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FEDERAL ENERGY
REGULATORY COMMISSION

John H. Burnes, Jr.
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February 15, 2008

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: OEP/DG2E/Gas 1
Long Beach LNG Import Project
Docket No. CP04-58-000, et al.
§ 375.308(x)

Dear Ms. Bose:

Enclosed for filing please find the responses of SES Terminal, LLC ("SES") to the Environmental Information Request submitted on January 18, 2008. The responses to Data Request Numbers 1, 2, 3, 4, 5, and 8 contain information which is sensitive, protected critical energy infrastructure information ("CEII") as defined in 18 C.F.R. § 388.113(c). Accordingly, SES is filing an original and two (2) copies of the responses to those Data Requests in a separate envelope which is marked in bold print **"CONTAINS CRITICAL ENERGY INFRASTRUCTURE INFORMATION – DO NOT RELEASE"**.

An original and seven copies of the responses to Data Request Numbers 6 and 7, together with this Transmittal Letter, are submitted for inclusion in the Public File in this proceeding.

Sincerely yours,

John H. Burnes, Jr.
Counsel for SES Terminal, LLC

Attachment

cc: Rich McGuire (FERC)
Michael Boyle (FERC)
Amy Davis (Natural Resource Group, Inc.)
Lieutenant Commander Peter Gooding (U.S. Coast Guard)
Antal Szijj (U.S. Army Corps of Engineers)
Service List

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SES Terminal LLC (SES)
Docket No. CP04-58-000, et al.
Long Beach LNG Import Project
ENVIRONMENTAL INFORMATION REQUEST
(Dated 1/18/08)

Public Information Response

1. Provide:

a. a color navigational map(s), in 8-inch by 11-inch format, that shows the entire liquefied natural gas (LNG) vessel transit route from the time the vessel enters the Vessel Traffic System of Los Angeles – Long Beach to the proposed LNG terminal location and adjacent shorelines; and

Response:

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b. a graphic overlay on the LNG vessel transit map illustrating the following "Zones of Concern"[1] from the center of the vessel route to each shoreline:

(1) Zone 1: heat flux of 37.5 kilowatt (kW)/per square meter (m^2) produced by a pool fire - extending out to about 500 meters (0.3 mile) from the channel;
(2) Zone 2: heat flux of 5 kW/m^2 produced by a pool fire - extending out to about 1,600 meters (1 mile) from the channel; and
(3) Zone 3: a flash fire from a vapor cloud - extending out as far as 3,500 meters (2.2 miles) from the channel.

Response:

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c. On the LNG vessel transit map, where applicable and feasible, indicate the locations of the sensitive environmental sites/areas listed below. Much of this information has already been provided by SES for the immediate area surrounding the terminal but the information was not in graphic form and did not adequately cover all of the "Zones of Concern."

(1) population density (as defined in enclosure 2 of NVIC 05-05);
(2) shellfish nurseries;
(3) critical habitat, migration routes, feeding/breeding grounds of federally listed and/or state-listed endangered or threatened species;

---

[1] The "Zones of Concern" are described in Enclosure 11 of the U.S. Coast Guard's Navigation and Vessel Inspection Circular (NVIC) 05-05. These zones are based on the report *Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water*, December 2004 (SAND2004-6258) prepared by Sandia National Laboratories. If use of larger-sized LNG vessels (greater than 148,000 cubic meter cargo capacity) is anticipated, please use zones resulting from an analysis of larger-sized vessels based on a methodology approved by the U.S. Coast Guard.

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(4) migration routes, major feeding/breeding grounds for marine mammals;
(5) wetland areas;
(6) *marine sanctuaries*;
(7) wildlife refuges/sanctuaries;
(8) migratory bird feeding/breeding grounds;
(9) state and National Parks;
(10) tribal lands/tribal fishing areas (treaty rights fishing areas);
(11) coral reefs;
(12) marine protected areas;
(13) essential fish habitats; and
(14) any other natural area or known population of a wildlife species protected by environmental law or Executive Order or designated environmentally sensitive by an environmental agency of the federal, state, or local government.

Response:

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2. Provide a written description of the entire LNG vessel transit route from the outer limit of the Vessel Traffic System of Los Angeles – Long Beach to the proposed location for the LNG terminal, including adjacent shorelines, discussing the existing human, aquatic, and terrestrial resources that may be impacted by LNG vessel transit or an ignited or unignited LNG spill (appropriate impact levels based on Sandia's "Zones of Concern" should be used). *A higher level of resource description should be provided for environmentally sensitive areas,* while a more general discussion of non-sensitive resources along the route is acceptable. If the LNG vessel transit route or a portion of the route is so far from the shoreline that shoreline habitats would not be impacted, a statement to this effect can be made and justified and a detailed analysis of the shoreline need not take place. However, an explanation of why LNG vessel steerage problems would not result in impacts on the shore should be provided (i.e., waterway is too shallow to allow for the vessel to come into damaging proximity to shore). Similarly, for aquatic, air, and other resources, if they would not be affected, a statement to that effect along with a short explanation will suffice. Describe the affected environment for the following aspects of the waterway/shoreline listed below. If any of these aspects are not applicable, include a specific statement to that effect.

Response:

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3. For all of the applicable environmental resources listed in item 2, discuss the consequences and impacts of LNG vessel transit and operation and potential impacts of an ignited or unignited LNG spill from either an accident or intentional attack (using appropriate "Zones of Concern") along the entire LNG vessel transit route. A higher level of impact analysis should be provided for environmentally sensitive areas and a more general discussion of non-*sensitive resources along the route is acceptable. As mentioned above, detailed discussions* are not necessary if specific resources would not be impacted. For each resource impacted, state SES' opinion as to the environmental significance of such impacts before and after mitigation (based on the Council on Environmental Quality definition of significance stated at Title 40 CFR Part 1508.27).

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Response:

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In addition to the resources listed in items 2a-ee, be sure to address:

a. impacts of LNG vessel transit on other marine traffic on the waterway for both commercial and recreational vessels (time delays, safety issues, any economic impacts); and

Response:

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b. Impacts of LNG vessel transit on maritime safety issues (i.e., vessel transit during tides, protection from high seas, natural hazards including reefs, rocks, sandbars, and manmade obstructions).

Response:

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4. Update the marine traffic study conducted in your initial filing, and include a description of the density and character of marine traffic on the waterway (average number of vessels using the waterway per day and types of vessels) and importance of vessel transit routes to commercial vessels (i.e., economic) and recreational vessels.

Response:

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5. Provide a color navigational map(s), in 8-inch by 11-inch format, that shows the entire LNG vessel transit route in relation to U.S. Navy operations.

Response:

Attachment 5-1 shows the approach channels to the Los Angeles-Long Beach harbor complex and U.S> navy operational areas. LNG Carriers would be in designated shipping fairways when transiting to the LNG terminal and subject to the same restrictions as any other commercial vessel transiting to or from the harbor complex.

Respondent's Name:	James Nickerson
Position:	Environmental Manager
Telephone Number:	712.898.9320

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6. Update the status of SES' efforts to gain access to and control of its proposed terminal site since receiving the January 22, 2007 letter from the Executive Director of the Port of Long Beach informing SES that the Board of Harbor Commissioners declined to lease the proposed LNG import facility site.

Response:

On January 22, 2007, the Board of Harbor Commissioners issued the following press release:

> Statement on LNG
>
> After deliberation, based upon the attached opinion from the City Attorney which concludes that the Environmental Impact Report on the proposed LNG project "is and in all likelihood will remain legally inadequate," and since an agreement between Sound Energy Solutions and the City does not appear to be forthcoming, the Board of Harbor Commissioners disapproves the project and declines to pursue further negotiations.

On that same date, the Executive Director of the Port of Long Beach ("POLB") sent a letter to SES, stating that the Board of Harbor Commissioners ("Board") "declines to enter into a lease" and has directed POLB staff to stop processing the SES application for a harbor development permit. The press release explained that the Board's decision was based upon an opinion of the City Attorney that the joint Environment Impact Statement/Environmental Impact Report ("EIS/EIR") that was then being prepared by Staffs of the Federal Energy Regulatory Commission ("FERC" or "Commission") and the Port of Long Beach ("POLB") to satisfy the requirements of the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA") was fundamentally flawed and inadequate under both NEPA and CEQA, and that such flaws could not be cured.

On February 8, 2007, SES notified FERC that it had filed a "Petition for Writ of Mandate" in the Superior Court for the State of California, County of Los Angeles SES Terminal, LLC v. Port of Long Beach, et al., Case No. BS 107298 ("Superior Court Petition").[2] SES advised the Commission that the Petition for Writ of Mandate requests the Court to issue a writ of mandate commanding POLB and the Board to set aside, annul, and vacate the January 22, 2007 decision to terminate review of the SES' Long Beach LNG Project ("Project"), and to direct the POLB to prepare a Final EIR prior to approving or disapproving the Project. SES explained its belief that the resumption of the CEQA review process would lead to a favorable EIR, which, in turn, would provide the basis for POLB and SES to resume negotiations and enter into a lease for the site of the proposed LNG import terminal.

The Petition For a Writ before the Los Angeles Superior Court has been fully briefed and is now ripe for a decision. A hearing was set for February 11, 2008, but has now been rescheduled for a date in March. As soon as SES receives notice from the court of the new date for the hearing, it will provide the information in a supplement to this response. SES anticipates that the Judge will issue a decision at or shortly after

[2] On February 8, 2007, SES responded to the January 31, 2007 letter from the Director of FERC's Office of Energy Projects (OEP) asking SES to explain why the OEP should continue to process SES' application in light of the action of the Board. On that date, SES also responded to a motion filed by Californians For Renewable Energy, Inc. ("CARE"), requesting FERC to terminate SES' application on the ground that it was incomplete for lack of a proposed project site. In both of those pleadings, SES noted the filing of the Petition for Writ of Mandate to compel the Port of Long Beach and the Board to resume processing the EIR for the Long Beach LNG Import Project pursuant to CEQA. A copy of the Petition for Writ of Mandate was attached to SES' Answer to the CARE motion.

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the hearing that will now take place in March.[3] In pleadings filed before the Superior Court, SES has demonstrated that Respondents POLB and the Board of Harbor Commissioners have a clear duty under CEQA to complete and certify an EIR for the Project, and that the abrupt abandonment of the CEQA process was arbitrary and completely unjustified. SES' substantive pleadings also demonstrate that the purported "disapproval" of the Project based upon the supposed inability to prepare an adequate EIR is legally and factually unsupportable. POLB has a legal obligation to prepare an EIR, and it cannot show that it is impossible to prepare an adequate EIR. Moreover, POLB agreed in a May 2003 Agreement, *setting forth the duties and obligations of the parties with respect to the construction and operation of the* Project, to cooperate with SES in the application and environmental review process. This obligation was acknowledged by the Long Beach City Council twice in 2005 when they voted to defer a final decision on the siting of the Project until completion of the EIR. Finally, the claim that a long-term gas supply agreement with SES was not "forthcoming" is incorrect and, in any event, does not support the decision to cease CEQA review.[4] The negotiations for the LNG supply agreement were on-going at the time of the Board's action and ended only as a result of the decision to abandon the EIR process. In fact, the parties specifically contemplated that the supply agreement would not be finalized until after certification of the EIR, not before.[5]

As the Commission is aware, the joint efforts of SES, POLB, and FERC Staff resulted in the issuance of a Draft EIS/EIR in October 2005. The Draft EIS/EIR contains a detailed analysis and discussion of the environmental and safety impacts posed by SES' LNG project. Among other things, the Draft EIS/EIR concludes that, with the implementation of certain mitigation measures, SES' LNG Project posed no substantial risks to public safety and security. SES anticipates a decision by the Judge on or shortly after the hearing in March. A favorable decision will invalidate the illegal and premature action by POLB and the Board of Harbor Commissioners and will result in the resumption of the interrupted EIR process and a favorable environmental review under CEQA. SES believes that that outcome, in turn, will require the parties to resume negotiation.

Respondent's Name:	John Burnes
Position:	Attorney
Telephone Number:	202.298.1865

[3] A hearing and decision in the case has been rescheduled on a few occasions. After a previous rescheduling, the hearing was set for December 13, 2007, but was postponed once again due to the workload of the trial judge assigned to the case. A new judge was assigned in mid-December, and the hearing was rescheduled for February 11, 2008. As noted, the hearing will now take place in March.

[4] The negotiation for a long-term gas supply between the Long Beach Gas and Oil Department and SES had been ongoing until one business day before the January 22, 2007 decision of the Board of Harbor Commissioners to terminate the preparation of the EIR.

[5] For the convenience of the Commission, SES is attaching copies of all the briefs submitted by SES and Respondents POLB, Board of Harbor Commissioners, and the City of Long Beach. Because of the large number of parties to this proceeding and the expense of reproducing all of the briefs, SES will not include copies of the briefs with these data responses served on the parties. SES will, however, provide copies to those parties who request them.

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7. **Demonstrate how SES would obtain the required legal/governmental control over the activities that occur within the portions of the thermal radiation exclusion zones that fall outside of the proposed site property line which are necessary to meet the federal safety requirements at Title 49 CFR Part 193.**

Response:

On October 8, 2005, the environmental staff of the Federal Energy Regulatory Commission (FERC or Commission) and the Port of Long Beach (POLB) issued a draft Environmental Impact Statement/Environmental Impact Report (DEIS/DEIR) on the LNG import terminal facilities proposed by SES Terminal LLC (SES) in the Port of Long Beach, California. Among other things, the DEIS/DEIR analyzed the thermal and vapor dispersion Exclusion Zones for the site of the proposed LNG terminal facilities (Exclusion Zones) (DEIS/DEIR, Section 4.11.5). The DEIS/DEIR determined that no prohibited activities or buildings currently exist within the thermal radiation Exclusion Zones, but noted that portions of several of these Exclusion Zones extend beyond the LNG terminal site property line. Title 49 C.F.R. Part 193 requires that either a government agency or SES must exercise legal control over activities within the Exclusion Zones for as long as the facility is operation. Accordingly, the DEIS/DEIR recommended (DEIS/DEIR, p. 4-140) that "SES provide in its comments on the draft EIS/EIR, or in a separate document submitted at the same time, evidence of its ability to exercise legal control over the activities that occur within the portions of the thermal radiation exclusion zones that fall outside the site property line that can be built upon."

On December 8, 2005, SES filed its response. SES noted that it was negotiating with POLB and the adjacent tenants to limit the use of the leased property within the Exclusion Zones, but would not be able to complete the negotiations by the deadline for filing comments on the DEIS/DEIR. SES advised the Commission that it would continue the negotiations, but requested an extension of time or a modification of the condition to enable SES to provide evidence of legal control prior to initial site preparation or before SES is given authority to begin construction, as the Commission had allowed applicants in other LNG import projects.

As the DEIS/DEIR notes (p. 4-140), POLB owns the land surrounding the LNG terminal site, but leases parcels to other tenants. Portions of the Exclusion Zones adjacent to the proposed LNG terminal site are currently occupied by three third parties (i) the Fremont Forest Group Corporation (Fremont) which occupies under a lease with POLB, and (ii) the Department of Oil Properties of the City of Long Beach (DOP) which occupies an area pursuant to a memorandum of understanding with POLB and a resolution of the POLB Board of Harbor Commissioners. The Exclusion Zones also extends onto an area, designated T124, which is owned by POLB, but not currently occupied by a third party tenant.

SES describes the planned process through which legal control over prohibited activities and structures will be established in those portions of the Exclusion Zones that currently lie outside the site property boundary.

A. <u>Requirements Applicable to the Exclusion Zone</u>

The proposed LNG terminal facilities are subject to the siting provisions of Title 49, Part 193, Subpart B which require that each LNG container and LNG transfer system have Exclusion Zones based upon three radiant flux levels, calculated in accordance with the regulations: 10,000 Btu/ft^2 - hr, 3,000 Btu/ft^2 - hr, and 1,600 Btu/ft^2 - hr. The thermal radiation distances were calculated by FERC Staff for the proposed facilities. The DEIS/DEIR determined that the Exclusion Zones for the 10,000 Btu/ft^2 - hr incident flux would not extend beyond the property line. However, based upon the analyses of the thermal radiation from the LNG storage tanks and trailer truck loading storage tank, several exclusion zones for the 3,000

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Btu/ft^2 - hr and 1,600 Btu/ft^2 - hr incident flux levels extend beyond the property line onto POLB property currently occupied by Fremont, DOP, as well as T124 (DEIS/DEIR of October 2005, p. 4-140). As of January 18 2008, SES understands that the uses of these properties (Fremont, DOP and T124) has not changed. Thus, POLB and/or SES would need to be able to exercise legal control over activities and uses within the portions of the Exclusion Zones outside the property site only with respect incident flux levels of 1,600 Btu/ft^2 - hr and 3,000 Btu/ft^2 - hr.

