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SAN LEANDRO-DAVIS WEST NEIGHBORHOOD GROUP

WEST OAKLAND ENVIRONMENTAL INDICATORS PROJECT

THE BAY AREA DITCHING DIRTY DIESEL COLLABORATIVE STEERING COMMITTEE

NEIGHBORHOOD HOUSE OF NORTH RICHMOND

January 24, 2006

Via Email and Facsimile

Chairman Sawyer
Members of the California Air Resources Board
California Air Resources Board
1001 "I" Street, 23rd Floor
Sacramento, CA 95814

Re: The Air Resources Board/Railroad Memorandum of Understanding – Clarification of the Release Clause and the Effect of the Agreement on State and Local Authority (To Be Presented to the Board on January 27, 2006)

Dear Chairman Sawyer and Members of the Board:

On behalf of the undersigned organizations and our hundreds of thousands of California members, we submit these comments in response to the Memorandum of Understanding between the California Air Resources Board ("CARB"), and Union Pacific Railroad Company and BNSF Railway Company (collectively the "Railroads") (the "MOU"). Specifically, our comments address the attachment to the January 13, 2006 CARB Staff Report, entitled "Clarification of the Release Clause and the Effect of the Agreement on State and Local Authority." In light of this

document, and previous arguments made by our organizations,[1] we continue to urge the Board to rescind the MOU.

At the October 27, 2005 Board meeting, the Board observed that many of the terms of the MOU contained ambiguities, and that clarification of those terms would help the Board determine whether it should affirm or rescind the agreement. To that end, the Board charged staff with the task of clarifying *all* of the ambiguous terms of the agreement, many of which were raised by various stakeholders including environmental, public health and community organizations,[2] and the South Coast Air Quality Management District ("SCAQMD"). For example, the MOU states that the Railroads agree to exert their *best efforts* to limit non-essential idling and to *maximize* the use of lower sulfur fuel, but fails to define operative terms such as "best efforts" and "maximize," thereby creating loopholes and hampering enforcement. It was precisely this (and other) vague language in the agreement, in addition to the application of the termination clause that the Board asked staff and the Railroads to clarify.

Nonetheless, as the staff report makes clear, staff and the Railroads have sought to clarify only *one* provision within the nearly 20-page agreement—the application of the termination clause (the "poison pill") and the related issue of whether the MOU affects the scope of preexisting regulatory authority. This is contrary to the directive of the Board, and perhaps more importantly, it means that staff and the Railroads could not agree on the meaning of many of the critical terms of the MOU, *and* that no progress has been made to cure the substantive deficiencies of the agreement. In addition, as discussed below, the clarification of the termination clause leaves many questions unanswered regarding the scope of that clause, and merely reinforces how the MOU will operate to undermine the authority of state and local governments to reduce locomotive emissions. Consequently, it simply makes no sense from a regulatory, public health, or business perspective to affirm an agreement when essential terms remain undefined and vague. Thus, we strongly urge the Board to rescind the MOU.[3]

I. The Board Should Rescind the MOU Because it Contains Numerous Substantive Deficiencies That Have Not Been Clarified by CARB Staff or the Railroads.

As highlighted by various stakeholders, the MOU contains numerous provisions that are subject to multiple interpretations. These ambiguities will hamper enforcement of the MOU and create

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[1] We understand that the Board is limiting comments concerning the MOU to issues surrounding the clarifications provided in the recent staff report, and will not consider general testimony regarding the lack of public process in the creation of the MOU, legal arguments that CARB has the authority to adopt as formal regulations the overwhelming majority (if not all) of the provisions of the MOU, or testimony that CARB's adoption of the agreement violates the California Environmental Quality Act and the California Administrative Procedures Act. Thus, we will not discuss those issues in this comment letter, but are hopeful that the Board will consider our prior comments on such issues when determining whether to affirm or rescind the MOU.

[2] Enclosed is a copy of the August 31, 2005 letter submitted by many of the undersigned organizations, which outlined the numerous vague and ambiguous provisions in the agreement.

