

May 23, 2018

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Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
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ENTERED
Office of Proceedings
May 23, 2018
Part of
Public Record



Re: Oakland Global Rail Enterprise—Authority to Operate a Rail Line in
Oakland, CA—Petition for Exemption from 49 U.S.C. § 10901—
Petition for Declaratory Order, Docket No. FD 36168_1

Dear Ms. Brown:

I am enclosing for filing in the above-named matter a Petition for Declaratory Order pursuant to 49 C.F.R. § 1117.1. Per instructions from the Board's Office of Proceedings, this Petition is begin filed under Subdocket No. FD 36168_1. I am also including a check for \$1,400.00 to pay the filing fee listed in 49 C.F.R. § 1002.2(f)(58)(ii), which covers such petitions.

Please acknowledge your receipt of this filing by returning a date-stamped copy of this cover letter. Do not hesitate to contact me if you have any questions.

Sincerely,

Kathryn Kusske Floyd

encl.

FEE RECEIVED

May 23, 2018

SURFACE

TRANSPORTATION BOARD

FILED

May 23, 2018

SURFACE

TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 36168_1

**OAKLAND GLOBAL RAIL ENTERPRISE
-AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA-
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

PETITION FOR DECLARATORY ORDER

**Kathryn Kusske Floyd
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Counsel to Oakland Global Rail Enterprise

Dated: May 23, 2018

Filing Contains Color Images

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168_4

**OAKLAND GLOBAL RAIL ENTERPRISE
-AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA-
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

PETITION FOR DECLARATORY ORDER

Oakland Global Rail Enterprise (“OGRE”) respectfully petitions the Surface Transportation Board (the “Board”) to issue a declaratory order under 49 C.F.R. § 1117.1 as set forth below.

INTRODUCTION

OGRE, a non-carrier, seeks an order from the Board confirming that Board approval is not required to rehabilitate approximately 22,202 feet of track within an existing rail right of way located at the former Oakland Army Base (“OAB”) in Oakland, California.

Under clear, long-standing Board precedent, the repair, replacement, rehabilitation, or rebuilding of existing Board-jurisdictional track is not construction of a new rail line requiring Board approval. This principle applies to carriers and non-carriers alike. Because OGRE plans only to rehabilitate track in an existing rail right of way, and does not intend to build a line of rail that did not previously exist, OGRE requests that the Board issue a declaratory order confirming that construction approval is not required.

BACKGROUND

The area comprising the OAB has been operating as a sea port since the 1800s. In 1941, the War Department commissioned and began construction of the OAB as a trans-shipment facility, sending tens of thousands of soldiers and 25 million tons of supplies to the Pacific during World War II, much of which was handled by rail. The Army continued to use the OAB as a major cargo port and warehousing center until 1995, when the OAB was closed as part of the Base Realignment and Closure program. The Federal government officially decommissioned the OAB in 1999.

Until the closure of the OAB, and for a short time thereafter, Oakland Terminal Railway (OTR)—a joint venture between Union Pacific Railroad and BNSF Railway—operated over the rail line serving the OAB. In the years following closure of the OAB, certain portions of track were removed by the City of Oakland (the “City”), while other portions fell into significant disrepair. But the rail line has never been formally abandoned.

In August 2006, approximately 170 acres of the former OAB were conveyed to the City, and another 200 acres were transferred to the Port of Oakland (the “Port”). Since 2008, the City and the Port have been redeveloping the OAB. As part of this development, Oakland Bulk and Oversized Terminal (“OBOT”), an affiliate of OGRE, entered into a ground lease with the City for the portions of the OAB known as the West Gateway and the existing railroad right of way located on the West Gateway, along the northern border of the OAB (the “Rail Right of Way”).¹ A separate affiliate

¹ Verified Statement of Mark McClure in Support of Petition for Declaratory Order (“VS”) at ¶ 4 (attached as Exhibit 1).

of OGRE, CCIG Oakland Global, LLC (“CCIG”), has entered into a ground lease with the City for that portion of the OAB known as the MH-1 Lease Area.² OBOT plans to build a rail-to-ship bulk commodity marine terminal (“Terminal”) at the West Gateway.³ CCIG plans to construct rail-serviced trade and logistics warehouses at the MH-1 Lease Area.⁴