Under Section 2.2.3.2(a) of NFPA 59A, the following requirements apply to any activities within those Exclusion Zones:

- An incident flux level of 1,600 Btu/ft^2 – hr requires that the area not be utilized for an outdoor assembly of 50 or more people
- An incident flux level of 3,000 Btu/ft^2 – hr requires that the area not be used for any building or structure for assembly, educational, health care, detention/correction or residential occupancies

B. Current Activities and Uses

The DEIS/DEIR determines that there are no prohibited activities or buildings within the Exclusion Zones on the property adjacent to the terminal site occupied by Fremont, DOP, and the unoccupied T124 area owned by POLB. Fremont uses the property for the storage and handling of lumber, wood, and other related products, and DOP uses its property for oil production operations. These uses are highly unlikely to involve the activities prohibited in connection with incident flux levels of 1,600 Btu/ft^2 - hr (outdoor assembly of 50 or more people per Section 2.2.3.2(a) of NFPA 59A) or 3,000 Btu/ft^2 - hr (structures for assembly, education, health care, detention or residential purposes per Section 2.2.3.2(a) of NFPA 59A). The Fremont lease with POLB imposes certain restrictions on uses affected by the Exclusion Zones. Any change in the uses from those set forth in the lease will require POLB's approval. The arrangement between POLB and the DOP does not typically involve the use of the site in a way that would affect the Exclusion Zone requirements. POLB owns the T124 area, and there are currently no prohibited uses or structures on the property.

C. Completion of Commercial Negotiations

As SES previously advised the Commission at the time of the issuance of the DEIS/DEIR, it was engaged in negotiations with POLB and other tenants concerning the means to achieve legal control over those areas to comply with the Exclusion Zones requirements. SES further advised the Commission that the negotiations could not be completed and a final definitive agreement reached until after the Commission issues a final order approving the Long Beach LNG Import Project. Those negotiations ceased, however, with the January 22, 2007 decision by POLB and the Board of Harbor Commissioners to stop review of the SES LNG project under the California Environmental Quality Act (CEQA). Once POLB resumes its CEQA review of the SES Application for a Harbor Development Permit, SES intends to recommence negotiations with POLB and the adjacent tenants concerning the means to achieve legal control over the portions of the Exclusion Zone outside the terminal property line to ensure that the uses and structures within those areas comply with the Exclusion Zone regulations. Consistent with CEQA requirements, however, POLB may not approve any property lease agreement or amendment until the CEQA review process is completed. Thus, as a practical matter, negotiations cannot begin until the CEQA process is restarted, and negotiations cannot be completed until the CEQA process is finished and the Commission issues its final order.

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Under these circumstances, SES reiterates its request to extend the time to meet the condition in the DEIS/DEIR of October 2005 or to modify the condition to require that SES provide evidence of the ability to exercise legal control over the activities in the portions of the Exclusion Zones prior to initial site preparation and before SES is given any authority to begin construction. SES submits that such an extension or modified condition would acknowledge the impact of POLB's January 22, 2007 decision on the commercial negotiations and would also be consistent with the approach taken by the Commission in other LNG terminal projects. See, e.g. ***Cameron LNG, LLC, 104 FERC ¶61,269 (Environmental Condition No. 40, at p. 61,894) (2003); Weaver's Cove Energy, LLC, 112 FERC¶61,070 (Environmental Condition No. 40, at p. 61,553) (2000)***. SES is willing to accept the identical condition in this proceeding.

Respondent's Name:	Thomas Giles
Position:	Executive Vice President
Telephone Number:	562.495.9875

8. Please provide all geotechnical data and seismic design information prescribed in the Commission's "*Draft Seismic Design Guidelines and Data Submittal Requirements for LNG Facilities*", January 23, 2007 {http://www.ferc.gov/industries/lng/lng-seis-guide.pdf} that has not previously been submitted. For any relevant information that has been submitted already, please provide the filing date.

Response:

This response contains Critical Energy Infrastructure Information

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ATTACHMENT

TO

RESPONSE NO. 6

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COPY

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Attorneys for Petitioner SES Terminal, LLC

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LOS ANGELES SUPERIOR COURT

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SES TERMINAL, LLC, a Delaware limited liability company; Petitioner, v. THE PORT OF LONG BEACH; BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH; CITY OF LONG BEACH; and Does 1 through 50, Respondents.	CASE NO. BS 107298 **PETITIONER SES TERMINAL'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** Date: October 31, 2007 Time: 9:30 a.m. Dept.: 85 Assigned to: Honorable Dzintra I. Janavs

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PETITIONER SES TERMINAL'S OPENING BRIEF

SES Terminal, LLC ("SES") seeks a writ of mandate to compel Respondents The Port of Long Beach ("POLB"), the Board of Harbor Commissioners of the City of Long Beach ("Board"), and the City of Long Beach ("City") to fulfill their duty under the California Environmental Quality Act ("CEQA") to complete and certify an Environmental Impact Report ("EIR") for SES' liquefied natural gas ("LNG") terminal in the Port of Long Beach.

I. INTRODUCTION

After luring SES away from the Port of Los Angeles and inducing SES to locate its proposed LNG terminal in Long Beach, Respondents abruptly and capriciously abandoned the CEQA process for the proposed facility, laying waste to years of effort and SES' $80 million investment in the project. Giving in to shifting political winds ushered in by a new City administration that was intent on derailing the proposed LNG terminal, and despite substantial completion of the EIR process, Respondents unceremoniously yanked the rug out from under SES during a closed-door meeting of the Board on January 22, 2007.

Immediately following the Board's action, Respondents issued a press release purporting to "disapprove" the project based on the Respondents' own supposed inability to prepare an adequate EIR and a self-fulfilling prophecy that they would not be able to negotiate a long-term LNG supply agreement with SES. Both justifications are pretextual and do not support the Board's action. Respondents are not only capable of finalizing the EIR, they are legally obligated to do so. Moreover, the May 8, 2003 agreement between SES and the City contemplates finalization of the LNG supply agreement *after* certification of the EIR, not before. The negotiations for the LNG supply agreement were ongoing at the time of the Board's action and ended only as a result of Respondents' abandonment of the EIR process.

Thus, the justifications offered by Respondents for the so-called "disapproval" of the planned LNG facility amount to little more than a deceptive ruse. By abandoning the EIR process, Respondents violated not only their duties under CEQA but also their obligations under the 2003 agreement between SES and the City that requires Respondents to cooperate with SES in the application process. Accordingly, a writ of mandate should issue from this Court directing the

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Board to set aside its purported January 22, 2007 "disapproval" of the LNG Project and commanding POLB to complete and certify the Final EIR within a reasonable time frame. Since the final EIR is already substantially complete, this should not be an onerous task.

II. STATEMENT OF FACTS

A. The LNG Project

California, which sits at the end of regional interstate gas pipelines, produces only about 15% of its own natural gas requirements. Because the interstate pipelines also supply markets in the Midwest and Northeast, California is vulnerable to price volatility when national gas-supply shortfalls develop. The LNG Project will provide a critical alternative supply of clean-burning natural gas to help stabilize or even reduce natural gas prices and help California avoid another electrical power crisis. (2 RP[1] 00297-00299.)

In 2002, SES engaged in discussions with the City of Los Angeles regarding the construction of an LNG receiving and supply terminal in the Port of Los Angeles. (1 RP 00056.) Learning of these discussions, the City of Long Beach induced SES to site its LNG terminal in the Port of Long Beach. (Petition,[2] ¶ 20; 1 RP 00056, 00072.) After early negotiations proved fruitful, SES and Respondents entered into an agreement on May 8, 2003 detailing the terms and conditions of SES' lease of a portion of the port and the duties and obligation of the parties with respect to the construction and operation of the LNG terminal ("Agreement"). (2 RP 00393-00404.)

Among other things, the Agreement requires Respondents "to cooperate with SES, at no cost to POLB other than reasonable staff time, in connection with the feasibility studies and application processes for the Project." (2 RP 00394.) Respondents' duty to cooperate obligates POLB to cooperate with SES in connection with the application and environmental review process. Id. In exchange for monthly payments totaling more than $1 million, the Agreement also contained a 37 month exclusivity period during which Respondents could not discuss with any other party the

[1] "RP" means the 39-volume Record of Proceedings certified by the Respondents on May 14, 2007 pursuant to Pub. Res. Code § 21167.6. Unless otherwise indicated, the number preceding the "RP" is the volume number, and the number following the "RP" is the page number(s).

[2] "Petition" means the Verified Petition for Writ of Mandate filed on February 8, 2007.

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possibility of locating an LNG terminal in Port of Long Beach. (2 RP 00393.) Upon the expiration of the exclusivity period, Respondents were free to consider other LNG proposals for the Port of Long Beach. Id. All other terms and conditions of the Agreement – including Respondents' duty of cooperation and good faith – survived the exclusivity period and continue in effect to this day.

The Agreement also contemplated that SES would contract with the City to supply LNG on mutually acceptable terms prior to finalization of SES' lease of a portion of the Port of Long Beach. (2 RP 00394.) However, nothing in the Agreement requires SES to finalize an LNG supply contract with the City as a condition to completion and certification of the EIR.

As proposed, SES' LNG terminal would receive LNG on transport ships, off-load and store the LNG in two (2) large onshore tanks, regasify the majority of the LNG into natural gas for distribution through the region's existing pipeline system, and distribute the remaining LNG for use as vehicle fuel (the "LNG Project"). (1 RP 00087-00098.) The LNG Project would provide as much as 750 million standard cubic feet per day of natural gas to southern California, 150,000 gallons per day of LNG vehicle fuel, and provide storage for up to 320,000 cubic meters of imported LNG to reduce fluctuations in the local supply of natural gas and to render the region less dependent on domestic pipeline natural gas. (1 RP 00087-00098; 2 RP 00297-00299.) Increased use of LNG would also significantly reduce air pollution in the region. (1 RP 00088.)

B. Regulatory Framework

In addition to permits and approvals from Respondents, construction of the LNG Project required approvals from a host of other local, state, and federal agencies. (Petition, ¶¶ 12-14.) The key federal agency approval for the siting, construction and operation of an LNG facility must come from Federal Energy Regulatory Commission ("FERC") under Section 3 of the Natural Gas Act ("NGA"). See 15 U.S.C. § 717, *et seq*. Approvals by other federal agencies, including the United States Army Corps of Engineers ("ACOE")[3] and the United States Coast Guard,[4] are also required.

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[3] See 33 U.S.C. § 1344, *et seq*. (ACOE permitting authority under Clean Water Act); 33 U.S.C. § 403 (ACOE permitting authority under Rivers and Harbors Act).

[4] 50 U.S.C. § 191 (USCG permitting authority under the Magnuson Act); 33 U.S.C. 1221, *et seq*. (USCG permitting authority under the Ports and Waterways Safety Act); and 46 U.S.C. Ch.

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Until recently, the complex web of multi-jurisdictional permitting requirements had brought to a virtual standstill the construction of new LNG Projects necessary for the nation's future energy supply. In 2005, Congress passed the Energy Policy Act of 2005 to break the logjam and amended the NGA to include an express preemption clause providing FERC with the "exclusive authority to approve or deny an application for the siting, construction, expansion or operation of an LNG terminal." 15 U.S.C. § 717b(e)(1).[5] See also ANR Pipeline Co. v. Iowa State Commerce Comm'n, 828 F.2d 465, 468 (8th Cir. 1987) ("Congress expressly has preempted state regulation of safety in connection with interstate gas pipelines").

C. SES' Permit Applications for the LNG Project

Pursuant to Section 3 of the NGA and related federal regulations, SES' application for operation of an on-shore LNG receiving terminal entailed, among other things, completion of thirteen Resource Reports providing information about every aspect of the LNG Project. (Petition, ¶ 31.) SES and its multi-faceted team of engineers, safety experts, and environmental professionals prepared the required Resource Reports over seven months at a cost of nearly $8 million. Id.

On July 25, 2003, SES submitted an application to POLB for a Harbor Development Permit ("HDP") seeking authorization to construct the LNG Project. (4 RP, tab 88.) Since that time, SES has supplemented its HDP application on several occasions. Among other things, the Resource Reports were submitted to POLB and FERC on or around January 26, 2004.[6] (14 RP 04423-04432.) (Petition, ¶ 31.) In all, SES has submitted more than forty-nine (49) volumes of documents and supporting material amounting to approximately twenty (20) linear feet of space lined beginning to end. (Petition, ¶ 39.) To date, POLB has not held a hearing or taken action on SES'

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701 (USCG permitting authority under the Maritime Transportation Security Act of 2002).

[5] The Energy Policy Act of 2005 was enacted in part to prevent the California Public Utilities Commission from blocking SES' LNG Project. See 15 U.S.C. § 717b(e)(1); see also SES RP 04668-04683, Declaratory Order Asserting Exclusive Jurisdiction, 106 FERC ¶ 61,279 (March 24, 2004) ("It is in the country's best interest that each state not have to develop and maintain the regulatory resources necessary for effective regulation of LNG imports and facilities").

[6] The HDP application has since been deemed complete by operation of law. Gov't Code § 65943(a).

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HDP application as required by the City's Guidelines for Implementation of the Port of Long Beach Certified Port Master Plan. (Petition, ¶ 75(e); 1 RP 00017-00032.)

D. **The CEQA/NEPA Process**

CEQA requires the preparation and certification of an EIR for any project that may have a significant effect on the environment. The lead agency's preparation of the EIR serves as a prerequisite to issuance of a host of permits and approvals by a variety of state and local agencies. (Petition, ¶ 17-18.) The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*, similarly obligates federal agencies considering permits for non-exempt projects to prepare an Environmental Impact Statement ("EIS") to evaluate the potential effects on the environment. For SES' LNG Project, the Energy Policy Act of 2005 designates FERC as the lead agency.

FERC and POLB agreed to prepare a joint EIS/EIR for the LNG Project and jointly retained a third party contractor for that purpose.[7] (3 RP 00498-00507, 00779.) POLB, on its own accord, hired additional independent consultants to analyze safety, security, and other aspects of the LNG Project. (24 RP 06853-06854; Petition, ¶ 32.) Despite the decision to prepare a joint document, both CEQA and NEPA require that the joint EIS/EIR represent the independent judgment of each lead agency.

The joint efforts of SES, POLB and FERC resulted in the dissemination of the draft EIS/EIR for public comment in October 2005. (35-38 RP tabs 624-626.) The draft EIS/EIR contains a detailed analysis and discussion of the environmental and safety impacts posed by the LNG Project. Id. Among other things, the draft EIS/EIR concludes that, with the implementation of certain minimal mitigation measures, the LNG Project posed no substantial risks to public safety and security. (36 RP 10082-10150.) The draft EIS/EIR presumably represented POLB's independent judgment that the LNG project did not present unacceptable security concerns. See Guidelines,[8] §

[7] Although CEQA and NEPA encourage cooperation between federal, state and local agencies, preparation of a joint EIS/EIR is not required. Accordingly, if the CEQA lead agency harbors concerns about the adequacy of an EIS prepared by a federal agency, the CEQA lead agency has the ability and obligation to prepare and certify a separate EIR.

[8] "Guidelines" means the State CEQA Guidelines, California Code of Regulations, Title 14, §§ 15000, et seq. The Guidelines are binding on all public agencies in California. San Joaquin

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15084(e) ("The draft EIR which is sent out for public review must reflect the independent judgment of the Lead Agency").

The public comment period for the draft EIS/EIR closed on December 8, 2005. (35 RP 09814.) POLB and FERC received numerous comments from a variety of interested parties, many of whom expressed concerns about safety and security in the Port of Long Beach resulting from the construction of an LNG terminal. (39-47 RP tabs 646-830.) SES worked with POLB and FERC to prepare draft responses to the public comments. (Petition, ¶ 49; 52-53 RP tab 880.) This work spanned many months and was completed at substantial expense to SES. (Petition, ¶¶ 49, 51.)

FERC and POLB thereafter incorporated SES' responses, where appropriate, into a draft final EIS/EIR. Id. In June 2006, the Board expressed its intent to complete and certify the EIR before taking further action on the LNG Project and SES' HDP application. (54 RP 14829.) As a result of the collaborative efforts of SES, POLB and FERC, a final EIS/EIR was expected by December 2006. (55 RP 14982-14985.)

E. The Board Abruptly Terminates the CEQA Process

On December 4, 2006, the President of the Board, James C. Hankla, wrote to Mayor Bob Foster and the Long Beach City Council regarding the LNG Project. (54 RP 14990-14991.) This letter confirmed that POLB has spent significant time analyzing public comments to the draft EIS/EIR, modifying its text, and preparing responses to the comments. The letter further explained that POLB will not divert additional staff to the task of completing the final EIS/EIR unless the Mayor and the City Council affirm their continued support for the LNG Project.[9] Mayor Foster responded to Mr. Hankla's inquiry by letter to SES dated December 7, 2006, wherein the Mayor declared "I will not support a Sound Energy Solutions LNG facility proposal at the Port of Long Beach." (54 RP 14992.) The City Council did not respond in writing to POLB's inquiry.

Shortly thereafter, City Attorney Robert Shannon, together with outside counsel, issued a

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Raptor/Wildlife Rescue Center v. County of Stanislaus, 27 Cal.App.4th 713, 720 fn. 2 (1994).

