File No. 120615

Committee Item No. 2
Board Item No. 36

COMMITTEE/BOARD OF SUPERVISORS

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Completed by: Linda Wong **Date** 6/11/12
Completed by: L.W. **Date** 6/19/12

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

[Settlement of Lawsuit – Waterfront Watch - $225,000]

Ordinance authorizing settlement of the lawsuit filed by Waterfront Watch against the City and County of San Francisco for $225,000; the lawsuit was filed on February 23, 2012, in San Francisco Superior Court, Case No. CPF-12-511968; entitled Waterfront Watch, et al., v. City and County of San Francisco, et al.; other material terms of said settlement are establishing a process for review of Pier 29 rehabilitation work, Port technical assistance to reduce air emissions at Pier 27, agreement not to place a Jumbotron on the water in Aquatic Park Lagoon.

NOTE: Additions are *single-underline italics Times New Roman*; deletions are ~~*strike-through italics Times New Roman*~~. Board amendment additions are double-underlined; Board amendment deletions are ~~strikethrough normal~~.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The City Attorney is hereby authorized to settle the action entitled Waterfront Watch, *et al.*, v. City and County of San Francisco, *et al.*, San Francisco Superior Court, Court No. CPF-12-511968 by the payment of $75,000 for attorneys' fees and $150,000 to conduct a bird study, and on such other material terms as set forth in the Settlement Agreement and General Release contained in Board of Supervisors File No. 120615, or such amended terms as do not materially increase the City's obligations or decrease the City's benefits.

Section 2. The above-named action was filed in San Francisco Superior Court on February 23, 2012, and the following parties were named in the lawsuit: Petitioners Waterfront Watch and Does 1 – 10; Respondents City and County of San Francisco, and numerous Real Parties in Interest including America's Cup Event Authority, San Francisco

America's Cup Organizing Committee, America's Cup Race Management, potential racing teams including Golden Gate Yacht Club of San Francisco, Oracle Racing, Inc, Club Nautico di Roma, Mascalzone Latino, Kungliga Svenska Segel Sallskapet, Artemis Racing, Royal New Zealand Yacht Squadron, *et al.*, and the United States Army Corps of Engineers, Winzler & Kelly Constructors & Structus Inc. Joint Venture, Dutra Construction Co. Inc., Kaplan McLaughlin, Diaz Architects & Pfau Long Architecture Joint Venture, and Turner Construction Company.

Section 3. This Board reviewed the environmental impact report prepared for the Cruise Terminal Project and the 34th America's Cup Project and approved the 34th America's Cup Project in Resolution No. 109-12, which Resolution included environmental findings required by the California Environmental Quality Act. The actions contemplated under this Settlement Agreement do not require additional environmental review for the reasons set forth in the Planning Department memorandum dated June 8, 2012 contained in Board of Supervisors File No. 120615.

APPROVED AS TO FORM AND RECOMMENDED:

DENNIS J. HERRERA
City Attorney

MARLENA G. BYRNE
Deputy City Attorney

RECOMMENDED:
SAN FRANCISCO PORT COMMISSION

MONIQUE MOYER
EXECUTIVE DIRECTOR

FUNDS AVAILABLE:

BEN ROSENFIELD
Controller

APPROVED:

AMY QUESADA, SECRETARY
PORT COMMISSION

SAN FRANCISCO
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The 34th America's Cup & James R. Herman Cruise Terminal and Northeast Wharf Plaza Projects

DATE:	June 8, 2012
TO:	President David Chiu and Members of the Board of Supervisors
FROM:	Bill Wycko, Environmental Review Officer — (415) 575-9048 Joy Navarrete, Case Planner — (415) 575-9040
RE:	BOS File No. 120615, Planning Department Case No. 2010.0493E, Settlement of Lawsuit - Waterfront Watch
PROJECT SPONSORS:	**34th America's Cup Project**: America's Cup Event Authority and City and County of San Francisco **James R. Herman Cruise Terminal and Northeast Wharf Plaza Project**: Port of San Francisco
HEARING DATE:	June 14, 2012

This Board has reviewed The 34th America's Cup and James R. Herman Cruise Terminal & Northeast Wharf Plaza Final Environmental Impact Report (FEIR) (Planning Department Case No. 2010. 0493E) and approved the 34th America's Cup Project in Resolution No. 109-12, which Resolution included environmental findings required by the California Environmental Quality Act, including findings regarding alternatives to the project, mitigation measures to address the Projects' significant impacts, and a statement of overriding considerations. This Board is now considering approval of a settlement agreement to settle a lawsuit filed by Waterfront Watch, San Francisco Superior Court Case No. CPF-12-511968 (Settlement Agreement) (Board File No. 120615), which Settlement Agreement would, among other things, revise the treatment of the historic Pier 29 shed building.

The proposed Settlement Agreement includes payment of attorney's fees, payment for a bird study, modification of the treatment of the historic Pier 29 shed building, and technical assistance to tenants and users of the northern waterfront to replace older, high emitting, gasoline powered harbor craft engines with newer, cleaner engines or power sources during the installation of shoreside power facilities, installation of shoreside power. None of these proposals require additional environmental review and all would involve actions that do not trigger environmental review under CEQA, would have no effect on the environment, would have a beneficial effect on the environment, or are within the scope of the Projects as analyzed in the FEIR.

Specifically with regard to the modifications of the treatment of the Pier 29 shed, the design of the Pier 29 shed would be revised such that approximately 75 additional feet of the east (outboard) section of the shed would be retained, with an angled northeast corner cut (Settlement Agreement Modifications), compared to Pier 29 shed design proposed for the FEIR project. As described in the FEIR, Pier 29, built in 1915-1918, is a contributing resource to the Embarcadero Historic District despite having experienced

substantial modification with the construction of the Pier 27 Terminal in 1965.Similar to the project as analyzed in the FEIR, the Settlement Agreement Modifications would not remove historically significant elements of the Pier 29 shed. The Settlement Agreement Modifications would retain more of the historic fabric of Pier 29 and the proposed redesign of the north-end walls would be consistent with the *Secretary of the Interior's Standards for the Treatment of Historic Properties* (Secretary's Standards). In addition, all permanent improvements to Pier 29 would be subject to Port Commission Resolution 04-89, which requires review by Port staff for consistency with the Secretary's Standards.