[3] As indicated below, if the Board does not rescind the MOU, it must revise the termination clause to strike the word "agreement" or to specify that "voluntary agreements" would not trigger termination of the MOU. *See* infra, at 5. Currently, the clarifications provided in the staff report are *inconsistent* with the language of the MOU. *See id.*

doubt as to whether any of the perceived benefits from the agreement can be achieved. For example, the following provisions are fatally flawed and were not discussed in the recent staff report:

- **Idling Reduction Program.** The MOU seeks to reduce non-essential locomotive idling, but contains undefined provisions such as: "If . . . a particular locomotive model will not allow a 15 minute shut-down cycle without risking *excessive* component failures, the automatic idling-reduction devices . . . shall reduce locomotive idling by the *maximum amount that is feasible*," and that the "Railroad[s] agree to exert their *best efforts* to limit the non-essential idling of locomotives not equipped with automatic idling-reduction devices." *See* MOU, at Section C.1.b. and C.1.d (emphasis added). As much as we want to believe that these provisions will be interpreted in the most health protective manner, the MOU provides no guarantees, and these terms were not clarified in the staff report.

- **Early Introduction of Low Sulfur Diesel.** While the MOU seeks to increase the amount of cleaner fuel supplied in California, it fails to require the Railroads to *use* a specific amount of cleaner fuel. In fact, the agreement merely states that the "Railroad[s] agree to *maximize* the use of lower sulfur diesel fuel" without defining the term "maximize." *See* MOU, at Section C.2.a. Such ambiguities fail to provide any real requirements and hamper CARB's enforcement.

- **Visible Emission Reduction and Repair Program.** The MOU seeks to ensure that the incidence of locomotives with excessive emissions is low. However, the agreement contains undefined terms that make uncertain whether this objective will be achieved. For example, the MOU states that the Railroads shall prepare a program to ensure that "locomotives with excessive visible emissions are repaired in a *timely manner*," and that such locomotives are "*expeditiously*" sent for testing or to a repair facility. *See* MOU at C.3.a, C.3.b.ii. The terms "timely manner" and "expeditiously" are subject to interpretation and must be defined.

- **Early Review of Impacts of Air Emissions from Designated Yards.** While this program element seeks to expedite the implementation of emissions mitigation measures, the MOU fails to require that any measures actually be adopted by the Railroads. Instead, the MOU merely requires the Railroads to consider measures that they themselves determine are "*feasible*," without ever establishing any criteria as to what is "feasible." *See* MOU, at C.4.a.-b.

- **Assessment of Toxic Air Contaminants from Designated California Rail Yards.** The goal of this provision is to evaluate the toxic air contaminants from certain designated rail yards. However, the MOU does not specify any risk level or risk target that would trigger mandatory risk reduction. Further, the MOU does not provide any specifics as to how the risk analysis will be conducted.

- **Evaluation of Other Medium-Term and Longer-Term Alternatives.** This program element does little more than require the Railroads to "*evaluate*" and "*meet and confer*" about "*feasible*" measures that can reduce emissions at rail yards. *See* MOU, at C.8.c. These vague provisions do nothing to ensure that the Railroads will utilize technologies that have been previously demonstrated and are commercially available.

- **Enforcement and Penalties.** The penalty provisions of the MOU contain numerous undefined terms and loopholes. The MOU restricts certain penalties to violations that cause a "*substantial impairment*" to a program element." *See id.* at C.10.b. Also, such penalties may not be imposed if a violation was created by "*unforeseen or uncontrollable circumstances.*" *See id.* at C.10.b.iv. And the Railroads can escape paying certain penalties if they remedy their violation within a "*reasonable time.*" *See id.* at C.10.a.iii. It is difficult to understand how CARB can effectively enforce the MOU given such vague provisions.

These examples are just a few of the many deficiencies in the MOU that might have been remedied had all stakeholders been permitted to comment and participate in the negotiation of the MOU. Further, it was precisely these provisions that the Board asked staff and the Railroads to clarify, but they did not. In fact, it is difficult to understand why the staff report did not, *at the very least*, outline the provisions of the agreement that stakeholders have argued contain ambiguities so that the Board can decide for itself whether the MOU is fatally flawed.

In the end, we can only assume that additional clarifications were not provided because there was no "meeting of the minds" between staff and the Railroads on critical provisions in the agreement. Faced with this harsh reality, there is no guarantee that any benefits from the agreement can be achieved, and more importantly, that such benefits outweigh the public relations and legal setbacks engendered by this agreement. Therefore, we strongly urge the Board to rescind the MOU.