[9] Standing alone, Mr. Hankla's letter constitutes an abrogation of POLB's duty under CEQA to complete an EIR. CEQA does not authorize POLB to take a straw poll of elected officials to gauge support for a project as a condition of completing an EIR.

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memorandum to the Board dated January 8, 2007 with the following subject line: "Long Beach LNG Project – Termination of Project Processing Prior to Completion of the Final EIS/EIR" ("City Attorney Memo"). (55 RP 15047-15050.) The City Attorney Memo concludes that the draft EIS/EIR, as modified in the responses to public comments, was flawed, and that it would be "neither premature nor inappropriate" for the Board to "abandon the project." Id. As shown below, the City Attorney Memo relies upon a hopelessly circular, pretextual rationale for abandoning the project, and one that finds no support under the law.

On January 22, 2007, without notice to the public or to SES, the Board voted behind closed doors to "disapprove" the LNG Project. (55 RP 15061-15065.) The agenda for the January 22 meeting of the Board contained no mention of a vote on any portion of the LNG Project, nor was any aspect of SES' HDP application before the Board for consideration. (59 RP 16209-16214.)[10] The Board announced its supposed "disapproval" of the project in a one paragraph press release on January 22, 2007 ("Press Release"). (55 RP 15061.) The Press Release, in its entirety, states:

> After deliberation, based upon the attached opinion from the City Attorney which concludes that the Environmental Impact Report on the proposed LNG project "is and in all likelihood will remain legally inadequate," and since an agreement between Sound Energy Solutions and the City does not appear to be forthcoming, the Board of Harbor Commissioners disapproves the project and declines to pursue further negotiations.[11]

Notwithstanding POLB's legal duty to prepare an adequate EIR, the Board adopted the City Attorney's rationale that the draft EIS/EIR could not be made legally adequate. The Board also relied upon a supposed lack of agreement between SES and the City regarding an LNG supply agreement, even though (i) negotiations were still on-going and (ii) the 2003 Agreement contemplated finalization of the supply agreement at the *end* of the review process. (55 RP 15061.)

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[10] The only reference to SES' LNG Project in the published agenda for the January 22, 2007 was a meeting with the Board's "Real Property Negotiators" concerning the project. Neither of the bases offered by the Board in support of the "disapproval" involve real property negotiations. Consequently, the meeting should not have occurred in secret, but rather should have been subject to California's open meeting laws.

[11] Respondents' decision to publish the January 8, 2007 City Attorney Memo operated as a waiver of any applicable privilege, including the attorney/client privilege and or the attorney work product doctrine, that may have attached to the memorandum.

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With its January 22, 2007 announcement, the Board sought to nullify years of collaboration between SES, interested stakeholders, and federal, state and local governments and negate $80 million worth of efforts. At the time of the "disapproval," the City was still engaged in negotiations with the SES regarding the LNG supplement agreement. In fact, a January 30, 2007 memorandum authored by Christopher Garner regarding the status of recent negotiations with SES (55 RP 15069) is inconsistent with the Board's assertion that such an agreement is not forthcoming.

III. STANDARD OF REVIEW

A writ of mandate may be issued by a court to compel the performance of a duty imposed by law. Code of Civ. Proc. § 1085; see Langsam v. City of Sausalito, 190 Cal.App.3d 871, 882 (1987) (writ of mandate compelling the issuance of a building permit); Beck Development Co. v. Southern Pacific Transportation Co., 44 Cal.App.4th 1160, 1191-93 (1996) (writ of mandate compelling a state agency to "make a reasonably prompt determination" regarding the designation of property as hazardous waste property and then to issue either a no-known-hazard statement or hold a hearing).

In an action or proceeding under Code of Civil Procedure § 1085 to set aside a determination or decision of a public agency on grounds of noncompliance with CEQA, the Court must determine whether there was a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Id. For actions under Code of Civil Procedure § 1085 challenging an agency's decision on other grounds, the Court must determine whether the decision was arbitrary or capricious or entirely lacking in evidentiary support, and whether the agency failed to follow the procedure and give the notices required by law. Langsam, supra, 190 Cal.App.3d at 878-879.

IV. THE BOARD'S DECISION CONSTITUTES PREJUDICIAL ABUSE OF DISCRETION

The Board's "disapproval" of the LNG Project was ostensibly based on: (1) the City Attorney Memo, and (2) an assertion that "an agreement between Sound Energy Solutions and the City does not appear to be forthcoming." (55 RP 15061.) Both justifications are transparent and fall apart under scrutiny.

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A. The Opinions Contained in the City Attorney Memo are Circular, Irrelevant and/or Erroneous and Do Not Support the Board's Decision

The City Attorney Memo came more than two years after publication of the draft EIS/EIR and while POLB and FERC staff were working on the final EIS/EIR. Based in large part on the City Attorney Memo and its conclusion that the EIR "is and in all likelihood will remain legally inadequate," the Board "disapproved" the LNG Project two weeks later and "declined to pursue further negotiations." (55 RP 15050, 15061.) As set forth below, the opinions contained in the City Attorney Memo are circular, irrelevant, and/or erroneous, and do not support the Board's decision.

1. As the Lead Agency under CEQA, POLB had a Duty to Prepare an Adequate EIR

CEQA mandates the preparation of an EIR whenever a proposed project may have a significant effect on the environment. Pub. Res. Code § 21082.2(d). When an EIR is required, the lead agency is responsible for preparing the EIR. Sunset Drive Corporation v. City of Redlands, 73 Cal.App.4th 215, 220-223 (1999) (a lead agency has no discretion to refuse to complete an EIR when a project requires one). The lead agency may either prepare the EIR itself or choose one of several alternative arrangements for preparing the document – including accepting a draft prepared by a consultant retained by the applicant – so long as the agency applies its "independent review and judgment to the work product before adopting and utilizing it." Friends of La Vina v. County of Los Angeles, 232 Cal.App.3d 1446, 1454 (1991); Guidelines, § 15084.

In Sunset Drive, a property owner sought permits from the City of Redlands ("Redlands") to construct a low-income housing project, and paid over $100,000 in fees for those applications to be processed. Sunset Drive, supra, 73 Cal.App.4th at 219. Redlands deemed the applications complete and determined that the project would require the preparation of an EIR. Id. The owner submitted a draft EIR prepared by its own consultants. Id. Consultants retained by Redlands (at the owner's expense) issued a report critical of the draft EIR. Id. The owner's consultants subsequently revised the draft EIR and resubmitted it to Redlands on two occasions to address the additional concerns raised by Redland's consultants. Id. After Redlands failed to respond to the third draft, the owner filed a petition for writ of mandate commanding Redlands to complete and certify the EIR. Id. at

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218. The trial court sustained Redlands' demurrer to the owner's second amended pleading, and the owner appealed. Id. The Court of Appeal reversed, holding that Redlands had no discretion to refuse to complete an EIR for the project, and that "mandamus lies to compel Redlands to complete the process of preparing and certifying the EIR for the project."[12] Id. at 222.

As in Sunset Drive, the LNG Project required preparation of an EIR. As the lead agency, POLB had a duty under CEQA to prepare and certify an *adequate* EIR. Sunset Drive, supra, 73 Cal.App.4th at 220; see also Guidelines § 15084(e) ("The Lead Agency is responsible for the adequacy and objectivity of the draft EIR") and § 15020 ("Each public agency is responsible for complying with CEQA and these Guidelines"). Misplaced concerns about the perceived adequacy of an EIR do not relieve a lead agency of its obligation to complete and certify an EIR.

The Board's decision to "disapprove" the LNG Project because the EIR was "inadequate" is circular and cannot be upheld. Consistent with Sunset Drive, Respondents must complete and certify a final EIR for the LNG Project.

2. POLB Did Not Lack Essential Information

The City Attorney Memo states that FERC has withheld significant details from the City of Long Beach," and that "essential information has not been supplied." The City Attorney Memo does not, however, describe the "information" that allegedly has not been supplied or attempt to explain why this information is "essential." Moreover, the record contains no evidence to suggest that any information needed by POLB to prepare an adequate EIR was withheld from POLB. While federal law prohibits public disclosure of some of the information provided to POLB, POLB's staff and consultants had access to this information at all times.

3. CEQA Does Not Require the Public Release of Sensitive Security Information

The City Attorney Memo asserts that POLB's inability to disclose certain information to the public under federal law, including portions of POLB's Hazards Analysis and the preliminary

[12] The Court of Appeal also reversed the trial court's judgment sustaining Redlands' demurrer to the owner's damage claim, holding that the owner had alleged facts sufficient to state a cause of action for denial of civil rights under 42 U.S.C. § 1983. Sunset Drive, supra, 73 Cal.App.4th at 225.

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Waterway Suitability Assessment, "violates CEQA." The City Attorney's conclusion is wrong.

Section 15120(d) of the Guidelines provides that "[n]o document prepared pursuant to [CEQA] that is available for public examination shall include ... any other information that is subject to the disclosure restrictions of Section 6254 of the Government Code." Government Code § 6254 restricts disclosure of numerous categories of documents, including any "document prepared by or for a state or local agency that assesses its vulnerability to terrorist attack or other criminal acts," "critical infrastructure information" submitted to the California Office of Homeland Security, and, of particular relevance here, any "records, the disclosure of which is exempted or prohibited pursuant to federal or state law . . . ."

Portions of POLB's Hazards Analysis and preliminary Waterway Suitability Assessment, as well as other information, fall squarely within the protections of Government Code § 6254. Therefore, the "lack of disclosure" of this information would not violate CEQA. Indeed, the *disclosure* of this information would violate CEQA as expressed in § 15120(d) of the Guidelines.

4. Even if CEQA Did Require the Public Disclosure of Sensitive Security Information, It Would be Preempted to the Extent Disclosure would Conflict with Federal Law

FERC has mandated that the security arrangements for the proposed LNG facility be subject to a confidentiality agreement, and it has prohibited the disclosure of the security arrangements to the public. (*See* 1 RP 00160) (U.S. Department of Homeland Security, Conditional Access to Sensitive But Unclassified Information: Non-Disclosure Agreement). This sensible prophylactic measure falls within the powers of FERC to limit disclosure of "Sensitive Security Information [SSI] and/or Critical Energy Infrastructure Information [CEII]." See 102 F.E.R.C. ¶ 61,190, at *9866 (2003) ("it does not make sense for the Commission to release the information to the State Agencies with no agreement to protect the information, at least to the extent permitted by law").[13]

Notwithstanding the obvious reasons for prohibiting public disclosure of sensitive security

[13] See also 49 C.F.R. § 1520 (SSI) and 18 C.F.R. § 388.112-113 (CEII); see generally 119 FERC ¶ 61,029 (2007) (discussing definition of CEII).

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information, POLB contends in its Answer to SES' Petition "that one reason an adequate EIS/EIR cannot be prepared is because the federal government will not allow public release of material that is mandated by CEQA." (See Answer ¶ 4; see also 55 RP 15047-05050). Thus, by claiming that an adequate EIS/EIS cannot be prepared unless they publicly disclose the critical security and infrastructure plans for the proposed LNG terminal (including to those who might seek to do harm to the United States), POLB is using its position as the entity obliged to prepare an EIR to block the siting, construction and operation of the proposed LNG terminal.

The Respondents' contention is contrary to law (and common sense) and must be rejected. As explained, CEQA does not require the public disclosure of national security information. Even if state law somehow requires the public disclosure of such information, federal laws precluding the publication of such information preempt any contrary state laws because such laws would "stand[] as an obstacle to the accomplishment of the full purposes and objectives of Congress." English v. General Electric Co., 496 U.S. 72, 78-79 (1990). National security is a uniquely federal interest, and State laws conflicting with that interest are preempted. Boyle v United States Techs Corp., 487 U.S. 500, 504 (1988) ("a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted").[14]

The suggestion that FERC is somehow preventing POLB from complying with CEQA by seeking to protect sensitive and critical energy infrastructure information is a ruse. FERC has made clear, in the context of releasing CEII to State agencies pursuant to a nondisclosure agreement, that it "has no intention of asking a state agency to ignore state law, but merely [asks the local agency] to give the Commission notice and an opportunity to take action to prevent release of the information." 102 F.E.R.C. ¶ 61,190, at *9866. (Cf. 1 RP 00160-00161.) Therefore, while FERC and the Department of Homeland Security ("DHS") regularly grant state agencies access to CEII, SSI, and other sensitive information, both agencies retain the right to control further disclosure.

Furthermore, even where state law *mandates* the release of information obtained from

[14] See also Stehney v. Perry, 907 F. Supp. 806, 824 (D.N.J. 1995) ("State regulation in the area of national security is expressly preempted by Article I, § 8 and Article II, § 2 of the Constitution"), aff'd by 101 F.3d 925, 938-39 (3d Cir. 1996).

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FERC, the Commission and the DHS have concluded that "*[f]ederal law preempts state law.*" 100 F.E.R.C. ¶ 61,256 (2002) (emphasis added); see 72 Fed. Reg. 17688, 17716 ("[T]o the extent any state law requires the public disclosure of information that is deemed [Chemical Vulnerability Information], it is the [DHS]'s view that such laws are preempted by this rule"). "Federal regulations have no less pre-emptive effect than federal statutes," whether in the field of energy regulation or homeland security. See, e.g., Southern Cal. Edison Co. v. Public Utilities Com., 121 Cal. App. 4th 1303, 1309-13 (2004) (preempting CPUC regulation to the extent it conflicted with FERC order). Thus, even if CEQA mandates public disclosure of SSI and CEII as asserted in the City Attorney Memo, this disclosure requirement would be preempted by federal agency actions of FERC and the DHS.

5. The City Attorney's Criticism of Other Aspects of the EIR are Irrelevant and/or Not Supported by Substantial Evidence

Much of the City Attorney Memo is devoted to an attack on the adequacy of some unspecified and undisclosed version of the final EIS/EIR that existed at some point after circulation of the draft EIR and before January 8, 2007.[15] For example, the City Attorney Memo criticizes the EIS/EIR's discussion of project alternatives and, without offering any specifics, contends that the analysis of "some" impacts and mitigation measures have been improperly deferred. (55 RP 15049.) The City Attorney Memo also states that the attorneys have "no confidence that these flaws will ever be adequately remedied."[16] (55 RP 15047.)

While the City Attorney Memo may or may not provide useful guidance for POLB in completing the final EIR, it has no relevance to the decision of whether or not to "disapprove" the LNG Project because it was POLB's duty to prepare an adequate EIR in the first place. In other

[15] Because the City Attorney Memo discusses "responses to comments" – a component of a final EIR – the comments contained in the City Attorney Memo were apparently based on a review of an internal draft of the final EIR/EIS which was not disclosed to the public or included in the RP.

[16] The City Attorney Memo states that the conclusions stated therein were reach only after "repeated attempts to correct those defects." What attempts, and by whom? While the City Attorney Memo does not begin to answer these questions, it should be noted that SES responded completely and in good faith to all data requests from POLB and FERC.

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words, the City Attorney Memo and the Board's decision seem to assume that the responsibility for preparing an adequate EIR belonged to someone else, even though the law clearly assigns that responsibility to POLB. Thus, if POLB believes that the draft EIR does not adequately address project alternatives and mitigation measures, it is POLB's responsibility to rectify those perceived shortcomings. POLB cannot use its own failure to cure a defect to declare the defect incurable.

Many of the criticisms contained in the City Attorney Memo are directed to the EIS/EIR's discussion of the potential impacts of the LNG Project on public safety. Since there is no indication that the authors of the City Attorney Memo have any expertise in these matters, the City Attorney Memo does not constitute substantial evidence in support of the Board's decision. See Guidelines, § 15384 ("Argument, speculation, unsubstantiated opinion or narrative ... does not constitute substantial evidence.") The fact that the authors of the City Attorney Memo may have simply adopted comments that were submitted by other agencies or the public does not change this conclusion. See Guidelines, § 15020 ("A public agency must meet its own responsibilities under CEQA and shall not rely on comments from other public agencies or private citizens as a substitute for work CEQA requires the Lead Agency to accomplish"). Once again, even if there was some defect in the draft EIR related to its discussion of public safety, CEQA obligates POLB to fix the defect and provide an adequate discussion of public safety.

Read broadly, the City Attorney Memo suggests that there is a disagreement between POLB and FERC concerning the potential public safety impacts of the LNG Project, and that this disagreement somehow prevents the preparation of a final EIR. On the contrary, POLB had and has the ability and legal duty to independently reach its own conclusions regarding the safety of the proposed facility based on the information available to it. If POLB and FERC reach different conclusions, POLB can and must issue its own final EIR separate and apart from the final EIS.

