



1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 622-2100
Telephone: (510) 622-2183
Facsimile: (510) 622-2270
E-Mail: Harrison.Pollak@doj.ca.gov

August 14, 2008

Richard D. Cameron
Director of Environmental Planning
Port of Long Beach
925 Harbor Plaza
Long Beach, CA 90802

RE: Port of Long Beach Middle Harbor Redevelopment Project

Dear Mr. Cameron,

The Attorney General submits these comments on the Draft Environmental Impact Statement/Report (DEIS/R) for the Port of Long Beach Middle Harbor Redevelopment Project ("Middle Harbor Project" or "Project"), pursuant to the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA).¹ The Middle Harbor Project will advance the commitment by the Port of Long Beach ("Port") to reduce the environmental impacts from its operations while accommodating growth in the shipping industry. But, as the Port recognizes, the Project will have significant environmental impacts, including a substantial increase in greenhouse gas emissions. The Port, under CEQA, and the U.S. Army Corps of Engineers, under NEPA, must do more to describe, to analyze, and to mitigate the Project's significant cumulative impacts related to global warming.²

¹These comments address only the treatment of the Project's greenhouse gas emissions in the DEIS/R. We express no view on other aspects of the document. The Attorney General offers these comments in his independent capacity and duty to protect the natural resources of the State from destruction, pollution and impairment in the public interest. These comments are those of the Attorney General, and are not made on behalf of any other California agency or office.

²The Notice of Availability in the Federal Register states that all comments can be sent through the Port, which is why we have addressed these comments only to the Port. (73 Fed.Reg. 28437 (May 16, 2008).)

BACKGROUND

As maritime ports enter into what the DEIS/R suggests will be a sustained era of growth, the world is approaching a tipping point at which greenhouse gas emissions reach an irreversible level. According to Rajendra Pachauri, Chairman of the United Nations Intergovernmental Panel on Climate Change, “If there’s no action before 2012, that’s too late. What we do in the next two to three years will determine our future. This is the defining moment.”³

Well before initiation of Middle Harbor Project, the Port has demonstrated its commitment to green policies, as set forth in the Green Port Policy that the Port adopted in 2005. This commitment also is manifested in the Clean Air Action Plan (CAAP), which the Port, along with the Port of Los Angeles, adopted in 2006. Under the CAAP, the ports commit to cutting air emissions by half over five years. One report recently described this undertaking to clean up their operations as “by far the most ambitious in the world.”⁴

The Port has made a similar commitment to address greenhouse gas emissions from its activities. In July, Executive Director Richard Steinke joined port leaders from around the world in Rotterdam to endorse the World Ports Climate Declaration. In the declaration, ports agree to implement initiatives to reduce greenhouse gas emissions from ocean-going ships, port operations and development, and landside transport; to promote the use of renewable energy; and to quantify and to take measures to reduce their carbon footprint.⁵

The Port already has embarked on several of the types of initiatives that the Declaration contemplates. For instance, the Port has collaborated with the City of Long Beach to quantify its own greenhouse gas emissions (not including Port tenants); it seeks to partner with Southern California Edison to implement energy efficiency measures; it has participated in Long Beach’s Urban Forest Master Plan development since 2007, in anticipation of planting trees outside the Harbor District as a means to mitigate greenhouse gas emissions; it has initiated a solar car canopy pilot project; and, significantly, it plans to complete a study of additional opportunities for solar generation during August 2008.⁶ These are positive, and much-needed, steps in the fight against global warming.

³Rosenthal, “U.N. Chief Seeks More Leadership on Climate Change,” N.Y. Times (November 18, 2007).

⁴Cannon, James, “U.S. Container Ports and Air Pollution: A Perfect Storm” (2008), *available at* http://s3.amazonaws.com/energy-futures.com/port_study_ef.pdf.

⁵C40 World Ports Climate Conference, “World Ports Climate Declaration” (July 2008), *available at* <http://wpcrotterdam.com/usr-data/general/Declaration.pdf>.

⁶Memorandum from Richard D. Cameron, Director of Environmental Planning, to Board of Harbor Commissioners, July 30, 2008.

