

DATE: JULY 26, 2018

FROM: CARGO & INDUSTRIAL REAL ESTATE

**SUBJECT: RESOLUTION NO. _____ AND ORDER NO. _____
- SET ASIDE BNSF RAILWAY COMPANY SOUTHERN CALIFORNIA
INTERNATIONAL GATEWAY (SCIG) REAL PROPERTY APPROVALS**

SUMMARY:

Staff requests that the Board of Harbor Commissioners (Board) adopt a proposed Order that sets aside the approval of the Site Preparation and Access Agreement (SPAA) and Permit 901 with BNSF Railway Company (BNSF) for the Southern California International Gateway (SCIG) project and Board Order No. 13-7125 adopted by the Board on March 21, 2013. The Order also directs the Board Secretary to request that the Los Angeles City Council also set aside all actions it has taken to approve the SPAA and Permit 901, as adopted in City Council Motions. 10-A, 10-B (as amended), 10-D and 10-E under City Council File No. 13-0398.

This Order is mandated by a court order that requires the City to set aside specified actions, resolutions and orders including the SCIG Project Final Environmental Impact Report (FEIR) certification and approvals predicated on the certified FEIR.

A separate companion Board Order sets aside the FEIR certification, SCIG project approval and related environmental approvals, and directs the Harbor Department to suspend any and all SCIG Project activities until such time as the City and BNSF Railway Co. (BNSF) have taken the actions necessary to bring the determinations, findings and decisions into compliance with the California Environmental Quality Act (CEQA).

RECOMMENDATION:

It is recommended that the Board of Harbor Commissioners (Board):

1. Find that the Director of Environmental Management has determined that the proposed action is administratively exempt from the California Environmental Quality Act (CEQA) in accordance with Article II, Section 2 (b)(f) and (h) of the Los Angeles City CEQA Guidelines;
2. Adopt Order No. _____ and Resolution No. _____; and

SUBJECT: SET ASIDE SCIG REAL PROPERTY APPROVALS

3. The Secretary shall certify to the adoption of Order No. _____ by the Board of Harbor Commissioners of the City of Los Angeles and shall cause a copy of the same to be presented to the City Council and request that the City Council take similar actions to set aside all City Council's SCIG project real property entitlement approvals, including Order No. 13-7125, which was originally adopted by the City Council under Motions 10-A, 10-B (as amended), 10-D and 10-E under City Council File No. 13-0398, pursuant to Charter Section 607.

DISCUSSION:

Background/Context - The SCIG Project is a \$500 million investment by BNSF to build a new, state of the art intermodal "near dock" railyard facility located within four miles of the San Pedro Bay Ports (Ports) and connected to the Alameda Corridor. The proposed SCIG Project would be located on an approximately 185-acre site comprised of 117 acres of Harbor Department land and 68 acres of land BNSF will acquire from private parties.

Past Board Actions - On March 7, 2013, the Board adopted Resolution No. 13-7451, which certified the SCIG Project FEIR in compliance with CEQA, adopted related documents and findings and approved the SCIG Project, as evidenced by the March 8, 2013 Notice of Determination (NOD).

On March 21, 2013, the Board adopted Order No. 13-7125, which approved the SPAA and Permit No. 901 between the Harbor Department and BNSF.

Past City Council Actions - On May 8, 2013, the Los Angeles City Council adopted Motions 10-A, 10-B (as amended), 10-D and 10-E under Council File No. 13-0398 (the Lease Council File), which adopted Order No. 13-7125, approving the SPAA and Permit No. 901, as a long term lease pursuant to Los Angeles City Charter Sec. 607.

Legal Challenges - Seven lawsuits challenging the SCIG Project FEIR pursuant to CEQA were filed in June 2013 in California state court against the City of Los Angeles and real party in interest BNSF¹. After a November 2015 trial of the consolidated CEQA claims, the trial court ruled in favor of the City on some CEQA issues, but concluded that certain specific environmental impacts required additional analysis that invalidated the SCIG FEIR.

¹ The lawsuit parties included agencies (City of Long Beach, Long Beach Unified School District, South Coast Air Quality Management District), environmental and community groups (Coalition for a Safe Environment, Coalition for Clean Air, East Yard Communities for Environmental Justice and Natural Resources Defense Council), five local businesses (California Cartage, Fast Lane Transportation, L.A. Harbor Grain, San Pedro Forklift and Three Rivers Trucking) and two residents. The California Attorney General also intervened in 2014.

SUBJECT: SET ASIDE SCIG REAL PROPERTY APPROVALS

On January 12, 2018, the California Court of Appeal overturned the trial court's 2016 ruling on all EIR analysis issues appealed by the City and BNSF, except for two air quality issues to be further analyzed (ambient air pollutant concentrations and cumulative impacts of such pollutant concentrations). On April 11, 2018, the California Supreme Court denied the petitioners' and Attorney General's petitions for review.

The Court of Appeal sent the case back to the trial court, which issued an order consistent with the appeal decision. The trial court's order mandates that the City take the actions listed below in this Order and companion action, and "suspend any and all [SCIG] project activities pursuant to or in furtherance of these determinations, findings and decisions until respondents have taken all actions necessary to bring the determinations, findings and decisions into compliance with CEQA."