II. The Termination Clause, as Interpreted by Staff and the Railroads, Warrants Recession of the MOU.

The staff report indicates that the termination clause, or "poison pill" provision, allows the Railroads to terminate the MOU if any agency or political subdivision of the state adopts or attempts to enforce any requirement addressing the goal of any program element set forth in the agreement. In particular, this provision would allow the Railroads to avoid their statewide obligations under the agreement, if for example, new legislation is adopted that overlaps with a program element of the MOU, if the Port of Los Angeles begins implementing its No Net Increase Plan through port-wide rules or policies, or the SCAQMD adopts its railroad regulations.

In fact, we find it extremely unfortunate that the staff report does not detail any of the efforts already underway that could be impacted by the MOU. Namely, both the Port of Los Angeles and the Port of Long Beach are beginning to implement clean air programs at their respective

ports. Just last year, the Port of Los Angeles completed its "No Net Increase" plan that envisioned reducing pollution at that port back to 2001 levels by adopting a host of measures, some of which could be implemented as port policy or through a port-wide rule. Based on the staff report, these efforts would trigger the termination clause. However, the staff report does not even mention the clean air programs of these ports. Further, while the MOU may not strip the ports of their authority to implement clean air initiatives, the political reality is that these local governments will surely think twice before mitigating the pollution impacting local communities if their efforts can only be achieved by terminating the agreement for the entire state.

Further, we also find it irresponsible that the staff report failed to discuss or even refer to SCAQMD's four rules that address locomotive emissions. These rules require railroad companies in California to conduct an emissions inventory and health risk assessment, keep records of locomotive idling, reduce long-term idling, and reduce the risk from rail operations. SCAQMD already adopted the health risk assessment rule, and the Governing Board will vote on two other rules in early February. The rulemaking on the fourth rule will commence sometime this year. While SCAQMD has continued to pursue adoption of its regulations despite the existence of the MOU, there can be little question that the MOU will pit local air districts against each other whenever they seek to address local air-pollution problems.

Additionally, it remains unclear whether compliance with the California Environmental Quality Act ("CEQA") would trigger the termination clause. The staff report states that "[a] participating railroad's *voluntary agreement* in this context to conditions or mitigation measures that duplicate or overlap an expressed goal of a program element would not allow it to trigger the release clause." *See* Staff Report, at A-4 (emphasis added). However, the staff report does not elaborate as to whether court-imposed mitigation, mitigation agreed to by a lead agency (i.e., a port) but that requires implementation by the Railroads, could trigger the termination clause. At best, the staff report resolves little while at the same time opening the door to a host of new important questions.

Moreover, we are very concerned that the clarification of the termination clause provided in the staff report is *inconsistent* with the language of the MOU, and request that the Board amend the agreement to reflect the staff report. For example, the MOU states that the "Railroads shall not be required to comply with more than one agreement . . . to meet the same goal of any Program Element." *See* MOU, at Section C.11.c. However, the staff report seems to indicate that *voluntary* agreements may be entered into and enforced without triggering the termination clause. *See* Staff Report, at A-4. Thus, if the Board does not rescind the MOU, it should revise the termination clause of the MOU to strike the word "agreement," or to make clear that "voluntary agreements" would not trigger termination of the MOU. Given that the staff report reflects both ARB and the Railroads' understanding of the termination clause, this amendment should be amiable to all parties. Further, this revision is necessary because the staff report indicates that the clarifications of the MOU "do[] not modify the Agreement." *See* Staff Report, at 7.

In essence, the staff report confirms that the poison pill is extremely broad. While the termination clause may not expressly prohibit state or local agencies from proceeding with

requirements that reduce locomotive emissions, there can be little doubt that this clause will undermine, at the very least, local efforts to address regional air-pollution problems. Further, as pointed out in prior hearings on the MOU, both staff and the Railroads have lobbied against important state legislation in the past by touting the termination clause in the 1998 MOU. Thus, there is no reason to believe that they will not do the same if the state legislature seeks to reduce toxic emissions from rail operations. This "chilling-effect" is simply one we cannot afford. Additionally, as stated above, many ambiguities remain as to whether CEQA compliance would trigger the termination clause.