The Planning Department concludes that the analyses conducted and the conclusions reached in the EIR certified on December 15, 2011, and effective January 24, 2012, remain valid, and that no supplemental environmental review is required for the proposed Settlement Agreement Modifications. The Settlement Agreement Modifications would neither cause new significant impacts nor result in the substantial increase in the severity of previously identified significant impacts, and no new mitigation measures would be necessary to reduce significant impacts. No changes have occurred with respect to circumstances surrounding the projects that would cause significant environmental impacts to which the Settlement Agreement Modifications would contribute considerably, and no new information has been put forward which shows that the Settlement Agreement Modifications would cause significant environmental impacts. Consequently, the project change does not require major revision of the EIR, and the project sponsors may implement the Settlement Agreement Modifications without additional CEQA review, consistent with California Public Resources Code Section 21166 and California Code of Regulations (CEQA Guidelines) Section 15164. Therefore, no additional environmental review is required beyond this memorandum.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement") is made as of June __, 2012 by and between WATERFRONT WATCH, an unincorporated association ("Waterfront Watch" or "Petitioner"), as the Petitioner in *Waterfront Watch v. San Francisco Port Commission* (San Francisco Superior Court Case No. CPF-12-511968, filed Feb. 23, 2012) (the "CEQA Action") and the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, including its Port Commission, Board of Supervisors and any and all other departments, commissions, divisions or offices thereof (collectively, the "City" or "Respondents"), as Respondents in the CEQA Action. GOLDEN GATE AUDUBON SOCIETY, a California non-profit corporation ("Audubon"), SIERRA CLUB, a California nonprofit corporation, SAN FRANCISCO TOMORROW, a California non-profit corporation organization, and TELEGRAPH HILL DWELLERS, a California nonprofit corporation, (collectively, "Administrative Appellants"), who also participated in the CEQA process for the Projects (defined in Recital A, below) by filing an appeal to the Board of Supervisors of the City's certification of the EIR for the Projects, also join in this Agreement as to specific provisions below in order to accommodate the settlement terms set forth in this Agreement. Petitioners, Administrative Appellants and Respondents are collectively referred to herein as the "Parties."

RECITALS

A. The City prepared one Environmental Impact Report for two related projects, the 34th America's Cup and the James R. Herman Cruise Terminal and Northeast Wharf Final Environmental Impact Report, Case No. 2010.0493E, which the Planning Commission certified on December 15, 2011 ("Final EIR") by its Motion No. 18514. The San Francisco Board of Supervisors upheld the certification on January 24, 2012 by its Motion M12-011. The 34th America's Cup and the James R. Herman Cruise Terminal and Northeast Wharf will be collectively referred to as the "Projects" in this Agreement.

B. The Port Commission approved the James R. Herman Cruise Terminal and Northeast Wharf Project ("Cruise Terminal Project") on December 16, 2011 by its Resolution Nos. 11-75, 11-76, 11-77 and 11-78. Following the Board of Supervisors' decision upholding the certification of the Final EIR, the City filed a Notice of Determination for the Cruise Terminal Project on January 25, 2012.

C. Waterfront Watch filed a petition for writ of mandate, San Francisco Superior Court Case No. CPF-12-511968 (the "CEQA Action"), on February 23, 2012, challenging the Cruise Terminal Project environmental review, alleging that the environmental review did not comply with the requirements of the California Environmental Quality Act ("CEQA"), California Public Resources Code Sections 21000 *et seq.*, the Guidelines for Implementation of CEQA ("CEQA Guidelines"), 14 California Code of Regulations Sections 15000 *et seq.*, and Chapter 31 of the San Francisco Administrative Code.

D. The San Francisco Board of Supervisors and the Port Commission approved the America's Cup Project ("America's Cup Project") on January 24, 2012 and April 24, 2012, respectively. The City filed a Notice of Determination for the America's Cup Project on April 25, 2012.

E. The Parties now deem it to be in their respective best interests and to their mutual advantage to settle the CEQA Action and to avoid the filing by Petitioners or Administrative Appellants of a new CEQA action challenging the America's Cup Project, without any admission of liability or wrongdoing on the part of any Party.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, of the promises, covenants, agreements, representations and warranties set forth below, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

1. **Effective Date**. The effective date of this Agreement shall be the first day on which all of the following events occur or have previously occurred: this Agreement has been executed by the Parties, approved by the Port Commission, adopted by the City's Board of Supervisors, and approved by the City's Mayor (the "**Effective Date**").

2. **Definition of Project**. For purposes of this Agreement, the term "Project" or "Projects" means, as stated at page 3-1 of the Draft EIR for the Project, "two related projects: (1) the proposed 34th America's Cup (AC34) - a series of international sailing events to be hosted by the City and County of San Francisco in summer-fall 2012 and summer-fall 2013, and (2) the proposed James R. Herman Cruise Terminal and Northeast Wharf Plaza (Cruise Terminal) project" described in Chapter 3 of said Draft EIR as the scope of these projects was subsequently revised by that certain Lease Disposition Agreement approved by the Board of Supervisors on March 27, 2012, and specifically does not include (1) the so-called "Long Term Development Rights" described in Section 3.4.8 of said Draft EIR, (2) the so-called "Successive Defense Potential" described in Section 3.4.9 of said Draft EIR or (3) any future America's Cup Race events held in the City and County of San Francisco or San Francisco Bay after the conclusion of the 34th America's Cup race events, which are expected to conclude in 2013.

3. **Bird Study**.

3.1 The City shall provide funding for a Bird Study to be designed and conducted by the United States Geological Survey ("USGS") in cooperation with the Western Ecological Research Center and the City, described in more detail in Exhibit 1 to this Agreement, in an amount up to One Hundred Fifty Thousand Dollars ($150,000.00), as follows:

USGS and its consultants shall prepare and submit to the City periodic invoices for work done in furtherance of planning and implementing the Bird Study, which the City shall pay within 30 days of receipt, provided that in no event will the City make any payment before September 4, 2012, and that the expenditures for the Bird Study that may be incurred prior to September 4, 2012 shall not exceed Fifteen Thousand Dollars ($15,000.00).