The Middle Harbor Project incorporates several elements of the Port's green policies. But even so, the Project will result in a substantial increase in greenhouse gas emissions. According to the DEIS/R, by the year 2030, the annual mitigated greenhouse gas emissions from the Project will be 920,858 metric tons of carbon dioxide equivalents (CO₂e), which is an increase of approximately 440 percent over the 2005 baseline. (DEIS/R at 3.2-70.) In other words, by 2030 the greenhouse gas emissions from operations related to the Middle Harbor terminal will be equivalent to adding 130,540 new passenger cars to the road each year.⁷

We are concerned by what appears to be a disconnect between the Port's objective to reduce its carbon footprint, and the significant increase in emissions that will accompany the proposed Middle Harbor Project. We encourage the Port to seize this opportunity to move closer to meeting its environmental goals.

COMMENTS UNDER CEQA

A. The DEIS/R Fails to Describe the Serious Consequences of Global Warming.

The DEIS/R describes briefly how the accumulation of greenhouse gases in the atmosphere can increase global temperatures, but it limits the discussion of impacts to a single sentence that fails to reveal the potentially catastrophic consequences of climate change. According to the DEIS/R, increasing temperatures and other environmental changes "have potentially negative environmental, economic, and social consequences around the globe." (DEIS/R at 3.2-8.) There is no description or acknowledgment of the California-specific impacts of global warming, or of potential impacts to the Port itself.

CEQA requires a good faith effort at full disclosure. (Cal. Code Regs., tit. 14, § 15151.) While the lead agency is not required to "foresee[] the unforeseeable," it must "use its best efforts to find out and disclose all that it reasonably can." (*Id.*, § 15144.) Full disclosure of a project's environmental impacts promotes a fundamental purpose of CEQA: to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." (*Laurel Heights Improvement Assn. of San Francisco v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123.)

The DEIS/R must consider the impact of the Project's greenhouse gas emissions within the context of current information about the present and projected effects of climate change on California. The California Climate Change Center, for example, reports that by the end of this century, if greenhouse gas emissions proceed at a medium to high rate, temperatures could rise by 4.7 to 10.5°F and sea levels may rise by 30 inches or more.⁸ This could have serious

⁷See <http://www.epa.gov/grnpower/pubs/calcmeth.htm#vehicles>.

⁸California climate Change Center, "Our Changing Climate: Assessing the Risks to California" (July 2006), pp. 3, 12-13, *available at* www.climatechoices.org/ca/site/our-changing-climate.html.

consequences in California, including changing weather patterns, substantial loss of snow-pack in the Sierra and consequent water shortages, coastal erosion, saltwater intrusion into the Delta, an increase of as much as 55 percent in the risk of large wildfires, reductions in the quality and quantity of agricultural products, among other things.⁹

The DEIS/R should also disclose the impacts that climate change may have on the Port. In a presentation entitled “Port Sustainability in a Changing Climate,” coastal scientist Adam Hosking described some of the implications that increasing sea levels could have on port operations, including increased storminess and wave agitation in port basins, resulting in increased downtime, and increased terminal flooding from overtopping.¹⁰ An accurate description of the Project in the DEIS/R requires some discussion of how anticipated changes to the environment from global warming will affect the extensive facilities and operations at the Middle Harbor terminal in the future.

B. The DEIS/R Fails Adequately to Disclose All Greenhouse Gas Emissions Related to the Project.

Another area where the DEIS/R falls short is in disclosing the full extent of greenhouse gas emissions associated with the expansion of an international shipping port. A central purpose of an environmental impact report prepared pursuant to CEQA is to “provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment” (Pub. Resources Code, § 21061.) For several decades, California courts have recognized that an environmental impact report should serve as an “environmental alarm bell” to “alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810; *San Joaquin Raptor/Wildlife Reserve Center v. County of Stanislaus* (1995) 27 Cal.App.4th 713, 721.) This key function of CEQA is especially relevant today, given the urgent necessity of reducing greenhouse gas emissions in the near term and at every opportunity.

The Middle Harbor DEIS/R limits the disclosure of greenhouse gas emissions to those that will occur within California’s borders and within the three-mile state water jurisdictional boundary west of Point Conception. (DEIS/R at 3.2-17.) However, the proposed terminal expansion will result in a nearly 200 percent increase in annual vessel calls, an approximately 150 percent increase in daily truck trips, and a more than 1,500 percent increase in annual

⁹Climate Action Team Report, Executive Summary, pp. xii-xiii (March 2006), *available at* www.climatechange.ca.gov/climate_action_team/reports/.