Finally, the City Attorney Memo suggests that it may not be *possible* to prepare an adequate EIR in this case, and that the Board may disapprove the LNG Project for that reason. However, the City Attorney Memo cites no authority for this novel theory. Indeed, there is none. The proposition that there could ever be a situation where an adequate EIR cannot be prepared is contrary to the well-established CEQA principle that a lead agency is not expected to do the impossible, but must

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instead prepare an EIR based on the best information that can be reasonably obtained under the circumstances:

> An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is *reasonably feasible*. Disagreement among experts does not make an EIR inadequate . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

Guidelines, § 15151 (emphasis added). See also Guidelines, § 15144 (an agency must use its "best efforts" to find out and disclose all that it "reasonably can"); Kings County Farm Bureau v. City of Hanford, 221 Cal.App.3d 692, 723 (1990) (the court noted that baseline emission data for other projects in the air basin had been provided by the California Air Resources Board and therefore the "EIR could reasonably and practically have included such projects in its analysis"); Berkley Keep Jets etc. v. Board of Port Comm., 91 Cal.App.4th 1344, 1355 (2001) (the "determination of EIR adequacy is essentially pragmatic"); Eureka Citizens for Responsible Government v. City of Eureka, 147 Cal.App.4th 357, 372 (2007) ("Technical perfection is not required; we look not for an exhaustive analysis but for adequacy, completeness, and a good faith effort at full disclosure").

Thus, even if substantiated, the City Attorney's opinions concerning the adequacy of the EIR (in the form that it existed at that time) do not and cannot support a decision to "disapprove" the LNG project. POLB's duty in the face of such concerns is to remedy the defects. As the governing body of POLB, the Board cannot rely on POLB's own failure to carry out its responsibility to prepare an adequate EIR.

6. POLB Has a Duty to Complete and Certify a Final EIR

Under the heading "Options available to the Board," the City Attorney Memo states, in sweeping fashion:

> The Board of Harbor Commissioners, as a matter of law, may disapprove a project at any time without preparing or completing an environmental impact report. Main San Gabriel Basin Watermaster v. State Water Resources Control Board, 12 Cal.App.4th 1371, 1379-1384 (1993).

(55 RP 15049.) On that basis, the City Attorney Memo concludes: "Therefore, should the Board, in its discretion choose to abandon the project, that decision would be neither premature nor

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inappropriate." (55 RP 15050.)

These statements reflect a fundamental misunderstanding of CEQA's exemption for "[p]rojects which a public agency rejects or disapproves." Pub. Res. Code § 21080(b)(5). Section 15270(b) of the Guidelines establishes that this exemption "is intended to allow an initial screening of projects *on the merits* for *quick disapprovals prior to the initiation of the CEQA process* where the agency can determine that *the project cannot be approved*." (Emphasis added.) In light of this statement of legislative intent, the record establishes that, for the following reasons, the exemption does not apply in this case:

- The Board's decision to "disapprove" the LNG Project was not made "prior to the initiation of the CEQA process." Rather, the decision came long after the initiation of a full CEQA review. Indeed, the draft EIS/EIR had already been prepared and circulated for comment, and substantial work on the final EIS/EIR had been undertaken.
- The LNG Project was not disapproved "on the merits," as SES' applications were not before the Board for consideration. Rather, the LNG Project was improperly abandoned on improper procedural and pretextual grounds.
- The Board did not, and cannot, find that the LNG Project "cannot be approved."

The City Attorney Memo's reliance on Main San Gabriel Watermaster v. State Water Resources Control Board, 12 Cal.App.4th 1371 (1993) is misplaced given the factual record here. In fact, the holding in Watermaster supports SES' position and undermines Respondents' pretextual justification for abandoning the CEQA process.

In Watermaster, Azusa Land Reclamation ("ALR") petitioned for a writ of mandate to compel the State Water Resources Control Board ("State Board") to set aside its disapproval of "waste discharge requirements" for a proposed landfill and to prepare an EIR for the project. Id. at 1373-1374. The trial court's denial of the petition was upheld by the Court of Appeal in reliance on Public Resources Code § 21080(b)(5). Id. at 1374-80. The issue, as stated by the Court, was whether any provision of CEQA required the State Board to prepare and consider an EIR prior to disapproving ALR's revised application for the project on the merits. Id. at 1379. In siding with

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the State Board, the Court of Appeal held that a project disapproval on the merits by a public agency is exempt from the requirements of CEQA in cases where the public agency has not already initiated a full CEQA review. Specifically, the Court stated that "the requirement of an EIR is not even triggered unless a public agency *proposes to carry out or approve* a project which may have a significant effect on the environment." Id. at 1380 (emphasis in original). The Court therefore concluded that nothing in the language of the CEQA or the Guidelines deprives public agencies of the authority to disapprove of a project "at any time prior to the initiation of full CEQA review." Id.

The facts of Watermaster fit these principles. There, the public agency disapproved a project that the public agency determined could not be approved on the merits and did so before initiation of a full CEQA review. Here, no such thing occurred. Indeed, the facts in this case do not remotely resemble those in Watermaster. On the contrary, the evidence in the record in this case overwhelmingly and indisputably establishes that the "requirement of an EIR" was, in fact, triggered by Respondents' proposal to carry out this LNG project and the subsequent initiation of a full CEQA review by the parties which has consumed many months and many millions of dollars.

In Watermaster, the State Board did not simply abandon the CEQA process, as occurred here, but instead disapproved the project "on the merits" after first holding a noticed public hearing. Id. at 1376-1378. Specifically, in refusing to permit the discharge of pollutants, the State Board found, among other things, "that the site's location over a major drinking water aquifer and its highly permeable geology made it unsuitable for the disposal of waste."[17] Id. Moreover, the State Board also rendered its decision *before* the process of preparing an EIR had begun (*i.e.*, prior to the commencement of the CEQA process). Id. at 1376-1377. See also Guidelines, § 15270(b). Thus, Watermaster is actually consistent with the legislative intent of the exemption as described in Guideline § 15270(b), and is inapposite to this case.[18] Simply put, Watermaster is not a free pass for

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[17] The Court of Appeal defined the issue presented as follows: "whether any provision of CEQA ... or the CEQA Guidelines ... requires that the State Board prepare and consider an EIR prior to disapproving *on the merits* ALR's revised WDR application ..." Watermaster, supra, 12 Cal.App.4th at 1379 (emphasis added). Thus, the fact that the State Board's decision was "on the merits" was clearly an important element of the Court's holding.

[18] Watermaster therefore serves as a good example of the circumstances under which a

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a lead agency to abandon its responsibility to prepare an adequate EIR on the circular ground that it purportedly cannot prepare an adequate EIR.

As indicated in Section 15270(b) of the Guidelines, Public Resources Code § 21080(b)(5) was designed to streamline the CEQA process in those cases where an agency, prior to commencing the preparation of an EIR, is able to determine that a project will not or cannot be approved on its merits. However, this statutory exemption was clearly not intended to allow a public agency to simply walk away from an application for approval of a private project after millions of dollars and thousands of man hours have been spent preparing an EIR.

Sunset Drive thus provides the applicable rule of law in this case. Sunset Drive places the responsibility to complete an adequate EIR squarely on the lead agency, and does not permit the lead agency to abandon in mid-stream its responsibility to prepare an adequate EIR simply because the task is difficult. Pursuant to Sunset Drive, the Court should command POLB to prepare and certify a Final EIR within a reasonably prompt period of time, *e.g.*, 90 days.[19]

B. The Board's Conclusion That an Agreement Between SES and the City "Does Not Appear to be Forthcoming" Is Speculative and Does Not Support the Board's Decision to "Disapprove" the LNG Project

The second "prong" of the Board's decision, *i.e.*, that an agreement between SES and the City "does not appear to be forthcoming," must be rejected for at least two reasons. First, pursuant to the Agreement, an energy supply agreement between SES and the City was not required until end of review process (*i.e.*, prior to lease approval). (2 RP 00394.) Therefore, the status of negotiations as of January 22, 2007 was irrelevant. Second, the Board's conclusion is speculative and is not supported by substantial evidence. See Guidelines, § 15384 ("Argument, speculation,

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project may be exempt from CEQA pursuant to Public Resources Code § 21080(b)(5) – circumstances that do not apply here.

[19] For private projects, the lead agency is required to complete and certify the final EIR within one year after the date when the lead agency accepted the application as complete. Guidelines, § 15108. In this case, the applications were accepted several years ago; therefore, the final EIR is long overdue. Accordingly, the POLB should be directed to complete the process in a relatively short period of time.

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unsubstantiated opinion or narrative ... does not constitute substantial evidence). Indeed, the conclusion is directly contradicted by evidence in the record showing that negotiations between the City and SES were on-going at the time of the Board's decision. (55 RP 15068-15069.) In effect, it is a self-fulfilling prophecy. Respondents cannot evade their obligations through their own failure to negotiate in good faith.

C. Board's Decision to "Disapprove" the LNG Project Was Improper, Pretextual, and a Violation of SES' Rights

As of the date of the Board's action on January 22, 2007, SES' applications had not been presented to the Board for decision. No staff reports or other information concerning the merits of the LNG Project had been prepared. No public notices had been issued to alert SES or the public that the Board was about to take an action on the LNG Project. Instead, the Board simply met in closed session – ostensibly to have a "conference with real property negotiators" – and quietly yielded to political pressure by pulling the plug on a $800 million dollar project that is of vital importance to the region and the state.

The Board's decision – rendered in the vacuum of a secret (and possibly illegal) meeting – cannot stand for several reasons. First, the decision wholly fails to comport with due process principles. These principles "are intended to guarantee a fundamentally fair decision making process," and require, at a minimum, notice and opportunity to be heard. Beck Development Co., supra, 44 Cal.App.4th at 1188-1189 (decision by the California Department of Toxic Substances Control to advise a city to impose a development moratorium on plaintiff's property, if construed as an end result of the agency's participation in the matter, would violate fundamental principles of due process). In light of the 2003 Agreement and SES' $80 million investment in the LNG Project, SES clearly had a sufficient, legally recognized and protected interest in the matter to warrant at least the minimum due process protections of notice and opportunity to be heard. See id. at 1189.

The Board's decision was also arbitrary and capricious. As evidenced by the orchestrated series of events beginning with the December 4, 2006 letter from the Board President to the Mayor and ending on January 22, 2007 with the Board's decision to terminate the CEQA process, the Board's decision was not based on the merits of the LNG Project, but was instead motivated by

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purely political considerations. Furthermore, the public safety concern expressed in the City Attorney Memo appears to be nothing more than a pretext.[20] In fact, within days of the Board's decision, POLB issued a request for proposal to enter into legal negotiations to provide liquefied natural gas infrastructure to POLB on a site much closer to populated areas than the site of SES' proposed LNG Project. See Petitioner's Request for Judicial Notice, Exhibit "A".

V. CONCLUSION

By characterizing the Board's decision as a "disapproval" of the LNG Project, the Respondents are attempting to hide behind a CEQA exemption that does not apply. Notwithstanding the Respondents' self-serving label, there is only one accurate way to describe the Board's action: a decision to abandon the EIR process for the LNG Project because it had fallen out of favor among a few politicians.

Respondents should not be allowed to sidestep their legal duties under CEQA and the 2003 Agreement to finish the EIR process for the LNG Project. A writ of mandate should issue directing the Board to set aside its "disapproval" of the LNG Project and commanding POLB to complete and certify a Final EIR for the LNG Project within a reasonable period of time.

DATED: July 6, 2007

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[20] Ultimately, while Respondents and other state and local agencies have a consultive role to play with respect to safety and siting issues regarding an LNG terminal, those matters rest within the exclusive jurisdiction of FERC under the Energy Policy Act of 2005.

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7th Floor, Los Angeles, California 90067.

On July 6, 2007 I served the document(s) described as **PETITIONER SES TERMINAL'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

☐ (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY E-Mail) I transmitted the above-described document by e-mail to the below-listed e-mail addresses.

☐ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

☒ (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on July 6, 2007 at Los Angeles, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Debora B. Gelberg

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SES TERMINAL, LLC, a Delaware limited liability company, Petitioner, v. THE PORT OF LONG BEACH; BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH; CITY OF LONG BEACH; and Does 1 through 50, Respondents.	Case No. BS 107298 ASSIGNED FOR ALL PURPOSES TO: Judge Dzintra I. Janavs DEPT: 85 **RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE** Hearing Date: October 31, 2007 Time: 9:30 a.m. Dept: 85 Date Action Filed: February 8, 2007

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

SES Terminal, LLC ("SES") and the Long Beach Board of Harbor Commissioners ("Board") executed a letter of intent ("LOI") in 2003. (2 RP 393.) The LOI gave SES certain limited rights to pursue a liquefied natural gas ("LNG") project on a City-owned 25-acre site in the Port of Long Beach ("POLB"), and contemplated that if SES obtained the necessary permits and approvals within a 37-month time frame, the parties would attempt to negotiate a long-term lease of the site. The LOI also contemplated that if the project proceeded, the City and its residents would receive significant financial benefits in the form of a long-term contract under which SES would provide natural gas to residents at reduced prices and make payments to the City. To facilitate negotiations of the gas contract, SES and the City's gas utility executed a non-binding memorandum of understanding ("MOU") in 2003. (2 RP 443.)

The LOI expired on June 9, 2006. Seven months later, on January 22, 2007, after learning the project's environmental review process was still far from complete and that the City's gas utility was dissatisfied with the benefits offered by SES under the MOU, the Board decided to end negotiations with SES and directed its staff to stop processing SES' project application.

SES sues POLB, the Board, and the City to require them to complete and certify the EIS/EIR that the Federal Energy Regulatory Commission ("FERC") and the Board had begun preparing on the project.[1] SES claims the Board's failure to complete and certify a final EIS/EIR violates (i) the duty to do so under CEQA, and (ii) the duty to cooperate with SES in the application process under the LOI. (SES Opening Brief ("OB") 1:25-28.) Neither assertion has merit.

The project site is not under the ownership or control of SES; it is tidelands property which the City owns in trust for the people of California. (35 RP 9835.) As administrator of the tidelands, the Board has broad discretion as to the uses to which the property may be put and has

[1] FERC was the lead agency for the project under NEPA, while the City, acting through the Board, was the lead agency under CEQA. Although named a Respondent, POLB is not a separate entity but rather, as the context dictates, is either a trade name for the Harbor Department of the City or its Board, which controls and manages said Department, or a geographic area within the City known as the Harbor District. The City owns the subject land within POLB, but under the City Charter, the POLB is governed not by the City Council, but by the Board. (Article XII of the City Charter.) The Respondents in this action will be referred to as the "City" or the "Board."

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the legislative prerogative to reject one trust use in favor of another. Under these circumstances, CEQA did not obligate the Board to complete and certify the EIS/EIR. Contrary to SES' assertion, such an obligation did not arise simply because the Board had already commenced the CEQA process. The case relied upon by SES, *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, is inapt because it (i) did not involve a project rejection, and (ii) concerned a private project on private land that did not require the use of public land to proceed. Nor did the LOI itself require the Board to continue processing the EIS/EIR after the expiration of the 37-month time period provided for in the LOI. Granting SES the relief it seeks would deprive the Board of a benefit it had specifically bargained for – that it was tying-up the site for only 37 months. Because the Board was free to pursue other uses for the site after June 9, 2006, it is unavailing for SES to argue that the Board nonetheless must simultaneously devote significant additional time and resources to completing an EIR on a project it has rejected. CEQA cannot be used to force a public agency to commit its limited resources to the costly and time-consuming environmental review of a project requiring the use of its own land where the agency has determined not to pursue the project.

II. FACTS

Two independent and simultaneous processes, one involving the LOI and the other the MOU, disclosed to the Board and the public fundamental problems with the LNG proposal, inevitably leading to the Board's decision in January 2007 not to further pursue a lease with SES:

The Letter of Intent: The parties first discussed locating an LNG facility in the POLB in 2002.[2] In May 2003, the parties entered into the LOI, giving SES the exclusive right to pursue development of an LNG receiving terminal in the Port for a maximum period of 37 months. (2 RP

[2] SES unabashedly accuses Respondents of "luring SES away from the Port of Los Angeles and inducing SES to locate its proposed LNG terminal in Long Beach," and then abandoning the project for "pretextual" reasons ("giving in to shifting political winds"). (OB 1:8, 11, 18.) Such accusations are contrary to the record. (See, *e.g.*, 1 RP 71 [SES' 8/31/02 e-mail "selling" POLB staff on the idea of the project] and 178 [1/14/03 e-mail from POLB's Managing Director of Development advising SES of her discussions with Port of LA, and stating "the bottom line was pretty clear, the Port of LA is not interested in this project"].) And, assuming *arguendo* the reason for deciding not to lease the site for an LNG facility was, as SES suggests, because of state agencies' and the public's opposition to the project, the Board was justified in giving weight to that input. (See 14 Cal. Code Regs. ("Guidelines") §§ 15201 [public input is "an essential part of the CEQA process"]; 15200(e) [purpose of review includes "discovering public concerns"].)

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393.) The LOI acknowledged that even after the pertinent studies were conducted, SES would have to obtain approvals, including a lease (a "preferential assignment agreement"), before it could construct and operate an LNG facility. In exchange for the exclusivity, SES would make monthly payments to the City of $36,300 beginning on January 1, 2004. (14 RP 4659.)

