

**AMENDED AND RESTATED  
MEMORANDUM OF AGREEMENT FOR OAKLAND ARMY BASE**

**AMONG**

**THE REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND,  
THE CITY OF OAKLAND, A MUNICIPAL CORPORATION,  
ACTING BY AND THROUGH ITS CITY COUNCIL, AND  
THE CITY OF OAKLAND, A MUNICIPAL CORPORATION, ACTING BY AND  
THROUGH ITS BOARD OF PORT COMMISSIONERS**

**AMENDED AND RESTATED AS OF FEBRUARY 27, 2008**

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**AMENDED AND RESTATED**

**MEMORANDUM OF AGREEMENT FOR OAKLAND ARMY BASE**

This AMENDED AND RESTATED MEMORANDUM OF AGREEMENT FOR OAKLAND ARMY BASE (the "Restated MOA"), dated for reference purposes as of FEBRUARY 27, 2003 (the "Restatement Date") is entered into by and among the Redevelopment Agency of the City of Oakland, a community redevelopment agency organized and existing under the California Community Redevelopment Law ("ORA"), the City of Oakland, a municipal corporation, acting by and through its City Council (the "City Council") and the City of Oakland, a municipal corporation, acting by and through its Board of Port Commissioners (the "Port"), in the following factual context:

A. ORA, the City Council and the Port (each a "Party" and, collectively, the "Parties") have worked cooperatively to assure the successful conveyance of the former Oakland Army Base from the United States Department of the Army on terms and conditions that further the goals, objectives and fiduciary obligations of all Parties.

B. The Parties entered into an initial Memorandum of Agreement (the "Initial MOA") dated for reference purposes as of July 8, 2003.

C. The Parties entered into a First Amendment to the Initial MOA dated April 17, 2006, and a Second Amendment dated June 15, 2006, which superseded the First Amendment.

D. The Oakland Base Reuse Authority, a joint powers authority composed of the City of Oakland and the Redevelopment Agency of the City of Oakland ("OBRA"), was formed in part to facilitate conveyance of the former Oakland Army Base. OBRA was a signatory to the Initial MOA, the First Amendment and the Second Amendment. Prior to the Restatement Date, OBRA transferred its assets and liabilities to ORA, including its rights and obligations under the Initial MOA, as amended. OBRA has ceased operations, and therefore, OBRA is not a Party to this Restated MOA.

E. The Parties have agreed to amend and restate the Initial MOA, as revised by the Second Amendment, as set forth herein.

F. All Exhibits and Schedules in effect as of the Restatement Date are attached to this Restated MOA, as Exhibits.

NOW, THEREFORE, for the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Definitions; Matters of Construction; Recitals**

1.1 **Defined Terms.**

(a) Definitions. Capitalized terms used in this Restated MOA shall have the following meanings:

(1) “Allocation Proportion” means fifty percent (50%) is allocated to the City and fifty percent (50%) is allocated to the Port.

(2) “Army” means the United States of America, acting through the Secretary of the Army, Department of the Army, and any successor department, agency or instrumentality.

(3) “Army Agreement” means the Economic Development Conveyance Memorandum of Agreement dated September 27, 2002, among the Army, OBRA, and ORA, for the conveyance of approximately 364 acres of the former OARB, a copy of which is attached hereto as Exhibit 1.1(a)(3).

(4) “Army Quitclaim Deed” means the Quitclaim Deed conveying the EDC Property from the Army to OBRA, recorded on August 8, 2003, in the Official Records of Alameda County as Document No. 2003 466370, a copy of which is attached hereto as Exhibit 1.1(a)(4).

(5) “Army Reserve” means the United States Army Reserve.

(6) “Army Reserve Properties” means the East Maritime Army Reserve Property and the West Maritime Army Reserve Property. Property owned by the Army Reserve and adjacent to the Army Reserve Properties is intended to be conveyed to EBMUD, but for purposes of this Restated MOA such property is excluded from the definition of Army Reserve Properties.

(7) “BCDC” means the San Francisco Bay Conservation and Development Commission and any successor department, agency or instrumentality.

(8) “BCDC Seaport and Bay Plan” means the San Francisco Bay Area Seaport Plan adopted by BCDC and the Metropolitan Transportation Commission and the San Francisco Bay Plan adopted by BCDC, both as amended by BCDC Resolution No. 00-10 on January 29, 2001.

(9) “Berth 21 Construction Easement” means an easement from the City in favor of the Port over portions of the West Maritime Property and the Port Sliver Properties, for purposes of the Port’s construction activities related to the Port Fill Project and construction of Berth 21, in the form attached hereto as Exhibit 1.1(a)(9). As set forth therein, the Berth 21 Construction Easement supersedes and replaces a general construction easement for those purposes over the entire West Maritime Property and Port Sliver Properties granted in the Initial MOA.

(10) "Berth 21 Submerged/Upland Property" means the approximately 55-acre mostly submerged land area and approximately 21-acre upland area, as more specifically described in the Berth 21 Submerged/Upland Property Quitclaim Deed, which OBRA conveyed to the Port on August 7, 2003 (immediately after OBRA's receipt of the same from the Army).

(11) "Berth 21 Submerged/Upland Property Quitclaim Deed" means the Quitclaim Deed conveying the Berth 21 Submerged/Upland Property from OBRA to the Port, recorded on August 8, 2003 in the Official Records of Alameda County Recorder as Document No. 2003 466373, a copy of which is attached hereto as Exhibit 1.1(a)11.

(12) "BRAC" means the Defense Base Closure and Realignment Act of 1990, Part A of Title XXIX of Public Law 101-510, 10 U.S.C. § 2687, as amended.

(13) "CalTrans" means the California Department of Transportation.

(14) "CalTrans I-880 Settlement" means the legally binding settlement agreement entered into among the Parties, CalTrans and the Federal Highway Administration, a copy of which is attached hereto as Exhibit 1.1(a)(14).

(15) "CEQA" means the California Environmental Quality Act, as amended, California Public Resources Code §§ 21000 *et seq.*

(16) "City" means ORA, OBRA and the City of Oakland, acting by and through its City Council, collectively.

(17) "City Council" is defined in the preamble.

(18) "City Council Ordinance" means City Ordinance No. 12738 (May 30, 2006), which superseded Ordinance No. 12532 (September 16, 2003), attached hereto as Exhibit 1.1(a)(18).

(19) "Covenant to Restrict Use of Property" means the Covenant to Restrict Use of Property recorded on August 8, 2003, in the Official Records of Alameda County as Document No. 2003 466371, a copy of which is attached hereto as Exhibit 1.1(a)(19).

(20) "DTSC" means the State of California, Environmental Protection Agency, Department of Toxic Substances Control.

(21) "DTSC Consent Agreement" means the Consent Agreement dated May 19, 2003 (which superseded the version effective September 27, 2002), as amended May 2, 2005 (which superseded the amendment dated September 8, 2004), among OBRA, ORA and DTSC, pursuant to which the RAP and the RMP will be implemented, a copy of which is attached hereto as Exhibit 1.1(a)(21).

(22) "East Maritime Army Reserve Property" means approximately 11.5 acres of real property, which includes Subaru Lot Parcel 15A, within the OARB used by the Army Reserve. OBRA conveyed Subaru Lot Parcel 15A to the Port through the quitclaim deed recorded on November 18, 2004, in the Official Records of Alameda County as Document

No. 2004 513853, a copy of which is attached hereto as Exhibit 1.1(a)(22). The remaining East Maritime Army Reserve Property is intended to be conveyed to the Port from the Army Reserve under a separate agreement.

(23) “East Maritime Lease” means that no-cost lease from the City to the Port, a copy of which is attached hereto as Exhibit 1.1(a)(23).

(24) “East Maritime Property” means the portion of the EDC Property sometimes referred to as “Parcel G”, as more specifically described in the East Maritime Quitclaim Deed, which was conveyed to the Port on August 7, 2006.

(25) “East Maritime Quitclaim Deed” means the Quitclaim Deed from OBRA to the Port, a copy of which is attached hereto as Exhibit 1.1(a)(25), to be held per the terms of the East Maritime Trust Agreement.

(26) “East Maritime Trust Agreement” means the East Maritime Trust Agreement Amended and Restated among the City, the Port and the East Maritime Trustee, a copy of which is attached hereto as Exhibit 1.1(a)(26).

(27) “East Maritime Trustee” means the Port Attorney, as trustee under the East Maritime Trust Agreement.

(28) “EBMUD” means the East Bay Municipal Utility District.

(29) “EBST” means the Environmental Baseline Survey for Transfer for Oakland Army Base, dated December 2002 and prepared by MWH Americas, Inc.

(30) “EDC Escrow” means that certain escrow the Parties established with First American Title Guaranty Company, 1531 Harrison Street, Oakland, California 94612, Attn: Neils Povlsen, Escrow No. 159883 for purposes of the EDC Property conveyances, which closed per the Initial MOA, as described in Section 2.1.

(31) “EDC Property” means approximately 364 acres of the former OARB and all appurtenant buildings, rights-of-way, beneficial easements and utilities thereto, conveyed to OBRA by the Army pursuant to the Army Quitclaim Deed.

(32) “EIR” means the Oakland Army Base Redevelopment Plan Environmental Impact Report certified by the Oakland Planning Commission on July 31, 2002.

(33) “Environmental Condition” means any condition existing on, at or originating from, real or personal property that constitutes (A) a Release of any Hazardous Materials on, at or from such real or personal property, (B) a violation of applicable Environmental Laws, and/or (C) Hazardous Materials existing on, at, under or above or migrating from such real or personal property.

(34) “Environmental Laws” means any and all laws, orders, constitutional provisions, ordinances, regulations, statutes, codes or treaties issued by any Governmental Authority, and any principle of common law or judicial or administrative

interpretation thereof, relating to Hazardous Materials, the abatement of pollution, protection or restoration of the environment, or the ensuring of public health and safety from environmental hazards, specifically including, but not limited to, those relating to the exposure to, use, Release, threatened Release, emission, presence, storage, treatment, disposal, generation, transportation, distribution, manufacture, processing, handling, management or control of Hazardous Materials, previously, presently, or subsequently in effect. To be included as an Environmental Law under this Restated MOA, any law, ordinance, regulation, statute or code adopted by a Party must be of general application and not unreasonably discriminate against another Party.

(35) “Environmental Services” means the activities to be performed pursuant to the ESCA.

(36) “ESCA” means the Environmental Services Cooperative Agreement executed September 27, 2002, , effective September 30, 2002, and amended May 16, 2003 between the Army and OBRA, attached hereto as Exhibit 1.1(a)(36), that covers matters relating to the Army’s reimbursement of certain costs and expenses associated with the environmental investigation and remediation of the EDC Property.

(37) “ESCA Funds” means all funds provided by the Army pursuant to the ESCA.

(38) “Escrow Holder” means First American Title Guaranty Company for purposes of the EDC Property conveyances described in Section 2.1, the Knight Yard Property conveyance described in Section 2.2) and the various conveyances effected pursuant to the Exchange Agreement described in Section 2.3.

(39) “Exchange Agreement” means that certain Oakland Army Base Title Settlement and Exchange Agreement by and between the Parties and the State of California, acting by and through the State Lands Commission, dated as of June 30, 2006, recorded on August 7, 2006, in the Official Records of Alameda County as Document No. 2006 301845, as authorized by the Oakland Army Base Public Trust Exchange Act (Chapter 664, Statutes of 2005). A copy of the Exchange Agreement is attached hereto as Exhibit 1.1(a)(39).

(40) “Exchange Agreement Escrow” means that certain escrow the Parties established with First American Title Company, 1850 Mt. Diablo Blvd., Suite 300, Walnut Creek, California 94596, Escrow Number NCS-224882-CC and NCS-22879-CC for the purposes of the Exchange Agreement conveyances, as described in Section 2.3.

(41) “Gateway Development Area” means the West Maritime Property, including the West Maritime Submerged Property upon its return to the City pursuant to Section 3.4, the Port Sliver Properties and the West Maritime Army Reserve Property and other property and property rights acquired by the City under the CalTrans I-880 Settlement.

(42) “Governing Body” means, with respect to a Party, the board, commission or other instrumentality with the applicable decision making authority for the Party.

(43) “Governmental Authority” means any nation or government, any state or other political subdivision thereof, and any agency, department, court, board,

commission, or other entity exercising valid executive, legislative, judicial, regulatory or administrative functions of or pertaining to government. As to any Governmental Authority that is a Party, any law, ordinance, regulation, statute or code adopted by that Party must be of general application and not unreasonably discriminate against another Party.

(44) “Hazardous Materials” means all hazardous substances, wastes, extremely hazardous substances, hazardous materials, hazardous wastes, hazardous constituents, solid wastes, special wastes, toxic substances, pollutants, contaminants, petroleum or petroleum derived substances or wastes, and related materials, including but not limited to any such materials defined, listed, identified under or described in any Environmental Laws.

(45) “Homeless Collaborative” means the Alameda County Homeless Base Conversion Collaborative.

(46) “Insurance Attachment Point” means the amount designated as the self-insured retention under the cost cap portion of the Insurance Policy, which is Twenty Million Nine Hundred Ninety-Two Thousand Two Hundred and Sixty-Five Dollars (\$20,992,265.00).

(47) “Insurance Policy” means the Remediation Cost Cap Environmental Site Liability Policy issued by Chubb Custom Insurance Company, Policy No. 3730-58-78 which covers the period from August 7, 2003 to August 7, 2013, a copy of which is attached hereto as Exhibit 1.1(a)(47).

(48) “Initial MOA” is defined in Recital B to this Restated MOA.

(49) “Knight Yard Lease” means the Agreement of Lease between the City and the Port that replaced the Agreement of Sublease between OBRA and the Port dated July 26, 2000, pursuant to which the Port leased the Knight Yard Property from OBRA. The Knight Yard Lease terminated when OBRA conveyed the Knight Yard Property to the Port on August 7, 2006.

(50) “Knight Yard Property” means the portion of the EDC Property more specifically described in the Knight Yard Property Quitclaim Deed.

(51) “Knight Yard Property Escrow” means that certain escrow the Parties established with First American Title Company, 1535 Harrison Street, Oakland, California 94612, Attn: Liz Treangen, Escrow No. 224884 for purposes of the Knight Yard Property conveyance, which closed on August 7, 2006 per the Second Amendment to the MOA, as described in Section 2.2.

(52) “Knight Yard Property Quitclaim Deed” means the Quitclaim Deed conveying the Knight Yard Property from OBRA to the Port, recorded on August 7, 2006, in the Official Records of Alameda County as Document No. 2006 301854, a copy of which is attached hereto as Exhibit 1.1(a)(52).