The Parties agree that, if for any reason, the City determines that the 2012 or 2013 Race Event shall not be held, then the City may provide notice to the Parties and USGS of that fact with a request that work on the Bird Study should stop. Upon receipt of such notice, USGS and its consultants shall have the right to compile and submit a final invoice to the City for any time spent and costs reasonably incurred implementing the terms of the Bird Study, up to the point of receiving notification from the City that has not yet been invoiced, which the City agrees it shall pay, after which the City shall not be obligated to make payments for any further work or costs incurred (if any) that may be done on the Bird Study, unless and until the 34th America's Cup is approved and undertaken. By way of example, but without limiting the foregoing, if the City determines the 2012 Race Event will not occur and the City's stop work notice sets forth reasons indicating the 2013 Race Event is also not likely to occur (e.g., another agency declines to issue a permit or authorization in 2012 that would apply equally to both Race Events), the City's stop work notice in 2012 shall continue and be effective for the 2013 Race Event, such that the City will not provide funding for the Bird Study until such time as the City reasonably determines that the 34th America's Cup Race Event in 2013 will be held.

The Parties agree that the funds in question shall only be used to reimburse USGS and its consultants for actual time spent and costs incurred in designing and implementing the Bird Study. The complete time frame for the Bird Study is expected to take place from late June 2012 through November 2014. The City and Port will work cooperatively with the Parties and USGS to support any efforts by the Parties and USGS to secure additional, third-party funding that USGS may seek or request for the Bird Study.

3.2 The general parameters of the Bird Study are set forth in Exhibit 1 to this Agreement, and the specific terms and conduct of the Bird Study may evolve as discussions and research clarify the needs for, and method of implementing, the Bird Study. Any changes to the Bird Study must be reviewed and agreed to by the USGS, the City, and Administrative Appellant Golden Gate Audubon Society. If the USGS unilaterally withdraws from or otherwise declines to conduct the Bird Study, the City and Administrative Appellant Golden Gate Audubon Society will meet and confer to select a mutually agreed upon, appropriate researcher and/or organization to conduct a Bird Study that substantially resembles the study described in Exhibit 1.

3.3 The Bird Study is a study proposed by the USGS, Western Ecological Research Center, to collect data on water bird responses to open water motorized, non-motorized, and human-powered watercraft, and the potential impact on birds' distribution, behavior and physiology. The study will evaluate baseline conditions and will examine species-specific responses (i.e. avoidance, displacement, resettling times) to motorized and non-motorized watercraft through various methods (land-based and boat-based observer surveys, continuous time-lapse video monitoring).

4. **Pier 29 Rehabilitation and Reconstruction Work**. The Port shall retain that portion of Pier 29, considered by Petitioners to preserve the historic fabric of Pier 29 as set forth in the detail drawings attached to this Agreement as Exhibit 2. The Port shall retain the services of a qualified historic preservation architect to prepare the final architectural design for the east and south ends of Pier 29 as proposed for the long-term use of Pier 29 following the conclusion of the America's Cup Event, which shall be provided to Petitioners and Administrative Appellants and submitted to the City's Historic Preservation Commission (HPC) to review and comment on its compatibility with the architectural and visual characteristics that define the Embarcadero National Register Historic District and consistency with the Secretary of the Interior's Standards. The Port shall provide the HPC with not less than 45 days to review and comment on the final architectural design for the east and south ends of Pier 29. The Port shall provide timely and actual notice to the President and Vice President of the HPC, the Secretary to the HPC and the Preservation Coordinator of the Port's request for review of the final architectural design plans when they are available, and shall make reasonable efforts to ensure that review of the final architectural design plans is included on the agenda for at least one HPC hearing within the 45-day time frame. In the event the Port makes such reasonable efforts but the HPC does not comment within said 45-day time frame, the Port Commission may, in its discretion, approve the proposed design and issue a permit without HPC comments. The Port will incorporate any HPC recommendations into the design of the east and south ends of Pier 29, unless the Port Commission determines that implementing such recommendations would make the intended use of Pier 29 infeasible or the costs of implementing such recommendations would make implementation of the Pier 29 design changes infeasible.

As to any portion of the original fabric of Pier 29 to be removed, the Port shall accomplish a HABS/HARE recordation and exhibit historic photos of Pier 29 in a public place, such as the new James R. Herman Cruise Terminal.

5. **Shoreside Power**. The Port is in the process of installing a shoreside power facility on Pier 70 as partial mitigation for temporarily removing the shoreside power facility on Pier 27 during AC34 and the Port's construction of the James R. Herman Cruise Terminal. During the period

when there is no shoreside power for cruise ships at Pier 27, the City shall work with tenants and users of the northern waterfront to provide technical assistance to replace older, high emitting, gasoline powered harbor craft engines with newer, cleaner, more efficient engines or power sources that will reduce air emissions in order to offset any potential localized adverse air quality effects in the northern waterfront resulting from the shutdown of shoreside power for cruise ships at Pier 27 and to permanently improve Bay Area air quality. The City shall use reasonable efforts to fund the assistance through grants, bonds and other financing methods. The City shall provide Petitioner with a quarterly status report on its efforts to fulfill its obligations under this Section 5.

6. **Jumbotron**. The City shall provide in the Lease Disposition Agreement with the 34th America's Cup Event Authority that the Event Authority shall not pursue approvals for or installation of a floating "jumbotron" video screen in the waters of Aquatic Park Lagoon.

7. **Dismissal of the CEQA Action**. No more than ten (10) business days after the Effective Date of this Agreement, Petitioner shall dismiss the CEQA Action and any other action that Petitioners or Administrative Appellants may have filed challenging City decisions to implement the Projects. Petitioner, Administrative Appellants and the City agree they shall cooperate to execute and file any documents with the Court necessary to effectuate this result.

8. **Objections to the Projects**.

