



October 11, 2023

Humboldt Bay Harbor Recreation and Conservation District  
c/o Rob Holmlund  
Director of Development  
Via email: [districtplanner@humboldtbay.org](mailto:districtplanner@humboldtbay.org)

**Re: Humboldt Bay Offshore Wind Heavy Lift Multipurpose Marine Terminal Project**

Dear Mr. Holmlund and Honorable Commissioners,

On behalf of the Surfrider Foundation, including the Humboldt Chapter, we submit this letter to Humboldt Bay Harbor Recreation and Conservation District (the “Harbor District”) regarding the Humboldt Bay Offshore Wind Heavy Lift Multipurpose Marine Terminal Project.

The Surfrider Foundation is a national, nonprofit environmental organization dedicated to the protection and enjoyment of our ocean, waves, and beaches, for all people. The Humboldt Chapter of the Surfrider Foundation has been involved in local water quality and public access campaigns in Humboldt Bay since 1988.

**The California Environmental Quality Act Requires Environmental Review Prior to the Harbor District Entering into an Option Agreement or Lease with Crowley**

Surfrider understands that the Harbor District has executed a Negotiation Agreement with Crowley Wind Services, Inc. (“Crowley”), and anticipates entering into an Option Agreement giving Crowley the right to enter into a Lease of real property for the development and operation of a new heavy lift marine terminal for the offshore wind industry. The Lease would be an exhibit to the Option Agreement, with all terms and conditions, as predetermined during the Negotiations Period, included. As explained herein below, the Harbor District must complete CEQA review, including consideration of a final EIR *prior* to entering into an Option Agreement and Lease. Those agreements may not simply be conditioned on later compliance with CEQA. To do so would evade the very purpose of CEQA of informing the public of potential significant effects of a project, and identifying project alternatives and mitigation to avoid or mitigate harms to the environment, and would be contrary to established law. The Surfrider Humboldt Chapter’s concerns include impacts port development could have on the nearshore environment, water quality, wildlife and outdoor recreational access. Project alternatives and mitigation are needed to comply with CEQA.

**A Lease is a “Project” Subject to CEQA**

Under CEQA, a lease issued by a public agency is clearly considered a “project” subject to CEQA review. See, e.g., Cal. Code Regs. tit. 14 § 15378:

(a) "Project" means *the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100- 65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a *lease*, permit, license, certificate, or other entitlement for use by one or more public agencies.

...

(c) The term "project" refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term "project" does not mean each separate governmental approval.

Moreover, a project subject to CEQA is the “whole of an action” and therefore, the lease may not be segmented from the Humboldt Bay Offshore Wind Heavy Lift Multipurpose Marine Terminal Project for CEQA analysis purposes.

The wind terminal project is not exempted from CEQA review. See, e.g., Cal. Code Regs. tit. 14 § 15061 (the project is not exempt by statute nor by categorical exemption nor a “common sense” exemption).

### **CEQA Requires Environmental Review Prior to Agency Approval, Which Includes When the Agency Commits to a Definite Course of Action**

Pursuant to CEQA regulations, *before granting any approval* of a project subject to CEQA, every lead agency or responsible agency shall consider a final EIR or negative declaration or another authorized document in place thereof. (Cal. Code Reg. tit. 14 § 15004).

"Approval" is defined as follows:

- (a) ... the *decision by a public agency which commits the agency to a definite course of action* in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval.
- (b) With private projects, approval occurs upon the *earliest commitment to issue or the issuance* by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project. (Cal. Code Regs. tit. 14 § 15352, *emphasis added*).

While the Negotiation Agreement purports that the Option Agreement will condition Crowley's exercise of the option on CEQA compliance, the California Supreme Court, in *Save Tara v. City of West Hollywood*, 45 Cal.4th 116 (Cal. 2008) has held that, while "[a] CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, ... if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review."<sup>1</sup> *Id.* at 132. The Court moreover explained that even where a public entity, "in theory, retains legal discretion to reject a proposed project[, it] may, by executing a detailed and definite agreement with the private developer and by lending its political and financial assistance to the project, have as a practical matter committed itself to the project."<sup>2</sup> As such, prior review is required.

The Court explained that the full consideration of environmental effects CEQA mandates must not be reduced "to a process whose result will be largely to generate paper, to produce an EIR that describes a journey whose destination is already predetermined." (citing *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271)

Further, the Court provides "... the EIR is intended "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action. [citations] When an agency reaches a binding, detailed agreement with a private developer and publicly commits resources and governmental prestige to that project, the agency's reservation of CEQA review until a later, final approval stage is unlikely to convince public observers that before committing itself to the project the agency fully considered the project's environmental consequences. Rather than a "document of accountability" [citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 , at p. 392], the EIR may appear, under these circumstances, a document of post hoc rationalization." (*Id.*, at 136)

### **The Option Agreement and Lease Will Commit the Agency to the Wind Terminal Project, and Therefore Require Prior Environmental Review**

Here, the surrounding circumstances make clear that the Option Agreement and Lease will commit the Harbor District to the wind terminal project. First, these would not be merely preliminary agreements for exploration of the project. Instead, the Lease would be attached as an exhibit to the Option Agreement, with all terms and conditions, as determined during the Negotiations Period, included.