(53) “Land Exchange Approval” means the final and irrevocable release by the State of California of its public trust interest in all or a portion of the Gateway

Development Area and imposition of such public trust interest on the East Maritime Property, which was effected pursuant to the Exchange Agreement.

(54) “Marine Sediments” means the marine sediments adjacent to existing Outfalls 7 through 11. Outfalls 8 through 11 are referenced in Exhibit 1.1(a)(54) attached hereto, and the general location of Outfall 7 is illustrated at figure 4-16 of the RAP.

(55) “Mediator” means a disinterested third party appointed by the Parties in accordance with the provisions of Section 10.2(b) of this Restated MOA.

(56) “Mutual Releases” is defined in Section 6.4.

(57) “MOA Dispute” means any claim, controversy, dispute, alleged breach or other similar action by or among any of the Parties arising out of the Parties’ rights and obligations created by this Restated MOA. Unless expressly provided otherwise in this Restated MOA, MOA Disputes are subject to the resolution procedures set forth in Article 10. If this Restated MOA expressly provides that the failure of the Parties to agree is not an MOA Dispute and is not subject to Article 10, then the Parties’ only obligations are to negotiate in good faith for the period indicated in the pertinent Section of this Restated MOA, without any further rights or obligations unless the Parties agree otherwise in writing.

(58) “New RAP Site” means any site that is elevated to the status of RAP Site after July 8, 2003 pursuant to the terms of the RAP and RMP.

(59) “OARB” means the Oakland Army Base, located in the City of Oakland, Alameda County, California.

(60) “OARB Final Redevelopment Plan” means the Final Redevelopment Plan for the EDC Property, adopted by the City Council on July 11, 2000, and amended December 21, 2004 by City Council Ordinance No. 12644, July 7, 2005 by City Council Ordinance No. 12672, and March 21, 2006, by City Council Ordinance No. 12743, a copy of which is attached hereto as Exhibit 1.1(a)(60), as the same may be further amended from time to time.

(61) “OARB Final Reuse Plan” means the Final Reuse Plan for the EDC Property approved by the OBRA Governing Body on July 31, 2002, a copy of which is attached hereto as Exhibit 1.1(a)(61).

(62) “OARB Reversionary Rights Deed for 14th Street” means the quitclaim deed covering certain reversionary rights the City holds to certain 14th Street property at the OARB, recorded on August 8, 2003, in the Official Records of Alameda County as Document No. 2003-466369, a copy of which is attached hereto as Exhibit 1.1(a)(62).

(63) “OARB Transfer Date” means the date on which the EDC Property was transferred by the Army to OBRA, which was August 7, 2003. Documents were recorded on August 8, 2003.

(64) “OBRA” is defined in the preamble to this Restated MOA.

(65) “ORA” is defined in the preamble to this Restated MOA.

(66) “Parties” and “Party” are defined in Recital A to this Restated MOA.

(67) “Port” is defined in the preamble to this Restated MOA.

(68) “Port Area” means the Port Area as defined in Section 725 of the Charter of the City of Oakland.

(69) “Port Fill Project” means the project that may be completed by the Port pursuant to which the Port will cover the Marine Sediments and thereby address potential impacts to aquatic communities from the Marine Sediments, as part of the fill of approximately twenty six (26) acres of net solid fill (approximately two (2) acres to be removed and approximately twenty-eight (28) acres to be filled, plus approximately six and one-half (6.5) acres net of pile supported wharf structures to be removed), in order to provide additional terminal capacity and create two (2) berths in the Oakland Outer Harbor.

(70) “Port Ordinance” means Port Ordinance No. 4016 (August 21, 2007) and Port Ordinance No. 3758 (August 5, 2003), as amended by Ordinance No. 3897 (March 7, 2006), attached hereto as Exhibit 1.1(a)(70).

(71) “Port Reversionary Rights Quitclaim Deed” means the Quitclaim Deed from the Port to the Army covering the Port’s reversionary interest in the property specified therein, recorded on August 8, 2003, in the Official Records of Alameda County as Document No. 2003 466368, a copy of which is attached hereto as Exhibit 1.1(a)(71).

(72) “Port Sliver Properties” means two “sliver” parcels consisting of approximately 1.5 acres in the Berth 10 area (Parcel C-2) and approximately 9.5 acres north of the West Maritime Property (Parcel C-1), as more specifically described in the Port Sliver Properties Quitclaim Deed, which were conveyed to ORA on August 7, 2006.

(73) “Port Sliver Properties Lease” means that no-cost lease from the Port to the City, a copy of which is attached hereto as Exhibit 1.1(a)(73).

(74) “Port Sliver Properties Parcel C-2 Lease/Sublease” means that no-cost lease/sublease from the City to the Port, a copy of which is attached hereto as Exhibit 1.1(a)(7).

(75) “Port Sliver Properties Quitclaim Deed” means the Quitclaim Deed from the Port to ORA to be held per the terms of the Port Sliver Properties and West Maritime Submerged Property Trust Agreement, a copy of which is attached hereto as Exhibit 1.1(a)(75).

(76) “Port Sliver Properties and West Maritime Submerged Property Trust Agreement” means the Port Sliver Properties and West Maritime Submerged Property Trust Agreement Amended and Restated among ORA, the Port and the Port Sliver Properties and West Maritime Submerged Property Trustee, a copy of which is attached hereto as Exhibit 1.1(a)(76).

(77) “Port Sliver Properties and West Maritime Submerged Property Trustee” means the ORA Agency Counsel, as trustee under the Port Sliver Properties and West Maritime Submerged Property Trust Agreement.

(78) “Qualified Land Exchange Approval” means a Land Exchange Approval that (A) provides for the release of the State of California’s actual or potential public trust interest in at least eighty (80) acres of the Gateway Development Area, either by exchange or because the State of California agrees such acreage is not subject to the public trust interest and (B) does not result in the disallowance of more than Four Million Dollars (\$4,000,000) in value of the consideration to be paid by the Port.

(79) “RAP” means the Final Remediation Action Plan dated September 27, 2002, amended on July 29, 2004 to include the Subaru Lot and on December 4, 2006 to include the East Maritime Army Reserve Property, to address Hazardous Materials at the EDC Property.

(80) “RAP Sites” means the seven (7) specific sites located at the EDC Property identified in the RAP as sites requiring remediation of Hazardous Materials.

(81) “Redevelopment MOU” means the Memorandum of Understanding dated September 27, 2002 between ORA and the Port relating to jurisdiction over the Port Area within the OARB, a copy of which is attached hereto as Exhibit 1.1(a)(81).

(82) “Regulatory Requirements” means the requirements applicable to the environmental investigation and remediation of the EDC Property and related areas of the OARB under the DTSC Consent Agreement, the RAP, the RMP, the ESCA and the Water Board Order applicable to Environmental Conditions at the EDC Property as of August 7, 2003.

(83) “Reinvestment Period” means the seven (7) year period commencing on August 7, 2003.

(84) “Release” means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the environment or out of any property, including the movement or continued movement of any materials through or in the air, soil, surface water, ground water or property.

(85) “Remediation Account” means an interest bearing bank account, with a financial institution approved by the Port, OBRA and ORA, to hold the funds contributed by the Parties to pay for unfunded environmental remediation costs, plus interest on the amounts deposited, in accordance with Section 5.3 of this Restated MOA.

(86) “Remediation Account Manager” means a team of two non-lawyer individuals, one appointed by the City and one appointed by the Port, to act in that capacity from time to time. The initial Remediation Account Manager team consisted of Andrew Clark-Clough for the City and Diane Heinze for the Port. As of the Restatement Date, Mr. Clough continues to represent the City and Dawn Crater, instead of Ms. Heinze, represents the Port.

(87) “Restated MOA” is defined in the preamble to this document.

(88) “Restatement Date” is defined in the preamble to this Restated MOA.

(89) “RMP” means the Final Risk Management Plan, attached as Appendix E to the RAP, setting forth the procedures for addressing Environmental Conditions at the EDC Property as they are identified.

(90) “Second Amendment to DTSC Consent Agreement” is defined in Section 5.1(d).

(91) “SLC” means the California State Lands Commission and any successor department, agency or instrumentality.

(92) “SLC Covenant” and “SLC Partial Revocation of Covenant” means the Declaration of Covenant, recorded on August 8, 2003 in the Official Records of Alameda County as Document No. 2003-466372, placing on record certain recitals affecting the EDC Property, as required by the SLC, a copy of which is attached hereto as Exhibit 1.1(a)(92A), and the Partial Revocation of Declaration of Covenant, recorded on August 7, 2006 in the Official Records of Alameda County as Document No. 2006-301846, which revoked and terminated the covenants set forth in Paragraphs (A) through (D) of said SLC Covenant (including those covenants set forth in deeds between OBRA and the Port) as to portions of the EDC Property, a copy of which is attached hereto as Exhibit 1.1(a)(92B).

(93) “Subaru Lot” means the approximately 19.03 acre area located north of West Grand Avenue conveyed by the Army to OBRA on November 18, 2004 by quitclaim deed recorded on November 18, 2004, in the Official Records of Alameda County as Document No. 2004-513849 (a copy of which quitclaim deed is attached as Exhibit 1.1(a)(93)), consisting of: (a) Parcel 15A, comprising approximately 2.51 acres of the East Maritime Reserve Property; and (b) Parcel 15B, comprising approximately 16.52 acres, also known as the West Maritime Army Reserve Property.

(94) “Transaction Costs” means the reasonable out-of-pocket transaction costs incurred by any Party for the transfer of the EDC Property and other transactions provided for by the Initial MOA. As set forth in Section 1.3(b), the Parties have agreed on the final amount of Transaction Costs in conjunction with agreement on the final allocation of payments from the CalTrans I-880 Settlement, as set forth in Section 1.3(a).

(95) “Trust Agreements” means the East Maritime Trust Agreement and the Port Sliver Properties and West Maritime Submerged Property Trust Agreement.

(96) “Wake Avenue Easement” means that easement defined in Section 7.3, in the form attached to this Restated MOA as Exhibit 1.1(a)(96).

(97) “Water Board Order” means the San Francisco Bay Regional Water Quality Control Board Order No. R2-2004-0086, a copy of which is attached hereto as Exhibit 1.1(a)(97).

(98) “West Maritime Army Reserve Property” means the approximately 16.52 acres of property, consisting of Subaru Lot Parcel 15B, located within and adjacent to the OARB and formerly used by the Army Reserve, which was conveyed to OBRA on behalf of the Army Reserve under a separate agreement on November 18, 2004 (see Exhibit 1.1(a)(93)), and from OBRA to ORA on September 13, 2006, recorded on September 19, 2006, in the Official Records of Alameda County as Document No. 20066354006, with a corrected quitclaim deed recorded on May 17, 2007, in the Official Records of Alameda County as Document No. 2007-190760, copies of which are attached hereto as Exhibit 1.1(a)(98).

(99) “West Maritime Lease” means the Agreement of Lease between the City and the Port dated August 7, 2003 that replaced the Sublease between OBRA and the Port dated July 26, 2000, pursuant to which the West Maritime Lease Property was leased by the City to the Port until the East Maritime Property was transferred to the Port pursuant to the Exchange Agreement, which occurred on August 7, 2006.

(100) “West Maritime Property” means the portion of the EDC Property more specifically described on Exhibit 1.1(a)(100) attached hereto.

(101) “West Maritime Submerged Property” means the 1.5 acres of the EDC Property transferred from OBRA to the Port on August 8, 2003, as more specifically described in the West Maritime Submerged Property Original Quitclaim Deed plus approximately 0.5 acres known as Parcels A-2 and D-2, which were formerly part of the Port Sliver Properties Parcel C-2; the West Maritime Submerged Property is more specifically described in the Port Sliver Properties and West Maritime Property Trust Agreement. The West Maritime Submerged Property description was redefined as part of the Exchange Agreement transaction completed on August 7, 2006.

(102) “West Maritime Submerged Property Original Quitclaim Deed” means the Quitclaim Deed conveying 1.5 acres of the EDC Property from OBRA to the Port, recorded on August 8, 2003, in the Official Records of Alameda County as Document No. 2003 466374, a copy of which is attached hereto as Exhibit 1.1(a)(102).

(103) “West Maritime Submerged Property Revised Quitclaim Deed” means the Quitclaim Deed from the Port to ORA, a copy of which is attached hereto as Exhibit 1.1(a)(103), to be held per the terms of the Port Sliver Properties and West Maritime Submerged Property Trust Agreement.

(104) “Work Plan” means the summary work plan and schedule for completion of the remediation required under the Regulatory Requirements, the current version of which is attached hereto as Exhibit 1.1(a)(104), as it may be amended from time to time pursuant to the mutual agreement of the Parties.

## **1.2 Certain Matters of Construction.**

(a) Wherever from the context it appears appropriate, each term stated in either the singular or plural shall include the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender shall include the masculine, feminine and neuter.

(b) The term “including” shall not be limiting or exclusive, unless specifically indicated to the contrary.

(c) All references to statutes and related regulations shall include any amendments of the same and any successor statutes and regulations, unless specifically indicated to the contrary.

(d) All references to any instruments or agreements shall include any and all modifications or amendments thereto and any and all extensions or renewals thereof.

(e) The words “herein,” “hereof,” and “hereunder” or other words of similar import refer to this Restated MOA as a whole, including the Exhibits hereto, as the same may from time to time be amended, modified or supplemented, and not to any particular section, subsection or clause contained in this Restated MOA.

(f) References to “days” mean calendar days.

(g) References to Sections mean Sections of this Restated MOA, unless specifically indicated to the contrary.