OGRE, which holds a sublease to the Rail Right of Way, intends to rehabilitate the approximately 22,202 feet of track west and east of the West Burma Crossing, excluding Wake and East Burma Crossings (see map attached as Exhibit 2).⁵ The construction would involve the regrading of the existing rail corridor, installation of ballast rock, and the rehabilitation and replacement of track connecting the existing Port of Oakland intermodal rail yard and Union Pacific main line to the OAB.⁶ This approximately 22,202 feet of rehabilitated track, along with other pre-existing track at the OAB that is in good condition and does not require rehabilitation, will constitute OGRE’s entire line.⁷ No new line of rail will be constructed outside of the existing right of way.⁸ Once complete, this rehabilitated track will serve the OAB area, including the Terminal and the MH-1 Lease Area.⁹

² *Id.*

³ *Id.* ¶ 10.

⁴ *Id.* ¶ 11.

⁵ *Id.* ¶¶ 5-6. See Map provided as Exhibit 2 (area encompassing rehabilitated track is marked by dark green boxes).

⁶ VS at ¶ 7.

⁷ *Id.* ¶ 8.

⁸ *Id.*

⁹ *Id.* ¶ 12.

ARGUMENT

Under well-settled Board precedent, the rehabilitation of existing Board-jurisdictional track falls outside the scope of activities requiring approval under 49 U.S.C. § 10901.¹⁰ Such activities are considered improvements to an existing line of rail, as opposed to construction of an “additional railroad line.”¹¹ Thus, “a rail line that has not been authorized to be abandoned may [be] repair[ed], replace[d], rehabilitate[d], or rebuild[t] . . . without Board authority.”¹²

The Board recently confirmed this principle’s application to rehabilitation activities conducted by non-carriers. In *Jersey Marine Rail, LLC—Petition for Declaratory Order, FD 36063*, a non-carrier planned to rehabilitate and operate over existing tracks that were previously served by a common carrier but had been out of service for thirty years.¹³ The Board found that, because the petitioner would be a new carrier, Board approval was required for the planned operations.¹⁴ But, the Board confirmed that the petitioner’s rehabilitation of existing tracks would “not amount to construction of a new line requiring prior approval under § 10901.”¹⁵

OGRE’s plans fall squarely within *Jersey Marine Rail*. OGRE is a non-carrier that intends to rehabilitate approximately 22,202 feet of track in an existing rail right

¹⁰ See, e.g., *Swanson Rail Transfer, LP—Declaratory Order—Swanson Rail Yard Terminal*, FD 35424 (STB served June 14, 2011); *Mo. Cent. R.R. Co.—Acquisition & Operation Exemption—Lines of Union Pac. R.R. Co.*, FD 33508 et al. (STB served Sept. 14, 1999); *Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude & Ogden Junction, Tex.*, 3 S.T.B. 646, 651 (1998).

¹¹ See 49 U.S.C. § 10901(a)(2).

¹² *Mo. Cent. R.R. Co.—Acquisition & Operation Exemption—Lines of Union Pac. R.R. Co.*, FD 33508 at 7.

¹³ *Jersey Marine Rail, LLC—Petition for Declaratory Order*, FD 36063 at 2 (STB served Jan. 31, 2017).

¹⁴ *Id.* at 5.

¹⁵ *Id.*

of way.¹⁶ Although out of service for many years, the line has never been abandoned. Further, all rehabilitation will occur within the existing right of way, and no new rail will be constructed that did not previously exist.

The only distinction between *Jersey Marine Rail* and OGRE's planned activities is the fact that the petitioner in *Jersey Marine Rail* planned to rehabilitate ancillary industrial spur track excepted from Board licensing under 49 U.S.C. § 10906.¹⁷ But this distinction makes no difference. The spur track was not the basis for the Board's determination that the non-carrier's rehabilitation did not require Board approval. Rather, the Board made clear "the established general principle that repair and rehabilitation of existing *Board-jurisdictional track* does not require construction authority."¹⁸ Because OGRE is rehabilitating Board-jurisdictional track within an existing rail right of way, no construction approval is required.