8.1 Except as set forth herein, Petitioner and Administrative Appellants shall not in their own name present, join or support with any financial resources over which they have control any lawsuit or any administrative challenge opposing the Projects, or submit, or join or support with any financial resources over which they have control, any written or oral comments, opposing the Projects to any public agency or public official designated to review, approve or recommend approval of the Projects during any proceeding in which such agency is reviewing and considering either or both Projects. Each Petitioner and Administrative Appellant agrees that if it takes any action in breach of this obligation, the City may provide notice of same to Petitioner and Administrative Appellants' legal representative and that the affected Petitioner or Administrative Appellant shall then have 14 days after said notice in which to cure said actions by submitting to the recipient agency or public official a disavowal of any such opposition, objection, comment or other support. If the affected Petitioner or Administrative Appellant timely cures as set forth herein, then the complained of action shall not constitute a breach of this Agreement. If the affected Petitioner or Administrative Appellant does not timely cure as set forth herein, the City may terminate this Agreement according to the procedures set forth in Paragraph 13 below.

8.2 Nothing in this Agreement shall be considered a limitation on the ability of individual members of Petitioner or Administrative Appellants, acting as individuals, to make any comments or provide support to third parties of any kind, provided that the signatories to this Agreement shall not in their own name present, or join or support with any financial resources over which they have control, any lawsuit or any administrative challenge opposing the Projects, or submit, or join or support with any financial resources over which they have control, any written or oral comments opposing the Projects in agency proceedings in which either or both Projects are being considered. However, if any person, expressly purporting to speak for, as a member of, or identifying themselves as a member of Petitioner or an Administrative Appellant, presents to any public agency, or public official designated to review, approve or recommend approval of the Projects, any opposition to, objection to, or comment on, any of the Projects, the City may provide notice of same to Petitioner and Administrative Appellants' legal representative and the affected Petitioner or Administrative Appellant shall then have 14 days after said notice in which to cure said actions by submitting to the recipient agency or public official a disavowal of any such opposition, objection, comment or other support.

8.3 Administrative Appellants, their signatories, or individual members of Administrative Appellants, may participate and provide comments on any aspect of the design of the Projects that may be presented for public review and participation to the Northeast Waterfront Advisory Group (NEWAG), the Central Waterfront Advisory Group (CWAG) or other City or Port body upon which an Administrative Appellant is designated in its organizational capacity, provided that such comments do not object to or challenge the prior approvals of the Projects.

8.4 Notwithstanding the limitations detailed above, Petitioner and Administrative Appellants shall reserve the right to comment on, object to or oppose, and if necessary to challenge through administrative or legal action, any other projects or activities located on the San Francisco Bay or Waterfront, or within the Northeast Waterfront Historic District, including the Teatro Zinzanni project, which the City or the Port determine is not required to seek approval of a Certificate of Appropriateness pursuant to San Francisco Planning Code Article 10, provided that such comments, objections or oppositions are not made about the construction, installation or other activities directly related to and necessary for implementing the Projects.

8.5 Petitioner and Administrative Appellants and their signatories may comment on, and if necessary object to or oppose through administrative action, the plans for design, landscaping, and programming plans for (1) portions of the Northeast Waterfront Plaza which have not yet been approved following public design review as of the date of this Agreement, (2) the treatment of the building façade at the end of Pier 29, (3) the public plaza space at the end of Piers 27-29, and (4) plans for the shared use of the Cruise Terminal, provided that such comments do not object to or challenge the prior approvals of the Projects.

8.6 Furthermore, Petitioner and Administrative Appellants shall have the right to monitor, comment upon and if necessary challenge the Project through administrative or legal action if such Party believes that the City has failed to obtain any administrative permit or authorization required by law for the Project to proceed, or are otherwise not in compliance with any conditions of approval imposed on the Projects throughout the permitting process, including all mitigation measures, with the exception that no such administrative or legal action shall be filed to challenge the adequacy of the Final EIR as defined in Recital A, above. Before initiating any such action, any Party that believes the City has failed to obtain a required permit or approval, or has failed to comply with a condition of approval, shall first notify the City in writing and use best efforts under the circumstances to cooperatively resolve the dispute with the City.

8.7 Further notwithstanding the limitations detailed above, Petitioner and Administrative Appellants reserve the right to comment on, object to or oppose, and if necessary to challenge through administrative or legal action, any future America's Cup Race events held in the City and County of San Francisco or San Francisco Bay after the conclusion of the 34th America's Cup Race events anticipated to be held in 2012 and 2013, including any "successive defense options" as described in Section 3.4.9 of the Draft EIR for the Project if any racing team should win the 34th America's Cup Race and elect to hold future America's Cup races in the City and County of San Francisco.

9. **Specific Performance as Sole Remedy**. The Parties agree that with respect to the obligations set forth in this Agreement (i) the performance of these obligations are paramount, (ii) that, in the event of a breach of these obligations, monetary damages will provide inadequate relief, and (iii) that in the event of such breach, each Party may only seek specific performance of these obligations; and (iv) the Parties expressly waive and forego the right to seek monetary damages or any other remedy, including excusing their own performance, for any breach of these obligations. To the extent any Party believes that another Party has taken or failed to take required actions under this Agreement that would constitute an excuse for non-performance, said Party is limited to seeking specific performance of the obligation it believes is due, and shall also

perform its obligations. Notwithstanding the foregoing, the City reserves the right to seek reimbursement from USGS or Western Ecological Research Center any monies that City determines have been improperly spent implementing the Bird Study.

10. **Release.** Except as otherwise provided in this Agreement, Petitioner and Administrative Appellants and each of their respective subsidiaries, successors, attorneys, assigns, heirs and representatives hereby release, remise and forever discharge the City and the City's agents, affiliates, successors, attorneys, assigns, heirs, beneficiaries, and representatives, and each and all of them, from any and all claims, damages, demands, liabilities, costs and expenses whatsoever which they now have or may hereinafter acquire in law or in equity, past, present, and future, known and unknown, suspected and unsuspected which, in whole or in part, arise out of, in any manner pertain to or are related to the Projects, the CEQA Action or the Administrative Appeal.

