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OFFICE OF THE CITY CLERK
OAKLAND
2010 MAR 11 PM 6:29

Approved as to Form and Legality

Agency Counsel

REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND

RESOLUTION No. 2010 - 0049 C.M.S.

RESOLUTION AUTHORIZING THE AGENCY ADMINISTRATOR TO: 1) EXECUTE AMENDMENT 1 TO THE 2008 AMENDED AND RESTATED MEMORANDUM OF AGREEMENT BETWEEN CITY OF OAKLAND, OAKLAND REDEVELOPMENT AGENCY AND PORT OF OAKLAND FOR THE OAKLAND ARMY BASE WHICH PRIMARILY MODIFIES THE MANNER IN WHICH REIMBURSEMENTS FOR REMEDIATION COSTS ARE SUBMITTED TO AND PAID FROM REMEDIATION ACCOUNTS, 2) CREATE A NEW FUND FOR THE ARMY BASE JOINT ENVIRONMENTAL REMEDIATION ACCOUNT, 3) APPROPRIATE FIVE MILLION SEVEN HUNDRED FORTY-ONE THOUSAND FOUR HUNDRED SEVENTY-SEVEN DOLLARS (\$5,741,477) FROM THE OBRA LEASING & UTILITY FUND (9575) INTO THE ARMY BASE JOINT ENVIRONMENTAL REMEDIATION ACCOUNT FUND, 4) ACCEPT FIVE MILLION SEVEN HUNDRED FORTY-ONE THOUSAND FOUR HUNDRED SEVENTY-SEVEN DOLLARS (\$5,741,477) FROM THE PORT OF OAKLAND FOR DEPOSIT INTO THE ARMY BASE JOINT REMEDIATION ACCOUNT FUND, AND 5) APPROPRIATE AND EXPEND UP TO ELEVEN MILLION FOUR HUNDRED EIGHTY-TWO THOUSAND NINE HUNDRED FIFTY-THREE DOLLARS (\$11,482,953) FOR THE ARMY BASE JOINT REMEDIATION PROGRAM ACTIVITIES

WHEREAS, the Oakland Base Reuse Authority ("OBRA"), the City of Oakland ("City"), the Oakland Redevelopment Agency ("Agency") and the Port of Oakland ("Port") entered into a Memorandum of Agreement for Oakland Army Base (the "Army Base MOA") on July 8, 2003; and

WHEREAS, On June 27, 2006, pursuant to Agency Resolution 2006-0049 and City Resolution 80001, the Agency accepted any and all of OBRA's rights and obligations and OBRA was dissolved;

WHEREAS, the City, the Agency and the Port (the "Parties") amended and restated the Army Base MOA on February 27, 2008 as the Amended and Restated Memorandum of Agreement for the Oakland Army Base ("ARMOA") following the conveyance of the Army Base properties and completion of various Army Base MOA actions; and

WHEREAS, the Parties desire to further amend the ARMOA to: (a) Place a \$5 million cap on future reimbursement of remedial cover costs by each party ("remedial covers" are caps that are put over contaminated areas); (b) Revise the remediation costs standard to a "deemed reasonable" standard to qualify for Joint Environmental Remediation Fund submittal; (c) Require the party incurring them to cover any claimed remediation costs not ultimately covered by ESCA funds or qualified under the Insurance Policy; and (d) Agency and Port would submit their respective remediation costs independently to the insurance company rather than jointly; and

WHEREAS, pursuant to the terms and conditions of the ARMOA, the Parties must create a new fund to utilize Agency and Port funds to continue the remediation activities at the Army Base; and

WHEREAS, in order to utilize the new fund, the Agency needs authorization from the Agency Board to accept, appropriate, and expend the Agency and Port funds; now therefore be it

RESOLVED: That the Agency Administrator is authorized to negotiate and execute Amendment 1 to the 2008 Amended and Restated Memorandum of Agreement for the Oakland Army Base substantially in the form set out in *Exhibit A*; and be it

FURTHER RESOLVED: the Agency Administrator is authorized to create a new fund (fund number to be determined) for the Army Base Joint Environmental Remediation Account; and be it