III. Conclusion.

At prior board meetings, staff and the Railroads repeatedly stated that they had a "mutual understanding" of the MOU's provisions. Yet, when directed by the Board to explain that understanding to the public, staff and the Railroads have provided at best, a cursory clarification of *one* provision within a nearly *20-page* agreement. The Board has listened to hours of testimony on how the MOU precluded critical public participation, how adoption of that agreement may have violated California law, and how the MOU undermines the authority of ARB and other government bodies from reducing rail emissions. And now the Board is faced with the reality that it has entered into an agreement ridden with ambiguities that no one can explain. The case for rescinding the agreement cannot be any more compelling than it is now. Accordingly, we remain steadfast in our request that the Board to rescind the MOU.

Sincerely,

Melissa Lin Perrella, Senior Project Attorney
Natural Resources Defense Council

Tom Plenys, Research Manager
Coalition For Clean Air

Susan Smartt, Executive Director
California League of Conservation Voters

Gary A. Patton, Executive Director
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San Pedro and Peninsula Homeowner's Coalition

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West Oakland Environmental Indicators Project

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West Oakland Environmental Indicators Project

Lee Jones, Community Outreach Specialist
Neighborhood House of North Richmond

Wafaa Aborashed, President
San Leandro-Davis West Neighborhood Group

The Bay Area Ditching Dirty Diesel Collaborative
Steering Committee

Enclosure

NATURAL RESOURCES DEFENSE COUNCIL ♦ COALITION FOR CLEAN AIR
CALIFORNIA ENVIRONMENTAL RIGHTS ALLIANCE
UNION OF CONCERNED SCIENTISTS
AMERICAN LUNG ASSOCIATION OF CALIFORNIA
COMMUNITIES FOR A BETTER ENVIRONMENT ♦ CLEAN POWER CAMPAIGN
CALIFORNIA LEAGUE OF CONSERVATION VOTERS
CALIFORNIA SAFE SCHOOLS ♦ COALITION FOR A SAFE ENVIRONMENT
AMERICAN LUNG ASSOCIATION OF LOS ANGELES COUNTY
SAN PEDRO AND PENINSULA HOMEOWNER'S COALITION

August 31, 2005

Via Facsimile, U.S. Mail & Email

Clerk of the Board
Honorable Cynthia Tuck
Members of the California Air Resources Board
California Air Resources Board
1001 "I" Street, 23rd Floor
Sacramento, CA 95814

Re: Comments Regarding the Statewide Memorandum of Understanding Between the California Air Resources Board, and Union Pacific Railroad Company and BNSF Railway Company

Dear Chairwoman Tuck and Members of the Board:

On behalf of the undersigned organizations and our hundreds of thousands of California members, we write to express our deep concern over ARB's negotiation and adoption of the June 2005 Statewide Memorandum of Understanding between the California Air Resources Board (ARB), and Union Pacific Railroad Company and BNSF Railway Company (collectively the Railroads) (the MOU) without any public participation. We request that the Board rescind the MOU.

First, as an initial matter, we wish to voice our deep concern with what appears to be ARB staff's increasing reliance on voluntary MOUs in lieu of tough, mandatory regulations. Throughout its long history, ARB has been the leading air agency in the nation, largely because a number of regions throughout the state have some of the worst air quality in the country. With this in mind,

ARB historically has regulated to the limits of its authority in order to achieve the difficult task of reaching attainment with federal air quality standards and to protect public health. MOUs, by their very nature, represent a "compromise position" between regulated industry and ARB and, as such, are far weaker than those restrictions the agency could mandate under the law. We are concerned that the recent MOU and others like it set a dangerous precedent for how ARB may "regulate" pollution sources, such as ports and the goods movement system, in the future.[1]

Second, putting aside whether it was wise for ARB to negotiate the MOU in the first place, once ARB made the determination to do so, it was essential for the agency to consider the input of all stakeholders before entering into that agreement. Its failure to do so violated the law and constitutes bad public policy. As discussed in greater detail below, it was vital to receive the public's input before entering into an agreement of such magnitude.

Third, as also discussed below, we disagree with ARB staff's contention that the MOU will yield significant emissions benefits for the state of California. *More importantly*, even if this contention were true, it would *not* provide a sufficient basis to uphold the MOU. Indeed, if the Board upholds the agreement, it would be turning a blind-eye to the value of open and transparent public processes and the trust built between this agency and the community. We therefore request that the Board remain steadfast in its efforts to keep open the lines of communication between itself and the communities it represents and rescind the MOU.