The Petitioner and Administrative Appellants understand and agree that this Agreement shall constitute a general release and shall be effective as a full and final accord and satisfaction, and as a bar to all actions, causes of action, costs, expenses, attorneys' fees, damages, claims and liabilities whatsoever, whether or not now known, suspected, claimed or concealed with respect to the Projects. The Petitioner and Administrative Appellants acknowledge that they are familiar with Section 1542 of the California Civil Code which provides as follows:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.**

The Petitioner and Administrative Appellants expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon it by the provisions of Section 1542 of the California Civil Code, as well as under any other similar state or federal statute or common law principle, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the Project, the CEQA Action and the Administrative Appeal.

In connection with the waiver and relinquishment set forth in the previous paragraph, the Petitioner and Administrative Appellants acknowledge that they are aware that they may hereafter discover claims or facts in addition to or different from those which they now know or believes to exist with respect to the Projects, the CEQA Action and the Administrative Appeal, but it is the Parties' intention to fully, finally and forever settle and release all of the disputes and differences known or unknown, suspected or unsuspected which do now exist, may exist in the future or have ever existed between the Parties, arising out of or in connection with the Projects. In furtherance of such intention, the Parties agree that this Agreement shall remain in effect as a full and complete settlement and release of the Petitioners' and Administrative Appellants' Claims, notwithstanding the discovery or existence of any said additional or different claims or facts arising out of or relating to the subject matter of this Agreement. The released claims do not include any claims arising out of or relating to the parties' obligations under this Agreement.

The Parties acknowledge that the foregoing waiver was separately bargained for and is a key element of this Agreement of which this release is a part.

11. **No Admission of Liability.** This Agreement is executed by the Parties for the sole purpose of settling the matters disputed among the Parties related to the Projects, including those leading up to, in, or arising out of, the CEQA Action, and it is expressly understood and agreed, as a condition hereof, that this Agreement should not constitute nor be construed to be an admission of the truth or correctness of any claim asserted in the CEQA Action. Each Party acknowledges that each other Party expressly denies that it is in any way liable or obligated to any other Party in connection with the Projects.

12. **Entire Agreement**. This Agreement, together with its exhibits, contains the sole, complete and entire agreement and understanding of the Parties concerning the matters contained herein and may not be altered, modified, or changed in any manner (including waivers) except by a writing duly executed by all Parties. In entering into this Agreement, no Party is relying on any oral or written statement or representation by any other Party other than those statements or representations expressly set forth herein. No conditions precedent to the effectiveness of this Agreement exist, other than as expressly provided for herein. There are no oral or written collateral agreements by and among the Parties. All prior agreements, discussions and negotiations have been and are merged, integrated into and superseded by this Agreement.

13. **Termination**. In the event this Agreement terminates pursuant to the terms of Section 14 of this Agreement, no Party shall be further obligated or required to continue to perform any remaining obligations that arise from actions by the Parties or others following the date of termination under this Agreement. In the event of such termination, each Party agrees to honor all obligations arising from actions of the Parties or others that were performed before the date of termination, and no Party shall be required to reimburse the other for any portions of the Agreement that have been or are required to be performed up to the point of such termination. Petitioner and Administrative Appellants specifically understand this means any effort to challenge the EIR's adequacy in court after dismissal of this action would be time barred by the statute of limitations set forth at Public Resources Code Section 21167. The City specifically understands that any amounts paid or required to be paid pursuant to Sections 3 and/or 21 of this Agreement will no longer be under the control of Petitioner or Administrative Appellants, and thus not subject to reimbursement, provided that the City reserves the right to seek reimbursement from USGS or Western Ecological Research Center any monies that the City determines have been improperly spent implementing the Bird Study.

14. **Severability**. If any term or provision of this Agreement is found to be illegal, invalid, unenforceable, or void in any respect by a court of competent jurisdiction, then the remainder of this Agreement shall be null and void, and shall be terminated.

15. **Survival**. Termination of this Agreement shall not affect any provision of this Agreement that, by its express term, is intended to survive expiration or termination of this Agreement.

16. **Applicable Law**. This Agreement shall be construed according to the laws of the State of California.

17. **Jurisdiction**. The parties consent to the jurisdiction of the courts of the State of California to resolve any dispute regarding this Agreement. In mutual recognition of the fact that this Agreement is to be performed in the City and County of San Francisco, California, the parties agree that in the event any civil action is commenced regarding this Agreement, San Francisco County, California, is the proper venue for the commencement and trial of such action.

18. **Interpretation**. All parties to this Agreement and their counsel have reviewed and revised this Agreement or had the opportunity to review and revise this Agreement, and the normal rule of construction to the effect that any ambiguities in an agreement are to be resolved against the drafting parties shall not be employed in the interpretation of this Agreement.

19. **No Representation**. Except as otherwise provided in this Agreement, each of the parties hereto acknowledges that no other party, nor any agent nor any attorney of any other party has made any promise, representation or warranty whatsoever, express or implied, not contained herein concerning the subject matter hereof to induce said party to execute or authorize the execution of this Agreement and acknowledges that said party has not executed or authorized the execution of this Agreement in reliance upon any such promise, representation or warranty not contained herein.

20. **Costs.** Except as provided in Section 21, the Parties to this Agreement agree to bear their own costs and attorneys' fees in connection with the negotiation and preparation of this Agreement and the CEQA Action, including the costs of preparation of the Administrative Record created in connection with the CEQA Action.

21. **Petitioners' Attorneys' Fees**. Notwithstanding the provisions of Section 20, Respondents shall reimburse Petitioners for their attorneys' fees and costs incurred in connection with the CEQA Action in the amount of Seventy-Five Thousand Dollars ($75,000.00) within ten (10) calendar days following Petitioners' dismissal of the CEQA Action and any additional actions that Petitioners and/or Administrative Appellants may have filed challenging the Projects by delivering a check(s) payable to "Lippe Gaffney Wagner in Trust for Waterfront Watch" in said amount to Lippe Gaffney Wagner LLP.

22. **Binding Effect; Representation of Authority**. The Terms of this Agreement shall be binding on each individual, in their individual capacity, executing this Agreement and the Party on behalf of which he or she executes this Agreement. Each individual executing this Agreement on behalf of any Party expressly represents and warrants to each of the other Parties that he or she has authority to execute this Agreement on behalf of, and thereby to bind, the Party on behalf of which he or she executes this Agreement to the terms of this Agreement, and, upon request by any other Party agrees to provide documentary evidence demonstrating that he or she has such authority..