¹⁰Hosking, Adam, “Port Sustainability in a Changing Climate,” presentation at the American Association of Port Facilities Seminar, San Diego, California (Nov. 7-9, 2007), *available at* http://aapa.files.cms-plus.com/SeminarPresentations/07_FACENG_Hosking_Adam.pdf.

trains.¹¹ Much of this increased transit, and the resulting greenhouse gas emissions, will extend beyond California's borders and outside the lines drawn in the DEIS/R.

For ships alone, roughly 60 percent of port calls in 2005 were from regions other than the west coast of North America, and nearly 40 percent were from overseas.¹² Travel to the Port and distant destinations potentially will result in a huge amount of greenhouse gas emissions outside of California state waters, which are not disclosed. Studies have shown that, worldwide, ocean-going vessels of over 100 tons emit up to three percent of the total world inventory of greenhouse gas emissions, which is more than the emissions attributable to almost any individual developed nation in the world.¹³

CEQA requires that an EIR "identify the significant effects on the environment of a project." (Cal. Pub. Resources Code, § 21002.1, subd. (a); see also *Laurel Heights Improvement Assn. of San Francisco v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 390, quoting *Friends of Mammoth v. Bd. of Supervisors of Inyo County* (1972) 8 Cal.3d 247, 259 [CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language"].) The "environment" to be reviewed under CEQA includes "the physical conditions which exist *within the area which will be affected by a proposed project*, including the land, air, water" (Pub. Resources Code, § 21060.5; emphasis added.) A CEQA "project" encompasses "an activity which may cause either a direct or indirect physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (Pub. Resources Code, § 21065.)

The central purpose of the Middle Harbor Project is to expand the ability of the Port to accommodate the increasing demand to move goods, and containers for carrying goods, to and from far-distant ports and other locations. The extensive greenhouse gases that will result from the projected movement of goods and containers to and from the redeveloped Middle Harbor will be emitted into the near-surface air and the global atmosphere both within and far outside of California. Global warming, caused by and exacerbated by these emissions, is causing and will cause harm to California.¹⁴ Accordingly, limiting consideration of greenhouse gas emissions

¹¹DEIS/R at 1-19, Table 1.6-1. The percentages represent Year 2030 projections for the 345-acre alternative over the 2005 CEQA baseline.

¹²Final Report, Low-Sulfur Marine Fuel Availability Study (Apr. 14, 2008), *available at* www.polb.com/environment/air_quality/vessels/default.asp.

¹³International Council on Clean Transportation, "Air Pollution and Greenhouse Gas Emissions from Ocean-Going Ships: Impacts, Mitigation Options and Opportunities for Managing Growth" (2007), at 26, 34.

¹⁴The California Climate Action Registry (CCAR) allows entities to report greenhouse gas emissions data from operations outside the United States, although it does not verify international greenhouse gas emissions data at this time. (CCAR, "General Reporting Protocol,

from an international port expansion project to those created within California undermines the full-disclosure purpose of the environmental analyses required under CEQA and does not reflect the quality of data required for accurate scientific analysis of the Project's impacts.¹⁵

For these reasons, the DEIS/R should be revised to include greenhouse gas emissions from all sources resulting from implementation of the Project, including mobile sources that emit greenhouse gases outside of California.¹⁶

C. The DEIS/R Fails Adequately to Analyze Feasible Mitigation.

As the Port correctly concludes in the DEIS/R, the cumulative environmental impacts from the increased greenhouse gas emissions are significant. (DEIS/R at 3.2-19.) We understand that cargo operations at the Port are expected to increase with or without the Project. As the Port recently recognized, however, its ability to accommodate the projected growth in trade "will depend upon [its] ability to address adverse environmental impacts (and, in particular, air quality impacts) that will result from such trade."¹⁷ The Middle Harbor Project represents an opportunity for the Port to take additional steps to reduce emissions and to put its green policies into effect to the fullest feasible extent.

