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**VIA EMAIL AND U.S. MAIL**

Lieutenant Governor John Garamendi (Lt.Governor@ltgov.ca.gov)  
State Controller John Chiang (john@sco.ca.gov)  
Director of Finance Michael Genest (debbie.price@dof.ca.gov)

State Lands Commission  
100 Howe Avenue, Suite 100-South  
Sacramento, CA 95825-8202

Re: Bay Trail mitigation of State Lands Commission 30-year tidelands  
lease to Chevron (Calendar Item 44, 12/3/08 Hearing Agenda)

Dear Chairman Garamendi and State Lands Commissioners:

TRAC, the Trails for Richmond Action Committee, has worked tirelessly for nearly a decade to complete the San Francisco Bay Trail linking the Eastshore State Park, the Miller-Knox, Keller Beach, and Pt. Pinole Regional Parks, the Rosie the Riveter National Historical Park, and six City parks along Richmond's 32 miles of spectacular shoreline. As legal counsel to TRAC, I write to express its vigorous support for the request by the City and the East Bay Regional Parks District that this Commission require Bay Trail mitigation from Chevron as a condition to approval of Chevron's proposed 30-year lease for operation of Long Wharf. The Commission has both the authority and the duty to require this mitigation, as I explain below.

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

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 though the area with no direct conflicting land uses, and the land could serve as safety buffer between the trail and the Refinery.

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However, the DEIR did not recommend mitigation for the significant adverse planning, recreational, transportation and land use impacts of a new 30-year lease, apparently due to a mistaken belief that this Commission lacked the authority to require this mitigation.

As a result, this Commission received scores 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. Supporters of Bay Trail mitigation included Senator Don Perata, Assemblywoman Loni Hancock, County Supervisor John Gioia, the Mayor of Richmond and a majority of its 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 nearly 100 individuals. Numerous letters in the March 7, 2007 Finalizing Addendum to the DEIR provide extensive, substantive comments supporting Bay Trail 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 limited view of the Commission's authority under both CEQA and other provisions of the California Public Resources Code. The Commission has broad authority to require Bay Trail mitigation from Chevron. 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 just across the Bay in Larkspur. So too here, the Commission has ample authority to require Chevron to dedicate offsite lands for the Bay Trail as mitigation for the continuing environmental impact caused by the Long Wharf.

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The Commission clearly has the power to deny the requested lease if the public's interests can't be protected. Chevron has no vested interest in the expired lease or in the improvements Chevron has made on the lease property. It made those improvements with full knowledge that its lease provided the Commission with plenary authority to keep those improvements, or to require their removal, when the lease expired.

Dispositive of this point is section 13 of the Commission's 1947 Lease to Standard Oil Company of California (now Chevron). It 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.*" *Id.*, emphasis added. Consequently, Chevron has no "vested" property rights in the wharf. The Commission has the power to refuse to enter into a new lease and can require Chevron to remove the wharf and restore the premises with no compensation. Alternatively, the Commission can assume ownership of the wharf by not requiring its removal. Either way, there would be no "taking" requiring compensation under the Fifth Amendment because Chevron entered into the lease voluntarily and agreed to this provision.

Since the Commission has the power to deny lease renewal, it clearly 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 Commission is irrelevant. The Commission thus has broad authority to require that Chevron grant the public a right of way over Chevron's adjacent lands for the Bay Trail.<sup>1</sup>

It has been suggested that the Supreme Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), might preclude the Commission from requiring the Bay Trail mitigation. This is incorrect. *Nollan* is readily distinguishable, as the land there in question was not leased from the public. Here, Chevron seeks to lease

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<sup>1</sup> Moreover, the Commission may always exercise its power to condemn. The Commission's powers to condemn implicitly include the power to condemn for necessary mitigation of resulting environmental effects. When a project requires mitigation, the Commission's authority 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 Commission, in carrying out its duties under CEQA, has the implied power of eminent domain over the Chevron property and certainly may thus condition its lease renewal on Chevron granting the access. Alternatively, of course, the Commission can simply refuse to renew the lease.

*public* land. Therefore, the case analogous to the Chevron Long Wharf situation is *United States v. Alaska*, 503 U.S. 569 (1992). There the Supreme Court stated that the rule of the *Nollan* case had no applicability where, as here, *publicly*-owned lands were at stake. In *Alaska*, the state wanted to build port facilities into Norton Sound and needed a 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 lacked 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 strikingly similar to that in *U.S. v. Alaska*, with this Commission occupying the same position as the federal government, and Chevron that of Alaska. Under *U.S. v. Alaska*, this Commission has broad authority to require the Bay Trail mitigation.

The *Alaska* Court also discussed the fact that the state regulations involved in the review authorized consideration of a wide range of factors and impacts on the public interests, and held these were valid restraints on development of public lands. So too here, the Long Wharf lease renewal is subject to the requirements of both CEQA and this Commission's own enabling statutes and its internal policies, and those laws confer wide mitigation authority. For example, even apart from its mitigation authority under CEQA, the Commission could condition the new 30-year lease upon Chevron providing land and funding for construction of the Bay Trail link. Article 9, section 2802 of the Commission's own regulations 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 likewise vests the Commission with broad and exclusive jurisdiction over submerged lands,

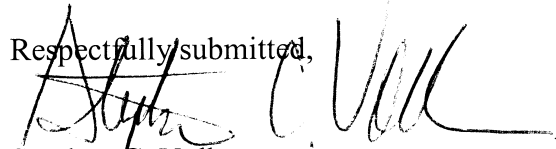
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directing that the Commission “may lease...such lands, as provided by law, upon such terms and for such consideration, if any, as are determined by it.

In summary, the Commission must heed the Legislature’s admonition 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 21081 of CEQA likewise bars this Commission 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. 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 6301 allows the Commission to include conditions in its lease applicable to property not owned by the Commission. Sections 6371 and 21081 require the Commission to mitigate, even where impacts occur with respect to properties the Commission does not own. These statutes establishing and governing the Commission’s public trust and CEQA duties clearly give the Commission authority to require Bay Trail mitigation.

Accordingly, we respectfully ask that the Commission require Chevron to provide the requested Bay Trail mitigation.

Respectfully submitted,



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Action Committee

SCV:taf

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