FURTHER RESOLVED: the Agency Administrator is authorized to accept Five Million Seven Hundred Forty-One Thousand Four Hundred Seventy-Seven Dollars (\$5,741,477) from the Port of Oakland, for deposit into the Army Base Joint Environmental Remediation Fund; and be it

FURTHER RESOLVED: the Agency Administrator is authorized to appropriate Five Million Seven Hundred Forty-One Thousand Four Hundred Seventy-Seven Dollars (\$5,741,477) from OBRA Leasing & Utility Fund (9575) into the Army Base Joint Environmental Remediation Account Fund.; and be it

FURTHER RESOLVED: the Agency Administrator is authorized to accept, appropriate and expend up to Eleven Million Four Hundred Eighty-Two Thousand Nine Hundred Fifty-Three Dollars (\$11,482,953) of the Army Base Joint Environmental Remediation Fund for Army Base Environmental Remediation Program Activities; and be it

FURTHER RESOLVED: That the Agency Administrator or his designee is hereby authorized to take whatever other actions are necessary with respect to the ARMOA and Army Base Joint Environmental Remediation Account consistent with this Resolution and its basic purposes.

IN AGENCY, OAKLAND, CALIFORNIA, APR 20 2010

PASSED BY THE FOLLOWING VOTE:

AYES – AYES – ~~WARRS~~, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID, AND CHAIRPERSON BRUNNER - 7
NOES – 0

ABSENT – 0

ABSTENTION – 0

Excused - Brooks - 1

ATTEST:



LATONDA SIMMONS

Secretary of the Redevelopment Agency
of the City of Oakland, California

EXHIBIT A

AMENDMENT 1

**TO THE 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**

This Amendment 1 to the Amended and Restated Memorandum of Agreement for Oakland Army Base (“Amendment 1”), dated for reference purposes only as of _____, 2010, and effective as of _____, 2010 (“Amendment 1 Effective Date”) is the first written amendment to the Amended and Restated Memorandum of Agreement for Oakland Army Base, dated as of February 27, 2008 (hereinafter, “Restated MOA”). This Amendment 1 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. The terms used in this Amendment 1 shall have the same meanings assigned to them in the Restated MOA.

B. ORA and the City Council are together referred to herein as the “City”. The City and the Port (each a “Party” and, collectively, the “Parties”) intend to work cooperatively to pursue their respective goals, objectives, and legal and fiduciary obligations with respect to the environmental remediation and development of the OARB, all as set out more fully in the Restated MOA, the terms of which are incorporated herein by reference.

C. The Parties have had discussions regarding, among other things, ways to streamline the process of submitting costs for reimbursement out of the ESCA Funds and reporting to Chubb Custom Insurance Company (“Chubb”) so that they can be credited toward the Insurance Attachment Point of the Insurance Policy issued by Chubb under which both the City and the Port are insureds.

D. As a result of those discussions, the Parties have agreed to amend the Restated MOA, pursuant to Section 11.2 of the Restated MOA, through this Amendment 1.

E. To effectuate this agreement, the City sent an email to Chubb dated June 11, 2009, a copy of which is attached as Exhibit "A" to this Amendment 1 and incorporated herein by reference, advising Chubb that the Parties are separately submitting their respective remediation cost reports to Chubb with respect to the costs described in Section F of this Amendment 1 in order to expedite matters.

F. After sending the e-mail mentioned in Section E of this Amendment 1, the City and the Port prepared and transmitted to Chubb their separate submissions for any remediation costs incurred up to the Amendment 1 Effective Date which the City or the Port believed should be credited toward the Insurance Attachment Point of the Insurance Policy but which had not yet been so credited ("Section F Remediation Costs") so that they could be credited toward the Insurance Attachment Point of the Insurance Policy.