A. The Governing Board Should Rescind the MOU Because it Was Negotiated and Adopted Without Any Public Input.

The MOU was negotiated and adopted without any input from the public, other impacted government agencies, or even ARB's own governing board, despite the fact that it will significantly impact the health of communities throughout the state, as well as the enforceability of critical air quality measures. While ARB contends that "not every action before the Air Resources Board lends itself to an open public hearing process . . . [and] [t]he 2005 Railroad MOU falls into the same category,"[2] the MOU is exactly the type of action that requires public participation. This agreement addresses rail emissions across the state, contemplates collaboration to publicly fund these efforts, and potentially affects other efforts throughout California to address pollution from rail operations. In other words, *this was a situation where input from all stakeholders was essential*. Not only has the public argued that a public process was necessary, but numerous elected officials have sent in letters asserting this same opinion as well, including the Board of Supervisors for the County of Los Angeles, the Latino Legislative Caucus, and State Senator Gloria Romero. Clearly, ARB's failure to provide for a public process

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[1] Moreover, ARB's use of MOUs instead of mandatory regulations may detrimentally affect air quality in other states as well. Under the Clean Air Act, California alone may adopt regulations stricter than those imposed by the federal government for many mobile sources of pollution. Other states may "opt-in" to California's standards, but only if such standards take the form of formally adopted regulations, not if they take the form of voluntary agreements.

[2] Letter from Barbara Riordan, Interim ARB Chair, to Gail Feuer, et al., at 1 (Jul. 6, 2005).

before it entered into the MOU was bad public policy. We also believe it may have violated the law—specifically, the California Environmental Quality Act (CEQA) and the California Administrative Procedures Act (APA).

While we acknowledge ARB's recent efforts to rectify the lack of public process for the MOU by holding two public meetings in August, and agreeing to distribute a staff report in September, these efforts are at best an attempt to justify an action *already taken* by ARB. Meaningful public participation includes that which is infused throughout the agency's decision making process. Under the present schedule, public meetings will be held and a staff report will be distributed *after* the MOU has been negotiated and executed. Further the staff report will be distributed *after* written comments are due, and such comments are due the same day as the public meeting in Southern California. As a result, the public will be required to provide its written comments before it receives some of the most relevant information from ARB regarding the MOU. This "process" clearly falls short of not only the public's expectations, but also the law.

B. The MOU Contains Numerous Substantive Deficiencies.

While we strongly believe that ARB's failure to include the public in the negotiation and adoption of the MOU provides a compelling independent basis to rescind the agreement, we feel it is important to highlight a few of the major deficiencies within the MOU. In particular, the MOU contains a "Poison Pill," which allows the Railroads to terminate the MOU if any agency or political subdivision of the state "adopts or attempts to enforce any requirement addressing the goal of any Program Element set forth in this Agreement." This broad termination clause will likely create a "chilling effect" on any efforts by the legislature, ARB itself, local air districts, cities, counties, and other governmental entities such as California ports to reduce toxic emissions from rail operations. While the termination clause may not expressly prohibit federal, state or local agencies from proceeding with separate requirements, there can be little doubt that this clause will undermine, at the very least, local efforts to address regional air-pollution problems.

In addition, even a cursory review of the MOU reveals that the agreement's provisions are weak and do not guarantee a significant reduction in emissions from rail operations. For example:

- **Idling Reduction Program.** The MOU only requires the installation of idling-reduction devices on "intrastate" locomotives, which comprise a very small subset of locomotives that operate in California. Further, many of the terms and phrases used in the idling provisions such as "excessive," "maximum amount that is feasible," "exert their best efforts," and "essential" are undefined, and as a result, create loopholes and hamper enforcement. As much as we want to believe that these provisions will be interpreted in the most health protective manner, the MOU provides no guarantees. Moreover, the MOU appears to permit locomotives without anti-idling devices to engage in "non-essential" idling for up to 60 minutes, while a shorter time limit is feasible and more health-protective.

- **Early Introduction of Low Sulfur Diesel.** While the MOU seeks to increase the amount of cleaner fuel supplied in California, it fails to require the Railroads to *use* a specific amount of cleaner fuel. In fact, it is our understanding that many locomotives obtain their fuel outside of California before they enter the state. In addition, requiring that the Railroads "maximize" their use of low sulfur diesel without defining the term "maximize" fails to provide any real requirements and hampers ARB's enforcement of this provision.