SES began the application process shortly after the LOI was signed. (See, *e.g.*, 4 RP 792 [SES' 7/25/03 application for Harbor Development Permit].) However, red flags soon began to appear. First, it became clear that the City's views on safety differed from those of FERC. On April 27, 2004, the City advised FERC that SES' Hazard Assessment was insufficient, and that the City would need to do its own safety analysis. (23 RP 6397, 6466; 26 RP 7355.) Although FERC resisted this approach (23 RP 6432), the City ultimately hired an expert consultant, Quest, to prepare its own safety analysis. (37 RP 10442 *et seq.*; 26 RP 7355.) Soon, the City's non-reimbursed expenses began to steadily rise (Quest's budget went from $130,000 in July 2004 (23 RP 6468) to $330,000 by May 2006 (53 RP 14632-33).)

Problems also arose regarding the draft EIS/EIR. Initially, POLB was concerned about the adequacy of the alternatives analysis and the need for a more robust treatment of the project's safety risks. (32 RP 9163.) Once the draft (35 RP 9810 *et seq.*) was released in October 2005, it was challenged in several respects, especially its safety analysis. Indeed, the Planning Department of the City of Long Beach – *the Lead Agency* – submitted a 52-page letter which criticized the EIR's safety, public services, air quality, and alternatives analyses.[3] (47 RP 13220-13271). Myriad highly critical comments were also received from the public as well as responsible and trustee agencies. (*E.g.*, the California Coastal Commission (46 RP 12741-12813); the California Public Utilities Commission ("CPUC") (41 RP 11501-11534, 11559-44 RP 12335; and 38 RP 10680-10778); and the California Energy Commission ("CEC") (46 RP 12814-12856).) Indeed, CPUC and its expert witness, Dr. Jerry Havens, the scientist who created the gas dispersion models used in the draft EIS/EIR to analyze the safety impacts of the project (38 RP 10693; 47 RP

[3] As stated, the City, acting through the Board, was preparing the EIS/EIR. The Board's decision on that document was appealable to the City Council, which would review *de novo* any Board decision. (Pub. Res. Code § 21151(c) [CEQA decision of an agency's nonelected body may be appealed to the agency's elected body]). The City Council is advised by the Planning Department. Thus, the Planning Department's comments were particularly significant.

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13010; 41 RP 11635-644), concluded that it would not be "in the public's interest to site the proposed terminal in the [POLB] because of the potential severe threat to public safety and to the Port and the surrounding infrastructure that could result." (38 RP 10694.) Citing data from Havens' declaration, CPUC opined that approximately 130,000 people within three miles of the proposed site would be in harm's way, and many of them could be killed or incur second-degree burns if there were a terrorist attack, earthquake, or human error, which caused the release of LNG.[4] (41 RP 11561-11644; see 39 RP 10937; 14 RP 4563-66; 24 RP 6705, 6726.) The City's planners concurred in his analysis. (47 RP 13222, 13254-13255.) Notably, SES had tried to hire Dr. Havens in connection with the safety analysis for its project in early 2005. (42 RP 11700.)

CEC, a trustee agency under CEQA, also identified "potential impacts to critical petroleum infrastructure marine terminals that could occur due to security zone operational limitations and catastrophic release associated with the LNG facility," and that since much of the nation's crude oil and refined petroleum products are received at the POLB/POLA terminals, any disruption of this importation would seriously impact the state's economy. (33 RP 9450-9456.) Further, CEC issued a Safety Advisory Report in September 2005 on SES' project, identifying a concern that state and federal requirements for encouraging the remote siting of LNG terminals had not been met.[5] (34 RP 9693, 9724; see 31 RP 8849.)

All of these comments were especially significant to the Board in light of the expertise of the commenters. (See *People v. County of Kern* (1976) 62 Cal.App.3d 761, 771-74 [the need for reasoned, factual explanations is particularly acute when critical comments regarding EIR are received from other agencies or experts].) These comments gave the Board new insights on the project, especially as to the potential risks to the public and the Port that it entailed.

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[4] In June 2005, Dr. Havens had also testified that because of basic flaws in the methodologies employed in evaluating safety risks, FERC had failed to adequately analyze the public risk posed by LNG facilities on the East Coast. (33 RP 9165-9228.) Those conclusions were corroborated by other experts in the field. (33 RP 9250-9308, esp. 9263-9276 [regarding flaws in FERC's methodologies]; 9309-9322 [regarding desirability of locating LNG facilities off-shore because of terrorist threat]; 2 RP 321-328; 5 RP 1087-93.)

[5] These comments were significant because SES had originally advised the City that off-shore facilities were infeasible because they were untried and too expensive to construct. (1 RP 103-04; 4 RP 919.) It was becoming increasingly clear, however, that off-shore facilities were in fact a viable alternative. (See, *e.g.*, 14 RP 4555-56; 24 RP 6705; 41 RP 11567, 11569, 11632; 49 RP 13662, 13682; 59 RP 16259 [Governor Schwarzenegger backs off-shore facility].)

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A particularly disturbing development that cast doubt on the entire process was CPUC's accusations, made under penalty of perjury, that SES had provided an inaccurate project description by deliberately withholding information from the public and the City. That is, the draft EIS/EIR assumed the Southern California Gas Company (SoCalGas) was capable of receiving up to 1 billion cubic feet of natural gas per day ("1 Bcf/d"), the announced capacity of the project (4 RP 797; 6 RP 1493-96), without major improvements to its system. In reality, a major upgrade, including a 5-mile 36-inch looping pipeline and the rebuilding of two stations, would be needed to handle 1 Bcf/d. When SES learned of this, it purported to revise the project description to publicly state that its project would entail only 800 million cf/d (49 RP 13554), while privately advising SoCalGas that it fully intended to continue with a 1 Bcf/d facility. CPUC claimed that SES conspired to withhold public disclosure of the scope of the needed facilities until after the Harbor Development Permit was issued. (41 RP 11501-11520; 47 RP 13016-19). The draft EIS/EIR did not address the necessary expansion of SoCalGas' intrastate pipeline system and the environmental impacts associated with that expansion. As stated by CPUC:

> "It is hard to imagine a better example of an omission of a 'foreseeable phase' or 'connected action' in order to evade the full environmental review of a project than what SES has done in the present case. This is a **deliberate violation** of CEQA and NEPA. . . . In addition, **this intentional omission calls into question the credibility of other information which SES has been providing (and not providing) about its project.**" (47 RP 13018-19, emphasis added.)

Such accusations provided further reason for concern. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654-55 [unless entire project described, important aspects are obscured from view].)

Moreover, due to the complexity of the comments on the draft EIS/EIR and the enormity of the task of responding to them, the release date of the final EIS/EIR was continued several times. (See, *e.g.*, 53 RP 14632; 54 RP 14839; 55 RP 14963, 14982.) City's planners concluded significant revisions and recirculation were needed. (47 RP 13222.) Consequently, the projected date of operation for the project was slipping far beyond the date contemplated by the parties.[6]

[6] Whereas SES originally represented the project would be operational by 2007 (4 RP 798; 28 RP 7820), by January 2007, SES still was not close to getting the needed permits and approvals, and construction was estimated to take another 4 years after that. (31 RP 8601.)

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With the LOI scheduled to expire June 9, 2006, SES requested in February 2006 that the Board extend the LOI. (49 RP 13628.) That request was denied by the Board on June 5, 2006. (54 RP 14829.) On that date, the Board also advised SES that because the LOI was expiring, it would accept no further rental payments after June 9, 2006. (54 RP 14830, 14832 [City returns SES check because payment covered "period beyond expiration of the agreement".) A June 9, 2006 Harbor Department memorandum confirmed that rent on the proposed project site would no longer be due from SES since the LOI had "expired under its own terms." (54 RP 14834.)

Thus, by January 2007, with the responses to comments not yet complete, and with the Board facing recirculation of the document once the responses and revisions were completed, it was clear that even if the project were approved, construction of the facilities would probably not begin until 2008 at the earliest, and that the project would be operational not in 2007 as originally thought, but in 2012 at the earliest. This timeframe had never been agreed to by the City.

The MOU: The LOI provided that finalization of the lease would involve SES and the City (through its municipal gas utility, Long Beach Energy) entering into a gas sales arrangement that would provide financial benefits to the City and its residents. (2 RP 394.) To accomplish this, the parties executed the MOU, under which they entered into confidential, non-binding discussions regarding the City's long-term purchase of natural gas from SES at significantly discounted prices. The MOU, dated May 29, 2003, contemplated reaching an understanding on the basic commercial terms for a long-term contract within 180 days (*i.e.*, prior to December 2003). (2 RP 443.) Early on, City staff advised SES that to be able to "sell" the LNG project to the City Council and City residents, a direct financial benefit "must be clearly evident" (3 RP 758), and that "without the gas supply component as part of the overall project, it will make it that much more difficult for the City of Long Beach to support the project as being beneficial to the citizens and businesses of Long Beach." (3 RP 759.)

The MOU negotiations went nowhere. Indeed, a full two years after the MOU was signed, City staff reported that no agreement on basic terms had been reached and that Long Beach Energy and SES had "long ago suspended negotiations." (31 RP 8842.)

Nevertheless, in May 2005, the City Council instructed staff to renew negotiations with

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SES. (49 RP 13626.) City staff did so, advising SES it wanted negotiated deal points ready to evaluate by Fall 2005, in the same timeframe it anticipated evaluating the draft EIS/EIR. (33 RP 9376.) Again negotiations failed. (39 RP 10914.) In February 2006, staff informed the Council:

> "[T]his project is highly controversial in regards to the City of Long Beach serving as the host site for the SES LNG terminal. Accordingly, SES has been told repeatedly that any offer it submits to the City must provide substantial ongoing value and benefits to both the citizens of Long Beach as well as the City itself. [¶] **The SES proposal is unacceptable and severely lacking in fair value as it would NOT result in substantial savings in natural gas bills for Long Beach residents [an average of only 40 cents/month], and would NOT provide substantial ongoing revenue available to the General Fund."** (49 RP 13626, emphasis in the original; see, also, 13651-60, 13702; 53 RP 14637, 14651; 54 RP 14835, 14853 [chronology of negotiations].)

In July 2006, after more unsuccessful negotiations between the parties, SES indicated that the City could expect no increase in the overall value of the package it had already offered. (54 RP 14854.) By November 2006, staff was recommending that negotiations be discontinued:

> "[I]t is not realistic to expect that further discussions with SES would provide any substantial additional value to what has been offered to date by SES. [¶] **From a natural gas supply perspective, competing LNG projects that will provide similar gas supply benefits to Southern California, without the potential siting risks to Long Beach, are either in construction or are further along in the regulatory process than SES. Additionally, other gas supply opportunities that potentially provide greater financial savings have also surfaced since discussions with SES began over three years ago."** (55 RP 14993, emphasis added; see, also, 14993-15033.)

Although SES made a new offer thereafter (55 RP 15039, 15043), and the parties met to discuss it on January 19, 2007, the City concluded the offer did not materially improve the value and near-term economic benefit to the City's General Fund. (55 RP 15053, 15058-59, 15067.)

The Decision To Terminate Negotiations: Although the City had continued to work with SES after the LOI expired in June 2006, hoping to resolve the draft EIS/EIR and MOU issues, it was clear by January 2007 those issues would not be quickly resolved (if ever). (55 RP 15047, 15049 [1/8/07 City Attorney's Memorandum listed several deficiencies in draft EIS/EIR, including its safety and security analyses, the deferral of critical safety analysis and planning, and the withholding of critical information from the public; it concluded that necessary corrections "could occur only after hundreds of additional hours of legal effort by the City Attorney and Special Counsel, as well as comprehensive assistance from experts in various technical fields, all resulting in substantial cost to the City and the POLB"].) It was also apparent the financial

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benefits of the project offered to the City and its residents would not be as significant as anticipated. (55 RP 15053, 15058-59, 15067.) Thus, on January 22, 2007, the Board voted not to pursue a lease with SES for the LNG facility on the City site, and directed its staff to stop processing SES' application. (55 RP 15060.) This lawsuit followed.

III. STANDARD OF REVIEW

SES correctly asserts that this proceeding is governed by Code of Civil Procedure section 1085 (traditional mandate). However, SES incorrectly argues that the substantial evidence standard of Public Resources Code section 21168.5 applies. (OB 8.) That section would apply were the Court reviewing the sufficiency of the EIS/EIR. (See *Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 673.)

Here, the issue is not the certification of an EIR, but the Board's determination **not to pursue a lease of the site to SES**. Thus, SES' challenge to the City Attorney memorandum as not being supported by substantial evidence, is a straw man argument, for the decision not to lease was legislative in nature and is governed not by section 21168.5, but by the arbitrary/capricious standard of review.[7] The property involved in the proposed lease was filled tidelands granted by the Legislature to the City in trust for a harbor and related facilities. (35 RP 9835; stats 1911, Ch. 676; stats 1925, Ch. 102; stats 1935, Ch. 158; *People v. City of Long Beach* (1959) 51 Cal.2d 875, 878.) The City has the right to select among competing trust uses for its public trust parcel, which is a legislative question. (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707, 715.) Because the Board, in deciding not to lease the property, was engaging in a quasi-legislative activity (*id.* at 718-719), the scope of review of that decision is not the substantial evidence test, but the even more deferential arbitrary/capricious test.[8] (*Id.*)

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[7] SES misfocuses much of its brief on the City's concern regarding its inability to publicly disclose information critical to an understanding of the project's safety risks. SES argues that withholding this information was perfectly legal and that federal law preempts any local interests. This argument proves too much. Whether the nondisclosure was technically defensible is beside the point. As the owner of the land involved, the City had the discretion to choose local interests over federal interests and to not proceed with the project in light of its concern that nondisclosure compromised the City's ability to prepare an adequate informational document under CEQA.

[8] Even if the substantial evidence test applied, the Board's decision would easily withstand SES' challenge as it is overwhelmingly supported by the record. Indeed, because SES failed to "lay out the evidence favorable to the other side and show why it is lacking," SES forfeited its claims in this regard. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

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IV. SES HAS NO RIGHT TO COMPLETION OF THE EIS/EIR, AND THE CITY HAS NO DUTY TO COMPLETE IT

Mandamus is "to compel the performance of an act which the law specially enjoins. . . ." (Code Civ. Proc. § 1085, emphasis added.) Two requirements are essential: (i) a clear, present and usually ministerial duty upon the part of respondent; and (ii) a clear, present and beneficial right in the petitioner to performance of that duty. (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 813-14.) Neither requirement is met here.

A. SES Has No Clear, Present, And Beneficial Right To Completion Of The EIR

1. SES Has No Legal Interest In The Site

To develop the project, SES needed several federal, state, and local permits and approvals, including a Port Master Plan ("PMP") amendment, a Harbor Development Permit ("HDP"), and a lease from the Board. (35 RP 9884-85.) Pursuant to the Guidelines for Implementation of the PMP, in order to apply for an HDP, SES had to hold a legal interest in the land upon which development was to occur. (1 RP 13, 35-36 [§ 10.2]; see Pub. Res. Code § 30601.5 [Coastal Act requires applicant for coastal development permit (*i.e.*, an HDP [1 RP 8]) who is not owner of the fee interest in the land to show legal right to use the land for the proposed development]; 14 Cal. Code Regs. § 13053.5 [Coastal Commission regulations require development permit application to document applicant's legal interest in all of the land upon which the work is to be performed].)

In its HDP application, SES identified its interest as follows:

> **"Applicant's legal interest in property (be specific):**
>
> "SES executed a Letter of Intent (LOI) on May 8, 2003 with the Port of Long Beach (POLB) for the purposes of developing a liquefied natural gas (LNG) receiving terminal and regasification facility." (4 RP 796.)[9]

Once the exclusivity period expired, SES no longer had any legal interest in the site. Once the Board decided not to lease the property, there was no longer any site for the project, and thus no project. Because there was no project, SES had no right to the completion of the EIS/EIR.

The LOI imposed very limited obligations on the parties; it stated the parties intended to

[9] SES also had to provide assurances to FERC that it had a site available. The exclusive right to pursue the development of the project under the LOI served this purpose until it expired. (2 RP 417.)

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negotiate a lease consistent with general business terms "at such time as it is appropriate to do so," giving SES a limited time to process its project. (2 RP 393.) It was anticipated that SES would obtain the necessary permits and approvals and begin construction of the project within 24 months of signing the LOI (by May 2005). Because the parties recognized the process might take longer, the LOI gave SES an additional 13 months (until June 2006) to process the project. (2 RP 394.) This deadline was set forth in unambiguous terms:

> "SES will have the exclusive right to pursue the development of an LNG receiving terminal in the Port of Long Beach until **the earlier of the time that** (i) SES delivers written notice of its determination in its sole and absolute discretion that the Project is not feasible, (ii) FERC has affirmatively denied SES the permits and approvals required for the Project, or (iii) **is thirty-seven (37) months after the date of this letter** (the 'Exclusivity Period')." (2 RP 393, emphasis added.)

The LOI also expressly provided that:

> "Other than the obligations expressly set forth herein, this letter of intent **does not create binding obligations on the part of the Port of Long Beach to assign the Site to SES or on the part of SES to lease the Site from the Port of Long Beach.** The Port of Long Beach and SES recognize that the Summary of Terms is a summary of the **general business terms only** and intend to negotiate the complete and definitive terms in a final preferential assignment agreement. . . . **This letter of intent does not constitute an assignment, permit, license, entitlement for use, or other commitment by the Port of Long Beach to a definite course of action concerning the Project.**" (2 RP 394, emphasis added.)