23. **Successors**. This Agreement shall be binding upon and shall inure to the benefit of each Party's successors and assigns.

24. **Time is of the Essence**. Time is of the essence as to each provision of this Agreement.

25. **Counterparts**. This Agreement may be executed in one or more counterparts, all of which together constitute one single document binding on each of the Parties.

26. **Telefacsimile/Electronic Signatures**. This Agreement and any documents relating to it may be executed and transmitted to any other Party by telefacsimile or by electronically transmitted PDF or similar scanned signature, which telefacsimile, PDF or electronically transmitted scanned signature shall be deemed to be, and utilized in all respects as, an original, wet-inked document.

27. **Notices**. Any notice, demand or other communications of any kind that any of the Parties may be required or permitted to serve upon any other Party pursuant to this Agreement shall be given in writing and delivered (a) in person (including express, courier, or overnight service), (b) by facsimile (if also sent by the end of the following business day under either clause (a) above or clause (c) below), or (c) by certified or registered mail, postage prepaid, return receipt requested, and, in any such case, addressed as follows:

If to the Sierra Club, addressed to:

Sierra Club
Attention: Rebecca Evans
San Francisco Group, Sierra Club
85 Second Street, Third Floor
San Francisco, CA 94105
Telephone No.: 415-977-5578
Facsimile No.: 415-977-5799

and

Sierra Club National Legal Program
Attention: Aaron Isherwood
85 Second Street, Second Floor
San Francisco, CA 94105
Telephone No.: 415-977-5500
Facsimile No.: 415-977-5799

If to Audubon, addressed to:

Golden Gate Audubon Society
Attention: Mike Lynes
2530 San Pablo Avenue, Suite G
Berkeley, CA 94702
Telephone No.: 510-843-2222
Facsimile No.: 510-843-5351

If to Waterfront Watch, addressed to:

Waterfront Watch
Attention: Aaron Peskin
470 Columbus Avenue, Suite 211
San Francisco, CA 94133
Telephone No.: 415-986-7014
Facsimile No.: 415-296-9533

If to Telegraph Hill Dwellers, addressed to:

Telegraph Hill Dwellers
Attention: President
P.O. Box 330159
San Francisco, CA 94133
Telephone No.: 415-273-1004
Facsimile No.: none available

If to San Francisco Tomorrow, addressed to:

San Francisco Tomorrow
Attention: Jennifer Clary, President
5537 Mission St., #201
San Francisco, CA 94112
Telephone No.: 415-585-9489
Facsimile No.: 415-564-1482

If to any of the foregoing Petitioner or Administrative Appellant entities, with a copy to:

Lippe Gaffney Wagner LLP
Attn: Thomas N. Lippe
329 Bryant St., Suite 3D
San Francisco, CA 94107
Telephone No.: 415-777-5600
Facsimile No.: 415-777-9809

If to the City, addressed to:

Office of Economic and Workforce Development
Attention: Director
1 Dr. Carlton B. Goodlett Place, Room. 448
San Francisco, CA 94102
Telephone No.: 415-554-6969
Facsimile No.: 415-554-4565

With a copy to:

San Francisco City Attorney's Office
Attention: Land Use
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102
Telephone No.: 415-554-4700
Facsimile No.: 415-554-4757

Port of San Francisco
Attention: Executive Director
Pier 1, The Embarcadero
San Francisco, CA 94111
Telephone No.: 415-274-0400
Facsimile No.: 415-732-0400

A Party may change or otherwise add to or subtract from the foregoing addresses applicable to such Party at any time and from time to time by providing notice to all signatories of such change in writing. All notices, demands or other communications delivered in accordance with this Section shall be deemed given, received, made or communicated on the date personal receipt actually occurs or, if mailed, on the delivery date or attempted delivery date shown on the return receipt; if sent by facsimile, on the date of transmission shown on the confirmation thereof, provided that such confirmation demonstrates that such transmission occurred at or prior to 5:00 p.m. California time on the date of delivery; otherwise on the following business day.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

SIERRA CLUB

By: _____ Dated: _____

Printed Name: _____
Chair for the San Francisco Group

GOLDEN GATE AUDUBON SOCIETY

By: _____ Dated: _____

Printed Name: _____
Its Director

TELEGRAPH HILL DWELLERS

By: _____ Dated: _____

Printed Name: _____
Its Secretary

SAN FRANCISCO TOMORROW

By: _____ Dated: _____

Printed Name: _____
Its President

WATERFRONT WATCH

By: _____ Dated: _____
Printed Name: _____
Its President

CITY AND COUNTY OF SAN FRANCISCO

By: _____ Dated: _____
Edwin Lee, Mayor

APPROVED AS TO FORM:
Dennis J. Herrera
City Attorney

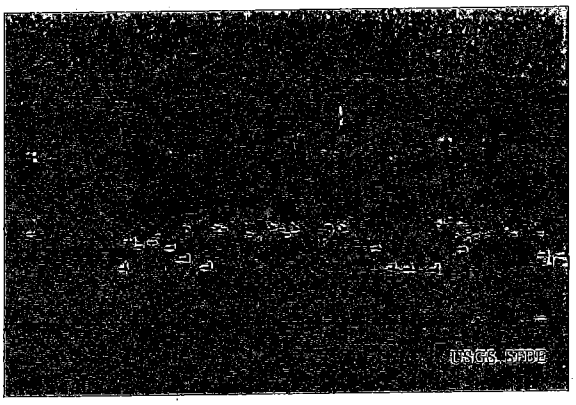
By: _____ Dated: _____
Marlena G. Byrne
Deputy City Attorney

SAN FRANCISCO PORT COMMISSION

By: _____ Dated: _____
Monique Moyer
Executive Director

U. S. Department of the Interior
U. S. GEOLOGICAL SURVEY
WESTERN ECOLOGICAL RESEARCH CENTER
San Francisco Bay Estuary Field Station
505 Azuar Drive, Vallejo, California 94592
(707) 562-2004 FAX (707) 562-3001
12 June 2012

Assessing Habitat Displacement of Rafting Waterbirds in San Francisco Bay: Learning from the 34th America's Cup Race



Background and Justification: The San Francisco Bay (SFB) estuary is a key migratory stop-over and wintering area for diving waterfowl and other rafting birds in the Pacific Flyway. Midwinter survey indices document that nearly half of some Pacific Flyway diving duck populations are counted in the estuary each year, and several thousand grebes and seabirds also rely on Bay habitats (USFWS 2010, Trost 2002). In 2012 and 2013, SFB will host the 34th America's Cup, one of the world's largest sporting events. Current estimates suggest this event will attract nearly 1000 spectator boats over approximately 45 days of racing in the Bay (Draft EIR for America's Cup 34 http://sfmea.sfplanning.org/2010.0493E_DEIR1.pdf) Some of the main races of this event will occur during August and September, which coincides with the beginning of migration and arrival to the estuary for many rafting waterbird species. The race area as currently defined has the potential to overlap with distributions of several open water rafting birds.