Proposed Order - As required by court order, the proposed Order in this action effectuates the following:

- (1) Sets aside the following actions, resolutions, and orders:
 - The Los Angeles Board of Harbor Commissioners' approval on March 21, 2013 of the Site Preparation and Access Agreement and Permit No. 901 with the BNSF Railway Company, as memorialized in the March 8, 2013 Notice of Determination, and the March 20, 2013 Order No. 13-7125, and Board Order 13-7125 re SPAA & Permit 901; and
- (2) Directs the Board Secretary to submit the proposed Order to the City Council and request that the City Council set aside the following actions, resolutions, and orders:
 - The Los Angeles City Council's May 8, 2013 approval of the Site Preparation and Access Agreement and Permit 901 with the BNSF Railway Company for the construction, operation and maintenance of the SCIG facility, all as evidenced by the May 9, 2013 Notice of Determination and May 8, 2013 Los Angeles City Council Motions 10-A, 10-B (as Amended), 10-D and 10-E under Council File No. 13-0398.

Companion Action - As required by court order, a separate Board Order effectuates the following:

- (1) Sets aside the following actions, resolutions, and orders:
 - The Los Angeles Board of Harbor Commissioners' March 7, 2013 certification of the Environmental Impact Report for the Southern California International Gateway Project, State Clearinghouse Number 2005091116, as memorialized in the March 8, 2013 Notice of Determination, and Resolution No. 13-7451, adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gateway (SCIG) Project; and

SUBJECT: SET ASIDE SCIG REAL PROPERTY APPROVALS

- The Los Angeles Board of Harbor Commissioners' March 7, 2013 adoption of (i) the Findings of Fact and Statement of Overriding Considerations and (ii) the Mitigation Monitoring and Reporting Program, all in connection with the Environmental Impact Report for the Southern California International Gateway Project, State Clearinghouse Number 2005091116, as memorialized in the March 8, 2013 Notice of Determination, and Resolution No. 13-7451, adopted by Board of Harbor Commissioners re Final Environmental Impact Report re Southern California International Gateway (SCIG) Project; and
- (2) Directs the Executive Director and Harbor Department staff to suspend any and all project activities pursuant to or in furtherance of these determinations, findings and decisions until respondents have taken all actions necessary to bring the determinations, findings and decisions into compliance with CEQA; and
- (3) Directs the Board Secretary to submit the proposed Order to the City Council and request that the City Council set aside the following actions, resolutions, and orders:
- The Los Angeles City Council's May 8, 2013 (i) adoption of the determination by the Los Angeles Harbor Department that the project and the proposed 50-year Permit were assessed in an EIR prepared in accordance with the California Environmental Quality Act, under the Council File Nos. 13-295, 13-0295-S1, 13-0295-S2, 13-0295-S3, 13-0295-S4, 13-0295-S5, 13-0295-S6, 13-0295-S7, and 13-0295-S8.

ENVIRONMENTAL ASSESSMENT:

The proposed action is approval of an Order that sets aside the BNSF SCIG Project approval, FEIR certification and adoption of related documents and findings, Permit 901 and the Site Preparation and Access Agreement. As setting aside project approvals is a ministerial, administrative activity in response to a court order, the Director of Environmental Management has determined that the proposed action is administratively exempt from the California Environmental Quality Act (CEQA) in accordance with Article II, Section 2(b)(f) and (h) of the Los Angeles City CEQA Guidelines.

FINANCIAL IMPACT:

The proposed Board action will set aside the specified actions and approvals predicated on the certification of the SCIG FEIR including Order No. 13-7125 which approved the SPAA and Permit No. 901 with BNSF for the SCIG Project. In accordance with the terms of the SPAA and Permit No. 901, revenues of \$6,663,682 were budgeted to be invoiced and recorded within A43010 in FY 2019. The proposed Board actions will result in BNSF not being invoiced in FY 2019 under the terms of the SPAA and Permit No. 901.

SUBJECT: SET ASIDE SCIG REAL PROPERTY APPROVALS

In addition to budgeting for the revenues anticipated to be invoiced in FY 2019 related to the SCIG Project, an equal \$6,663,682 was budgeted to A59810 (Provisions for Bad Debts – Trade) within the FY 2019 operating expense budget to account for collection uncertainty related to the ongoing litigation surrounding the SCIG Project. The proposed Board actions will result in this provision related to the SCIG Project being unused in FY 2019 so long as BNSF is not invoiced under the terms of the SPAA and Permit No. 901.

Therefore, the proposed Board actions will not have a financial impact on the Harbor Department aside from staff time associated with undertaking these proposed actions. Further financial details regarding rents collected by BNSF from third party tenants operating on the SCIG Project site as well as tolled license fees payable by BNSF to the Harbor Department since the Effective Date of the SPAA and Permit No. 901 will be brought before the Board in a separate action.

CITY ATTORNEY:

The Office of the City Attorney has prepared and approved the Order as to form and legality.

TRANSMITTAL:

1. Proposed Order

FIS Approval: MT
CA Approval: JMC



JACK HEDGE
Director of Cargo & Industrial Real Estate



FOR MICHAEL DiBERNARDO
Deputy Executive Director

APPROVED:



EUGENE D. SEROKA
Executive Director