



November 9, 2009

Nick Sramek  
President, Board of Harbor Commissioners  
Port of Long Beach  
925 Harbor Plaza  
Long Beach, CA 90802

Dear Nick:

This is in response to your letter dated November 3, 2009.

First, I would like to explain what is, and is not, in the settlement agreement that the Port of Long Beach ("POLB") entered into with the American Trucking Association ("ATA"). Second, I want to remind you of the history of the Clean Air Action Plan and describe why the settlement is offensive to it. Third, I will outline why the settlement is illegal under California law. Last, I have a suggestion about how to get the Clean Trucks Program back on track.

### **The Settlement**

From the standpoint of air quality, the two worst things about the settlement are that the registration agreement created in the settlement forbids POLB from barring a licensed motor carrier ("LMC") from its property for dispatching one, a hundred, or a thousand dirty trucks to the Port, and that the unelected POLB Harbor Commissioners have contracted away the City of Long Beach's police power *forever* concerning any changes to the registration agreement. Let me explain these in turn.

#### *No Power To Exclude LMCs For Dispatching Dirty Trucks.*

Under the POLB settlement agreement, LMCs are required to "register" with POLB prior to conducting port drayage services and enter into a "registration agreement." The *only* grounds available to suspend a registration agreement is if the LMC's state and federal operating authority is suspended or if the port finds that an LMC knowingly provided false information to the Port's Drayage Truck Registry. This means that the settlement agreement does not allow an LMC to be suspended even if it repeatedly dispatches trucks that violate environmental, safety or security laws or regulations, except in the exceedingly rare case in which the federal or state government, after long delay, suspends an LMC's operating authority.

The effect of this is that the registration agreement fails to provide a true deterrent or remedy for conduct that can cause a complete breakdown of the Port's environmental, safety and security programs. Long Beach's inability to hold LMCs accountable coupled with the fact that under the registration agreement, LMCs are not required to report accidents to OSHA or workers compensation offices for contractors (since drivers do not have to be employees), results in LMCs having little business incentive to assist independent drivers in achieving optimum safety or environmental standards. Under POLB's settlement, the port is left enforcing its environmental standards against thousands of individual trucks, and is unable to directly remedy the problem at its source.

Let me summarize: *POLB has no independent authority under the registration agreement to suspend an LMC for dispatching dirty or unsafe trucks to the Port.* If you disagree with this, I urge you to re-read Section X of the registration agreement.

#### *Port and City Police Power Contracted Away.*

In its settlement, POLB Harbor Commissioners—not the elected members of the Long Beach City Council—contracted away the Port's and City's police power and discretion to manage the Long Beach Tidelands by constraining the Port's and City's ability to enforce future environmental, safety and security guidelines for drayage services. Specifically, under the settlement agreement, any attempt by the Port or City to require LMCs to meet more stringent environmental, safety or security requirements than those set out in the registration agreement would be a breach of the settlement agreement and authorize ATA to reinstate its lawsuit against Long Beach. For instance, if the current commission or a future commission required LMCs to create vehicle maintenance plans to ensure sophisticated diesel particulate filters are well-maintained and functioning properly, POLB would likely be in breach of the settlement. If you disagree with this, I urge you to re-read paragraphs 4 and 5 of the Stipulation And Settlement that the Port entered into. To repeat: *what the Port has done ties Long Beach's hands to address future needs of the port and surrounding communities—forever.*

#### *Additional Issues With The Settlement.*

Failure To Include Maintenance and Financial Capability Requirements. Unlike the POLB concession agreement, the registration agreement does not require LMCs to prepare maintenance plans or allow the port to inspect any LMC maintenance records. It is well-known that port trucks often go into disrepair because drivers cannot afford to properly maintain their trucks, let alone purchase new, cleaner models. Given that Long Beach's registration agreement provides no incentive for LMCs to financially support or assist drivers with maintenance or provide any requirements that proper maintenance occurs, there is great concern that the environmental benefits achieved by the ports' truck bans will be short lived.

Further, unlike the concession agreement, the registration agreement does not require LMCs to meet minimum financial capability requirements. Any LMC that certifies that it will comply with the registration agreement and pay a one-time \$250 registration fee and \$100 per truck annual fee can perform port drayage operations at Long Beach. Absent financial requirements, there is no guarantee that trucks will be well-maintained or that those performing port drayage will have the capital to purchase newer, cleaner trucks as they become commercially available. As a result, the drayage market will have to rely on perpetual government subsidies and taxpayer dollars to clean up future fleets. Relying on underpaid drivers to meet port environmental, safety, and security programs has been a failure in the past and there is no reason to expect that this situation will change.