Additionally, under the Negotiations Agreement, the Harbor District agreed to cooperate with Crowley in efforts to obtain grants and other funding to obtain entitlements *and for constructing*

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<sup>1</sup> The CEQA Guideline defining "approval" states that "[w]ith private projects, approval occurs upon the *earliest commitment* to issue *or* the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." ([Cal. Code Regs., tit. 14, § 15352, subd. \(b.\)](#))

<sup>2</sup> *Id.*, at 135. Further, the Court reasoned, "When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and announcing a detailed agreement to go forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval." *Id.*

*the project.* Further, the Harbor District has already obtained funding from the California Energy Commission and State Lands Commission, which, per the Harbor District’s October 25, 2022 staff report, will be used in part for “up to 30% engineering design” and to “complete required mitigation.” The California Supreme Court has considered whether an agency has lent its political and financial assistance in determining whether it has committed to a project, and such assistance supports such a finding. (See, e.g., *Save Tara v. City of West Hollywood*, at 122.) Even prior to the execution of an Option Agreement or Lease, the Negotiation Agreement describes roughly 27 required minimum project components. The Harbor District has also agreed to use commercially reasonable diligence to obtain all required approvals, further demonstrating that the District has committed itself to the project. Finally, the Harbor District’s October 25, 2022 staff report explains that “[t]he Harbor District is committed to working with the County of Humboldt, City of Eureka, Humboldt Core Hub, residents of the Samoa Peninsula, adjacent Coastal Dependent Industrial (CDI) property owners, as well as other CDI property owners around the Humboldt Bay to take advantage of the tremendous opportunities that the offshore wind industry can provide to our region.”

In light of all of these circumstances, it is clear that the Option Agreement and Lease would constitute a commitment to the project, and California law requires that a final EIR be considered *prior* to the Harbor District’s entry of the Option Agreement and Lease.

### **Surfrider Evaluates Offshore Wind Development Based on our Renewable Ocean Energy Policy**

The Surfrider Foundation recognizes that projects that utilize wind as a renewable source of energy can help reduce dependence on fossil fuels and subsequent emissions of greenhouse gases, and are therefore important for mitigating climate change impacts. We further recognize offshore wind projects may provide important economic opportunities for coastal communities.<sup>3</sup> However, Surfrider also recognizes that there are many questions and concerns about renewable ocean energy, including potential impacts to ocean recreation, the coastal and ocean environment, public safety, access, and aesthetics.<sup>4</sup>

Accordingly, Surfrider takes a cautious, measured approach to offshore wind projects, and supports them only when there is thorough information, including with respect to potential environmental impacts, and if they meet a high bar for environmental and recreational protection.<sup>5</sup> This evaluation applies to potential offshore development, as well as related port development and shore-based infrastructure. Surfrider’s Renewable Ocean Energy Policy provides that there must be “meaningful community input and ... transparency in the planning process so that local communities are informed about projects and have an opportunity to provide input.”

Additionally, the California Environmental Quality Act (“CEQA”) requires as such.

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<sup>3</sup> See Surfrider Foundation Policy on Renewable Ocean Energy (2008), *available at* <https://www.surfrider.org/policy-on-renewable-ocean-energy>

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, see also

<https://www.surfrider.org/news/whats-happening-with-offshore-wind#:~:text=For%20this%20reason%2C%20the%200Surfrider.for%20environmental%20and%20recreational%20protection.>

While Surfrider supports offshore renewable energy including wind projects that meet the principles of our renewable ocean energy policy, it is critical that thorough consideration of all significant impacts, alternatives, and mitigation measures be conducted prior to an agency committing to a project. The Harbor District must certify a final EIR for the Humboldt Bay Offshore Wind Heavy Lift Multipurpose Marine Terminal Project before entering into an Option Agreement or Lease with Crowley.

Sincerely,



Staley Prom, Esq.  
Sr. Legal Associate  
Surfrider Foundation



Jessie Misha  
Humboldt Chapter Chair  
Surfrider Foundation

Cc:

Commissioner Aaron Newman  
Commissioner Greg Dale  
Commissioner Stephen Cullman  
Commissioner Craig Benson  
Commissioner Patrick Higgins