G. The Parties also desire to amend certain provisions of the Restated MOA as set forth in this Amendment 1.

H. The Restated MOA was executed by the Mayor of the City of Oakland and the President of the City Council on behalf of the City Council, and was executed by the Agency Administrator on behalf of ORA. Since the City Council has adopted Resolution No. authorizing the City Administrator of the City of Oakland to execute this Amendment 1 on behalf of the City Council, and the City Attorney has confirmed that the City Administrator's signature fully binds the City Council in this Amendment 1, the Mayor of the City of Oakland and the President of the City Council are not required to execute this Amendment 1.

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. Except to the extent amended by this Amendment 1, all other provisions of the Restated MOA (including all Exhibits and Schedules to the Restated MOA) shall remain in full force and effect.

2. Based on ESCA funding requests submitted to the Army as of the Amendment 1 Effective Date, and once the City submits the Port's Section F Remediation Costs to the Army for reimbursement out of the ESCA Funds, which the City agrees to do within five (5) days after the Port Attorney executes this Amendment 1, the Parties agree that upon receipt of all requested amounts from the Army, at least the Twelve Million Two Hundred Fifty Thousand Dollars (\$12,250,000) in ESCA Funds referenced in Section 5.3(c) of the Restated MOA, as said Section is amended in this Amendment 1, will have been "expended". Accordingly, within thirty (30) days after the Amendment 1 Effective Date, the City and the Port shall proceed to make the deposits called for in Section 5.3(c) of the Restated MOA, as said Section is amended in this Amendment 1. The rights of the Parties to make withdrawals from the Remediation Account, however, shall be modified to the extent set forth herein.

3. In order to carry out the purposes of this Amendment 1, as of the Amendment 1 Effective Date, Section 5.3 of the Restated MOA is hereby rescinded in its entirety and replaced by the following, new Section 5.3:

“5.3. Unfunded Remediation Costs.

(a) Generally. The Parties acknowledge and agree that the following costs and expenses associated with the investigation and remediation of the EDC Property in accordance with the Regulatory Requirements shall be considered “Unfunded Remediation Costs”: (1) any such costs incurred after the ESCA Funds are expended and before the Insurance Attachment Point is reached; (2) any such costs that exceed the total of the ESCA Funds and the limits of the Insurance Policy even after the Insurance Attachment Point is reached; and (3) such costs, if any, which are ultimately determined, whether before or after reimbursement from the ESCA Funds or the Insurance Policy, not to be covered by the ESCA Funds or the Insurance Policy.

(b) Allocation. All Unfunded Remediation Costs as described in Sections 5.3(a)(1) and (2) of the Restated MOA shall be allocated to the City and the Port in accordance with the Allocation Proportion, provided that:

(1) 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; provided, however, that 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;

(2) Unfunded Remediation Costs associated with Marine Sediments shall be the responsibility of the Port in accordance with Section 5.5 of the Restated MOA;

(3) all future costs for applications of covers after the Amendment 1 Effective Date for which either Party seeks reimbursement from the Remediation Account shall be limited to a total of Five Million Dollars (\$5,000,000.00) for each of the City and the Port, so that the aggregate amount for application of covers after the Amendment 1 Effective Date for which reimbursement is sought from the Remediation Account by the City and the Port will not exceed Ten Million Dollars (\$10,000,000.00); provided, however, that the limitation described above shall not prohibit each Party from seeking credit toward the Insurance Attachment Point or coverage under the Insurance Policy for future costs for applications of covers after the Amendment 1 Effective Date;

(4) except as required by DTSC or another Governmental Authority, or as necessary to achieve the stated remedial objectives of the RAP and/or RMP, the costs associated with a Party’s decision to excavate and transport off of the EDC Property soil with concentrations of chemicals of concern below remedial goals described in the RAP and/or RMP, which Regulatory

Requirements would permit re-use of the soil on the EDC Property, shall be deemed Unfunded Remediation Costs and 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 of the EDC Property; and

(5) in the event that Chubb finally disallows a Section F Remediation Cost application toward the Insurance Attachment Point or coverage under the Insurance Policy, or the Army finally denies reimbursement of a Section F Remediation Cost reimbursement from the ESCA Funds solely because of a delay in submitting the cost information to the Army, or Chubb, then the Party incurring such cost shall be entitled to payment for such cost from the Remediation Account, but the Parties first shall be obliged to diligently pursue all appropriate remedies and efforts to dispute the disallowance of the cost based on the alleged delay.