Failure to Protect Local Neighborhoods From Safety Hazards Created by Trucking Operations. The registration agreement does not require motor carriers to comply with any truck routes or parking restrictions as a condition of obtaining port entry. As a result, POLB has removed an important mechanism to ensure trucking operations comply with local ordinances. In fact, POLB is precluded under the registration agreement from taking any corrective action against motor carriers who fail to comply with, e.g., local and state truck routes. Port trucks create not only public health impacts but safety concerns for local residential neighborhoods where trucks regularly park and traverse local roads. Such trucks could be extra-wide, over-height, and/or carrying hazardous materials—but POLB has contracted away its ability to do anything about this that is not authorized in the current registration agreement.

### **The Clean Air Action Plan**

The Clean Air Action Plan was meant to be a coordinated attack on the recognized problem of air pollution at POLB and the Port of Los Angeles. Although the Ports wound up differing over the POLA employee phase-in and certain minor details, both Ports enacted plans that had at their core the idea that the Ports would have control over the environmental performance of the LMCs through a concession agreement between the Port and the LMC.

Indeed, in the ATA lawsuit POLB Executive Director Richard Steinke told the court that “a key component of the CAAP is the Clean Trucks Program” and specifically references the “Drayage Truck Concession Requirements” which he attached as an exhibit to his August 19, 2008 Declaration. POLB’s Dr. Kanter told the federal court that: “without the mitigation measures provided by the CAAP and the CTP, the Port cannot approve urgently needed renovation projects to accommodate expanding trade volumes.”<sup>1</sup> POLB vigorously defended the wisdom, necessity and legality of its concession plan in its August 20, 2008 brief in opposition to ATA’s motion for a preliminary injunction, and again at every stage of this litigation, in the District Court and in the Ninth Circuit, until the very day

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<sup>1</sup> Declaration of Dr. Robert Kanter, August 19, 2008, para. 11.

that it abandoned its concession plan in favor of the so-called “registration agreement.” In fact, in its November 2008 brief filed in the Ninth Circuit, POLB vigorously defended the environmental benefits of its concession agreement and explained the detriment that would occur to the environment if its agreement were enjoined:

If this Court were to enjoin the concession contracts now, the environmental benefits achieved thus far would be undermined, and any future environmental benefits would be placed on hold. As the Ports have shown, the concession contracts play a key enforcement role in the scheme of the CTP. Without the concession contracts, the safety and environmental goals of the CTP will be compromised, and the public interest will be significantly undermined.

As I have discussed above, POLB has contracted away its right to bar an LMC from the Port for environmental and safety reasons, short of the state or federal government doing it for them. This is a 180 degree turn from the position that POLB had maintained from the day it enacted the CAAP up to the day it settled with ATA.

On a related note, much has been made of the fact that the air near the ports is cleaner because of the new trucks now serving both ports; people have argued that this shows that the concession plans are somehow not needed. Let’s look at the numbers: as of this writing, POLA has funded 2,200 new trucks, and POLB 171. POLA’s numbers reflect the fact that POLA will only subsidize trucks owned by LMCs *which have signed a concession agreement*. What this shows is that POLA’s concession agreement has been critical to cleaning up the air at both ports.

### **The Legality of the Settlement Agreement**

There are a number of legal problems with the settlement which we will be urging the Long Beach City Council to consider. Among these are:

#### *Invalid Delegation Of Police Powers.*

POLB cannot legally contract away its or the City of Long Beach’s police powers to a non-governmental entity. The police power is broadly defined in California to include “the protection of peace, safety, health and morals,” *Mott v. Cline*, 200 Cal. 434, 446 (1927), and includes actions taken to protect the environment. See, e.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal.App.4th 534 (2001). “It is settled that a government entity may not contract away its right to exercise the police power in the future. (See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800, 132 Cal.Rptr. 386, 553 P.2d 546 (*Avco*); *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 736-739, 73 Cal.Rptr.2d 409 (*County*

Mobilehome); Alameda County Land Use Assn. v. City of Hayward (1995) 38 Cal.App.4th 1716, 1724, 45 Cal.Rptr.2d 752 (Alameda County.) A contract that purports to do so is invalid as against public policy. (County Mobilehome, supra, 62 Cal.App.4th at p. 736, 73 Cal.Rptr.2d 409.)” Cotta v. City and County of San Francisco, 157 Cal.App.4th 1550, 1556-7 (2007).