### **1.3 CalTrans Allocation, Transaction Costs, and Community Trust Fund.**

#### **(a) CalTrans Allocation.**

(1) CalTrans Settlement. Prior to July 8, 2003, the Port, on the one hand, and OBRA, ORA and the City Council collectively, on the other hand, allocated between them in equal shares the monies received from CalTrans in the aggregate amount of Eleven Million Six Hundred Thousand Dollars (\$11,600,000), plus interest, pursuant to the CalTrans I-880 Settlement, relating to CalTrans’ use of Pier 7 and Burma Road at the OARB, which parcels were transferred to CalTrans in 2002. The settlement amount was calculated assuming monthly rent at an agreed upon figure for eight (8) years, discounted to present value. The basis for the allocation was that the Port should receive that portion of the CalTrans payment attributable to the period from June 15, 2002 until three (3) years after the OARB Transfer Date (which was assumed to be April 30, 2003 but in fact was August 7, 2003), since that was the term of the no-cost West Maritime Lease from the City to the Port, and the City should receive the balance, as well as any extension payment. For convenience, the Parties assumed a non-discounted monthly payment of One Hundred Twenty Thousand Eight Hundred Thirty-Three Dollars (\$120,833), which is Eleven Million Six Hundred Thousand Dollars (\$11,600,000) divided by ninety-six (96) months, and allocated forty-eight (48) months of payments to the Port and forty-eight (48) months of payments to ORA, OBRA and the City collectively. However, if the actual period of CalTrans’ use of Pier 7 and Burma Road was different from the assumptions made in calculating the allocation (because the OARB Transfer Date was August 7, 2003 instead of April 30, 2003, CalTrans terminates its right to use early, or for any other reason), or if any of the other assumptions on which the allocation was based materially change, then the Parties agreed that the Port, on the one hand, and ORA, OBRA and the City Council collectively, on the other hand, will promptly re-calculate the allocation, using the new facts and the assumed monthly payment of One Hundred Twenty thousand Eight Hundred Eighty-Three Dollars

(\$120,833). At the election of the Party or Parties entitled to receive funds under the new allocation, the amount due may be offset against obligations otherwise owing under this MOA.

(2) Allocation. As of the Restatement Date, the Parties have agreed that the total amount owing from the Port to the City in connection with both Transaction Costs and allocation of the payments from CalTrans, is Two Hundred Eighty Thousand Dollars (\$280,000), which amount will be paid in accordance with Section 1.3(b). The Parties have agreed that there shall be no further re-allocation of the Eleven Million Six Hundred Thousand Dollars (\$11,600,000) payment from CalTrans, regardless of any changes in the assumptions on which the allocation was based. The City shall be entitled to any extension payment from CalTrans for extending the term of its lease beyond the initial ninety-six (96) month period.

(3) Under-Freeway Parcel U-1 Easement Assignment. Pursuant to Paragraph 6 of the CalTrans I-880 Settlement, the Port has agreed to transfer to CalTrans fee title to approximately 2.9 acres of under-freeway property defined in the Settlement Agreement as the "Horseshoe Ramp" property and commonly known as Parcel U-1, and CalTrans has agreed to execute and record an easement over Parcel U-1 in favor of the Port. CalTrans and the Port have not completed the transfer of Parcel U-1. Upon transfer and recordation of the Parcel U-1 quitclaim deed and subsequent Parcel U-1 easement, the Port, as soon as commercially reasonable, shall record an assignment of the Parcel U-1 easement to the City.

(b) Transaction Costs. The Parties have agreed that the total amount owing from the Port to the City, in connection with the Transaction Costs and the CalTrans I-880 Settlement allocation under Section 1.3(a), is Two Hundred Eighty Thousand Dollars (\$280,000). The Port will pay this amount to the City within thirty (30) days after full execution and delivery of this Restated MOA. Except for this payment, each Party will bear its own Transaction Costs

(c) Community Trust Fund. The City established a Community Trust Fund prior to August 7, 2006. On or before August 7, 2010, the developers of the portions of the OARB owned by ORA will make contributions to the Community Trust Fund to be held in a discrete City trust account. Within thirty (30) business days after any such contribution is made by such a developer, and provided that the contribution is made on or before August 7, 2010, the Port shall match the contribution, up to a maximum contribution from the Port of Two Million Dollars (\$2,000,000). The funds contributed by the Port shall be placed in a discrete City trust account, separate from the account for the City's developer contributions, and used only for purposes consistent with the public trust, in accordance with Section 8 of the Oakland Army Base Public Trust Exchange Act (Chapter 664 of the California Statutes of 2005). The Parties hereby agree that the City Administrator shall (i) be the trustee with control and supervisory authority over the Port's contributions to the Community Trust Fund and (ii) use and administer the Port's contributions to the Community Trust Fund in strict compliance with the provisions of Section 8 of the Oakland Army Base Public Trust Exchange Act. If no City developer contributions have been made before August 7, 2010, then the Port shall have no obligation to pay the contribution described above; however, the Port, in its sole and absolute discretion, may elect to make a contribution in whatever amount it determines, up to a maximum contribution of Two Million Dollars (\$2,000,000) by September 6, 2010.

## 2. EDC Property Conveyance Matters

In addition to the transfers to CalTrans in 2002 noted in Section 1.3(a)(1) above, a number of property transfers, as described below were completed prior to this Restated MOA. All the property transfers are listed in Exhibit 2.1A and depicted in Exhibit 2.1B.

### 2.1 Initial MOA Property Transfers.

On August 7, 2003, through the EDC Escrow, the Parties caused the conveyance of the EDC Property from the Army to OBRA, the Berth 21 Submerged/Upland Property from OBRA to the Port, and the 1.5 acre EDC Property portion of the West Maritime Submerged Property from OBRA to the Port. Specifically, on August 8, 2003, the Escrow Holder recorded the following documents in the Official Records of Alameda County in the order noted:

<u>Property</u>	<u>Acreage</u>	<u>Grantor</u>	<u>Grantee</u>	<u>Document #</u>
Port Reversionary Rights Quitclaim Deed	187	Port	Army	2003-466368
OARB Reversionary Rights Deed for 14 <sup>th</sup> Street		City	Army	2003-466369
Army Quitclaim Deed - EDC Property	363.4	Army	OBRA	2003-466370
Covenant to Restrict Use of Property – EDC Property	363.4			2003-466371
SLC Covenant	365.4			2003-466372
Berth 21 Submerged/Upland Property Quitclaim Deed	70.4	OBRA	Port	2003-466373
West Maritime Submerged Property Quitclaim Deed	1.5	OBRA	Port	2003-466374

### 2.2 Knight Yard Property Transfer.

(a) Payments by Port and Transfer of the Knight Yard Property.

(1) Through the Knight Yard Property Escrow, the Port paid the City a total of Twelve Million Four Hundred Nineteen Thousand Dollars (\$12,419,000), allocated as follows:

(A) A payment of Five Million Four Hundred Thousand Dollars (\$5,400,000) to OBRA as reimbursement for the 50% share of the cost of the relocation of the Homeless Collaborative previously paid by OBRA;

(B) A payment of Three Million Dollars (\$3,000,000) placed and retained in a separate City trust account to be used for the Gateway Development Area public park and related public access purposes only; and

(C) A payment of Four Million Nineteen Thousand Dollars (\$4,019,000) placed and retained in a separate City trust account to be used on or for the benefit of tide and submerged lands granted to the City only for purposes consistent with the public trust.

(2) Through the Knight Yard Property Escrow, on August 7, 2006, the City transferred the Knight Yard Property to the Port via the Knight Yard Property Quitclaim Deed.

**2.3 Exchange Agreement Property Transfers.**

On August 7, 2006, through the Exchange Agreement Escrow, the Parties caused certain conveyances from the Port and OBRA to the SLC, and the SLC subsequently made certain conveyances from the SLC to the Port and ORA. On August 7, 2006, the Escrow Holder recorded the following documents in the Official Records of Alameda County in the order noted:

<u>Property</u>	<u>Acreage</u>	<u>Grantor</u>	<u>Grantee</u>	<u>Document #</u>
SLC Partial Revocation of Covenant	364			2006-301846
Port Quitclaim Deed to Parcels F & H	70.6	Port	SLC	2006-301847
OBRA Quitclaim Deed to Parcels E & G	147.6	OBRA	SLC	2006-301848
SLC Public Trust Patent - Parcels F, G & H	201.5	SLC	Port	2006-301849
SLC Public Trust Patent – Parcel E	16.7	SLC	ORA	2006-301850
OBRA Quitclaim Deed to Parcel B	114.8	OBRA	SLC	2006-301851
Port Quitclaim Deed to Port Sliver Property (Parcel C)	11	Port	SLC	2006-301852
SLC Trust Termination Patent to Parcels B & C	125.9	SLC	ORA	2006-301853

Following the Exchange Agreement Escrow, OBRA conveyed the following Parcels to ORA, the first two on September 19, 2006, the final one on May 17, 2007:

<u>Property</u>	<u>Acres</u>	<u>Grantor</u>	<u>Grantee</u>	<u>Document #</u>
EDC Property – Baldwin Yard Parcel 14 Quitclaim Deed ( <u>Exhibit 2.3</u> )	11.5	OBRA	ORA	2006-354006
West Maritime Army Reserve Property – Subaru Lot Parcel 15B Quitclaim Deed ( <u>Exhibit 1.1(a)(98)</u> )	16.5	OBRA	ORA	2006-354007
West Maritime Army Reserve Property – Subaru Lot Parcel 15 B Correction Quitclaim Deed ( <u>Exhibit 1.1(a)(98)</u> )	16.5	OBRA	ORA	2007-190760

**3. Land Exchange; Subsequent Conveyances**

**3.1 Land Exchange Cooperative Process.**

The Parties and the SLC effected certain conveyances pursuant to the Exchange Agreement on August 7, 2006 as described in Section 2.3 above. The Parties acknowledge that such conveyances constitute a Qualified Land Exchange Approval.

**3.2 East Maritime Property.**

(a) Ownership. On August 7, 2006, the East Maritime Property was transferred to the Port in accordance with the terms of the Exchange Agreement. The Parties also intend that, at all times on and after August 7, 2006, either the term of the East Maritime Lease shall be in effect or the Port will have valid record fee title to the East Maritime Property. Accordingly, the term of the East Maritime Lease will commence if the Port's record fee title is invalidated as a result of a court invalidating the Exchange Agreement. The term of the East Maritime Lease will subsequently terminate on the date the Port regains record fee title to the East Maritime Property. Should termination result from the Port regaining record fee title through the closing of an alternative exchange agreement, and if the Port's title is then invalidated as a result of a court invalidating the alternative exchange agreement, the term of the East Maritime Lease shall terminate and the East Maritime Property Quitclaim Deed shall be deemed delivered to the Port and may be recorded pursuant to the East Maritime Trust Agreement. If the Port does not have record fee title to the East Maritime Property through the closing of an alternative exchange agreement within one year from the date the term of the East Maritime Lease commences (or such alternative duration as the Parties may mutually agree in writing), then the East Maritime Property Quitclaim Deed shall be deemed delivered to the Port and may be recorded pursuant to the East Maritime Trust Agreement.

(b) Tenant Activities. For the period on or before August 7, 2006, as between the Port and the City, the City had responsibility for any tenants or other licensees of the East Maritime Property other than the Port, including but not limited to all matters associated with (i) the condition of the East Maritime Property and improvements thereon, and (ii) the coordination of tenant or licensee operations with implementation of the Regulatory

Requirements. In addition, as between the Port and the City, the City was responsible for terminating all City tenancy or license agreements and removing all City tenants and licensees not later than August 7, 2006, with the following exceptions, whom the Port recognized as the Port's tenants or licensees as of August 7, 2006: (1) Bobac C.F.S. Corporation; (2) Compass Container Group, Inc.; and (3) Oakland Military Institute, College Preparatory Academy, a California Non-profit Corporation. As between the City and the Port, the City shall pay all legal fees, costs and other expenses relating to any unlawful detainer actions, and shall promptly reimburse the Port for any of the same paid by the Port. The City shall defend, indemnify and hold the Port harmless from and against all claims, liabilities, losses, damages, costs and expenses relating to the action.

(c) Continuing Responsibility. The City had full and complete responsibility for the East Maritime Property during the period on or before August 7, 2006, including responsibility for claims, liabilities, losses, damages, costs and expenses accruing during said time. Even after August 7, 2006, as between the City and the Port, the City shall continue to have responsibility for the acts or omissions of any City tenant or licensee accruing prior to the date the City causes the tenant or licensee to be removed, as required in Section 3.2(b) (for clarity, this continuing responsibility does not extend to the tenants and licensees listed in Section 3.2(b) above that the City is not required to remove).

### **3.3 West Maritime Property.**

(a) Ownership. The City acquired the West Maritime Property from the Army pursuant to the Army Quitclaim Deed on August 8, 2003, which property had been subleased by the Port since 2000. During the period from August 8, 2003 and before August 7, 2006, the Port continued to lease from the City those portions of the West Maritime Property (excluding the 1.5 acres of the West Maritime Submerged Property conveyed from OBRA to the Port pursuant to the West Maritime Submerged Property Original Deed), and all improvements thereon, pursuant to the terms of the West Maritime Lease. The West Maritime Lease terminated when the East Maritime Property was conveyed to the Port on August 7, 2006.

(b) Tenant Activities. For the period on or before August 7, 2006, as between the Port and the City, the Port had responsibility for any subtenants or other licensees of the property subject to the West Maritime Lease, including but not limited to all matters associated with (i) the condition of the leased property and improvements thereon, and (ii) the coordination of tenant or licensee operations with implementation of the Regulatory Requirements. In addition, as between the City and the Port, the Port had responsibility for terminating all Port tenancy or license agreements and removing all Port tenants and licensees not later than August 7, 2006, except for the following whom the City agreed to recognize as the City's tenant or licensee as of August 7, 2006: (1) Big Rig Insurance Agency; (2) Fundis Company; (3) Oakland Maritime Support Services; (4) Oakland Port Scale; (5) Oakland Port Services; (6) Occupational Testing Center; (7) Pacific Mobile Repair Services, Inc.; (8) Pacific State Environmental Services; and (9) United Intermodal Services, Inc. As between the Port and the City, the Port shall pay all legal fees, costs and other expenses relating to any unlawful detainer actions, and shall promptly reimburse the City for any of the same paid by the City. The Port shall defend, indemnify and hold the City harmless from and against all claims, liabilities, losses, damages, costs and expenses relating to the action.

(c) Continuing Responsibility. The Port had full and complete responsibility for the West Maritime Property during the period on or before August 7, 2006, including responsibility for claims, liabilities, losses, damages, costs and expenses accruing during said time as set forth in, and subject to the provisions of, the West Maritime Lease. Even after August 7, 2006, as between the Port and the City, the Port shall continue to have responsibility for the acts and omissions of any Port tenant or licensee to be removed as required in Section 3.3(b) (for clarity, this continuing responsibility does not extend to the tenants and licensees listed in Section 3.3(b) above that the Port is not required to remove).

(d) Berth 21 Construction Easement. Upon full execution and delivery of this Restated MOA, the Parties will execute and deliver, and the Port will record, the Berth 21 Construction Easement in the form attached as Exhibit 1.1(a)(9).