In addition to major events such as America's Cup, on-going recreational and transit activities that occur in SFB also may influence waterbirds. The main way in which human activities negatively impact birds is by restricting their access to resources that would otherwise be exploited (Gill 2007). Boat traffic can adversely affect waterbirds by causing them to flush from roosting and foraging sites (Mori *et al.* 2001, Knapton *et al.* 2000, Huffman 1999) resulting in habitat displacement. For example, studies in SFB (Takekawa *et al. in review*) and in Denmark (Larsen and Laubek 2005) show that high speed ferries may significantly reduce habitat use within 300-500 m. Disturbance can cause waterbirds to expend more energy flying and spend less time feeding, reducing body condition and the ability to migrate and reproduce (Belanger and Bedard 1990, Haramis *et al.* 1986, Bell and Austin 1985). Repeated disturbance may cause waterbirds to shift distribution patterns, forage in less preferred habitats, or emigrate (Schwemmer *et al.* 2011, Havera *et al.* 1992). Responses to human presence can greatly depend on species, bird densities, individual body condition, foraging conditions in the impact area, type of disturbance and other parameters (Borgmann 2011, Gill 2007, Yasue 2005), and much remains to be learned about how these factors can interact to influence waterbird responses.

Little is known about how disturbance may affect habitat use and foraging energetics of rafting birds in Central SFB where the America's Cup races will occur. Surveys of the open water in this area have been sparse, and additional information is needed to understand how birds are distributed in and using this area and what activities influence main waterbird species. This lack of knowledge prevents effective planning and management of boat traffic that could minimize waterbird impacts. Thus, the 34th America's Cup provides a unique opportunity to quantify effects of high density water traffic on birds and identify best management practices to minimize future impacts.

Exhibit 1

Objectives:

To learn about waterbird responses to SFB events such as the America's Cup as well as other open water activities, we propose assessing the effects of watercrafts on waterbird distribution, habitat displacement, and energy expenditure. Specifically, our objectives are to:

1. Determine distribution of rafting birds on race routes and in adjacent areas across the Central Bay before and after race events with aerial surveys
2. Examine species specific responses (i.e. avoidance, displacement, resettling times) to motorized and non-motorized watercraft with land-based and boat-based observer surveys.

Methods:

Objective 1. Aerial surveys – We will use aerial surveys to quantify distributions and densities of waterbirds throughout fall over three years. Aerial surveys will be conducted in the Central Bay along predetermined transects developed for yearly USFWS mid-winter waterfowl surveys (Accurso 1992) and along added transects to cover the race and spectator areas. In 2012, 2013, and 2014 we will survey 2 to 4 times between mid-August through mid-October. Surveys conducted in fall 2014 will be used as a baseline. Matched flights will be conducted the day before and as soon as logistically feasible (preferably within the same day) after specific race events. Baseline flights will also be conducted during 2 consecutive days and will match times of day flown during event flights. Trained observers seated on either side of a Partenavia P-68 Observer twin-engine aircraft will record species, numbers, and locations with specialized software and an integrated GPS system (Hodges 2003). These data will be used to identify waterbird distributions in the Central Bay during fall, to model species densities in relationship to site habitat variables, and to determine before and after race area-wide distributions in comparison to baseline (De La Cruz 2010, Peters & Otis 2006).

Objective 2. Land-based and boat-based surveys – To provide comparable spatial and temporal data on species specific waterbird responses to a variety of watercraft types we will use a combination of land-based, boat-based, and video surveys during Aug-April 2012-2013 and 2013-2014. At a series of pre-determined 1-km^2 open water sites distributed both along the America's Cup race course and at additional sites that represent a gradient of human presence, we will conduct land-based surveys to study species specific waterbird responses to open water motorized, non-motorized, and human-powered watercrafts. Within each month, we will distribute surveys randomly across sites, times and tidal cycles. Additional surveys will be made during America's Cup race events to quantify responses to spectator boats. Trained observers will use binoculars, spotting scopes, theodolites, range-finders and digital voice recorders to document flock size, species, sex, watercraft speed, disturbance types and frequency, and behaviors prior to, during, and after watercraft approach, including response distances and resettling times (Gill *et al.* 2001, Ronconi and St. Clair 2002). Events separated by >10 min will be considered independent observations (Burger 1998). To survey open water areas that cannot be observed from shore, we will conduct boat-based surveys of 1-km^2 sites from small motorized crafts anchored at pre-determined points in the Central Bay. Timing and methods, including surveys during race events, will be similar to those listed above for land-based surveys.

Project timeline: June 2012 through March 2015. Objectives 1 will be completed from July to November of 2012, 2013, and 2014. Objective 2 will be conducted from Aug - April 2012-2013 and 2013-2014. A final report will be produced in March 2015.

Investigators:

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Michael Lynes, Golden Gate Audubon Society, 2530 San Pablo Avenue, Suite G, Berkeley, CA 94702. Tel: 510/843-6551; fax: 510/843-5351; email: mlynes@goldengateaudubon.org.