SES expressly agreed that the LOI was to be non-binding. On April 16, 2003, shortly before the LOI was signed, SES' attorney stated in an e-mail to the City:

> "I wish to emphasize that **we view the LOI as being non-binding, i.e., it creates very limited obligations** that are expressly spelled out in the LOI. We see the Summary of Terms as describing the general terms and that a final agreement on lease terms will be set forth in a preferential assignment agreement that will have all of the terms spelled out in detail." (2 RP 334, emphasis added; see, also, 2 RP 296 [where SES "acknowledged and agreed" in February 3, 2003 that the LOI did **not** constitute a lease or other commitment by the Port to a definite course of action concerning the Project].)

That SES was keeping its options open was also made clear well after the LOI was executed in May 2003. In February 2004, SES stated that it "does not expect to make a final determination until approximately one year from now [*i.e.*, 2 years after LOI signed] regarding the construction of the proposed LNG terminal in the Port of Long Beach." (14 RP 4530.)

The City kept its options open as well, not wanting its property to be tied up too long with the project. SES was well aware of this. On December 23, 2002, SES sent the City an outline of

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SES' basic, initial points for the LOI, in which SES acknowledged that a condition precedent to the City leasing the site was SES obtaining all required permits and discretionary approvals **by a date certain**. (1 RP 177 ["[I]f Conditions Precedent **not met by a date certain, obligations by SES and POLB to enter into lease will expire**" (emphasis added)].)

Notably, SES' original draft of the LOI did not include a deadline as part of the exclusivity provision. (2 RP 336.) The City insisted on a deadline, proposing that a 36-month deadline be included. In countering with a 48-month deadline, SES acknowledged the consequences of not obtaining all necessary permits and approvals before the exclusivity period expired:

> "We have also countered with a proposal that the exclusivity period in the LOI expire after 48 months. **Mitsubishi is much more comfortable with the longer period**; in light the [sic] significant amounts of time and money Mitsubishi will invest in the permitting process, **Mitsubishi wishes to have a control of the site for an adequate period of time so that it does not risk losing exclusive rights if the permitting process is delayed.**" (2 RP 345, emphasis added; 358, 363 [draft with 48-month deadline].)

Thus, SES well understood that the City could abandon the project at the end of the exclusivity period, and tried to protect itself against that contingency by seeking to negotiate a 4-year period. As stated, however, the deadline ultimately agreed to was 37 months. (2 RP 368, 370, 393.)

Further, the City made clear from the beginning that the proposed project must include certain components to proceed, including a lease of the project site and a long-term natural gas supply agreement between SES and the City. (3 RP 557 ["SES representatives have been told that until the finalization of the above components, there is no project, only a proposal."].)

More importantly, SES repeatedly acknowledged during processing that **without a lease** of the project site, **there was no project**. (33 RP 9331 [June 7, 2005 SES City Council meeting statement: "We will not bypass local authority. . . . The last thing we need is the lease from the Port. And **if we don't get a lease from the Port, we don't have a project**. . . . And I believe that's exactly what the law is. And whatever it is, that's the way we are going to behave."]; 9390 [July 2005 SES interview with the Long Beach Business Journal: "LBBJ: What happens if the Long Beach Harbor Commission says they don't want the facility? SES: **We don't have one**. . . . **We have to have a lease** . . . there's no eminent domain involved in any of this. LBBJ: So, if the harbor commission votes against having the facility, **then it's dead no matter what FERC**

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wants? SES: **Yes. . . .**"]; 9457 [August 8, 2005 SES letter to City Council: "We will **not have a project unless we receive a Harbor Development Permit and a final lease agreement for the property. . . .**"]; see, also, 23 RP 6408, 6446; 24 RP 6846; 29 RP 8038-39.)

Once the LOI expired on June 9, 2006, the Board was free to pursue other uses for the site, including no use, and SES no longer had any interest in the property; thus, SES has no standing to challenge the Board's decision to abandon the CEQA process. (*Municipal Court v. Superior Court* (1988) 202 Cal.App.3d 957, 961 [petitioner lacked standing because it had no beneficial interest in the matter].) To seek a writ of mandate, SES must show it is "beneficially interested" in the litigation. (Code Civ. Proc. § 1086.) "Beneficially interested" means petitioner has some special interest to be served or some particular right to be preserved over and above the interest held in common with the public at large. (*Embarcadero Municipal Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 786-787.) Because SES was divested of all interest in the property, it is impossible for SES to receive mandamus relief here. (See *County of San Luis Obispo v. Superior Court* (2001) 90 Cal.App.4th 288, 292-93.)

In *San Luis Obispo*, petitioner applied to the county for certificates of compliance under the Subdivision Map Act for certain lots created under an antiquated subdivision map on the property. Petitioner needed the certificates to develop his land. When the county denied his application, petitioner filed a petition for writ of mandate to compel the county to issue the certificates. The trial court granted the writ, even though shortly after filing suit, petitioner had lost the property through foreclosure. (90 Cal.App.4th at 291.) The Second District Court of Appeal issued a writ of mandate directing the trial court to deny relief, holding that the foreclosure divested petitioner of all interest in the property, thus making "it impossible for [petitioner] to receive relief." (*Id.* at 292.) In so holding, the court stated:

> "[Petitioner] **has no beneficial interest in the property. He has no more rights than any other stranger to the title.** What [petitioner] apparently seeks is a hypothetical determination that he would be entitled to the certificates if he were the owner or vendee of the property. Such hypothetical determinations are not within the purview of administrative mandate. (See *Grant v. Board of Medical Examiners* (1965) 232 Cal.App.2d 820, 827 . . . **[writ will not lie to enforce a mere abstract right].)**" (*Id.* at 293, emphasis added.)[10]

[10] Citing *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405 and *Patrick Media Group, Inc. v. California Coastal Com.* (1994) 9 Cal.App.4th 592, petitioner in *San Luis Obispo* argued that developers whose contracts with property owners have expired still have

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Like the petitioner in *San Luis Obispo*, SES lost its only interest in the site when it lost its exclusive right to develop under the LOI, and SES now holds no more rights in the site than any other stranger to the title. Thus, even were there a hypothetical duty under CEQA to complete an EIR once started, the writ must still be denied because that duty would not be owed to SES.

2. **POLB's Duty To Cooperate Did Not Survive The Exclusivity Period**

SES also asserts that by abandoning the EIR process, Respondents violated their duty under the LOI "to cooperate with SES in the application process." (OB 1:26-27.) Without citation to any authority, SES claims that although the LOI's exclusivity period expired on June 9, 2006, all other terms and conditions of the LOI, including Respondents' duty of cooperation with SES, "survived the exclusivity period and continue in effect to this day." (OB 3:1-4.)

SES' claim is without merit; the LOI merely provided that: (i) SES was given a 37-month Exclusivity Period to pursue development of an LNG terminal in the POLB; (ii) "**During the Exclusivity Period,**" SES would diligently pursue the permits and approvals necessary to develop the project; and (iii) **In order to facilitate SES' applications** for project permits and approvals, POLB would cooperate with SES **in connection with the application processes**. (2 RP 393-4.) Thus, the only cooperation promised was in connection with SES' applications, which, in turn, were to take place "during the Exclusivity Period." Accordingly, any such obligations expired along with the Exclusivity Period in June 2006. Indeed, it is nonsensical to argue the City had to continue to "cooperate" with SES by continuing to process SES' applications on a site the City

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standing. The Second District distinguished those cases, pointing out that the court in *Mola* did not contradict the holding that the expiration of plaintiff's option to purchase the property rendered its mandamus action moot; *Mola* simply held that in the absence of a completed mandamus action, the developer's action for inverse condemnation damages could not be maintained. (*San Luis Obispo*, 90 Cal.App.4th at 295.) To the extent *Mola* could be read to confer standing on petitioner in *San Luis Obispo*, the Second District **declined to follow it**. (*Id.*)

That holding makes even more sense here. In those cases holding that a permit applicant's standing survives the expiration of a contract with the landowner, the applicant had sued for inverse condemnation damages based on a quasi-judicial decision regarding a project proposed for **private property**. The cases hold that the applicant must first succeed in setting aside an agency's decision through a mandate action before pursuing damages for a regulatory taking, allowing the agency to change its mind rather than pay compensation for a taking. Here, the City could not be sued for inverse condemnation damages as the land involved is **owned by the City**, not some private party. Consequently, since SES could not force the City, in effect, to exercise its eminent domain power by suing in inverse condemnation, the rationale of those cases that conclude that a developer still has standing even though its contract with the landowner has expired, does not apply here.

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had decided to use for other purposes, which it was free to do once the exclusivity period expired.

B. **City Has No Clear, Present, And Ministerial Duty To Complete The EIS/EIR**

The writ must also be denied because the Board has no duty to complete the EIS/EIR. Public Resources Code section 21080(b)(5) provides that the requirements of CEQA, which would include the requirement that a final EIR be completed and certified within one year after the date the lead agency accepts the project application as complete (§ 21151.5(a)(1)(A)), do not apply to projects "which a public agency rejects or disapproves." Here, the Board determined it would not lease the subject property to SES for the project (55 RP 15060), thus rejecting the project and obviating the need to complete and certify the EIS/EIR under section 21080(b)(5).[11]

SES asserts section 21080(b)(5) is qualified by Guidelines section 15270 to the extent that the CEQA exemption for a rejected project does not apply once the CEQA process is initiated.[12] (OB 18 and fn 19.) Section 15270(b) provides: "This section is intended to allow an initial screening of projects on the merits for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved." Because the CEQA process was underway here, SES maintains the Board was duty-bound to complete it, and cites *Sunset Drive Corporation v. City of Redlands, supra*, 73 Cal.App.4th 215 to support its argument.

Sunset Drive is inapposite. There, a landowner applied to the city to develop a low-income housing project on the landowner's private property. (73 Cal.App.4th at 219.) In 1992, the city deemed the applications complete, and in 1994, the owner submitted a draft EIR. Following two sets of city comments critical of the draft EIR, in 1995 the owner submitted a third draft EIR for review and action. (*Id.*) When the city failed to take action on either the project or the draft EIR for nine months, the owner filed a mandamus action to compel the city to complete and certify an EIR. (*Id.* at 219-20.) In reversing the trial court's sustaining of a demurrer without leave the amend, the court of appeal held that the city was obligated to certify an EIR within one year of the

---

[11] Consistent with section 21080(b)(5), FERC's regulations implementing NEPA expressly provide: "Notwithstanding any provision in this part, the Commission may dismiss or deny an application without performing an environmental impact statement or without undertaking an environmental analysis." (18 CFR § 380.11(c).)

[12] SES erroneously asserts that section 15270 is a "statement of legislative intent." (OB 16:7.) The Guidelines are not a product of the Legislature; rather, they are developed by the Office of Planning and Research for adoption by the Secretary of Resources. (Guidelines § 15000.)

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date of the completion of the owner's application. (*Id.* at 221.)

Sunset Drive is distinguishable from this case in four important respects. First, unlike here, the city in *Sunset Drive* **never rejected the project** – it merely refused to review the third draft of the EIR or to take action on the project. (73 Cal.App.4th at 220, 224.) There is no suggestion the court would have held that the city was required to complete the EIR process had the city actually rejected the project; rather, it was the city's refusal to take any action that was dispositive. (*Id.* at 222 ["A refusal to exercise discretion is itself an abuse of discretion. . . . Accordingly, although mandamus is not available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result, it does lie to command the exercise of discretion – to compel some action upon the subject involved"].) Nothing in *Sunset Drive* remotely suggests that an agency must complete an EIR when the agency "rejects" a project by lawfully refusing to authorize the legislative action that is required for the project to proceed. (See *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479 [EIR not required where design review application *denied*].)

Second, in *Sunset Drive* **petitioner owned the land** for which the project was proposed, and thus had a constitutional right to use the site in some fashion. (*Id.* at 219.) Here, SES no longer has any interest in the City's land, and consequently no right to use it. SES' argument ignores the fact that the City, acting through the Board, had two roles here. First, as the property owner, the City had the right to determine how it would use its property; *i.e.*, the right to decide whether to lease it to SES. Second, as the regulator of land within its jurisdiction, the City had the authority to decide whether to approve the LNG permits. Once the Board determined in its first role not to lease the site to SES, as it had the right to do after the LOI expired, the Board had no duty in its second role to continue processing SES' permit applications, or the EIS/EIR thereon, since the site was no longer available to SES. *Sunset Drive* is inapposite because the project did not require the use of the city's land to proceed, and the city did not take action as a landowner.

Third, the landowner in *Sunset Drive* had no intention of abandoning the project. (*Id.*) Here, the landowner is the City, and the City has no intention of proceeding with the project. Thus, the granting of the writ in *Sunset Drive* would not result in a futile act at a considerable

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expense to the community, as it would here. (See *Rogers v. Board of Directors of Pasadena* (1933) 218 Cal. 221, 223-24 [writ denied where no showing it "will result in anything but an expensive and fruitless proceeding."]; Guidelines § 15003(g) and *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283 ["[t]he purpose of CEQA is not to generate paper. . . ."].)

Finally, *Sunset Drive's* holding was based on Public Resources Code section 21151.5, requiring an agency to certify the EIR for a project within one year of the completed application. (*Id.* at 220, 223.) Here, the Board was working with FERC on a joint EIS/EIR. (Pub. Res. Code § 21083.6.) Because federal agencies are not subject to CEQA's time limits, the one-year deadline of section 21151.5 is inapplicable. (See Guidelines §§ 15110, 15224.)

SES also asserts that *Main San Gabriel Basin Watermaster v. State Water Resources Control Board* (1993) 12 Cal.App.4th 1371 ("*Watermaster*") supports its argument. On the contrary, *Watermaster* clearly supports the Board's action. In *Watermaster*, the owner of a 302-acre site sought approval from the Water Quality Control Board ("Board") to dispose of waste on 222 acres of the site adjacent to an 80-acre landfill site operated by the owner since the 1960s. (*Id.* at 1373-75.) To allow the operation, the Board had to approve waste discharge requirements ("WDRs") designed to reduce the leaching of hazardous materials into the groundwater basin. (*Id.* at 1374-75.) The Board had previously approved both WDRs and the owner's request to dispose of solid waste on the entire 302-acre site, but those approvals had been overturned due to the Board's failure to prepare an EIR for the project. (*Id.* at 1375-1376.)

The Board then disapproved the owner's revised WDRs and application to expand the landfill operations. (*Id.* at 1377.) The owner brought suit, arguing that the Board was required to prepare and consider an EIR before taking any action on the merits of the owner's application. (*Id.* at 1374.) The trial court rejected this argument and the court of appeal affirmed, stating "[w]e concur with the ruling of the lower court that CEQA imposes no such requirement. . . ." (*Id.*) The court relied on the unambiguous command of Public Resources Code section 21080(b)(5):

> "(a) Except as otherwise provided in this division, this division shall apply to discretionary projects **proposed to be carried out or approved** by public agencies. . . .
>
> "(b) This division does **not apply** to any of the following activities:
> [¶] (5) Projects which a public agency **rejects or disapproves**."

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Finding section 21080(b)(5) clear, the court stated that "the Legislature has determined for reasons of policy to exempt project disapprovals from environmental review under CEQA." (*Id.* at 1383.)

Attempting to avoid the clear language of section 21080(b)(5), the owner made the same three arguments advanced by SES here. First, citing Guidelines section 15270(b), the owner argued that "disapprovals without an EIR are limited to the initial screening phase of project review," and that "since [owner's] WDRs for landfill expansion were originally approved by the State Board, the 'initial screening' phase is long past and the State Board may no longer take advantage of the 'quick disapproval' exemption to deny [owner's] application on the merits without preparation and consideration of an EIR." (*Id* at 1380.) The court disagreed:

> "The terms 'initial screening' and 'quick disapproval' are not defined for purposes of CEQA Guidelines section 15270, subdivision (b) . . . , and it can hardly be debated that disapproval **without certification of an EIR** would in the normal course of events be 'quick' in comparison to disapproval following the necessarily lengthy CEQA review process." (*Id.* at 1380-81, emphasis added.)