### **3.4 West Maritime Submerged Property.**

(a) Ownership. The Port owns the West Maritime Submerged Property. Pursuant to the terms of the Port Sliver Properties and West Maritime Submerged Property Trust Agreement, upon completion of the Port Fill Project (or on an otherwise mutually agreed upon date), the Port shall transfer the West Maritime Submerged Property to ORA. If and when the Port completes the Port Fill Project, the project shall include the fill of the West Maritime Submerged Property. The fill materials used for the project shall comply with the RAP/RMP. In the event the Port, in its sole discretion, does not complete the Port Fill Project, the Port shall, at ORA's election, transfer the West Maritime Submerged Property to ORA in a condition substantially similar or better to the condition of the property at the time of the original 2003 West Maritime Submerged Property transfer from OBRA to the Port, except to the extent any impairment is caused by the City, its employees, agents, contractors, and tenants. In the event the Parties are not able to resolve any issues that arise pursuant to this provision, the matter shall be considered an MOA Dispute and will be subject to mediation in accordance with Article 10.

(b) Responsibility. The Port shall have full and complete responsibility for the West Maritime Submerged Property (for the EDC Property portion, the Port's responsibility dates from and after August 7, 2003), including liability for claims, losses and damages accruing during its period of ownership. The Port intends to pursue the completion of the Port Fill Project on or before the end of calendar year 2011, but reserves the right to determine in its sole and absolute discretion whether and/or when to complete the Port Fill Project and the schedule for such completion.

(c) Environmental Investigation. The West Maritime Submerged Property includes both portions of the EDC Property and Parcels A-2 and D-2, which were originally, and are now, owned by the Port. The Parties have caused BASELINE Environmental Consulting to complete a report entitled "Phase I Environmental Site Assessment, 2.0 Acre Site on Berth 10, Port of Oakland" dated June 2006, on Parcels A-2 and D-2. Prior to transfer of the West Maritime Submerged Property to the City, the Port shall remove any dredged soils stored on the site and the City and Port will consult with the applicable Governmental Authorities to determine whether further investigation of the West Maritime Submerged Property Parcels A-2 and D-2 is required to support redevelopment consistent with the uses provided for in the OARB Final Reuse Plan. If further investigation is required, the Parties, with Governmental Authority

oversight, will mutually agree to the scope of the environmental investigation and to a consultant to conduct such investigation. The City and the Port each will pay fifty percent (50%) of the costs and expenses associated with such investigations (excluding in the case of each Party its own costs and expenses for staff and internal overhead and in-house and outside legal counsel, unless otherwise agreed by the Parties in writing). Any and all information obtained or developed during the environmental investigations shall be provided to the City and the Port.

### **3.5 Port Sliver Properties.**

(a) Ownership. On August 7, 2006, the Port Sliver Properties were transferred to ORA in accordance with the terms of the Exchange Agreement, subject to the Port Sliver Properties Parcel C-2 Lease/Sublease. The Parties intend that, at all times on and after August 7, 2006, either the term of the Port Sliver Properties Lease shall be in effect or ORA will have valid, record fee title to the Port Sliver Properties, in either case subject to the Port Sliver Properties Parcel C-2 Lease/Sublease. Accordingly, the term of the Port Sliver Properties Lease will commence if ORA's record fee title is invalidated as a result of a court invalidating the Exchange Agreement. The term of the Port Sliver Properties Lease will subsequently terminate on the date that ORA regains record fee title to the Port Sliver Properties. Should termination result from ORA regaining record fee title through the closing of an alternative exchange agreement, and if ORA's title is invalidated as a result of a court invalidating the alternative exchange agreement, the term of the Port Sliver Properties Lease shall terminate and the Port Sliver Properties Quitclaim Deed shall be deemed delivered to ORA and may be recorded pursuant to the Port Sliver Properties and West Maritime Submerged Property Trust Agreement. If ORA does not have record fee title to the Port Sliver Properties through the closing of an alternative exchange agreement within one year from the date the term of the Port Sliver Properties Lease commences (or such alternative duration as the Parties may mutually agree in writing), then the Port Sliver Properties Quitclaim Deed shall be deemed delivered to ORA and may be recorded pursuant to the Port Sliver Properties and West Maritime Submerged Property Trust Agreement.

(b) Responsibility, Rents and Other Proceeds. The Port had full and complete responsibility for the Port Sliver Properties during the period on or before August 7, 2006, including responsibility for claims, liabilities, losses, damages, costs and expenses accruing during that time. After August 7, 2006, the Port shall continue to have responsibility for Parcel C-2 in accordance with the terms of the Port Sliver Properties Parcel C-2 Lease/Sublease.

(c) Environmental Investigation. The Parties have completed an environmental assessment of Port Sliver Properties Parcel C-1, and no further environmental investigation of that parcel is required by the Parties. The Phase I Environmental Site Assessment referenced in Section 3.4(c) also covers Port Sliver Properties Parcel C-2. Prior to August 7, 2009, the Port shall remove the dredged soils stored on Port Sliver Properties Parcel C-2 and the City and the Port will consult with the applicable Governmental Authorities to determine whether further investigation is required of Port Sliver Properties Parcel C-2 to support redevelopment consistent with the uses provided for in the OARB Final Reuse Plan. If further investigation is required, the Parties, with Governmental Authority oversight, will mutually agree to the scope of the environmental investigation of Port Sliver Properties Parcel C-2, and to a consultant to conduct such investigation. The City and the Port each will pay fifty percent (50%) of the costs

and expenses associated with such investigations (excluding in the case of each Party its own costs and expenses for staff and internal overhead and in-house and outside legal counsel, unless otherwise agreed by the Parties in writing). Any and all information obtained or developed during the environmental investigations shall be provided to the City and the Port.

(d) City Obligations. The City (1) accepted the Port Sliver Properties “as is”, with the City and the Port having responsibility for environmental remediation obligations for the Port Sliver Properties as set forth in Sections 6.1 and 6.2, (2) released the Port from all claims, losses, liabilities, damages, costs and expenses arising from or in connection with the Port Sliver Properties, other than as expressly set forth in this Restated MOA and (3) agreed to defend, indemnify and hold the Port harmless from any third party claims, losses, liabilities, damages, costs and expenses (including, without limitation, reasonable attorney’s and consultant’s fees and costs) arising from or in connection with the Port Sliver Properties. An “as is” transfer means that the Port did not make any warranties or representations whatsoever regarding physical condition, size, suitability for the City’s intended use, suitability for development, the availability of approvals or entitlements, the availability of utilities and services, the availability of water, geologic conditions, soils conditions or any other matter whatsoever related to the Port Sliver Properties, and has no obligations as to the Port Sliver Properties after transfer of title or commencement of the term of the Port Sliver Properties Lease under this Section 3.5, other than as expressly set forth in the Port Sliver Properties Parcel C-2 Lease/Sublease and this Restated MOA, and the City has relied solely on its own analysis in accepting the Port Sliver Properties.

### **3.6 Exchange Agreement Invalidation.**

If a court invalidates the Exchange Agreement and some or all of the conveyances effected pursuant to the Exchange Agreement are thereby invalidated, then the following shall apply, as referenced in Sections 3.2(a) and 3.5(a):

(a) First, the Parties will use commercially reasonable efforts for one year after invalidation to secure an alternative exchange agreement which will effect the property exchanges. During this period, the Parties will control their respective properties via the East Maritime Lease and the Port Sliver Properties Lease.

(b) If the property exchanges have not been effected within one year after invalidation (unless the Parties otherwise mutually agree to a longer term in writing), the East Maritime Quitclaim Deed and the Port Sliver Properties Quitclaim Deed will be deemed delivered to the relevant Party and may be recorded. The term of the corresponding leases will expire when the lessee has fee title.

(c) If the property exchanges contemplated by an alternative exchange agreement do occur (within one year after invalidation of the original Exchange Agreement), but are later invalidated because the alternative exchange agreement is invalidated, then upon such invalidation the East Maritime Quitclaim Deed and the Port Sliver Properties Quitclaim Deed will be deemed delivered to the relevant Party and may be recorded. The Parties have no obligation to try to secure a second alternative exchange agreement.

#### **4. Reinvestment Obligations**

##### **4.1 Proceeds to City.**

All cash proceeds received by the City during the Reinvestment Period from (a) any payments by the Port pursuant to Section 1.3(b) for Transaction Costs, (b) rents and other proceeds from the East Maritime Property, and (c) the payment by the Port for the Knight Yard Property, including but not limited to the lease payments to the City pursuant to the Knight Yard Lease, shall be used by the City solely for reinvestment and redevelopment of the EDC Property in accordance with the Army Agreement.

##### **4.2 Proceeds to Port.**

The Parties agree that no cash or other proceeds received by the Port shall be subject to the reinvestment obligation referenced in Section 4.1 and the Port shall not be required to use such cash or other proceeds for reinvestment or redevelopment of the EDC Property. The City will advocate to the Army that the Port should not be subject to such reinvestment obligation due to the consideration being paid by the Port for the Knight Yard Property, as well as the other consideration specified in Section 1.3 or otherwise in this Restated MOA. The Port will have the right to participate in the City's negotiations with the Army that involve application of the reinvestment obligation to the Port. Notwithstanding the foregoing, the Port agrees that it will prepare and maintain for not less than ten (10) years after August 7, 2003 records reflecting the use of cash and other proceeds received by the Port from the EDC Property during the seven (7) year period after August 7, 2003 to the extent such cash or other proceeds are used to support the economic redevelopment of the EDC Property in accordance with Article 2 of the Army Agreement. The Port will make these records available to the City upon the City's reasonable request.

#### **5. Remediation of EDC Property**

##### **5.1 Allocation of Responsibility Under DTSC Consent Agreement.**

(a) General. The EDC Property shall be investigated and remediated to the extent required by the DTSC Consent Agreement in accordance with its terms and with the other Regulatory Requirements. The information contained in the RAP, the RMP, the EBST and the other documents specified in Exhibit 5.1(a) attached hereto shall be deemed to provide baseline information regarding the pre-existing Environmental Conditions and other environmental matters at the EDC Property as of August 7, 2003. Pre-existing Environmental Conditions on the EDC Property shall be addressed as set forth in this Section 5.1. Funding for such investigation and remediation shall be provided by the Army, the City, the Port and proceeds of the Insurance Policy, as set forth in Sections 5.2, 5.3 and 5.4 below. Any Party retaining a contractor to perform environmental remediation on the EDC Property in accordance with this Restated MOA shall require the contractor to carry commercial general liability insurance with limits of at least Three Million Dollars (\$3,000,000) and pollution liability insurance with limits of at least Two Million Dollars (\$2,000,000). Any Party retaining a contractor to perform work other than environmental remediation shall require the contractor to carry insurance appropriate for the work to be performed, in the reasonable business discretion of the Party retaining the

contractor. Such insurance policies shall name all Parties as additional insureds. Each Party will use commercially reasonable efforts to pursue claims against any contractor it retains. The City Parties are signatories to the ESCA, DTSC Consent Agreement and Covenant to Restrict Use of Property, and they are responsible for complying with those agreements and with the RAP and the RMP; however, the remainder of this Section 5, discusses the contractual responsibilities as between the City and the Port under those agreements and the associated Regulatory Requirements.

(b) City Responsibilities. As between the City and the Port, the City shall be responsible for the following:

(1) subject to Section 6.2(b)(1), complying with and implementing all remedial activities required under the Regulatory Requirements on the West Maritime Property, except for the portion of the West Maritime Property transferred to the Port by the Berth 21 Submerged/Upland Property Deed; and

(2) complying with and implementing all remedial activities required under the Regulatory Requirements on the 1.5 acre EDC Property portion of the West Maritime Submerged Property conveyed from OBRA to the Port pursuant to the West Maritime Submerged Property Original Quitclaim Deed, to the extent such activities are required to be conducted after title is conveyed to the City.

(c) Port Responsibilities. As between the City and the Port, the Port shall be responsible for the following:

(1) subject to Section 6.2(d), complying with and implementing all remedial activities required under the Regulatory Requirements on the Berth 21 Submerged/Upland Property and with respect to the Marine Sediments (whether through completion of the Port Fill Project or otherwise);

(2) subject to Section 6.2(a)(1), complying with and implementing all remedial activities required under the Regulatory Requirements on the East Maritime Property;

(3) subject to Section 6.2(e), complying with and implementing all remedial activities required under the Regulatory Requirements and Section 3.4 of this Restated MOA on the EDC Property portion of West Maritime Submerged Property, to the extent such activities are required to be conducted before title is conveyed to the City; and

(4) complying with and implementing all remedial activities required under the Regulatory Requirements on the Knight Yard Property arising from and after July 26, 2000, the date that OBRA acquired control from the Army under its master lease with the Army and simultaneously subleased the Knight Yard Property to the Port.

(d) Priority RAP Activities. The City and the Port each shall implement the remediation of the RAP Sites on the property for which it is responsible in accordance, respectively, with Sections 5.1(b) and 5.1(c) above. The City and Port each shall use commercially reasonable efforts to complete remediation (excluding long-term monitoring or similar activities) of the RAP Sites for which it is responsible on or prior to August 7, 2008,

unless a later date for such completion has been has been agreed to in writing by the applicable Governmental Authority (including DTSC) and the Parties. Each Party agrees to reasonably cooperate to avoid interfering with the other Party's operations or tenants during the course of such activities.

(e) DTSC Consent Agreement Amendment. Even though the Port is not currently a signatory to the DTSC Consent Agreement, in accordance with the terms of this Restated MOA, the Port is obligated to comply with all requirements of the DTSC Consent Agreement, RAP, RMP, Covenant to Restrict Use of Property, and any other requirements of a Governmental Authority, with respect to the property for which it is responsible under Section 5.1(c) above, to the extent the same accrue from and after the date the specified property is transferred to the Port (or to the extent any transfer is invalidated, from and after the date the specified property is leased to the Port pursuant to Section 3.6). Under the Initial MOA, the City and Port agreed to cooperate and use commercially reasonable efforts to effect an assignment and assumption of the DTSC Consent Agreement consistent with the Port's responsibility. Notwithstanding such efforts, DTSC has indicated it will not release the City from the obligations the Port assumes, and therefore the City ultimately will remain liable for the Port's performance under the DTSC Consent Agreement. Therefore, the Port shall take full and complete responsibility for complying with the DTSC Consent Agreement (and all amendments and modifications thereto which the Port approves in advance and in writing), for the property described in Section 5.1(c) from and after the date such property was transferred to the Port (until, as to the 1.5 acre EDC Property portion of the West Maritime Submerged Property conveyed from OBRA to the Port pursuant to the West Maritime Submerged Property Original Quitclaim Deed, such Property is transferred to the City), including without limitation responsibility for any and all fines, penalties or other sanctions resulting from the Port's failure to comply with applicable requirements of the DTSC Consent Agreement with respect to the property specified. Nevertheless, the Parties agree to cooperate and use commercially reasonable efforts to effect an amendment to the DTSC Consent Agreement substantially in the form attached hereto as Exhibit 5.1(e) (the "Second Amendment to DTSC Consent Agreement").