Except as provided in Section 5.3(b)(5), the Unfunded Remediation Costs described in Section 5.3(a)(3) shall be the sole responsibility of the Party incurring them, and said Party shall not claim any reimbursement from the Remediation Account for said Unfunded Remediation Costs. If the Party has initially been reimbursed for such Unfunded Remediation Cost from the ESCA Funds or the Remediation Account, such Party shall reimburse the ESCA Funds or the Remediation Account in the amount it received for the unsuccessfully disputed Unfunded Remediation Cost plus, in the case of reimbursement to the Remediation Account, interest thereon at the annual rate of six percent (6%). Moreover, in the event that the Remediation Account has been closed, any Party who later becomes obliged to reimburse the Remediation Account shall instead pay to the other Party directly the Allocation Proportion (*i.e.*, 50%) of the amount that it is obliged to reimburse the Remediation Account.

(c) Allocation Procedure. Pursuant to Section 2 of Amendment 1, the Parties agree that at least Twelve Million Two Hundred Fifty Thousand Dollars (\$12,250,000) of the ESCA Funds have been “expended” (including amounts subject to outstanding funding requests under Army Grants Officer review). Accordingly, within thirty (30) days after the Amendment 1 Effective Date, 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 the City). Each Party may draw from the Remediation Account to fulfill its remediation obligations as set forth in Section 5.1 of the Restated MOA, subject to, and consistent with, the draw procedures set forth in Section 5.3(d) of the Restated MOA. 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.

(d) Remediation Account Draws. Once any Unfunded Remediation Costs have been “deemed reasonable” under Paragraph 33 of the Insurance Policy because sixty (60) days have elapsed after Chubb’s receipt of the City’s and/or the Port’s submissions of costs and/or any “additional information or back up documentation” requested by Chubb and Chubb has not rejected or denied the costs, 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 of the Restated MOA, and the Remediation Account Manager shall pay the funds requested to the Party requesting them. The Parties may, if they mutually agree, arrange for claimed Unfunded Remediation Costs (including all or any portion of the Section F Remediation Costs) deemed to merit or require faster payment from the Remediation Account to be paid from the Remediation Account before they have been “deemed reasonable” under the Insurance Policy, subject to the reimbursement provisions herein. 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) of the Restated MOA, subject to the exceptions provided in Section 5.3(b) of the Restated MOA. 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.

(e) Allocation Accounting. The Port and the City 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. The Parties, with the assistance of the Remediation Account Manager, shall, on a monthly basis, 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.”

4. In order to carry out the purposes of this Amendment 1, as of the Amendment 1 Effective Date, Section 5.4 is hereby rescinded in its entirety and replaced by the following, new Section 5.4:

“5.4. Insurance Policy.

(a) Insurance Attachment Point. Prior to the Amendment 1 Effective Date, and before the Insurance Attachment Point under the Insurance Policy is reached, the Parties were obligated by the Restated MOA to jointly submit the reports required by the Insurance Policy to Chubb, executed by the Port and by OBRA or ORA, and specifying allowable costs incurred during the reporting period. In addition to the agreed separate submission of Section F Remediation Costs described in Section F above, on and after the Amendment 1 Effective Date, each Party shall separately transmit the submissions to Chubb required by the Insurance Policy, specifying allowable remediation costs incurred by that Party. Each Party promptly will notify the other Party in writing of any responses it receives from Chubb; the notification will include a copy of any written responses from Chubb. 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 Chubb 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 of the Restated MOA. The Party making a claim shall provide a copy of the claim notice to the other Parties at the same time as it submits the claim to Chubb. The Parties shall reasonably cooperate with respect to claims submitted to Chubb. The Party making the claim shall be responsible for its costs, legal or otherwise, in pursuing any claim. After Chubb agrees that the Insurance Attachment Point has been reached, each Party shall advance its own costs of remediation in accordance with its obligations under Section 5.1 of the Restated MOA, submit its own claim to Chubb, and be entitled to the sole benefit from any reimbursement from Chubb for that Party’s claims. Each Party will promptly notify each other Party in writing of the response received from Chubb in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by Chubb.