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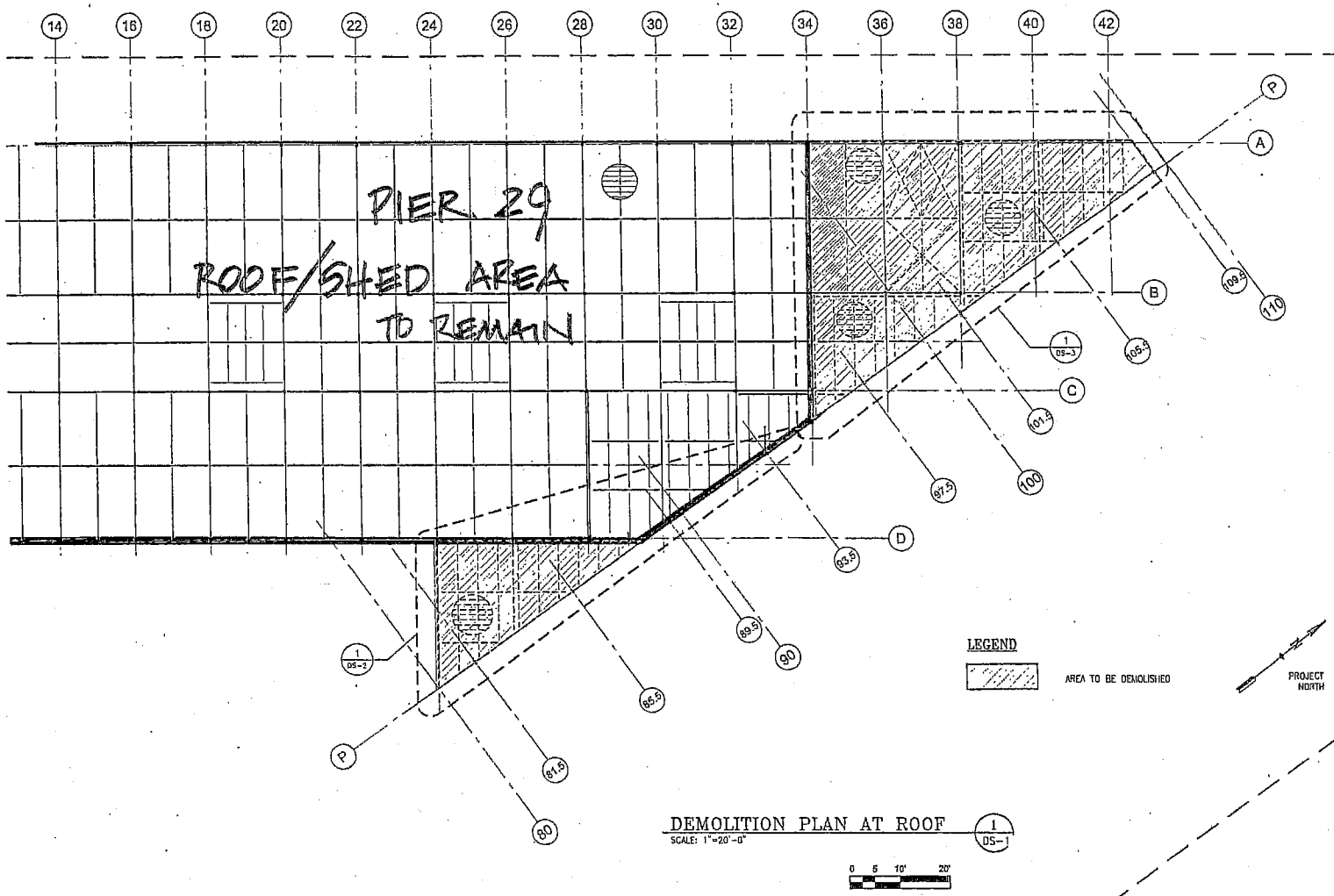
Budget:

Estimated Project Budget	Contributed by USGS	Total Request
Salary[1]		
USGS Research Wildlife Biologist (40h @ $127.09/h)	10,168	2,542
USGS Wildlife Biologist (180h @ $79.89/h)	23,568	14,380
Temporary Technical staff (2 @ 1173h ea, $29.09/h)	20,945	68,258
Sub-total Salary	*54,681*	*85,180*
Operating Costs[2]		
Contracted flights (60 flight hours @ $565/hour)	0	33,900
Vehicle ($290/mo plus 1000 mi/mo @ $0.42/mi for 9 mo.)	4,260	6,390
Survey supplies and equipment	5,400	2,800
Sub-total Operating	*9,660*	*43,090*
Direct Costs	64,341	128,270
Indirect Costs		21,730
Total Costs		**150,000**

[1] Salary cost fully-loaded rate includes benefits and admin costs, partially offset by ongoing USGS programs

[2] Operating costs offset by USGS including unfunded labor assessment, existing datasets, computers, computer software, analytical expertise, survey equipment and offsite data archiving.



DEMOLITION PLAN AT ROOF (1 / DS-1)

SCALE: 1"=20'-0"

NO.	DATE	DESCRIPTION	BY	APP.
0	4/27/12	ISSUED FOR BID	NA	RS

TABLE OF REVISIONS
CHECK WITH TRACING TO SEE IF YOU HAVE LATEST REVISION

REFERENCE INFORMATION & FILE NO. OF SURVEYS

SAN FRANCISCO PORT COMMISSION
PORT OF SAN FRANCISCO
DEPARTMENT OF ENGINEERING
PORT OF SAN FRANCISCO

Structural Design Engineers
100 Montgomery Street, Suite 1150
San Francisco, California 94104
415-781-1505 x200 desk
415-781-2718 fax
www.sdeal.com

REGISTERED PROFESSIONAL ENGINEER
KATHERINE S. NAU
No. 22086
Exp. 9-30-12
CIVIL
STATE OF CALIFORNIA

DESIGNED:	SL	DATE: 04/27/12
DRAWN:	NA	DATE: 04/27/12
CHECKED:	RS	DATE: 04/27/12

APPROVED BY
SAN FRANCISCO PORT COMMISSION
DATE: _____
CHIEF HARBOR ENGINEER

SCALE: AS NOTED
SHEET OF SHEETS: 4 OF 12

PIER 29 END WALL DEMOLITION
DEMOLITION PLAN AT ROOF

CONTRACT NO. 2761
DRAWING NO. 17657-29-5
SPECIFICATION NO. N/A
SHEET NO. DS-1

MEW: PLOT1

582

Exhibit II