(f) Implementation of DTSC Consent Agreement and Other Regulatory Requirements. Whether or not the Second Amendment to DTSC Consent Agreement is approved by DTSC, as between the City and the Port, (i) the City shall take lead responsibility for all contacts with DTSC (and other Governmental Authorities, as appropriate) with regard to activities that are the City's responsibilities under this Restated MOA, and (ii) the Port shall take lead responsibility for all contacts with DTSC (and other Governmental Authorities, as appropriate) with regard to activities that are the Port's responsibilities under this Restated MOA, unless as otherwise mutually agreed in the Work Plan. Such lead responsibility by a Party shall include without limitation (1) the Party having leadership responsibility with respect to DTSC and other Governmental Authorities with jurisdiction over the activities for which the Party is responsible under this Restated MOA and (2) the Party having principal responsibility for all communications with such Governmental Authorities with regard to the activities for which it is responsible. Neither Party may engage in substantive communications with DTSC or other Governmental Authorities with jurisdiction over the activities for which the other Party is, at the time of the communication, responsible under this Restated MOA without first obtaining the other Party's approval. Furthermore, each Party shall immediately notify the other Party of

any communications from DTSC, or other Governmental Authorities, to such Party with regard to matters for which the other Party is, at the time of the communication, responsible. Finally, as between the Port and the City, a Party is deemed the responsible party under this Section 5.1(e) only during the period the Party owns the properties in question or controls them, e.g., the Port controls the East Maritime Property during the term of the East Maritime Lease.

## **5.2 Allocation of ESCA Funds.**

(a) General. The Army has agreed to provide ESCA Funds up to a maximum of Thirteen Million Dollars (\$13,000,000) for the investigation and remediation of the EDC Property and payment of the Insurance Policy premiums in accordance with the terms and conditions of the ESCA. The Army also has demolished Building 1 using non-ESCA Funds. The City shall follow the procedures set forth in the ESCA, and use its reasonable business efforts and pursue commercially reasonable legal remedies, to obtain payment and/or reimbursement from the Army for environmental remediation activities.

(b) ESCA Funding Requests. The ESCA provides procedures by which the City shall request advance payments of ESCA Funds. The City and the Port shall regularly confer and cooperate in determining when payment requests to the Army shall be made, the portion of Environmental Services to be funded for the period of funding requested, and the amount of ESCA Funds to be requested for such portion of Environmental Services. All requests for ESCA Funds (including those made by the Port) will be based on invoices from third party service providers payable on a thirty (30) day cycle, and will comprise only costs that are allowed to be credited in meeting the Insurance Attachment Point under the cost cap portion of the Insurance Policy (or that all Parties otherwise agree in advance and in writing are costs authorized by the ESCA, such as reporting requirements under the Technical Specifications and Requirements Statement attached to the ESCA). Requests for ESCA Funds will not be made on the basis of estimates of future costs to be incurred (unless the Parties otherwise agree). The ESCA Funds received will be used to pay only the invoices for which a particular request was made (unless the Parties otherwise agree). The City shall submit a draft request form for ESCA Funds to the Port for Port review and comment no later than fifteen (15) days before such request is to be submitted to the Army. The Port shall have ten (10) days from the time it receives the form to provide comments, including funding requests, on such form to the City. Unless the City objects to a request by the Port for ESCA Funds, the City will include the Port's request for ESCA Funds in the first draw request to the Army made after the City's receipt of the Port's request, and will transfer the ESCA Funds responding to the Port's request as soon as reasonably possible, but in any event five (5) business days after the City receives the ESCA Funds from the Army. Any ESCA Funds received by the City will be placed in an interest-bearing account. Interest on the funds must be returned to the Army. The City will return the interest earnings to the Army after the ESCA Funds have been exhausted. Issues raised by any Party with respect to a request for ESCA Funds that are not resolved by Port and City representatives shall be an MOA Dispute subject to Article 10.

(c) Insurance Policy. On August 7, 2003, Three Million, Four Hundred Ninety Thousand Six Hundred and Eighty-Eight Dollars (\$3,490,688.00) of ESCA Funds were used to pay the premium on the Insurance Policy.

(d) Priority RAP Activities. Except as provided in Section 5.2(e), ESCA Funds remaining after purchase of the Insurance Policy shall first be used to complete the remediation of the RAP Sites, and/or to reimburse the City and the Port for the implementation and/or completion of the remediation of the RAP Sites.

(e) RMP Activities. ESCA Funds remaining after purchase of the Insurance Policy and full payment of all costs and expenses associated with the RAP Sites, including but not limited to all reimbursements due to the City or the Port, shall be used to complete, and/or to reimburse the City and the Port for the implementation and/or completion of, the activities required by the RMP. Notwithstanding Section 5.2(d) and the preceding sentence, however, the Parties agree that to the extent certain RMP activities occur in accordance with the Work Plan before the remediation of all RAP Sites is completed (either because the activities are (1) required by the DTSC Consent Agreement, the RAP or RMP, as such documents may be modified by amendments accepted by the Parties in advance and in writing, (2) necessary to accommodate redevelopment or (3) otherwise necessary to comply with Regulatory Requirements), then ESCA Funds for those RMP or other compliance activities may be used before remediation of all RAP Sites is completed.

(f) Work Plan and Schedule. The Work Plan will be implemented in conjunction with and in a manner consistent with the general remediation schedule required by Section 3.3 of the DTSC Consent Agreement. Implementation of the Work Plan over the five (5) year period after August 7, 2003 will take into account, among other relevant considerations, (1) savings achievable through economies of scale and efficient mobilization, (2) savings and revenue enhancements achievable by tying remediation to redevelopment and by deferring remediation until required for redevelopment (*e.g.*, potentially deferring investigation until after demolition in order to reduce costs, or deferring demolition of improvements capable of producing revenues), (3) shifting liability through lump sum contracts and other arrangements, (4) developing milestones that allow reasonable time for the City and the Port to meet all deadlines imposed by the Regulatory Requirements and (5) considering redevelopment activities, to the extent then known. The Parties acknowledge that the factors specified in clauses (1) through (5) may conflict. Implementation of the Work Plan will achieve a reasonable balancing of these factors, but priority will be given to meeting the deadlines imposed by Regulatory Requirements. The Parties will review the Work Plan on a regular basis, but no less often than every six (6) months, and will make reasonable adjustments based on changed circumstances and new events within thirty (30) days after each such review. The Parties' failure to agree on adjustments to the Work Plan will be an MOA Dispute subject to Article 10.

### **5.3 Unfunded Remediation Costs.**

(a) Generally. The Parties acknowledge and agree that there likely will be a shortfall between the ESCA Funds available to cover the costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements and the Insurance Attachment Point. It is also possible that the costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements may exceed the ESCA Funds and proceeds from the Insurance Policy

even after the Insurance Attachment Point is reached, or may not be covered by the ESCA Funds or the Insurance Policy.

(b) Allocation. The unfunded remediation costs, as described in Section 5.3(a), necessary to fulfill the Regulatory Requirements shall be allocated to the City and the Port in accordance with the Allocation Proportion; provided that, unfunded remediation costs for abatement of asbestos or lead based paint in connection with building demolition shall not be subject to the Allocation Proportion, but instead (as between the Parties) will be the entire responsibility of the Party undertaking the demolition, except as provided below, and provided further, that remediation costs associated with Marine Sediments shall be the responsibility of the Port in accordance with Section 5.5. If there are unfunded remediation costs for abatement of asbestos or lead based paint in connection with building demolition associated with a building that straddles the boundary of properties owned by both the Port and the City, then such unfunded remediation costs will be shared by the Parties owning the contiguous properties proportionately, based on the amount of square footage of the building being demolished that is located on the property owned by the Port and on the property owned by the City. In addition, except as required by DTSC or another Governmental Authority, or as necessary to achieve the stated remedial objectives of the RAP and/or RMP, a Party's decision to excavate and transport off site soil with concentrations of chemicals of concern below remedial goals, which Regulatory Requirements would permit to re-use on-site, shall not be subject to the Allocation Proportion, but instead (as between the Parties) will be the entire responsibility of the Party electing to excavate and dispose of the soil off-site.

(c) Allocation Procedure. The Remediation Account Manager shall notify the Parties in writing when Twelve Million Five Hundred Thousand Dollars (\$12,500,000) of the ESCA Funds have been expended (including any amounts subject to outstanding funding requests under Army Grants Officer review). Within thirty (30) days after receipt of such notice from the Remediation Account Manager, the Parties shall deposit in the aggregate One Million Dollars (\$1,000,000) in the Remediation Account in accordance with the Allocation Proportion (*i.e.*, Five Hundred Thousand Dollars (\$500,000) from the Port and Five Hundred Thousand Dollars (\$500,000) from OBRA, ORA and the City Council collectively). Each Party may draw from the Remediation Account to fulfill its remediation obligations as set forth in Section 5.1 (except that remediation costs associated with Marine Sediments shall be the responsibility of the Port in accordance with Section 5.5), consistent with the draw procedures set forth in Section 5.3(d). The Remediation Account Manager shall notify the Parties in writing each time the Remediation Account balance falls below Two Hundred Fifty Thousand Dollars (\$250,000). Within thirty (30) days after receipt of such notice from the Remediation Account Manager, the Remediation Account shall be funded by the Parties in aggregate One Million Dollar (\$1,000,000) increments in accordance with the Allocation Proportion. Such incremental payments shall continue until the aggregate amount paid for environmental remediation from ESCA Funds and from Remediation Account funds equals the Insurance Attachment Point, and thereafter if required under Section 5.3(a).

(d) Remediation Account Draws. Any Party seeking to withdraw funds from the Remediation Account shall make a request to the Remediation Account Manager specifying in sufficient detail the amount of funds requested, including a reasonable itemization of costs, and a description of how the funds will be used to comply with the obligations set forth in Section 5.1.

The Parties anticipate that draws generally will be based on invoices from third party service providers payable on a thirty (30) day cycle, and will comprise only costs that are unfunded remediation costs as described in Section 5.3(a), subject to the exceptions provided in Section 5.3(b). Draws will not be made on the basis of estimates of future costs to be incurred. Therefore, the draw request will include an invoice in sufficient detail to determine the service provider and the services performed. A copy of the draw request shall be sent at the same time to each Party not seeking the funds. The Parties not seeking the funds shall have fifteen (15) days after receiving the request to notify the Party seeking the funds and the Remediation Account Manager that the information provided in the request is insufficient or the requested funds are otherwise not necessary to fulfill the obligations set forth in Section 5.1. The Party seeking the funds shall have ten (10) days after receiving such notification to confer with the other Parties and provide the necessary information to justify the requested use of the funds. If during or at the end of such ten (10) day period the Parties agree on the funds to be drawn from the Remediation Account, the Parties shall notify the Remediation Account Manager immediately after such agreement, and the Remediation Account Manager shall pay the disputed withdrawal request in accordance with the agreement reached by the Parties. If the Parties cannot agree, the dispute will be an MOA Dispute subject to Article 10. Notwithstanding such disagreement, the Party seeking the funds may request that the Remediation Account Manager disburse the funds requested. However, if after resolution of an MOA Dispute, it is determined that some or all of the funds requested are disallowed, then within fifteen (15) days after such determination, the receiving Party shall reimburse the Remediation Account for such disallowed amounts plus interest thereon at an annual rate of six percent (6%).

(e) Allocation Accounting. The Port and ORA shall establish the Remediation Account and will require the Remediation Account Manager to provide a statement on a monthly basis that reflects the account balance, the cumulative contributions to the Remediation Account by each Party and specific draws on the Remediation Account. At the time the Insurance Attachment Point is reached, and subsequently as of the date the Remediation Account terminates, the Parties, with the assistance of the Remediation Account Manager, shall reconcile the Remediation Account to ensure that each Party's contribution to the Remediation Account was consistent with the Allocation Proportion. If a Party underfunded its Allocation Proportion of the Remediation Account, it shall reimburse the Party that overfunded the Remediation Account in an amount that reconciles the cumulative Remediation Account contributions with the Allocation Proportion.

(f) Demonstration of Financial Assurance for Conveyance. The City and the Port cooperated in submitting to DTSC a financial assurance demonstration in accordance with the Allocation Proportion, under which the City demonstrated financial capabilities of funding fifty percent (50%) of the anticipated remediation funding gap, and the Port demonstrated financial capabilities of funding the remaining fifty percent (50%) of the remediation funding gap.

#### **5.4 Insurance Policy.**

(a) Insurance Attachment Point. Prior to the date the Insurance Attachment Point is reached, the Parties shall jointly submit reports executed by the Port and by OBRA or ORA to the Insurance Policy provider, as required under the Insurance Policy, specifying allowable costs

incurred during the reporting period. Each Party promptly will notify each other Party in writing of any responses it receives from the Insurance Policy provider. The notification will include a copy of any written responses from the Insurance Policy provider. The Parties shall confer when any Party believes that eighty-five percent (85%) of the Insurance Attachment Point has been reached. The Parties shall reasonably cooperate and confer with the Insurance Policy provider to reconcile the status of the self-insured retention and allowable costs under the Insurance Policy.

(b) Cost Cap Insurance Policy Claims. After the date the Insurance Attachment Point is reached, each Party shall be entitled to make claims under the cost cap portion of the Insurance Policy to fulfill its obligations under Section 5.1. The Party making a claim shall provide a copy of the claim notice to the other Parties at the same time the claim is submitted to the Insurance Policy provider. The Parties shall reasonably cooperate with respect to claims submitted to the Insurance Policy provider. The Party making the claim shall be responsible for its costs, legal or otherwise, in pursuing any claim. Each Party shall advance the cost of remediation in accordance with its obligations under Section 5.1, and benefit from any reimbursement from claims paid. Each Party will promptly notify each other Party in writing of the response received from the Insurance Policy provider in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by the Insurance Policy provider. In the event any remediation costs that are properly incurred and reported by a Party to fulfill its obligations under Section 5.1 are not reimbursed by the Insurance Policy provider, the Party making the claim may submit the claim to the other Parties and to the Remediation Account Manager and it shall be paid from the Remediation Account or, if the funds in the Remediation Account have been depleted, will be shared by the Parties in accordance with the Allocation Proportion using the procedures set forth in Section 5.3(c).