Here, POLB has given ATA veto power over any changes in the so-called registration agreement, whether for environmental, safety or other reasons. For instance, if the port required LMCs to create vehicle maintenance plans for the trucks they dispatch, or conditioned port access on LMC’s dispatching that met certain environmental standards, ATA would have grounds to argue that the settlement was breached. Without these types of environmental safeguards, however, we believe that benefits of POLB’s Clean Trucks Program will be short-lived. Structuring the settlement in this way is plainly an unlawful delegation of Long Beach’s police powers to a trade association.

*Violation of the California Environmental Quality Act (CEQA).*

POLB’s statements to the public and to the federal courts recognize that air quality in Southern California is likely to suffer without the Port’s concession plan in place. POLB’s own briefs and declarations in the federal court action are evidence of the environmental benefits that the now-revoked program were expected to bring. Nevertheless, POLB did not conduct any CEQA review prior to entering its settlement agreement with ATA.

Under CEQA, a full environmental impact report is required where substantial evidence supports a “fair argument” that significant impacts “may” occur—even if other substantial evidence supports the opposite conclusion. No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75; Friends of “B” Street v. City of Hayward (1980) 106 Cal.App.3d 988, 1000-03. The “fair argument” standard imposes a “low threshold” for requiring the preparation of an EIR. Citizen Action to Serve All Students v. Thornley (1990) 222 Cal.App.3d 748, 754. Such a standard “reflect[s] a preference for requiring an EIR to be prepared.” Mejia v. City of Los Angeles (2005) 130 Cal.App.4th 322, 332. Under the “fair argument” standard, deference to the agency’s determination is not appropriate, and its decision not to require an EIR may be upheld only if there is *no* credible evidence to the contrary. Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307, 1317-18.

Here, it does not appear that POLB has considered whether CEQA applies to the settlement agreement itself—specifically, whether POLB’s abandonment of the environmental provisions in its concession agreement triggers a CEQA analysis. POLB did make CEQA findings in its November 2, 2009 Resolution purporting to conform POLB Tariff No. 4 to the settlement agreement, claiming statutory exemptions on these bases: rates, tolls, fares, and charges (Cal. Public Resources Code Section 21084); restoration or rehabilitation of mechanical equipment (Section 15301(d)); and “no possibility of significant adverse effect on the

environment” (Section 15061(b)(3)). In my view, the first two claimed exemptions are frivolous and the last cannot overcome the “fair argument” rule discussed above because the settlement will hamstring POLB’s ability to prevent LMCs from sending dirty trucks to service the port.

*Violation of the California Tidelands Trust.*

The Port of Long Beach is built on tidelands that are subject to the California Tidelands Trust. The land is owned by the State of California and was granted in trust to the City of Long Beach. According to the California State Lands Commission, which regulates uses of California tidelands<sup>2</sup>: “All uses, including those specifically authorized by the Legislature, must take into account the overarching principle of the public trust doctrine that trust lands belong to the public and are to be used to promote public rather than exclusively private purposes. The Legislature cannot commit trust lands irretrievably to private development because it would be abdicating the public trust.” POLB’s website states that it is obligated under the Tidelands Trust to “manage and develop the Harbor District for the sole purposes of commerce, navigation, fisheries and recreation.”<sup>3</sup>

In *State ex rel. California State Lands Com’n v. City of Long Beach*, 125 Cal.App.4th 767, 779 (2005), the California Court of Appeal stated: “The public interest in the Long Beach tidelands—which the City holds in trust for the people of the State of California—necessarily includes their protection and preservation.” By entering into the settlement agreement and by amending its tariffs, POLB will physically damage Port property, the Port environment and the workers and residents at or near the Port, and has impaired its own ability to manage and expand Port commerce—the very values that Mr. Steinke and Dr. Kanter told the federal court are so important.

**How To Resolve The Problems Created By The Settlement**

This is simple: revoke it. POLB signed it; POLB can tear it up, get back in the ATA lawsuit and defend the concession plans that POLB defended for years as prudent, necessary, wise and legal.

Thank you for your consideration of this letter.

Yours truly,



David Pettit  
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Natural Resources Defense Council

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<sup>2</sup> [www.slc.ca.gov/Policy.../Public\\_Trust/Public\\_Trust\\_Doctrine.doc](http://www.slc.ca.gov/Policy.../Public_Trust/Public_Trust_Doctrine.doc).  
<sup>3</sup> <http://www.polb.com/contact/qc.asp#533>.