Moreover, the court held that (i) the **plain meaning rule**, and (ii) the Legislative Counsel's **unqualified** description of the measure when section 21080(b)(5) was enacted, supported the conclusion "that ***all*** project disapprovals by a public agency are exempt from CEQA review." (*Id.* at 1382, emphasis in original.) This holding is consistent with the rest of CEQA. Public Resources Code section 21003.1(a) recognizes that agencies may not even become aware of adverse environmental impacts **until informed of them by public comment**. Under SES' reasoning, an agency could avoid the time and expense of preparing an EIR by rejecting a project out-of-hand based on little or no information about its impacts, but would have to complete an EIR once it is begun even though substantive comments from the public or expert state agencies inform the agency of unacceptable project impacts. The illogic of this position defeats it.[13]

Second, the owner argued that Public Resources Code section 21061 evidenced a legislative intent to require preparation and consideration of an EIR prior to approval or

[13] Indeed, nothing in the statute (§ 21080(b)(5)) even suggests a limitation such as that imposed by the guideline (§ 15270(b)), and thus the guideline is entitled to no weight since it is inconsistent with controlling CEQA law. (See *Communities For A Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 115; *Muzzy Ranch Co. v. Solano County Airport Land Use Comm.* (2007) 41 Cal.4th 372, 380, n. 2 ["In interpreting CEQA, we accord the CEQA Guidelines great weight **except where they are clearly unauthorized or erroneous.**")

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disapproval of any project. (*Id.* at 1381.) Rejecting this argument, the court stated:

> "Public Resources Code section 21061 merely addresses the **possibility** that once an agency proposes to carry out or approve a project, and thereafter prepares an EIR, it may conclude based on the information contained therein that disapproval is the wiser course of action." (*Id.* at 1381, emphasis added.)

Finally, the owner argued that the public participation policies underlying CEQA were best advanced by requiring an EIR. (*Id.* at 1383.) The court emphatically rejected this argument:

> "[T]he Legislature has determined for reasons of policy to exempt project disapprovals from environmental review under CEQA. Our state legislators evidently concluded that public agencies **should not be forced to commit their resources to the costly and time-consuming environmental review process for proposed private development projects slated for rejection**, whatever the reason for agency disapproval. This court does not sit in judgment of the Legislature's wisdom in balancing such competing public policies."(*Id.* at 1383-84 (emph. add).)

Here, the Board has "rejected" SES' proposal, thus bringing itself within the terms of section 21080(b)(5). Given the voluminous expert testimony from State agencies highly critical of the draft EIS/EIR, the record establishes that attempts to cure the identified defects in the draft EIR would result in a further "lengthy CEQA review process." (*Watermaster*, 12 Cal.App.4th at 1381.) Certainly, the Board's rejection of SES' proposed use on land that SES has no right to use is relatively quick compared to the extensive time it would take to prepare and recirculate an adequate CEQA document for the project. (55 RP 15049; 47 RP 13222.) SES' reliance on CEQA Guidelines section 15270(b) should be rejected for this reason alone.

Further, SES' argument that *Watermaster* stands for the proposition that section 21080(b)(5) applies only to the disapproval of a project "on the merits" is specious. (OB 17:15-23.) Section 21080(b)(5) states that CEQA does not apply to "[p]rojects which a public agency **rejects** or **disapproves**." Rejections and disapprovals, while similar, are distinctly separate actions, both of which the Legislature chose to exempt from the coverage of CEQA. To "reject" means "to refuse to hear, receive or admit." (Webster's 9th New Coll. Dict., (1986), p. 993.) "Disapproval" means "to pass unfavorable judgment on; to refuse approval of." (*Id.* at 359.) Thus, rejecting a project would include not hearing it on its merits. The Legislature has unambiguously declared that the **rejection** of a project (the refusal to hear it), as well as the disapproval of a project (to pass unfavorable judgment on), are both exempt from CEQA.

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C. The Board Did Not Violate SES' Rights In Making Its Decision

SES claims the Board's January 22, 2007 action (i) did not comport with due process, and (ii) was arbitrary and capricious. Not so.[14] First, the Board's action did not violate due process. *Beck Dev. Co. v. Southern Pac. Transp. Co.* (1996) 44 Cal.App.4th 1160, does not aid SES. There, plaintiff owned the land subject to the moratorium (*id.* at 1171) and thus had a property interest at stake, a prerequisite to due process protection. (*Schultz v. Regents* (1984) 160 Cal.App.3d 768, 775.) Here, by 2007, SES had no more than an abstract desire to lease the site. Further, *Beck* involved a quasi-judicial decision; here, the decision was quasi-legislative and thus not subject to due process requirements. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.)

Nor was the Board's decision to end negotiations arbitrary or capricious, as many factors supported it, including: (i) the raging controversy regarding the risk to the public and the Port facilities posed by the project; (ii) the fact that over time it had "become more evident that the location of an LNG facility within Long Beach would have a direct and serious impact upon the quality of life of the City's residents" (28 RP 7809); (iii) the expiration of the LOI in June 2006; (iv) the ever-expanding project horizon date; (v) the emerging options both for greater savings from other gas supply opportunities and for off-shore LNG facilities; (vi) the increasing commitment in City resources necessitated by the project (see, *e.g.*, 31 RP 8669; 54 RP 14838-39); (vii) the many reasons set forth in the City Attorney Memorandum of January 8, 2007; (viii) the inability of the parties to agree to a gas supply arrangement to financially benefit the City and its residents; and (ix) SES' misrepresentations of the scope of project.[15]

D. SES Failed To Exhaust Its Administrative Remedies

SES' bid for relief regarding the Board's decision not to complete the EIS/EIR is foreclosed for an additional reason: SES failed to appeal the Board's decision to the Long Beach

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[14] Contrary to SES' claim that the decision to end negotiations was made at a "possibly illegal" meeting (OB 19:15), the lease decision was made in a noticed closed session of the Board with its real property negotiator (55 RP 15066), and thus was legal. (Gov. Code § 54956.8.) Moreover, had SES wished to challenge the Board's procedures, SES had to first make a written demand on the Board to cure or correct any purported violation within 90 days of its occurrence (by April 22nd). (Gov. Code § 54960.1.) SES failed to do so, and thus cannot now challenge its legality.

[15] Indeed, SES' misrepresentations preclude relief as a writ will not issue in aid of one who does not come into court with clean hands. (*Elliott v. Contractors' St. Licenses Bd.* (1990) 229 Cal.App.3d 1048, 1054.)

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City Council, thereby failing to exhaust its administrative remedies. Under Public Resources Code section 21151(c), the decision of an agency's nonelected body that a project is not subject to CEQA may be appealed to the agency's elected body. The Board, a nonelected body, determined that the project was no longer subject to CEQA once the Board decided not to lease the site. SES argues this decision violated CEQA. Thus, SES had to appeal that decision to the City Council, the elected body. SES' failure to perfect an appeal by doing so within 10 days of the decision (LBMC § 21.21.507 http://municipalcodes.lexisnexis.com/codes/longbeach/) precludes relief here. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292-93 [if administrative remedy provided by statute, relief must be sought from administrative body before courts will act].)

V. CONCLUSION

CEQA requires that an EIR, an informational document that discloses the environmental costs of approving a project, be certified for certain projects the agency proposes to carry out or approve. CEQA is intended to protect the environment, not the developer, and thus it exempts project rejections/disapprovals from its provisions. SES acknowledged that without a lease, it had no project. Once the Board decided not to lease its site for an LNG facility, SES had no project, and consequently the City had no duty to commit its limited resources to completing the EIS/EIR – because the proposal would not be approved, there was no need to disclose the environmental costs of approving it. (Civ. Code § 3532 ["The law neither does nor requires idle acts."].)

The LOI was not, as SES now argues, a perpetual contract that could tie-up the City's property indefinitely. After the 37-month exclusivity period, the Board was free to say no to the project without further study. SES could have sought to negotiate a provision that its exclusivity period did not lapse until after the EIS/EIR was certified, so as to give SES standing in this mandamus action. It did not do so. SES now invites the Court to incorporate such a provision in the LOI on its behalf. The Court should decline this invitation.

Dated: August 23, 2007

RUTAN & TUCKER, LLP

By: _____

Robert S. Bower
Attorneys for Respondents

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PROOF OF SERVICE BY OVERNITE EXPRESS

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On August 23, 2007, I served on the interested parties in said action the within:

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

by depositing in a box or other facility regularly maintained by Overnite Express, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as stated below, with fees for overnight delivery provided for or paid.

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Executed on August 23, 2007, at Costa Mesa, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Janet Bechtel
(Type or print name)

(Signature)

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LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

SES TERMINAL, LLC, a Delaware limited liability company; Petitioner, v. THE PORT OF LONG BEACH; BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH; CITY OF LONG BEACH; and Does 1 through 50, Respondents.	CASE NO. BS 107298 **PETITIONER SES TERMINAL'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** Date: October 31, 2007 Time: 9:30 a.m. Dept.: 85 Assigned to: Honorable Dzintra I. Janavs

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PETITIONER SES TERMINAL'S REPLY BRIEF

SES Terminal, LLC ("SES") submits the following reply to Respondents' Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate ("Opposition" or "Opp.").

I. INTRODUCTION

Respondents' Opposition fails to address or even mention the one thing at issue in this mandamus proceeding – the actual reasons for Respondents' refusal to complete an environmental impact report ("EIR") in connection with SES' applications to construct a liquefied natural gas ("LNG") terminal. As set forth in the minutes of the January 22, 2007 meeting of the Board of Harbor Commissioners (the "Board") and Respondents' press release of the same day, the Board terminated the EIR process because (1) the draft EIR "is and in all likelihood will remain legally inadequate," and (2) an LNG supply agreement between SES and Respondent City of Long Beach ("City") "does not appear to be forthcoming." As shown in SES's opening brief, neither justification supports the Board's decision.

As the lead agency, the Port of Long Beach ("POLB") must, as a matter of law, prepare an adequate EIR for the proposed LNG terminal project (the "Project"). As an informational document, the EIR need not be perfect, but it must reflect a good faith effort at full disclosure in the light of what is reasonably feasible. Respondents cannot show that it is impossible for POLB to prepare an adequate EIR.

Further, the Board's speculation that the City and SES will not reach agreement on the sale of LNG to the City was, at best, premature. As explained in SES's opening brief, no such agreement need be reached until after completion of the EIR. Moreover, the record clearly demonstrates that negotiations between SES and the City were ongoing at the time of the Board's action. In other words, there had been no breakdown in negotiations. Rather, the Board's refusal to complete the EIR *caused* the negotiations to end.

Instead of attempting to defend the Board's actual rationale for terminating the EIR process, Respondents offer a host of *post hoc* justifications, none of which has merit:

- Ignoring the Board's expressed reasoning and the existing agreement on the terms of a lease for the Project site, Respondents argue that the City, as the owner of the land, simply

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decided not to lease the proposed Project site to SES for reasons that are not reflected in the minutes of the Board's January 22, 2007 meeting. No such decision was made, and Respondents' attempt to rewrite history must be rejected.

- Respondents next claim that SES lacks standing because SES no longer has a property interest in the land on which the Project would be constructed (the "Site"). However, standing does not require such an interest. Indeed, absent a certified EIR, SES could not legally obtain a property interest in the Site without violating the California Environmental Quality Act ("CEQA"). As the applicant for a harbor development permit ("HDP") for the Project and the holder of rights under the May 8, 2003 agreement between SES and POLB (the "Agreement"), and given its $80 million investment in the EIR and HDP application process, SES has standing to object to Respondents' unjustified, last-minute abandonment of the EIR process.

- Respondents contend that they need not complete the EIR because POLB's obligation to cooperate with SES in the permit application process terminated with the expiration of the exclusivity period in June 2006. However, a straight-forward reading of the Agreement indicates otherwise. Moreover, POLB has an independent duty under CEQA to prepare an adequate EIR in a timely fashion, and may not use its own failure to complete the EIR by June 2006 to terminate its duty to cooperate. Indeed, POLB recognized its ongoing obligation by continuing to cooperate with SES after June 2006 until its recent abandonment of the EIR.

- Finally, relying on an ordinance that permits appeals of certain CEQA determinations by the Board to the Long Beach City Council, Respondents argue that SES failed to exhaust its administrative remedies. On the contrary, no such administrative remedy was available because (1) the Board did not make an "environmental determination" as defined in the applicable ordinance, and (2) the Board made its decision in a secret meeting without providing SES the opportunity to be present or object.

In the end, this is simply a case where a lead agency has wrongfully refused to carry out its obligation to complete an adequate EIR on the unlawful basis that it was not capable of doing so. Accordingly, a writ of mandate should issue compelling Respondents to set aside their purported "disapproval" of the Project and directing POLB to complete and certify the EIR.

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II. THE OPPOSITION MISCHARACTERIZES THE BOARD'S DECISION

In their Opposition, Respondents misleadingly argue that POLB was entitled to stop work on the final EIR for the LNG Project because "the Board determined it would not lease the subject property to SES for the project ...." (Opp. at 2:7-8.) The Opposition also implies that this supposed decision not to lease the Project site to SES was based on a multitude of reasons ranging from inadequate "financial benefits" to the City to perceived safety concerns. Opp., pp. 3-8.[1]

These *post hoc* justifications are directly contradicted by the January 22, 2007 press release (the "Press Release"), in which the Board set forth the actual basis for its decision:

> After deliberation, based upon the attached opinion from the City Attorney which concludes that the Environmental Impact Report on the proposed LNG project "is and in all likelihood will remain legally inadequate," and since an agreement between Sound Energy Solutions and the City does not appear to be forthcoming, the Board of Harbor Commissioners disapproves the project and declines to pursue further negotiations.

(55 RP 15061.) The Board's January 22, 2007 meeting minutes ("Minutes") mirror this language. (55 RP 15066.) The Press Release and the Minutes, which are the only documents in the certified Record of Proceedings (the "Record" or "RP") that purport to set forth the reasons for the Board's decision, clearly state that the Board relied on POLB's alleged inability to meet its obligations to prepare an adequate EIR and the Board's erroneous speculation about the status of negotiations between SES and the City relative to an agreement to supply LNG to the City.

Instead of confronting these reasons head on, the Opposition picks through the Record to speculate on *possible* bases for the Board's decision while completely ignoring the only two documents that set forth the *actual* reasons for the decision. Neither the Press Release nor the Minutes indicate that the City had decided not to lease the Project site to SES, or that such decision led to the so-called "disapproval" of the Project. To the contrary, these documents establish that the Board's decision to terminate further negotiations was based upon the Board's misplaced concerns about the adequacy of the POLB's own EIR and the Board's self-fulfilling prophecy that an LNG supply agreement "does not appear to be forthcoming." (55 RP 15061.) None of the reasons that

[1] Indeed, the Opposition purports to read the minds of the Board members themselves. See Opp., at 4:18-22 ("All these comments [on the Draft EIR] were especially significant to the Board ... and gave the Board new insights on the project, especially as to the potential risks to the public ...").

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Respondents now assert would have supported a decision by the Board to decline to enter into a lease with SES squares with the rationale articulated in the Press Release and the Minutes.[2] Moreover, the Record contains no support for the hindsight argument that the Board's decision was made in its capacity as the property owner rather than in its capacity as the lead agency responsible for approving and permitting the Project.[3]

SES seeks review of the decision actually made by the Board as established by the Record — not the Respondents' *post hoc* rationalizations.

III. SES HAS A BENEFICIAL INTEREST ENTITLING IT TO MANDAMUS RELIEF

Respondents argue that SES lacks standing to seek mandamus relief because SES does not currently have a property interest in the Site. Respondents are mistaken. Indeed, if SES had acquired such an ownership interest before completion of the EIR, it would have been a violation of CEQA. See City of Vernon v. Board of Harbor Commissioners, 63 Cal.App.4th 677, 690 (1998) (holding that a letter of intent between the Board and the proponent of a container project on public land did not violate CEQA because the City completed a final EIR *before* entering into a lease).

Standing requires only "some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large.*" Carsten v. Psychological Examining Com., 27 Cal.3d 793, 796 (1980) (emphasis added). See also Horn v. County of Ventura, 24 Cal.3d 605, 619-20 (1979) (prospective property owner had standing to bring a mandamus action to assert his due process rights in connection with the approval of a subdivision). Such a "special interest" or "particular right to be preserved or protected" is established where, as here, the petitioner is an applicant for a development permit or other

[2] For example, the Opposition cites the California Public Utilities Commission's false and unfounded accusation that SES deliberately withheld information about the Project from the City. Opp., p. 5. While page limitations prevent SES from responding fully to this and other misrepresentations contained in the Opposition's statement of "facts," the Court should ignore them as they are not reflected in the Press Release or the Minutes.

[3] In a letter dated January 22, 2007 to SES, the Executive Director of POLB states that the Board "declines to enter into a lease with Sound Energy Solutions" for the reasons set forth in the Press Release. (55 RP 15060.) However, no such decision is indicated in the Press Release or the Minutes. Thus, the letter reflects only the Executive Director's own characterization of the Board's decision, and does not constitute the decision itself.

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entitlement for use that is the subject of the mandamus action. As the court declared in Mola Development Corporation v. City of Seal Beach, 57 Cal.App.4th 405, 415 (1997):

> Standing to pursue administrative mandamus is not limited to property owners; instead, it applies to persons who have "undertaken the efforts necessary to secure [regulatory] approvals [and who have] a substantial stake in the project by virtue of those efforts . . . ." [citation omitted.]