(c) Excess Remediation Costs. If environmental remediation costs exceed the limit of the cost cap portion of the Insurance Policy, and/or if there are environmental remediation costs properly incurred and reported by any Party to fulfill its obligations under Section 5.1 that are not covered by the cost cap portion of the Insurance Policy, such excess environmental remediation costs shall be allocated and shared in accordance with the Allocation Proportion using the Remediation Account procedures set forth in Section 5.3(c).

(d) Liability Claims Under Insurance Policy. Each Party shall be entitled to make claims under the liability portion of the Insurance Policy in the event such Party incurs a loss resulting from a pollution incident associated with the EDC Property. The Party making a claim shall provide a copy of the claim notice to the other Parties at the same time the claim is submitted to the Insurance Policy provider. The Parties shall reasonably cooperate with respect to claims submitted to the Insurance Policy provider. The Party making the claim shall (1) be responsible for payment of any deductible associated with the claim and its costs, legal or otherwise, in pursuing any claim, and (2) benefit from any reimbursement from claims paid, and bear the risk that the Insurance Policy provider will not fully reimburse such Party for all or any portion of the claim. Each Party will promptly notify each other Party in writing of the response received from the Insurance Policy provider in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by the Insurance Policy provider.

(e) Disputes Regarding Insurance Claims. In the event any Party disputes a claim under the Insurance Policy made by another Party, the disputing Party shall notify the other Parties in writing of the basis for the dispute. If the Parties cannot resolve the dispute within thirty (30) days of the notice (or such shorter period as is expressly provided in this Restated MOA), it shall be an MOA Dispute subject to Article 10.

(f) Insurance Policy Term and Limits. The Parties shall confer when Twenty Million Dollars (\$20,000,000) of the cost cap limits have been paid by the Insurance Policy provider. If at such time there is a reasonable possibility that required activities necessary to comply with the Regulatory Requirements will in the aggregate exceed the cost cap limits, the Parties shall determine in good faith whether an increase in cost cap limits is appropriate. The Parties shall further confer one year before the end of the Insurance Policy term to determine in good faith whether an extension of the term is appropriate. If the Parties cannot agree on whether an increase in limits and/or extension of the term is appropriate, regardless of how much of the policy proceeds have been paid out by that date, the dispute will be an MOA Dispute subject to Article 10. To the extent the Parties agree that an increase in limits and/or extension of the term is appropriate or it is otherwise so determined as a result of an MOA Dispute resolution, the cost of any increased premium shall be allocated in accordance with the Allocation Proportion.

## **5.5 Marine Sediments.**

As among the Parties, the Port shall have full and complete responsibility for any and all remediation activities required to address the impacts to Marine Sediments to the extent the Marine Sediments are required to be addressed to achieve regulatory closure in accordance with the Regulatory Requirements. Notwithstanding anything in this Restated MOA to the contrary, the Allocation Proportion shall not apply to funding for activities associated with the Port Fill Project, including but not limited to remediation of the Marine Sediments, and all such funding shall be provided by the Port or third parties. The City shall not be required to provide any funding for the Port Fill Project or the remediation of the Marine Sediments, and no ESCA Funds, funds from the Remediation Account, or proceeds from claims under the Insurance Policy shall be used for the Port Fill Project or the remediation of the Marine Sediments. The Parties acknowledge and agree that it is anticipated completion of the Port Fill Project will satisfy the Regulatory Requirements applicable to the Marine Sediments, but the Port's obligations will not be satisfied by the Port Fill Project in the event the Port Fill Project does not fully achieve regulatory closure in accordance with the Regulatory Requirements. The City will reasonably cooperate at the expense of the Port with any efforts the Port undertakes to recover remediation costs relating to the Marine Sediments from third parties.

## **6. Other Environmental Matters**

### **6.1 Pre-Existing Environmental Conditions.**

(a) EDC Property. To the extent required pursuant to the Regulatory Requirements, Environmental Conditions existing as of August 7, 2003 at the EDC Property shall be addressed in accordance with Article 5.

(b) Army Reserve Properties. In the event the environmental remediation funding to be provided by the Army Reserve for the Army Reserve Properties is not sufficient to cover all costs and expenses associated with investigation and remediation of Environmental Conditions existing as of the date of transfer of the Army Reserve Properties, to the extent required by any Governmental Authority, with respect to (1) the West Maritime Army Reserve Property, as among the Parties, the City shall be responsible for all excess costs and expenses associated with the environmental remediation of such property, or (2) the East Maritime Army Reserve Property, as among the Parties, the Port shall be responsible for all excess costs and expenses associated with the environmental remediation of such property.

(c) Port Sliver Properties and West Maritime Submerged Property Parcels A-2 and D-2. The results of the environmental investigation described in Sections 3.4(c) and 3.5(c) shall be deemed to provide baseline information regarding the pre-existing Environmental Conditions at the Port Sliver Properties and West Maritime Submerged Property Parcels A-2 and D-2. Environmental Conditions on or emanating from these areas that are identified in such environmental investigations, as among the Parties, shall be the responsibility of:

(1) the Port, with respect to Port Sliver Properties Parcel C-2 and West Maritime Submerged Property Parcels A-2 and D-2, to the extent such Environmental Conditions (A) existed as of August 7, 2003 and (B) are required by any Governmental Authority to be remediated. In the event remediation is required, the Parties agree that the Port shall remediate according to the requirements of the overseeing Governmental Authority to a standard consistent with the uses provided for in the OARB Final Reuse Plan and in accordance with the terms of the Port Sliver Properties Parcel C-2 Lease/Sublease and Port Sliver Properties and West Maritime Submerged Property Trust Agreement; or

(2) the City, with respect to Port Sliver Properties Parcel C-1, to the extent such Environmental Conditions (A) existed as of August 7, 2003 and (B) are required by any Governmental Authority to be remediated. Promptly following the City's request the Port shall assign to the City all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any remediation required to be conducted, or other losses incurred, by the City with respect to the Environmental Conditions at Port Sliver Properties Parcel C-1, and shall cooperate with the City to enable the City (at the City's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

## **6.2 Allocation of Responsibility for "New" Environmental Conditions.**

(a) East Maritime Property. As between the City and the Port, Environmental Conditions on or emanating from the East Maritime Property shall be the responsibility of:

(1) the City, to the extent such Environmental Conditions (A) result from (i) the use or operation of such properties between June 16, 1999 and August 7, 2006, when the City had control of the East Maritime Property under its lease from the Army, or (ii) the use or operation of such properties by its tenants or licensees (except those listed in Section 3.2) before actual vacation of the property, and (B) are required by any Governmental Authority to be addressed during such periods; or

(2) the Port, to the extent such Environmental Conditions (A) result from the use or operation of such properties after August 7, 2006, and (B) are discovered, arise or are required by any Governmental Authority to be addressed after August 7, 2006. However, the Port shall not be responsible for Environmental Conditions that (C) result from the use or operation of such properties by a City tenant or licensee before actual vacation of the property (except those tenants listed in Section 3.2), and (D) are required by any Governmental Authority to be addressed during that period. After the vacation of such City tenant or licensee, at the Port's request, the City promptly shall assign to the Port all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any remediation required to be conducted, or other losses incurred, by the Port with respect to the Environmental Conditions at the East Maritime Property, and shall cooperate with the Port to enable the Port (at the Port's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

(b) West Maritime Property. As between the City and the Port, Environmental Conditions on or emanating from the West Maritime Property shall be the responsibility of:

(1) the Port, to the extent such Environmental Conditions (A) result from (i) the use or operation of such properties between July 26, 2000 and August 7, 2006, the term of the West Maritime Lease, or (ii) the use or operation of such properties by its tenants or licensees (except those listed in Section 3.3) before actual vacation of the property, and (B) are required by any Governmental Authority to be addressed during such periods, or

(2) the City, to the extent such Environmental Conditions (A) result from the use or operation of such properties after August 7, 2006 and (B) are discovered, arise or are required by any Governmental Authority to be addressed after August 7, 2006. However, the City shall not be responsible for Environmental Conditions that (C) result from the use or operation of such properties by a Port tenant or licensee before actual vacation of the property (except those tenants listed in Section 3.3), and (D) are required by any Governmental Authority to be addressed during that period. After the vacation of such Port tenant or licensee, at the City's request, the Port promptly shall assign to the City all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any remediation required to be conducted, or other losses incurred, by the City with respect to the Environmental Conditions at the West Maritime Property, and shall cooperate with the City to enable the City (at the City's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

(c) Knight Yard Property. As between the City and the Port, Environmental Conditions on or emanating from the Knight Yard Property shall be the responsibility of the Port to the extent such Environmental Conditions (1) result from the use or operation of the Knight Yard Property after July 26, 2000, and (2) are discovered, arise or are required by any Governmental Authority to be addressed after July 26, 2000 but are not required to be addressed as part of the remediation required pursuant to the Regulatory Requirements, whether they result from the use or operation of such property before or after July 26, 2000. Promptly following the Port's request, the City shall assign to the Port all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any investigation or remediation required to be conducted, or other losses incurred, by the Port with respect to the

Environmental Conditions at the Knight Yard Property, and shall cooperate with the Port to enable the Port (at the Port's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

(d) Berth 21 Submerged/Upland Property. As between the City and the Port, Environmental Conditions on or emanating from the Berth 21 Submerged/Upland Property shall be the responsibility of the Port to the extent such Environmental Conditions are discovered, arise or are required by any Governmental Authority to be addressed after August 7, 2003, but are not required to be addressed pursuant to the Regulatory Requirements, whether they result from the use or operation of such property before or after August 7, 2003. Promptly following the Port's request, the City shall assign to the Port all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any investigation or remediation required to be conducted, or other losses incurred, by the Port with respect to the Environmental Conditions at the Berth 21 Submerged/Upland Property, and shall cooperate with the Port to enable the Port (at the Port's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

(e) West Maritime Submerged Property. As between the City and the Port, Environmental Conditions on or emanating from the West Maritime Submerged Property that, with respect to Parcels A-2 and D-2, are not identified in the environmental investigation described in Section 3.4, shall be the responsibility of:

(1) the Port, to the extent such Environmental Conditions (A) result from the use or operation of the 1.5 acre EDC Property portion of the West Maritime Submerged Property after August 7, 2003 and during the period it is owned by the Port, and (B) are required by any Governmental Authority, during the period the West Maritime Submerged Property is owned by the Port, to be addressed, but are not required to be addressed pursuant to the Regulatory Requirements; or

(2) the City, to the extent such Environmental Conditions are discovered, arise or are required by any Governmental Authority to be addressed after transfer of title of the West Maritime Submerged Property to the City, whether they result from the use or operation of such property before or after such transfer, but are not required to be addressed pursuant to the Regulatory Requirements. On such transfer date, at the City's request, the Port promptly shall assign to the City all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any investigation or remediation required to be conducted, or other losses incurred, by the City with respect to the Environmental Conditions at the West Maritime Submerged Property, and shall cooperate with the City to enable the City (at the City's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable.

(f) Port Sliver Properties. As between the City and the Port, Environmental Conditions on or emanating from the Port Sliver Properties that are not identified in the environmental investigation described in Section 3.5 shall be the responsibility of:

(1) the Port, for Port Sliver Properties Parcel C-2, to the extent such Environmental Conditions are required by any Governmental Authority to be addressed on or

before termination of the Port Sliver Properties Parcel C-2 Lease/Sublease (provided that such investigation or remediation may be completed after transfer); or

(2) the City, for Port Sliver Properties Parcel C-1, as well as for Port Sliver Properties Parcel C-2, to the extent such Environmental Conditions are required by any Governmental Authority to be addressed after termination of the Port Sliver Properties Parcel C-2 Lease/Sublease. As of the Restatement Date as to Port Sliver Properties Parcel C-1, and after termination of the Port Sliver Properties Parcel C-2 Lease/Sublease for Port Sliver Properties Parcel C-2, at the City's request, the Port promptly shall assign to ORA all of its transferable claims, rights or demands against third parties (excluding insurance carriers) associated with any investigation or remediation required to be conducted, or other losses incurred, by the City with respect to the Environmental Conditions at the Port Sliver Properties, and shall cooperate with the City to enable the City (at the City's expense) to obtain the benefit of any claims, rights or demands against third parties (excluding insurance carriers) that are not transferable; or

(3) the Port, to the extent such Environmental Conditions result from the Port's fill and other activities described in Section 3.5(d).

(g) Army Reserve Properties. As between the City and the Port, Environmental Conditions on or emanating from:

(1) the East Maritime Army Reserve Property shall be the responsibility of the Port, to the extent such Environmental Conditions result from the use or operation of the East Maritime Army Reserve Property after it is transferred to the Port; and

(2) the West Maritime Army Reserve Property shall be the responsibility of the City, to the extent such Environmental Conditions result from the use or operation of the West Maritime Army Reserve Property after it is transferred to the City.

### **6.3 Exchange of Reports and Filings.**

The Parties shall provide to each other copies of any reports or other submissions made to any Governmental Authority in connection with the EDC Property or other properties covered by this Restated MOA until all ESCA Funds, Remediation Account Funds and Insurance Policy proceeds are expended, and shall authorize and request DTSC and other state or federal agencies to provide any responses to such reports or submissions directly to the other Parties; provided, however, that if all obligations under the DTSC Consent Agreement that relate to the remediation of Marine Sediments are assigned to the Port and the City is released from responsibility and liability for all such obligations, the obligations of the Port pursuant to this Section 6.3 to provide reports and other submissions to the City shall not apply to the Port Fill Project nor to the remediation of Marine Sediments, since no ESCA Funds, funds from the Remediation Account or proceeds from claims under the Insurance Policy may be used for the Port Fill Project or the remediation of Marine Sediments.

### **6.4 Mutual Releases.**

On August 7, 2003, the Port and the City executed and exchanged mutual

releases, copies of which are attached hereto as Exhibit 6.4 (the "Mutual Releases"), pursuant to which the Port and the City released each other from any claims the other has or may have with respect to Environmental Conditions existing on or prior to August 7, 2003 at the properties covered by this Restated MOA, so that the provisions of this Restated MOA shall be exclusive with respect to the allocation of liability for Environmental Conditions associated with such properties.

## **6.5 EIR Mitigation Obligations.**

Each of the Parties shall implement feasible mitigation measures identified in the EIR, and acknowledge and agree that no such mitigation measures can be modified without additional CEQA review. The Parties shall negotiate in good faith to reach an agreement with respect to the financial contributions required from the City and the Port for joint mitigation measures in the EIR that are acceptable to each of the Parties participating in such mitigation measures. The Parties shall use good faith efforts to reach such an agreement within two (2) years after the execution of the Exchange Agreement. In the event agreement cannot be reached with respect to such financial contributions within the time period specified, then the matter shall be considered an MOA Dispute subject to Article 10; provided, however, that in the event the Mediator becomes the decision maker with respect to such financial contributions, the standard for resolving such dispute will be a nexus-based analysis of relative contribution by the Parties to the environmental impacts that are identified in the EIR.