REQUEST FOR EXPEDITED CONSIDERATION

Because rail service is an integral component of the OAB development, particularly for the Terminal and MH-1 Lease Area, OGRE needs to begin rehabilitation of the track as soon as possible.

Without the rehabilitated track, rail service cannot be provided to the Terminal or MH-1 Lease Area. Although there are no existing tenants requiring rail service at this time, CCIG currently is negotiating with a potential tenant for the MH-1 Lease Area that would require rail service for the transport of resin pellets.¹⁹

¹⁶ OGRE recognizes that, as a non-carrier, it must obtain authority to operate the rehabilitated rail line. OGRE intends to file a Petition for Exemption for such operations in the near future.

¹⁷ *Jersey Marine Rail, LLC—Petition for Declaratory Order*, FD 36063 at 4.

¹⁸ *Id.* at 5 (emphasis added).

¹⁹ VS at ¶ 15.

Furthermore, even without tenants, the rehabilitated track is needed now. An operational rail line connecting the OAB to the Port of Oakland intermodal rail yard and the Union Pacific main line is expected to further attract tenants to the Terminal and MH-1 Lease Area and support development of the OAB.²⁰ The rail line also will be used to transport construction materials needed for the OAB development.²¹

Given this immediate need, OGRE has taken a number of actions to advance the rehabilitation and operation of the rail line. First, OGRE has contracted with an entity to perform the track rehabilitation.²² Importantly, if rehabilitation activities cannot begin by July 2018, OGRE will have to renegotiate the contract price.²³ OGRE's contractor estimates that rehabilitation of the track will take approximately nine (9) to twelve (12) months, depending on delays expected during the winter rainy season.²⁴ It is OGRE's intent to complete the rehabilitation as soon as possible, so that OGRE can begin operations as soon as the Board provides it the authority to do so.²⁵

Expedited consideration is also appropriate here as the Petition for Declaratory Order raises a straightforward legal question. As explained above, the Board recently addressed this issue in *Jersey Marine Rail*, which presented a similar factual situation.

²⁰ *Id.*

²¹ *Id.* ¶ 16.

²² *Id.* ¶ 13.

²³ *Id.*

²⁴ *Id.* ¶ 14

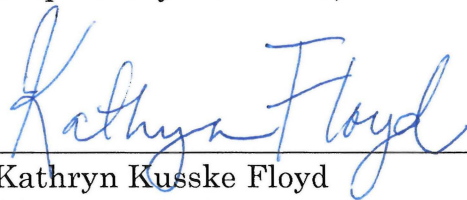
²⁵ *Id.*

For the foregoing reasons, OGRE requests that the Board grant expedited consideration of this Petition for Declaratory Order and issue a decision no later than June 30, 2018, so that OGRE can commence services under its contract for rehabilitation of the track.

CONCLUSION

OGRE plans to rehabilitate Board-jurisdictional track within an existing right of way located on the OAB. The Board should expedite consideration of this Petition and issue a declaratory order confirming that this track rehabilitation is not construction under 49 U.S.C. § 10901 and therefore does not require Board approval.

Respectfully submitted,

A handwritten signature in blue ink, reading "Kathryn Floyd", is written over a horizontal line.

Kathryn Kusske Floyd
Margaret K. Fawal

Counsel to Oakland Global Rail Enterprise

Dated: May 23, 2018

EXHIBIT 1

Finance Docket No. 36168_1

OAKLAND GLOBAL RAIL ENTERPRISE
—AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901

PETITION FOR DECLARATORY ORDER

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36168-1

**OAKLAND GLOBAL RAIL ENTERPRISE
-AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA-
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

**VERIFIED STATEMENT OF MARK MCCLURE
IN SUPPORT OF PETITION FOR DECLARATORY ORDER**

1. My name is Mark McClure. I am the President of Oakland Global Rail Enterprise, LLC ("OGRE"). My office is located at 300 Frank H. Ogawa Plaza, Suite 340, Oakland, CA 94612.

2. As President of OGRE, I have been actively involved in and am familiar with OGRE's planned rehabilitation and operation of approximately 22,202 feet of track within an existing rail right of way located at the former Oakland Army Base ("OAB") (the "Project").