SES's application for a HDP for the Project, originally submitted on July 25, 2003 (4 RP, tab 88), has not been formally acted on by the Board. SES spent over three years and $80 million in furtherance of the HDP application before it was thwarted by the Board's wrongful decision to abandon the EIR process. At the time of the Board's action, SES, POLB, and the Federal Energy Regulatory Commission ("FERC") were in the process of completing the joint final EIS/EIR.[4] By virtue of SES' pending HDP application and its diligent efforts to timely perform all necessary activities to obtain that permit, SES enjoys standing to seek mandamus relief. See Mola, 57 Cal.App.4th at 415. See also Hollman v. Warren, 32 Cal. 2d 351, 357 (1948) (applicant for notary commission had standing to petition Governor to appoint additional notary commissioner).

Thus, the fact that SES does not currently have a property interest in the Site is irrelevant to the standing issue. As the court noted in Mola, "[d]evelopers have standing even if they have not yet concluded an agreement with the property owner to acquire the site, and even if their contracts with the property owner have terminated or expired." Id. (citing Patrick Media Group, Inc. v. Cal. Coastal Com., 9 Cal.App.4th 592, 606 (1992)). In fact, the applicable regulations explicitly recognize that a future interest in the property contingent upon approval of an HDP provide a sufficient "legal right, interest or other entitlement" to confer standing. *See* 14 Cal. Admin. Code § 13053.5 (requiring identification of "the applicant's legal interest in all the property upon which

[4] The Record belies Respondents' assertion that the City had concluded that recirculation of the draft EIR would be required in light of the public comments received on the draft EIR. (Opp. at 5:24-25.) While the potential for recirculation was mentioned in comments submitted by the Long Beach Planning Department in 2005, there is no indication in the Record that a decision to recirculate a revised draft EIS/EIR for public comment had been made. Indeed, the record indicates that recirculation was ***not*** anticipated by the lead agencies. *See* 55 RP 14983 (on September 20, 2006, POLB staff informed the Board that "it is anticipated that the final EIS/EIR will be ready for distribution ... on December 20, 2006 ..."); 55 RP 14984 (October 6, 2006 FERC memorandum circulating the Administrative Final EIS/EIR for final regulatory review).

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work would be performed, *if the application were approved* ...") (emphasis added); POLB's Guidelines for Implementation of the Certified Port Master Plan (requiring applicants to provide "[a] description and documentation of the applicant's legal interest in the property upon which development is to occur, *if the application were approved*." (1 RP 13, 36 (emphasis added).)

The May 8, 2003 Agreement, and POLB's ongoing obligation to cooperate with SES in connection with the HDP application, also confer standing. The Agreement entitled SES to lease the Site following issuance of the HDP, and even provided an outline of the expected terms of that lease. (2 RP 393-404.) Upon approval of the HDP application and other required permits, SES has every right to expect the City to enter into a lease consistent with the terms of the Agreement.

Contrary to Respondents' assertion, POLB's duty of cooperation is independent from, and therefore survives, the limited exclusivity period provision in the Agreement. At most, that provision prohibited Respondents from exploring alternative uses for the Site for 37 months. It does not operate to extinguish SES' interest in the Site after expiration of the exclusivity period. Neither the Agreement nor the attached "Summary of Terms" indicate that the parties' agreement on the general business terms of a lease will terminate upon expiration of the exclusivity period.[5]

Even if the duty to cooperate had expired, SES would still have standing to pursue this mandate action. After all, it was the Respondents who controlled the schedule and timing for certification of the EIR and ultimately permitted the exclusivity period to lapse without having issued a completed EIR. Moreover, Respondents continued to work on preparing the final EIS/EIR and negotiate the LNG supply agreement with SES after the exclusivity period had expired, thereby inducing SES to incur substantial additional costs in good faith reliance on Respondents' conduct. For these reasons, Respondents should be estopped from arguing that expiration of the exclusivity period terminated SES' interest in the Site. See Cal. Evidence Code § 623 ("Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular

[5] POLB continued to work on the final EIR and negotiate the LNG supply agreement with SES after the 37-month exclusivity period expired on June 9, 2006. (55 RP 14982-14985, 15053, 15058-59, 15067). Respondents' conduct is irreconcilable with their new argument that all of all of their duties – and all of SES's rights and interests in the Site – were extinguished on June 9, 2006.

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thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."); see also Emma Corp v. Inglewood Unified School District, 114 Cal.App.4th 1018 (2004) (equitable estoppel applied to public agency).

Respondents' standing argument relies heavily on County of San Luis Obispo v. Superior Court, 90 Cal.App.4th 288 (2001) for the proposition that, "[b]ecause SES was divested of all interest in the property, it is impossible for SES to receive mandamus relief here." (Opp., p. 12.) In San Luis Obispo, the petitioner sought a writ of mandate compelling a county to issue certificates of compliance under California's Subdivision Map Act, Gov't Code §§ 66410 et seq. ("Map Act"). Pursuant to Gov't Code § 66499.35, only a "person owning real property or a vendee of that person pursuant to a contract of sale of the real property" may obtain a certificate of compliance. Noting that foreclosure proceedings had "divested [petitioner] of all interest in the property prior to completion of judicial review of the administrative action," the court denied mandamus because petitioner was no longer an owner or vendee of the subject property and thus not entitled to a certificate of compliance under Gov't Code § 66499.35. Id. at 292. Because San Luis Obispo was based on specific provisions of the Map Act that are not implicated in this case, it is irrelevant.

IV. CEQA MANDATES THAT POLB COMPLETE AND CERTIFY THE EIR

The Opposition attempts to sidestep the key issue in this proceeding – namely, the obligations CEQA imposes on a lead agency in the preparation and certification of an EIR. Lacking any legitimate excuse for their last-minute desertion of the EIR process, Respondents seek to divert the Court's attention from their improper conduct through rampant speculation, misplaced argument and misleading interpretations of case law. Respondents' Opposition essentially boils down to the erroneous contention, based on the misapplication of a single case, that a lead agency has the unfettered right to abandon the CEQA process at any time by simply "disapproving" an applicant's project for any reason, regardless of how close the EIR is to completion. See Opp., pp. 14-18.

There is no dispute that POLB, as the lead agency under CEQA, is responsible for preparation and certification of the EIR. There is similarly no dispute that CEQA mandates the preparation of an adequate EIR based upon available information "in the light of what is reasonably feasible." 14 Cal. Code of Reg. § 15151. The role of the EIR is to discuss environmental impacts

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and the means for mitigating those impacts. If mitigation is unavailable, the EIR should say so. However, nothing in CEQA permits the lead agency to do what the Board did here – simply abandon the CEQA process because it does not believe it is capable of preparing an adequate EIR.[6]

The case of Sunset Drive Corporation v. City of Redlands, 73 Cal.App.4th 215 (1999), is directly on point. In Sunset, the court held that the lead agency had no discretion to refuse to complete an EIR for the project, and that "mandamus lies to compel Redlands to complete the process of preparing and certifying the EIR for the project." Id. at 222. For the reasons discussed in SES' opening brief, Sunset compels a conclusion that Respondents had a duty to complete and certify the EIR for the Project in this case.

In an attempt to distinguish Sunset, Respondents' raise four arguments, none of which has merit. First, Respondents argue that Sunset did not involve a decision to "reject" a project. (Opp., p. 15.) However, according to the Minutes, neither did the Board – at least not on the merits.[7] Second, Respondents argue that the applicant in Sunset was also the property owner. Id. This argument draws a distinction without a difference. As discussed above, SES clearly has a sufficient beneficial interest in the Project to seek mandamus relief. Third, Respondents suggest that Sunset does not apply because Respondents, as the "landowner," had no intent to approve the Project. Id. This argument is less an attempt to distinguish Sunset than it is a request that this Court ignore Respondents' violations of law simply because they own the property in question. Fourth, Respondents assert that Sunset's holding was based on the one year time limit for certifying an EIR contained in Pub. Res. Code § 21151.5, and argue that this time limit is inapplicable here because federal law does not provide a time limit for completing a joint EIS/EIR. Id. This unsupported argument contradicts Section 15110 of the CEQA Guidelines, which provides that the one year time limit may be waived for a joint EIS/EIR only at the "request of an applicant" and only under

[6] CEQA directs the lead agency to provide reasoned responses to all public comments on a draft EIR. CEQA does not, however, allow a lead agency "to rely on such comments as a substitute to for work CEQA requires the Lead Agency to accomplish" (14 Cal. Code of Reg. § 15020) or to abandon the process of completing a final EIR based on such public comments.

[7] If the Board's action constitutes a "rejection," then so does the decision in Sunset – a rejection arising from the lead agency's failure to complete an EIR.

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circumstances not present in this case.

Respondents maintain that Main San Gabriel Watermaster v. State Water Resources Control Board, 12 Cal.App.4th 1371 (1993) somehow supports the Board's total abandonment of the ongoing CEQA process. Watermaster offers no such support and, in fact, supports *SES'* position. Wastermaster involved only the narrow issue of "whether any provision of CEQA . . . or the CEQA Guidelines . . . requires that the State Board prepare and consider an EIR prior to disapproving on the merits ALR's revised WDR application under the Porter-Cologne Act." Id. at 1379. Yet, as shown below and in SES' opening brief, the factual situation in Watermaster does not exist here.

First, SES does not contend, as the petitioner did in Watermaster, that "disapprovals without an EIR are limited to the initial screening phase of project review." Rather, SES contends that when the EIR process is substantially completed, a lead agency cannot simply walk away from an EIR without completing it because the agency doubts its own ability to complete it.

Second, Watermaster acknowledged that Pub. Res. Code § 21080(b)(5) "is intended to allow an initial screening of projects *on the merits* for quick disapprovals *prior to the initiation of the CEQA process* . . . ." The Watermaster court also noted that CEQA Guidelines § 15270(b) does not bespeak "a legislative intent to deprive public agencies of their authority under CEQA or CEQA Guidelines to disapprove of a project ***at any time prior to the initiation of a full CEQA review.***" Id. at 1380 (emphasis added). In Watermaster, a full CEQA review process had not been initiated. Here, in contrast, the Record indisputably shows that the lead agency had not only initiated, but substantially completed, a full CEQA review before the Board arbitrarily pulled the plug.

Third, unlike Respondents in this case, the state agency in Watermaster did not abandon the CEQA process on the ground that it did not believe that an adequate EIR could be prepared.

Fourth, the Watermaster court noted that the petitioner had the parallel remedy of challenging "the State Board's exercise of discretion under the standards of the Porter-Cologne Act ...." Id. at 1384. Here, SES has no similar parallel challenge, as there has been no merit-based decision on SES' permit applications from which SES can appeal.

For the reasons stated above, Watermaster undermines Respondents' own arguments. Moreover, Watermaster does not answer the question posed by SES' petition: when an EIR is on

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the eve of completion following a lengthy CEQA review process, can a lead agency avoid a decision on the merits by simply refusing to complete and certify the EIR on the ground that it supposedly is unable to complete an adequate EIR? The answer is clearly no, and nothing in Watermaster suggests otherwise.[8]

V. THE BOARD'S DECISION CONSTITUTES ABUSE OF DISCRETION

Try as they might, Respondents cannot transform their failure to fulfill duties imposed by CEQA into a landowner's decision regarding the use of its property. Respondents are required to act in their capacity as regulators responsible for compliance with CEQA and deciding applications for HDPs. Therefore, the appropriate standard is the prejudicial abuse of discretion standard applicable to all CEQA actions. See Pub. Res. Code § 21168.5. For the reasons discussed in SES' opening brief, the Board's action constitutes abuse of discretion because it was not supported by substantial evidence and not in accordance with the law.

Respondents argue that the Board's decision was "legislative" in nature and therefore governed by the deferential "arbitrary and capricious" standard of review. (Opp. at 8.) But, the Board's decision was not "legislative" because it did not "involve the adoption of a 'broad, generally applicable rule of conduct on the basis of general public policy.'" Horn, supra, 24 Cal.3d at 613 (quoting San Diego Bldg. Contractors Assn. v. City Council, 13 Cal.3d 205, 212-213 (1974). Rather, as the Minutes clearly indicated, the Board terminated the EIR process for a *specific* project based on *specific* (albeit unsupported) findings. It would also be inaccurate to describe the Board's action as "quasi-legislative." Given the Board's failure to hold a noticed public hearing prior to terminating the EIR process and the scant record underpinning its decision, the Board's decision is akin to an "informal administrative action" which merits a much less deferential standard of review. Western States Petroleum Association v. Superior Court, 9 Cal.4th 559, 575-6 (1995) (judicial review of informal administrative actions lies on the opposite side of the continuum than that for

[8] Respondents assert that their decision will result in the avoidance of additional costly and time-consuming environmental review. (Opp., p. 18.) The Record, however indicates that the EIR was nearly complete and ready for distribution as a final document. (54 RP 14829; 55 RP 14982-14985). Moreover, this argument overlooks the fact that a lead agency may recover the reasonable costs of preparing environmental documents from an applicant. 14 Cal. Code of Reg. § 15045(a).

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quasi-legislative administrative decisions).

Even if the arbitrary and capricious standard were applicable, the Board's decision would still have to be set aside for the reasons discussed below and in SES' opening brief. Among other things, the Board's decision was not based on the merits of the Project or any of SES' pending permit applications, which had not yet been presented to the Board for decision. Rather, the Record shows that the decision was based on a host of improper considerations, including doubts about POLB's ability to complete an adequate EIR, feigned concerns about federal restrictions on the Respondents' ability to publicly disseminate sensitive security information, the City Attorney's unsubstantiated opinions concerning the safety of the proposed LNG terminal, and sheer conjecture about the outcome of ongoing negotiations between SES and City staff regarding an LNG supply agreement. Indeed, as evidenced by the orchestrated events beginning with the December 4, 2006 letter from the Board President to the Mayor and ending with the Board's January 22, 2007 decision to terminate the CEQA process, the Board's decision was little more than political theater.

The arbitrary and capricious nature of the Board's decision is further evidenced by the fact that the Board acted surreptitiously and behind closed doors in violation of SES' right to due process of law. Rather than seek transparency by providing notice and hearing prior to terminating the CEQA process, the Board met in secret (ostensibly in conference with its real property negotiator), thereby depriving SES and other interested parties an opportunity to comment on a matter of obvious public interest. See Shapiro v. San Diego City Council, 96 Cal. App. 4th 904, 924 (2002) (holding that the "narrowly defined exception to the rule of open meetings, for the purpose of giving instructions to the [real property] negotiators," does not allow for private discussion regarding the status or scope of environmental review relating to that transaction).[9] Incredibly, the Opposition does not even attempt to explain why the Board could not have made its decision in the light of day – lending further support to SES' contention that the Board had no legitimate basis for its decision

[9] Respondents contend that SES cannot challenge the legality of the Board's meeting because SES did not make written demand on the Board to cure or correct the violation. (Opp., p. 19, fn 14.) However, SES is not seeking remedies under the Brown Act itself. Rather, SES submits that the Board's flagrant violation of the Brown Act evidences the Board's arbitrary and capricious conduct.

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to abandon the EIR process.

VI. SES DID NOT FAIL TO EXHAUST AVAILABLE ADMINISTRATIVE REMEDIES

The Opposition concludes with the off-handed suggestion that SES failed to exhaust its administrative remedies. A review of the Long Beach Municipal Code ("LBMC") quickly dispatches this argument, and explains why it was relegated to the end of the Opposition.

LBMC § 21.21.507 provides:

> Any person who appeared before the [Board] and objected to the Board's (1) certification of an environmental impact report, (2) approval of a negative declaration ... or (3) determination that a project is not subject to the California Environmental Quality Act ("CEQA") ... may appeal that environmental determination to the City Council.

Here, the Board deprived SES of the opportunity to "appear" before the Board as the decision was made without public notice and during a closed-door session. Thus, by its own conduct, the Board rendered LBMC § 21.21.507 inapplicable. Moreover, the Board's decision, as set forth in the Minutes and the Press Release, did not include a "determination" that the Project was "not subject" to CEQA. Respondents may argue that the *effect* of the Board's action was to relieve Respondents of their statutory duties under CEQA, but this cannot obscure the fact that the Board did not make a CEQA determination within the meaning of LBMC § 21.21.507.[10]

In short, no appeal or other administrative remedy was available to SES.

VII. CONCLUSION

For these reasons, the Court should grant SES' Petition for Writ of Mandate.

DATED: September 11, 2007

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By: _____
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[10] Under Respondents' overly expansive interpretation of LBMC § 21.21.507, every permit application or project of any kind that is denied or rejected by the Board would be deemed to be a "determination" that the project is not subject to CEQA, thereby subjecting the action to appeal to the City Council. Such an interpretation is clearly untenable and must be rejected.

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PROOF OF SERVICE

STATE OF CALIFORNIA, CITY AND COUNTY OF LOS ANGELES

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1900 Avenue of the Stars, 7th Floor, Los Angeles, California 90067.

On September 11, 2007 I served the document(s) described as **PETITIONER SES TERMINAL'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** in this action by placing the true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

☐ (BY MAIL) I am "readily familiar" with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY E-Mail) I transmitted the above-described document by e-mail to the below-listed e-mail addresses.

☐ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

☒ (BY OVERNIGHT DELIVERY) I caused said envelope(s) to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee(s).

Executed on August 11, 2007 at Los Angeles, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Debora B. Gelberg

Debora B. Gelberg

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