## **7. EDC Property Development**

### **7.1 Adoption of Land Use Modifications.**

(a) City Approvals. The City Council enacted the City Council Ordinances attached as Exhibit 1.1(a)(18) and delivered a certified copies thereof to the Port. On March 7, 2006, the City Council also adopted a General Plan Amendment (Resolution No. 79770 C.M.S) that (1) covers the Port's use of the East Maritime Property, the Knight Yard, the East Maritime Army Reserve Property, the Berth 21 Submerged/Upland Property and property rights the Port acquires or will acquire under the CalTrans I-880 Settlement and (2) conforms to the certified EIR, the OARB Final Redevelopment Plan, the OARB Final Reuse Plan, the BCDC Bay and Seaport Plans and the Redevelopment MOU. The City represents that, as a result of the Resolution referenced above, all of the property listed in the immediately preceding item (1) is designated in the General Plan as General Industrial/Transportation, and the General Plan conforms to each of the matters listed in the immediately preceding item (2).

(b) Port Approvals. The Port enacted the Port Ordinance No. 4016 on August 21, 2007, attached as Exhibit 1.1(a)(70), and delivered a certified copy thereof to the City Council.

### **7.2 Port Electrical Systems.**

The Port and the City have adopted a final Utilities Program Management Agreement attached to this Restated MOA as Exhibit 7.2. At the City's option, exercised in its sole and absolute discretion, the development of the West Maritime Property shall be integrated into the Port's electrical system(s), including the Davis Street Substation, at the City's expense in

a fair and cost effective manner, based on actual costs of integrating new development into the Port's electrical utility system(s) and taking into consideration the Port's needs for electricity and its outstanding contractual commitments associated with its electrical utility system(s). However, the Parties' failure to agree on a mutually acceptable plan for electrical systems is not an MOA Dispute and is not subject to Article 10.

### **7.3 Wake Avenue Easement.**

The City has granted a non-exclusive easement to the Port to use Wake Avenue for access (the "Wake Avenue Easement"). The Wake Avenue Easement shall terminate in the event a publicly-dedicated or separate roadway is constructed or developed which provides the Port with access to the Port's property at least equivalent to the access granted in the Wake Avenue Easement. Upon such event, and if the City so requests, the Port promptly will execute and/or record any suitable document memorializing the termination of the Wake Avenue Easement.

### **7.4 Cooperative Activities.**

(a) The City and the Port shall coordinate the development of the EDC Property so that each Party can pursue its development plans in accordance with the timetable chosen by the Party in a manner that does not unreasonably disrupt the development plans of the other Parties, and the Parties shall develop and implement a mutually acceptable development work plan and schedule. In the event that a Party believes another Party has delayed or disrupted its development of the EDC Property, the matter shall be considered an MOA Dispute and will be subject to mediation in accordance with Article 10.

(b) The City and the Port shall cooperate with each other to obtain all approvals necessary for development of the EDC Property, including but not limited to the following:

(1) establishing covenants, conditions and restrictions relating to necessary setbacks and other boundary conditions for the development of the EDC Property, in each case consistent with the requirements of the BCDC Bay and Seaport Plan;

(2) accommodating bike trail and other public access requirements on Maritime Street, along the southern border of the City development area, and elsewhere in the OARB;

(3) vacating Maritime Street, 14th Street and 22nd Street for the benefit of the Port (the City will discuss with the Port in advance all findings and determinations recommended by City staff to the City Council with respect to these street vacations);

(4) establishing reciprocal easements, rights of entry or similar property rights to enable each Party to perform demolition and construction activities along shared property lines; and

(5) attempting to agree upon an overall utilities and infrastructure plan consistent with this Restated MOA, including Sections 7.2 and 7.3, prior to August 7, 2008, with the City to pay the cost of integrating its new development into the Port's utility system, based

on the actual costs of such integration. However, the Parties' failure to agree upon such a plan is not an MOA Dispute and is not subject to Article 10.

## **8. Effectiveness of MOA**

### **8.1 Effective Date.**

The effective date of this Restated MOA shall be the date on which this Restated MOA is executed and delivered by the Governing Bodies of all Parties. The terms and conditions contained in this Restated MOA are, upon execution and delivery by the authorized representatives of all Parties, intended to be binding on the Parties hereto.

### **8.2 Force Majeure.**

(a) No Party shall be liable to the other Parties for its failure to perform hereunder due to any occurrence beyond its reasonable control, including but not limited to acts of God, fires, floods, wars, sabotage or labor disputes.

(b) The Party whose performance is prevented by any such force majeure occurrence shall (1) notify the other Parties in writing as soon as is reasonably possible after the commencement of such occurrence, setting forth the full particulars in connection with the same, (2) to the extent feasible, remedy such occurrence with all reasonable dispatch, and (3) promptly give written notice to the other Parties of the cessation of such occurrence.

(c) Any dispute over a force majeure event shall be an MOA Dispute subject to Article 10.

### **8.3 No Amendments.**

Neither Party will amend the ESCA, the Army Agreement, the DTSC Consent Agreement, the RAP/RMP, the Insurance Policy, the OARB Final Redevelopment Plan, the OARB Final Reuse Plan, the Army Quitclaim Deed, the Covenant to Restrict Use of Property, the SLC Covenant or the Exchange Agreement without the other Parties' prior written consent.

## **9. Covenants and Representations and Warranties**

### **9.1 Covenants.**

(a) Each Party will continue to provide to the other Party all material correspondence received or sent and all other material information compiled relating to compliance with the DTSC Consent Agreement, the RAP/RMP and the Insurance Policy, excluding appraisal reports or documents subject to attorney-client or other privilege. Each Party will inform the other Party, in sufficient time to allow the other Party to participate if the other Party so chooses, of substantive conference calls or meetings with the with the applicable Governmental Authorities, to the extent the meetings or conference calls relate to the transactions described in this Restated MOA, excluding closed sessions of each Party's Governing Body or meetings subject to attorney-client or other privilege. The foregoing provisions of this Section 9.1(a) will not apply to independent development projects undertaken

by any Party, including without limitation the Port Fill Project and any transaction on the Subaru Lot Parcel 15B, except to the extent the Parties seek to establish joint mitigation measures for such projects.

(b) Each Party will use commercially reasonable efforts to satisfy all conditions to be met on its part in order to consummate the transactions described in this Restated MOA.

(c) Each Party will provide full and complete access to the other Party to the portions of the real property described in this Restated MOA that it owns or for which it has responsibility, to enable the other Party to fulfill its obligations pursuant to this Restated MOA and the Regulatory Requirements, including but not limited to the obligations set forth in Section 5.1, and subject to mutually acceptable reasonable right of entry agreements.

(d) ORA, OBRA and the City Council, on the one hand, and the Port, on the other hand, will use commercially reasonable efforts to enforce agreements with third parties, such as the Army Agreement, the ESCA, the DTSC Consent Agreement and the Exchange Agreement, as the same may be modified from time to time by amendments agreed to by the Parties in advance and in writing, for the benefit not only of itself as a direct contracting party but for the benefit of the other Parties to this Restated MOA who are not contracting parties to the third party agreement.

## **9.2 City's Representation and Warranties.**

The City makes the following representations and warranties as of July 31, 2003, August 7, 2003, August 7, 2006, the date any lease term commences under the East Maritime Lease, the Port Sliver Properties Lease or the Port Sliver Properties Parcel C-2 Lease/Sublease, and the date any property is or was transferred to another Party in accordance with this Restated MOA, with the understanding that each such representation and warranty is material and is being relied upon by the Port in entering into this Restated MOA.

(a) The execution, delivery and performance of (1) this Restated MOA and (2) all other documents to be delivered by or on behalf of the City in connection with this Restated MOA, have been duly and validly authorized by all necessary action and proceedings on the part of the City, and no further action or authorization is necessary on the part of the City in order to consummate the transactions contemplated in this Restated MOA. To the actual knowledge of the City, this Restated MOA and the other documents executed by the City in connection with this Restated MOA are legal, valid and binding obligations of the City, enforceable in accordance with their respective terms.

(b) To the actual knowledge of the City, there is no pending litigation, administrative proceeding, or other legal or governmental action against the City which would prevent the consummation of the transactions in accordance with the terms of this Restated MOA.

(c) There are no material reports, data, surveys, maps, assessments or other documents in the possession or control of the City or its contractors or consultants concerning the environmental or other condition or the EDC Property which have not been delivered or

made available to the Port, excluding documents subject to attorney-client or other privilege. No documents subject to attorney-client or other privilege contain materially detrimental information on the Environmental Condition or other conditions of the EDC Property that is not also disclosed in documents delivered or made available to the Port.

### **9.3 Port's Representation and Warranties.**

The Port makes the following representations and warranties as of July 31, 2003, August 7, 2003, August 7, 2006, the date any lease term commences under the East Maritime Lease, the Port Sliver Properties Lease or the Port Sliver Properties Parcel C-2 Lease/Sublease, and the date any property is or was transferred to another Party in accordance this Restated MOA, with the understanding that each such representation and warranty is material and is being relied upon by the City in entering into this Restated MOA.

(a) The execution, delivery and performance of (1) this Restated MOA and (2) all other documents to be delivered by or on behalf of the Port in connection with this Restated MOA have been duly and validly authorized by all necessary action and proceedings on the part of the Port, and no further action or authorization is necessary on the part of Port in order to consummate the transactions contemplated in this Restated MOA. To the actual knowledge of the Port, this Restated MOA and the other documents executed by the Port in connection with this Restated MOA are legal, valid and binding obligations of the Port, enforceable in accordance with their respective terms.

(b) To the Port's actual knowledge, there is no pending litigation, administrative proceeding, or other legal or governmental action against the Port which would prevent the consummation of the transactions in accordance with the terms of this Restated MOA.

(c) There are no material reports, data, surveys, maps, assessments or other documents in the possession or control of the Port or its contractors or consultants concerning the environmental or other condition or the EDC Property which have not been delivered or made available to the City, excluding documents subject to attorney-client or other privilege. No documents subject to the attorney-client or other privilege contain materially detrimental information on the Environmental Condition or other condition of the EDC Property that is not also disclosed in documents delivered or made available to the City.

### **9.4 Survival.**

The representations and warranties in Sections 9.2 and 9.3 shall be deemed to be repeated at the consummation of the transactions contemplated this Restated MOA, shall not be merged into any deed then delivered, and shall survive such consummation.

### **9.5 Changed Circumstances.**

If either Party becomes aware of any fact or circumstances which would render false or misleading a representation or warranty made by such Party, it shall promptly give written notice of such fact or circumstance to the other Party, but such notice shall not relieve any Party of any liabilities or obligations with respect to any representation or warranty.

## **10. Dispute Resolution/Arbitration of Disputes**

### **10.1 Good Faith Negotiation by Parties.**

The Parties shall attempt to resolve, through good faith negotiation among themselves, any MOA Dispute subject to this Article 10 for a period of thirty (30) days after the MOA Dispute is raised by any Party in a written notice to the other Parties. Each Party shall be represented in such negotiations by one or more representatives with decision making and settlement authority sufficient to resolve the particular MOA Dispute, subject to approval of the Party's Governing Body, where required.

### **10.2 Mediation.**

Any MOA Dispute that cannot be resolved by the Parties during such thirty (30) day good faith negotiation period shall be submitted to confidential (to the extent permitted by applicable law) mediation in accordance with this Section 10.2.

(a) Any Party may initiate mediation after the good faith negotiation period described in Section 10.1 by providing the other Parties with a notice in writing, which notice shall contain a statement setting forth the nature of the MOA Dispute, the key issues to be resolved in the mediation, the amount of money involved, if any, third parties, if any, necessary for resolution, and the remedy sought.

(b) The Mediator shall be appointed upon the mutual agreement of the City and the Port. In the event the City and the Port cannot agree on a person to act as the Mediator within thirty (30) days after the notice described in Section 10.2(a), then the City and the Port shall request, from a nationally recognized provider of alternate dispute resolution services mutually agreed upon by the City and the Port, a list of ten (10) names of persons with at least five (5) years of experience in resolving disputes similar to the dispute at issue, and otherwise qualified to act as a Mediator. The City and the Port shall then mutually agree upon one of the persons on such list to act as the Mediator, or if they cannot agree within ten (10) days after both Parties have received the list, take turns striking names from such list one by one, with the Party who did not initiate the mediation striking the first name, until the name of one person remains, and the remaining person shall act as the Mediator.

(c) Initially, the mediation shall be a nonbinding process in which the Parties shall discuss their MOA Dispute with the Mediator in a good faith attempt to resolve the issues and reach a settlement. If the initial discussions with the Mediator do not result in a resolution, the Mediator will act as a decision maker and render a final, binding decision on the MOA Dispute as set forth in this Section 10.2.

(d) The rules and procedures for the mediation shall be those set forth in this Section 10.2 plus any supplemental rules and procedures established by the Mediator that are not inconsistent with the rules and procedures set forth herein.

(1) The notice described in Section 10.2(a) provided by the Party initiating the Mediation shall be provided to the Mediator. The Port, on the one hand, and ORA, OBRA and the City Council collectively, on the other hand, shall each provide to the Mediator

and to each other a written answer to the MOA Dispute described in such notice within fifteen (15) days after the Mediator has been appointed. The Mediator also may require or request a confidential submission for the Mediator's use only, to the extent permitted by applicable law.

(2) The Mediator shall schedule an initial meeting with the Parties on a mutually acceptable date within thirty (30) days after he or she has been appointed. At this meeting, the Parties shall discuss the MOA Dispute with the Mediator informally in a good faith attempt to resolve the issues and reach a settlement. If the Mediator believes the informal discussions are productive, the Mediator may continue them for a period of time not to exceed sixty (60) days from the date of the initial meeting. Each Party agrees to provide as participants in the discussions one or more representatives with decision making and settlement authority sufficient to resolve the particular MOA Dispute, subject to approval of the Party's Governing Body, where required.

(3) If the MOA Dispute has not been resolved through an agreement in principle among the Parties within such sixty (60) day period, the informal discussions will cease. The Mediator shall render a final, binding decision on the MOA Dispute in writing within thirty (30) days after the cessation of informal discussions.

(4) The Mediator shall have the authority to request any information at any time from any Party to the MOA Dispute as he or she shall deem reasonably necessary for resolution, whether during the informal discussions, upon the termination of informal discussions, or during the period the Mediator is making a decision, excluding attorney-client or other privileged information. If any Party refuses to provide any such information, the Mediator shall have the right to draw an adverse inference or make a finding of fact against such Party as a result of any such refusal.