3. I am submitting this Verified Statement in support of the Petition for Declaratory Order filed by OGRE seeking confirmation that the rehabilitation of track within the OAB's existing rail right of way does not require Board approval. This Verified Statement is based on firsthand knowledge from my involvement, as President of OGRE, in the planning of the Project.

4. As part of the larger redevelopment of the former OAB into a trade and logistics hub, Oakland Bulk and Oversized Terminal ("OBOT"), an affiliate of OGRE, entered into a lease with the City of Oakland ("City") for that portion of the OAB known

as the West Gateway, which area includes the existing railroad right of way located along the northern border of the OAB (the "Rail Right of Way"). A separate affiliate of OGRE, CCIG Oakland Global, LLC ("CCIG"), entered into a lease with the City for that portion of the OAB known as the MH-1 Lease Area. Development of the OAB, including the West Gateway and MH-1 Lease area, will be phased based on tenant demand.

5. OGRE has entered into a sublease with OBOT to occupy and use the Rail Right of Way.

6. In order to restore rail service at the OAB, OGRE intends to rehabilitate approximately 22,202 feet of track within the Rail Right of Way located west and east of the West Burma Crossing, excluding Wake and East Burma Crossings; the rail tracks originally installed when the OAB was commissioned in the 1940s were removed or fell into disrepair after the United States Department of the Army shuttered the OAB in 1999.

7. The Project involves the regrading of the existing rail corridor, installation of ballast rock, and the rehabilitation and replacement of track. Once complete, the track would connect the OAB to the existing Port of Oakland intermodal rail yard and the Union Pacific main line.

8. The approximately 22,202 feet of rehabilitated track, along with other pre-existing track at the OAB that is in good condition and does not require rehabilitation, will constitute OGRE's entire line of rail. No new line of rail will be constructed outside of the existing right of way as part of the Project.

9. The rehabilitated track is an integral part of the OAB redevelopment plans.

10. For example, OBOT plans to build a rail-to-ship bulk commodity marine terminal ("Terminal") at the West Gateway. The Terminal will handle non-containerized materials for export to foreign markets.

11. In addition, CCIG plans to construct rail serviced trade and logistics warehouse at the MH-1 Lease Area to service containerized and non-containerized goods.

12. The future developments at the OAB, including the Terminal and the MH-1 Lease Area, will be served by OGRE's rehabilitated track.

13. OGRE has contracted with Industrial Railways Company ("IRC") to perform the track rehabilitation. The contract price is dependent on beginning rehabilitation activities no later than July 2018. If IRC cannot begin its work by that date, OGRE will be required to renegotiate the contract price.

14. Once initiated, IRC estimates that all rehabilitation activities would be complete in nine (9) to twelve (12) months, depending on delays expected during the winter rainy season. OGRE intends to complete the rehabilitation as soon as possible so that operations can begin once OGRE obtains authority to operate from the Board.

15. Although there currently are no tenants at the Terminal or MH-1 Lease Area, CCIG currently is negotiating a lease with a potential tenant that would require rail service for the transport of resin pellets. In addition, it is expected that an operational rail line connecting the OAB to the existing Port of Oakland intermodal rail yard and the Union Pacific main line would further attract tenants to the Terminal and MH-1 Lease Area and support the development of the OAB.

16. OGRE also intends to transport construction materials for purposes of OAB redevelopment activities.

VERIFICATION

I, Mark McClure, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

A handwritten signature in black ink, appearing to read "Mark McClure", written over a horizontal line.