- **Visible Emission Reduction and Repair Program.** Further, while the MOU seeks to reduce excessive visible emissions by setting a compliance goal of 99%, it does not set a deadline for compliance, and merely requires ARB and the Railroads to "meet and confer" if actual compliance is less than 99%. Additionally, these provisions once again contain undefined terms that will create an enforcement problem. For example, the terms "expeditiously" and "timely manner" are not defined under the agreement yet determine when locomotives with visible emissions are to be tested and repaired.

- **Early Review of Impacts of Air Emissions from Designated Yards.** While these provisions seek to expedite the implementation of emissions mitigation measures, the MOU fails to require that any measures actually be adopted by the Railroads. Instead, the Railroads are merely required to consider measures that they themselves determine are "feasible."

- **Assessment of Toxic Air Contaminants from Designated California Rail Yards.** The goal of this provision is to evaluate the toxic air contaminants from certain designated rail yards. However, the MOU does not contain any targets for action or any meaningful commitment to reduce risk levels. Further, the MOU does not establish how the risk analysis will be conducted.

- **Evaluation of Other Medium-Term and Longer-Term Alternatives.** This provision does little more than require the Railroads to "evaluate" and "meet and confer" about measures that can reduce emissions at rail yards. The provisions lack any real commitment by the Railroads to utilize technologies that have been previously demonstrated and are commercially available. For example, this provision could have required the Railroads to replace all existing switchers with the cleanest models available.

- **Enforcement and Penalties.** If the Railroads fail to comply with the MOU, ARB is limited to imposing monetary penalties; the agency is expressly prohibited from seeking a court order to require compliance. Moreover, the monetary values assigned for the violations do not provide an adequate incentive for the railroads to comply. Additionally, the agreement fails to provide where the money from the penalties will go. Any fines should be spent on mitigation measures that will benefit the communities closest to where the violations occurred.

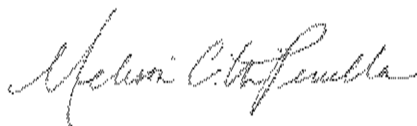
- **The MOU Fails to Include Any Provisions for Clean Switching Locomotives.** The MOU fails to require the Railroads to replace existing switchers with the cleanest models available, despite the fact that switching locomotives employ some of the oldest and dirtiest diesel engines in existence. Switching locomotives are the workhorses of rail yards, often idling or operating on rail sidings close to homes. Provisions for clean switching locomotives should have been a priority for clean-up in the MOU, either through an accelerated retirement program or a commitment to specific new engine replacements such as natural gas or diesel-electric hybrids such as Green Goats.

These examples are just a few of the many deficiencies in the MOU that might have been remedied had all stakeholders been permitted to comment and participate in the negotiation of the MOU. Further, we believe ARB underestimates its legal authority to regulate the Railroads, and urge the Board to undertake its own independent examination of the MOU and conclude that no agreement, let alone this one, justifies ARB's decision to preclude public participation.

C. Conclusion.

ARB performed a great disservice to itself and the public when it adopted the MOU. Indeed, that agreement represents bad public policy and its adoption may have violated the law. Accordingly, we strongly urge the Board to rescind the MOU.

Sincerely,



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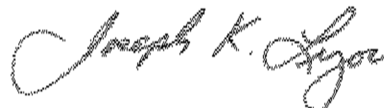

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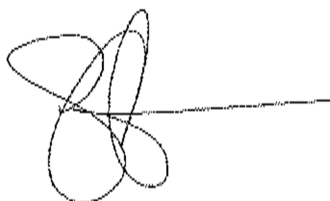

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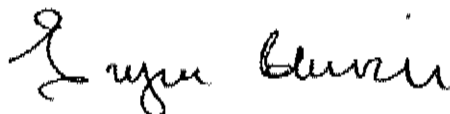

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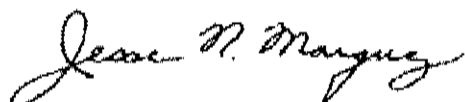

Jesse Marquez
Executive Director
Coalition for a Safe Environment

Noel Park
San Pedro and Peninsula
Homeowner's Coalition

cc: Dr. Alan Lloyd, Secretary, Cal EPA