CEQA requires this. A lead agency must mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so. (Pub. Resources Code § 21002.1, subd. (b); *City of Marina Board of Trustees* (2006) 39 Cal.4th 341, 360.) "Feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, social and technological factors." (Pub. Resources Code, § 21061.1.) Mitigation of significant environmental impacts is one of the most important functions of CEQA. (*Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d

Version 3.0" (Apr. 2008), at 12, *available at* www.climateregistry.org/tools/.)

¹⁵NEPA similarly requires the lead agency to disclose the significant environmental impacts that are effects of a proposed federal action, even if the impacts occur outside of the United States, and even if the federal action itself is not the source of the impacts. (See *Border Power Plant Working Group v. Dept. of Energy* (S.D.Cal. 2003) 260 F.Supp.2d 997, 1014 [requiring analysis of impacts from the operation of power plants in Mexico, even though the federal project only involved transmission lines from the power plants]; see also 42. U.S.C. § 4332(2)(F) [NEPA requires federal agencies to "recognize the worldwide and long-range character of environmental problems].)

¹⁶We note that an agency may have an obligation to disclose and to analyze impacts that are not within its jurisdiction to mitigate. (See *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 100; see also Pub. Resources Code, § 21081, subd. (a)(2).)

¹⁷Port of Long Beach, Air Emissions Inventory (June 2008), at 17.

30, 41.) CEQA also requires the Port to ensure that measures intended to mitigate impacts are “fully enforceable through permit conditions, agreements, and other measures.” (Pub. Resources Code, § 21081.6, subd. (b).)

The DEIR/S lists twelve mitigation measures to reduce operational greenhouse gas emissions, nine of which are specific to reducing GHG emissions, and the other three of which are selected to reduce criteria pollutants as well. (DEIS/R at 3.2-63-68.) However, it is not evident from the DEIS/R that the Port adequately considered all feasible mitigation for the Project, as CEQA requires.

An obvious omission in the DEIS/R is any discussion of mitigation for the significant amount of greenhouse gas emissions that will result from construction activities. The DEIS/R discloses the greenhouse gas emissions from construction, but it is silent on mitigation. (DEIS/R at 3.2-63.) We note that there is some mitigation for the air quality impacts from emissions of criteria pollutants during construction. (DEIS/R at 3.2-24 to 3.2-27.) The DEIS/R should discuss whether these measures can be expanded to further reduce greenhouse gas emissions, and whether other strategies are available.

As for Project operations, there may be additional types of feasible mitigation for the Port to require as part of the Project, including greenhouse gas reduction measures that the Port already is exploring as part of its broader efforts to go green. For instance, could the Port create or expand programs to encourage employees to carpool or to use public transportation? Use “cool pavements” and “cool roofs” for new construction throughout the Port? Establish a user-fee schedule that accounts for a ship’s pollution-control measures? Provide incentives for its tenants to reduce greenhouse gas emissions? We understand from our discussions with the Port that it is looking at alternatives like these – if not these specific options – already. To the extent they are feasible, they should be incorporated into the Middle Harbor Project and into the discussion of mitigation in the DEIS/R.

Some mitigation measures in the DEIS/R could also be expanded. For example, mitigation measure AQ-17 requires the applicant to install solar panels on the main terminal building. (DEIS/R at 3.2-67.) It does not quantify the size of the solar installation, or identify other on-site and off-site locations for solar (or wind, or both) generation. The Port is studying its potential solar capacity throughout the Port, but it should address this in the DEIS/R. If the Port believes that it can generate electricity from solar, wind, or other low-emission sources, or if it can lease space to other companies to do so, then it must consider this as mitigation for the Project – particularly in light of the increased electricity needed to support the Project.¹⁸

¹⁸We note that the Project would include construction of a 66 kV substation to provide power to support Middle Harbor container terminal operations and power needs for other Port facilities. (DEIS/R at 1-16.) How much of that can the Port – or a different entity – generate using alternative sources of electricity? (See, e.g. University of California, “Commitment to Climate Solutions” (July 15, 2008) [describing a program through which private investors will construct, install and maintain photovoltaic panels and fuel cells on the UC San Diego campus,

