

The California State Lands Commission Has a Duty and Authority to Require Bay Trail Mitigation from Chevron in Connection with Issuing a New 30-year Lease for Operation of Long Wharf

The February 2006 Draft Environmental Impact Report for the Chevron Richmond Long Wharf Marine Terminal Lease Consideration (DEIR) recognizes:

"Granting a new lease for Long Wharf operations offers the opportunity to examine the potential for any adverse impacts to public access opportunities along this section of the Bay Trail segment linking Point Richmond with Point Molate. In addition, if the lease were denied, the shoreline facilities supporting the Long Wharf could be removed. With this area open, a trail could go through the area with no direct conflicting land uses, and the land could serve as safety buffer between the trail and the Refinery."

However, the DEIR did not recommend mitigation for the significant adverse planning, recreational, transportation and land use impacts of a new 30-year lease.

As a result, the State Lands Commission received a myriad of letters and emails on the DEIR from elected officials, government agencies, public interest groups, organized labor and individuals recommending mitigation by completing the Bay Trail connection with the City of Richmond's Point Molate property. These included communications from Senator Don Perata, Assemblywoman Loni Hancock, County Supervisor John Gioia, the Mayor of Richmond and a majority of the City Council, ABAG Bay Trail Project, Bay Access, Bicycle Trails Council of the East Bay, East Bay Bicycle Coalition, East Bay Regional Park District, Marin Bicycle Coalition, Plumbers & Pipefitters Local 342, Point Richmond Neighborhood Council, Save The Bay, TRAC and about 100 individuals. Letters in the March 7, 2007 Finalizing Addendum to the DEIR contain substantive comments supporting Bay Trail impacts, nexus and mitigation.

Despite these comments on the DEIR, the Finalizing Addendum stated:

"The proposed Project is located on State tide and submerged lands in San Francisco Bay that are under the jurisdiction of the California State Lands Commission. The proposed lease area does not extend over the upland area of Chevron's facilities, which are subject to the cited land use plans in which the Bay Trail is indicated and, therefore, would not affect the implementation of projects that are consistent with such plans."

This is an unduly limiting view of the CSLC's authority under both CEQA and the California Public Resources Code.

The CSLC has broad authority to require Bay Trail mitigation from Chevron. Such offsite dedication of easements and the provision of funds for offsite acquisitions and environmental improvements has been a standard operating procedure for public agencies for decades. Numerous court rulings uphold the power (and duty) of public agencies to acquire offsite mitigation lands to mitigate the adverse

environmental impacts of projects they approve. For example, in *Golden Gate Bridge Authority, Etc. v. Muzzi* (1978) 83 Cal.App.3d 707, 713, the court held that the Golden Gate Bridge Authority had authority to condemn offsite marshlands to set aside and manage as environmental mitigation for the adverse impacts of a ferry terminal project in Larkspur. So too here, the CSLC has ample authority to require Chevron to dedicate offsite lands for the Bay Trail as mitigation for the continuing environmental harm caused by the Long Wharf.

An agencies' powers to condemn implicitly include the power to condemn for necessary mitigation of resulting environmental effects, and that when a project requires mitigation, the agency's ability to mitigate by condemnation may be implied as an incident to its other statutory powers, as long as the test of necessity can be met. The CSLC, in carrying out its duties under CEQA, has the implied power of eminent domain over the Chevron property and certainly may then condition its lease renewal on Chevron granting the access; it can otherwise ultimately refuse to enter into the renewal.

The CSLC has the power to deny a new lease if the public interests can't be accommodated. Chevron has no vested interest in the lease situation or the improvements which would result in a "taking" or an "exaction" if the lease were denied. Therefore the CSLC has the power to condition a new lease on additional consideration to be "paid" by Chevron in the form of granting shoreline access for the Bay Trail. The fact that the shore property is not under the direct jurisdiction of the CSLC is irrelevant.

Section 13 of the 1947 Lease from CSLC to Socal (No. 236) provides that upon termination of the Lease, "the State and Lessee will agree on whether said wharf and causeway shall be left on the demised premises in their then existing condition or removed, and if the State shall request the removal of the wharf and causeway, Lessee shall do so and restore the demised premises as nearly as possible to the condition existing at the date of execution of this lease." The effect of this provision is that Chevron has no "vested" property rights in the wharf etc., because the State has the power to refuse to enter into a new lease and can require Chevron to remove the wharf, etc. and restore the premises with no compensation; alternatively, the State can take over ownership of the wharf etc. by not requiring their removal. There would be no "taking" requiring compensation under the 5th Amendment because Chevron entered into the lease voluntarily and agreed to that particular provision. If the State enters into a new lease with a requirement of granting rights over part of the littoral for the Bay Trail, it is just in the nature of additional rent.

In the US Supreme Court case *United States v. Alaska*, 503 U.S. 569 (1992), the Court quoted from *Nollan* in stating that the rule of the case had no applicability to the situation at hand. In this Alaska case, the state wanted to build port facilities into Norton Sound and needed federal permit because of the impact on navigable waters. The federal government conditioned approval on the state's disclaiming

rights to additional submerged lands that it could claim within its (3-mile) boundary if the facilities moved the coastline seaward. The state argued that the federal government didn't have authority to impose this condition. The Court held for the federal government stating "it would make little sense, and be inconsistent with Congress' intent, to hold that the Corps legitimately may prohibit construction of a port facility, and yet to deny it the authority to seek the less drastic alternative of conditioning the permit's issuance on the State's disclaimer of rights to accreted lands." The Long Wharf situation is analogous to the Alaska one. The Court also talked about the regulations involved in the review authorizing consideration of a wide range of factors and impacts on the public interests, and that these were valid. The analogy for the Long Wharf lease involves the requirements of CEQA and the CSLC's own statutes and policies.

Notwithstanding the CEQA issues, the Commission could condition the new 30-year lease upon Chevron providing land and funding construction of the Bay Trail link. Article 9, Section 2802. Commission Criteria of the Public Resources Code states: "The Commission in determining pursuant to Public Resources Code Section 6702(b)(3) whether a lease, contract or other instrument is in the best interest of the State will consider whether the use, project or activity permitted by such instrument is: (d) conducive to public access; (e) consistent with environmental protection; (f) otherwise in the best interests of the state." Section 6301 of the California Public Resources Code, which provides for the Commission having exclusive jurisdiction over submerged lands, states that the Commission "may lease...such lands, as provided by law, upon such terms and for such consideration, if any, as are determined by it."

In summary, the legislature declared in Section 21002 of CEQA that "... public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects". Section 6371 of the Public Resources Code requires the Commission to comply with the EIR requirements of CEQA before leasing any of its lands. Section 21081 of CEQA bars an agency from approving any project for which an EIR has been certified and which identifies one or more significant effects on the environment unless changes or alterations are required which mitigate the effects. The statutory provisions establishing and governing the CSLC and CEQA clearly give the Commission authority to require Bay Trail mitigation, e.g. Section 6301 allows the CSLC to include conditions in its lease which involve property not owned by it, and Sections 6371 and 21081 require it to mitigate, even where impacts occur with respect to properties not owned by it.

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