdictional hurdles, speed project review, or eliminate many of the restrictions which make it more difficult to develop the Oakland waterfront than other properties elsewhere in the City, the MOU may not waive these roles, duties, and responsibilities.

The Staff Report fails to address or acknowledge these concerns. PMSA is Opposed to the MOU and believes that it should not go forward. In addition, we would advise that, at the very least, the CED Committee direct staff to re-evaluate the context of the MOU, further confer with the public and stakeholders, and evaluate the MOU proposal in the context of the many broader legal restraints on Port property imposed by both state and local law.

Please feel free to contact me regarding this or any other matter as it pertains to the proposed Howard Terminal Project.

Sincerely,

Mike Jacob
Vice President & General Counsel

cc: Members, Community & Economic Development Committee
Hon. Libby Schaaf, Mayor
Hon. Rebecca Kaplan, President
Danny Wan, Executive Director, Port of Oakland
CEQA NOTICE - Betsy Lake, Deputy City Administrator
Peterson Vollmann, Bureau of Planning