Mark McClure

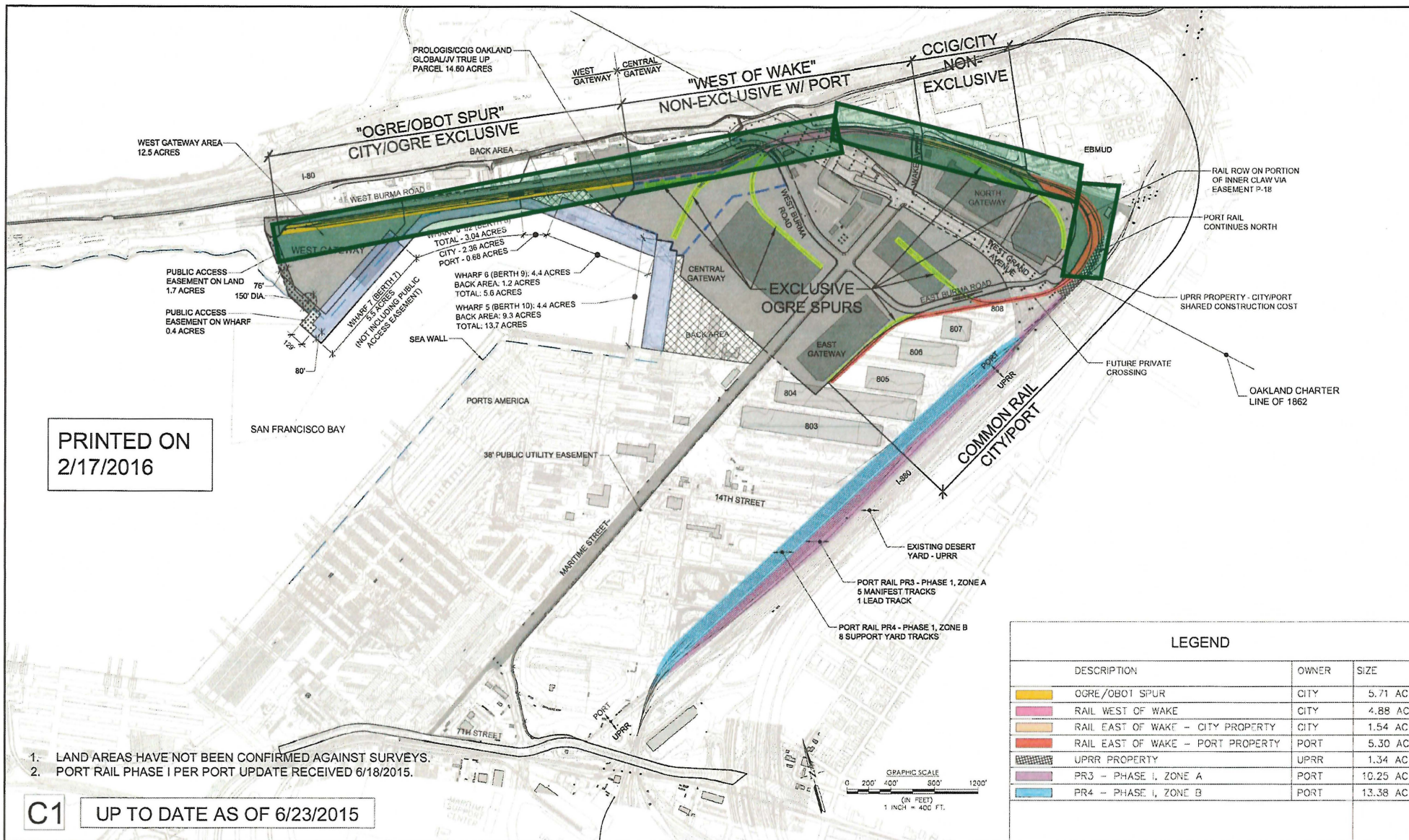
May 21, 2018

EXHIBIT 2

Finance Docket No. 36168_1

**OAKLAND GLOBAL RAIL ENTERPRISE
—AUTHORITY TO OPERATE A RAIL LINE IN OAKLAND, CA—
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901**

PETITION FOR DECLARATORY ORDER



**ARCHITECTURAL
DIMENSIONS**

ARCHITECTURAL DIMENSIONS
JAMES HELBROINER
310-463-8000
300 FRANKLIN OGDEN PLAZA, SUITE 375
OAKLAND, CA 94612

PROJECT INFO.

OAB/OHIT RAIL SYSTEM
AREA CALCULATIONS
CITY OF OAKLAND, ALAMEDA COUNTY, CALIFORNIA

CAL. NO. AD-0547.02
REV. NO. 33257

REV.	DATE	COMMENTS	JOS. NO.	OAB. NO.

SCALE: 1" = 400'
DATE: 6/23/2015
DRAWN BY: J. ARLAADA
CHECKED BY: J. ARLAADA

DRAWING NO.
X-1705
SHEET 1 OF 1