(5) Each Party may provide to the Mediator any information the Party deems reasonably necessary for resolution of the MOA Dispute, at any time, whether during the informal discussions, upon the termination of informal discussions, or during the period the Mediator is making a decision.

(6) The Mediator shall be authorized to engage in ex parte contacts with any Party or other person with information relevant to the MOA Dispute at any time until termination of discussions among the Parties and the Mediator. The Mediator shall not engage in any such ex parte contacts during the period the Mediator is making a decision. All ex parte contacts shall remain confidential to the Mediator, to the extent permitted by applicable law.

(e) The mediation shall be held in such time and place within the City of Oakland or the City and County of San Francisco as may be selected by the Mediator, subject to the consent of the Parties, which consent shall not be unreasonably withheld.

(f) The fees and expenses of the Mediator and any other services of a provider of alternative dispute resolution services shall be shared equally by the Port, on the one hand, and ORA, OBRA and the City Council collectively, on the other hand, so that each side to the MOA Dispute pays one half of such expenses; provided that, the Mediator shall have the right to assess all or any part of any expenses to one or more Parties as sanctions. If the Mediator does not

assess the expenses of the mediation, and the Parties do not otherwise agree, the expenses of each Party in preparing for and participating in the mediation shall be borne by each such Party.

(g) The final decision of the Mediator reached pursuant to Section 10.2(d)(3) shall be conclusive and binding upon the Parties, and shall be enforceable by any Party in any court of competent jurisdiction.

**10.3 Confidentiality.**

All matters relating to any MOA Dispute, or mediation thereof, and the results thereof, shall be confidential except as otherwise required by applicable law or to the extent disclosure is necessary to carry out the terms of any resolution reached in mediation, or to support a claim for insurance coverage.

**10.4 Exclusivity of Article 10.**

Except as otherwise specified in this Restated MOA, the provisions of this Article 10 shall constitute the sole and exclusive provisions for the resolution of any and all MOA Disputes subject to this Article 10, whether arising before or after August 7, 2003.

**10.5 Acknowledgement.**

**NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "MEDIATION PROVISION" DECIDED BY NEUTRAL MEDIATION/ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "MEDIATION PROVISION". IF YOU REFUSE TO SUBMIT TO MEDIATION/ARBITRATION AFTER AGREEING TO THIS PROVISION YOU MAY BE COMPELLED TO MEDIATE/ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT THE MATTERS INCLUDED IN THE "MEDIATION PROVISION" TO NEUTRAL MEDIATION/ARBITRATION.**

Agreed to and accepted by: City Council: \_\_\_\_\_ ;  
ORA: Par; Port: Q

## **11. Other Matters**

### **11.1 Fees and Expenses.**

Except as specifically set forth herein (including Transaction Costs under Section 1.3), each Party shall pay the fees and expenses of its legal counsel and other advisors retained for purposes of the transactions described in this Restated MOA, and shall bear all direct and indirect costs of its own employees assigned to the transactions or who otherwise provide assistance with respect to the matters described in this Restated MOA. However, this Section 11.1 is not intended to prevent the Parties from subsequently agreeing in writing that particular employees of any Party may be assigned to implement specified joint mitigations measures, and to allocate the direct and indirect costs of such employees as the Parties mutually agree.

### **11.2 Amendments.**

Subject to applicable law, this Restated MOA may be amended only by an instrument in writing signed by authorized representatives of all of the Parties. Any agreements reached between the Parties arising from or relating to this Restated MOA must be in writing and signed by the Party or Parties to be bound by the agreement.

### **11.3 Governing Law.**

This Restated MOA shall be construed and interpreted in accordance with the laws of the State of California applicable to agreements made and to be performed within such state.

### **11.4 Specific Performance.**

Both Parties hereto recognize that certain obligations under this Restated MOA, including but not limited to those in Articles 2, 3, 5, 6 and 7, are special, unique and of extraordinary character, and if any Party hereafter fails to comply with the obligations and restrictions imposed upon it hereunder, the other Party or Parties will not have an adequate remedy at law. It is agreed that under such circumstances, any Party, in addition to any other rights which it may have, shall be entitled to injunctive relief to enforce any such restrictions and obligations, and that in the event any actual proceedings are brought in equity to enforce any such provision, no Party shall raise as a defense that there is an adequate remedy at law. Nothing in this Restated MOA shall be construed to prohibit any Party from pursuing any other available remedies for any breach or threatened breach, including recovery of damages, subject to the provisions of Article 10 requiring mediation.

### **11.5 Notices.**

All notices, requests, demands, and other communications hereunder shall be in writing and may be sent by first-class mail, fax, Federal Express or other commercial overnight delivery service, courier service or messenger. The date of the actual receipt of such notices, requests, demands, and other communications shall be deemed to be the date of actual delivery. Such communications shall be given as follows:

If to the City Council or ORA to:

City of Oakland  
One Frank H. Ogawa Plaza, Sixth Floor  
Oakland, CA 94612  
Attention: Alix Rosenthal, Esq., Deputy City Attorney  
Telephone: 510-238-3603  
Facsimile: 510-238-6515

Redevelopment Agency of the City of Oakland  
250 Frank H. Ogawa Plaza, Suite 3330  
Oakland, CA 94612  
Attention: Deborah A. Edgerly, Agency Administrator  
Telephone: 510-238-3302  
Facsimile: 510-238-2223

with copies to:

Holland & Knight LLP  
50 California Street, Suite 2800  
San Francisco, CA 94111  
Attention: Elizabeth A. Lake, Esquire  
Telephone: 415-743-6969  
Facsimile: 415-743-6910

If to the Port to:

Port of Oakland  
530 Water Street  
Jack London Square  
Oakland, CA 94607  
Attention: Omar R. Benjamin, Executive Director  
Telephone: 510-627-1210  
Facsimile: 510-839-5104

with copies to:

Port of Oakland  
530 Water Street  
Jack London Square  
Oakland, CA 94607  
Attention: David L. Alexander, Port Attorney  
Telephone: 510-627-1340  
Facsimile: 510-444-2093

Bingham McCutchen LLP  
Three Embarcadero Center  
San Francisco, CA 94111  
Attention: James C. Fowler, Esquire  
Telephone: 415-393-2052  
Facsimile: 415-393-2286

#### **11.6 Successors and Assigns.**

This Restated MOA shall be binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns. This Restated MOA shall not be assignable by any Party hereto without the prior written consent of the other Parties and any attempt to assign this Restated MOA without such consent shall be void and of no effect.

#### **11.7 Severability.**

If any provision of this Restated MOA as applied to any Party or to any circumstance shall be adjudged by an arbitrator or court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect (to the maximum extent permissible by law) any other provision of this Restated MOA, the application of any such provision under circumstances different from those adjudicated by the arbitrator or court, or the validity or enforceability of this Restated MOA as a whole; provided, however, that if a material provision is adjudged void or unenforceable, the Parties shall negotiate an equitable adjustment to such other provisions of this Restated MOA as may be necessary or appropriate to effectuate as closely as possible the intent of the Parties as evidenced by this Restated MOA as a whole.

#### **11.8 Headings.**

The captions and other headings contained in this Restated MOA are for convenience only and shall not be considered a part of or affect the construction and interpretation of any provision of this Restated MOA.

#### **11.9 Counterparts.**

This Restated MOA may be executed in two or more counterparts, all of which shall be deemed an original, but each of which shall constitute one and the same agreement. Signature pages may be detached from the counterparts and attached to a single copy of the Restated MOA to physically form one document.

#### **11.10 Integration and Controlling Document.**

This Restated MOA is intended to be a comprehensive amendment and restatement of the Initial MOA and the First and Second Amendment thereto. This Restated MOA and the Exhibits and Schedules to it are intended to (a) constitute the entire agreement among the Parties pertaining to the subject matter hereof and (b) supersede and replace the Initial MOA and the First and Second Amendments thereto, as well as all prior and contemporaneous agreements and understandings of the Parties in connection with the subject matter hereof.

### **11.11 Waiver.**

A waiver by any of the Parties of any provision hereof shall not be effective unless in writing and shall not constitute a waiver by such Party of any other provision or of any subsequent breach.

### **11.12 Interpretation.**

All Parties agree that they have participated in the formation of this Restated MOA, and that the rule of construction which provides that any ambiguity shall be construed against the drafter of an instrument shall not apply to the interpretation of this Restated MOA.

### **11.13 No Third Party Beneficiary Rights.**

This Restated MOA is not intended to and shall not be construed to give any person other than the Parties signatory hereto any interest or rights (including, without limitation, any third party beneficiary rights) with respect to or in connection with any agreement or provision contained herein or contemplated hereby.

### **11.14 Time of the Essence.**

Time is of the essence with respect to this Restated MOA.

### **11.15 Further Assurances.**

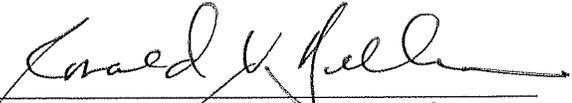
Each Party, at any time on or after consummation of the transactions contemplated in this Restated MOA, shall at its own expense, execute, acknowledge and deliver any further deeds, assignments, conveyances and other assurances, documents and instruments of transfer reasonably requested by another Party and shall take any other action consistent with the terms of this Restated MOA that may reasonably be requested by the other Party for the purpose of transferring and confirming to such Party, or reducing to such Party's possession, any or all of the property intended for such Party or otherwise necessary or desirable to carry out the terms of this Restated MOA.

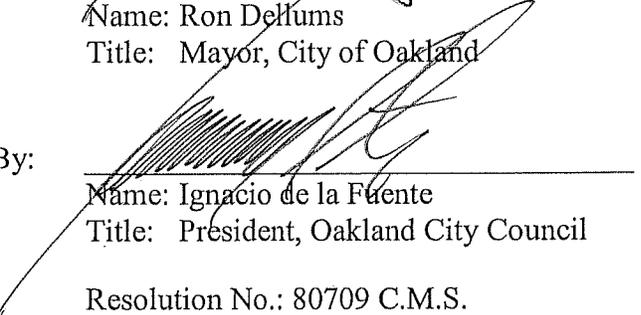
### **11.16 Commissions, Indemnity.**

Each Party represents to the other Parties that the representing Party has incurred no liability for any brokerage commission or finder's fee arising from or relating to the transactions described in this Restated MOA. Each Party will defend, indemnify and hold harmless each other Party from and against any claims, losses, liabilities and expenses (including, without limitation, reasonable attorney's and consultant's fees and costs incurred in connection with the same) arising from or in connection with any brokerage commission or finder's fee which the indemnifying Party has agreed to pay or which is claimed to be due as a result of the actions of the indemnifying Party.

This Restated MOA has been duly executed as of the Restatement Date.

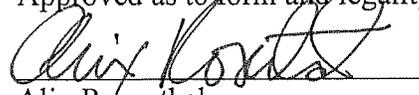
**CITY OF OAKLAND, A MUNICIPAL CORPORATION, ACTING BY AND THROUGH ITS CITY COUNCIL**

By:   
Name: Ron Dellums  
Title: Mayor, City of Oakland

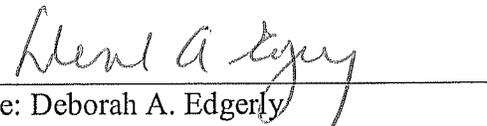
By:   
Name: Ignacio de la Fuente  
Title: President, Oakland City Council

Resolution No.: 80709 C.M.S.

Approved as to form and legality:

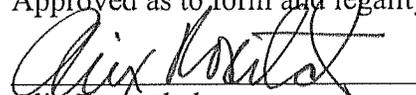
  
Alix Rosenthal  
Deputy City Attorney

**REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND**

By:   
Name: Deborah A. Edgerly  
Title: Agency Administrator

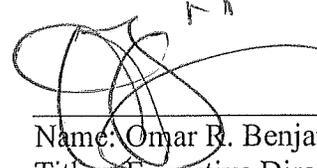
Resolution No.: 2007-0060 C.M.S.

Approved as to form and legality:

  
Alix Rosenthal  
Deputy Agency Counsel

**CITY OF OAKLAND, A MUNICIPAL  
CORPORATION, ACTING BY AND  
THROUGH ITS BOARD OF PORT  
COMMISSIONERS**

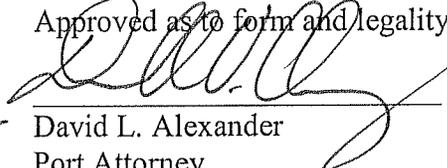
By:



Name: Omar R. Benjamin  
Title: Executive Director

Resolution No.:

Approved as to form and legality:



for

David L. Alexander  
Port Attorney

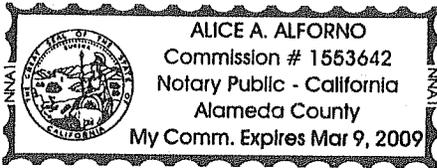
**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

State of California

County of ALAMEDA

On JANUARY 23, 2008 before me, ALICE A. ALFORNO, A NOTARY PUBLIC

personally appeared J MAR BENJAMIN



who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Alice A. Alforno

Place Notary Seal Above

**OPTIONAL**

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

**Description of Attached Document**

Title or Type of Document: AMENDED AND RESTATED MEMORANDUM FOR OAKLAND Army IS ASC TRAINING CTR, City of OAKLAND & PORT OF OAKLAND

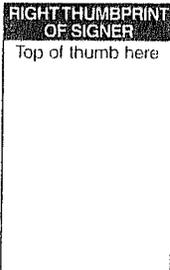
Document Date: \_\_\_\_\_ Number of Pages: 47

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): Executive Director
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

PORT OF OAKLAND

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

State of California

County of Alameda

On 2/27/08 before me, Michelle Taylor, Notary Public

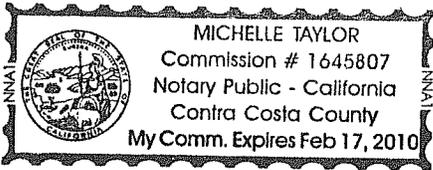
personally appeared Deborah A. Edgerly

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies); and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Michelle Taylor



Place Notary Seal Above

**OPTIONAL**

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

**Description of Attached Document**

Title or Type of Document: Amended and Restated Memorandum for Oakland Army Base Among ORA, City of Oakland & Port of Oakland  
Document Date: \_\_\_\_\_ Number of Pages: 47

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: Deborah A. Edgerly

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: City Administrator

Signer Is Representing: City of Oakland



Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