Where on-site options for mitigation have been exhausted, the Port should consider the feasibility of undertaking or funding off-site mitigation, particularly in the area immediately surrounding the Port. For instance, the South Coast Air Quality Management District (SCAQMD) has announced plans for a Climate Solutions Exchange, where entities that need to reduce greenhouse gas emissions can purchase credits based on other entities' voluntary reductions.¹⁹ Before the Climate Solutions Exchange is operational, there may be other ways for the Port to fund emissions reduction efforts. We note that, for instance Chevron has agreed to pay at least \$1.5 million into a carbon offset fund that the SCAQMD will administer, to mitigate greenhouse gas emissions from an expansion project at its El Segundo Refinery.²⁰ A reasonable financial commitment by the Port to purchase carbon credits would have an important nexus to the Port's activities by providing additional mitigation for the Middle Harbor Project.

We recognize that, ultimately, it is for the Port to decide what mitigation is, and is not, feasible. We encourage the Port to expand its discussion and adoption of mitigation measures in the final EIS/R, to comply with CEQA's requirement to adopt feasible mitigation that will avoid or substantially lessen the Project's significant environmental effects.

COMMENTS UNDER NEPA

We note two additional deficiencies under NEPA. First, the DEIS/R conflates the NEPA baseline with "Alternative 3," which includes landside improvements only, for which no federal action or permit would be required. (DEIS/R at 1-3.) Alternative 3 will result in substantial growth as well, by more than doubling the amount of cargo handled at the terminal by 2030. (DEIS/R at p. 1-19, Table 1.6-1.) According to the DEIS/R, construction of Alternative 3 will result in nearly 37,000 tons of greenhouse gas emissions, and the annual operational emissions under Alternative 3 will reach approximately 872,000 tons by 2030, which is an increase of 664,000 tons above 2005 levels. (DEIS/R at 3.2-97, Table 3.2-50, and 3.2-99, Table 3.2-51.) There is no basis to exclude these significant increases in greenhouse gas emissions from the NEPA baseline. The NEPA baseline is supposed to reflect "the environment of the area(s) to be affected" by the project, not an imagined future scenario that may or may not occur. (See 40 C.F.R. § 1502.15.) For the same reason, the NEPA baseline must not include future emissions under Alternative 4, the no-project alternative. They too are speculative and do not represent present conditions.

and the University will then buy back the power through long-term contracts].)

¹⁹SCAQMD, "White Paper: SoCal Climate Solutions Exchange" (June 2008), *available at* www.aqmd.gov/hb/2008/June/080637a.htm; see also California Environmental Insider (June 17, 2008) at 6-7.

²⁰ Final EIR, Chevron Products Company El Segundo Refinery Product Reliability and Optimization Project, at 5.27-28, *available at* www.aqmd.gov/ceqa/documents/2008/nonaqmd/chevron/PRO/ch5.pdf.

Second, the DEIS/R fails to evaluate the significance of the Project's greenhouse gas emissions under NEPA. The U.S. Army Corps of Engineers uses the absence of a regulatory threshold of significance to avoid evaluation of the significance of the Project's greenhouse gas emissions. (DEIS/R at 3.2-19-20.) Nothing in NEPA or its regulations requires establishment of a regulatory threshold in order to assess the significance of an environmental effect. Indeed, NEPA requires federal agencies to "recognize the worldwide and long-range character of environmental problems." (42 U.S.C. § 4332(2)(F).) The Project will emit more than 920,000 tons of greenhouse gases into the atmosphere each year by 2030, which is more than 700,000 tons per year over 2005 levels. (DEIS/R at 3.2-70.) This cannot be considered anything but significant in California, a state that has mandated that greenhouse gas emissions be reduced to 1990 levels by the year 2020, and in light of California's objective, consistent with the science, to stabilize emissions at levels 80 percent below 1990 levels by 2050.

CONCLUSION

Thank you very much for the extensive assistance and information you and your staff have provided to our office to date about the Middle Harbor Project and for the opportunity to comment on the DEIS/R. We are most willing to meet with you and your staff to discuss our comments and to work cooperatively to address the important environmental issues related to the Project.

Sincerely,

/S/

HARRISON M. POLLAK
Deputy Attorney General

TIMOTHY R. PATTERSON
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: U.S. Army Corps of Engineers, Los Angeles District, Regulatory Branch