(c) 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 it submits the claim to Chubb. The Parties shall reasonably cooperate with respect to claims submitted to Chubb. 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 Chubb 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 Chubb in connection with a claim, including a detailed accounting as to the particular costs reimbursed or not reimbursed by Chubb.

(d) Insurance Policy Term and Limits. The Parties shall meet and confer at the earlier of either the time when Twenty Million Dollars (\$20,000,000) of the cost cap limits under the Insurance Policy have been paid by Chubb, or by August 7, 2012 which is one year before the expiration of the Insurance Policy term, to assess whether 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 or extend beyond August 7, 2013, the expiration of the Insurance Policy term. If the Parties agree that an increase in cost cap limits and/or an extension or replacement of the Insurance Policy is appropriate or necessary, all costs of securing that increase or extension (excluding the Port's and City's in-house costs and outside legal costs), including, but not limited to, any insurance premium for any increase in limits or extension or replacement of the Insurance Policy, shall be allocated to the City and the Port in accordance with the Allocation Proportion. If the Parties do not reach agreement with regard to securing an increase in the cost cap limits and/or an extension of the term of the Insurance Policy within a reasonable time before the cost cap limits or term of the Insurance Policy are likely to be exceeded, then the matter shall be resolved as an MOA Dispute subject to Article 10 of the Restated MOA. Any costs (excluding the Port's and City's in-house costs and outside legal costs) incurred for securing increased limits under, or replacement insurance for, or an extended term of, the Insurance Policy as a result of, or pursuant to, the resolution of the MOA Dispute shall be allocated to the City and the Port in accordance with the Allocation Proportion.

(e) The provisions and procedures of this Amendment 1 shall apply to any increased limits under, or extension of, the Insurance Policy or any insurance secured at or before the end of the Insurance Policy term to replace the Insurance Policy. If there is a successor insurer other than, or in addition to, Chubb, the term "Chubb" as used in this Amendment 1 shall apply to such successor insurer to the extent that there is a mechanism in the successor insurance policy under which costs submitted to the insurer shall be "deemed reasonable" within a reasonable time after submission to the successor insurer as currently set out in the Insurance Policy. To the extent that, for whatever reason, there is no longer a mechanism under the Insurance Policy or any successor insurance policy for submitted costs to be "deemed reasonable" within a reasonable time, any issues as to the reasonableness and/or necessity of any submitted costs shall be deemed an MOA Dispute under Article 10."

5. Except as otherwise provided in this Amendment 1, in consideration of the foregoing agreements in this Amendment 1, the City and the Port hereby mutually release one another from any and all actions, causes of action, claims, or demands arising out of or relating to prior submissions, or failures to submit, Section F Remediation Costs for ESCA Funds reimbursement or credit toward the Insurance Attachment Point.

IN WITNESS WHEREOF, the Parties have executed this Amendment 1 on the date(s) shown below:

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

Dated: _____, 2010

By: _____

Name: Omar R. Benjamin
Title: Executive Director

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

Dated: _____, 2010

By: _____

Name: Dan Lindheim
Title: City Administrator

Resolution No.: _____

Approved as to form and legality:

Name: _____
Title: _____

**REDEVELOPMENT AGENCY OF THE
CITY OF OAKLAND**

By: _____
Name: Dan Lindheim Title: Agency
Administrator

Resolution No.: _____

Approved as to form and legality:

Name: _____
Title: Agency Counsel

**THIS AGREEMENT SHALL
NOT BE VALID OR EFFECTED
FOR ANY PURPOSE UNLESS
AND UNTIL IT IS SIGNED BY
THE PORT ATTORNEY.**

Approved as of form and legality
this ____ day of _____, 2010.

David L. Alexander
Port Attorney

Port Resolution No. _____

P.A.# _____