NO COAL
IN OAKLAND
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February 15, 2016

Via Electronic Mail

Dear Mayor Schaaf,

No Coal in Oakland opposes the hiring of an outside consultant to analyze the potential health and safety effects of shipping coal and other hazardous commodities through the proposed Oakland Bulk and Oversized Terminal (OBOT). Our opposition originates not out of an obstinate desire to discourage careful consideration of the evidence presented to the City Council last year, but out of fear that the involvement of this consultant will have the perverse effect of increasing the vulnerability of the City to legal attack should the City Council adopt an ordinance banning the transport and handling of coal through OBOT, as we think it should.

I. The Legal Test for Adoption of the Ordinance Is Deferential to the City Council

Section 3.4.2 of the Development Agreement permits the City to enact an ordinance affecting the use of its leasehold at the former Oakland Army Base if two conditions are met: (1) the regulation must be permissible under federal and state constitutions, statutes, and laws; and (2) the City must determine, "based on substantial evidence and after a public hearing that a failure to [adopt the ordinance] would place existing or future occupants or users of the Project [or] adjacent neighbors … in a condition substantially dangerous to their health and safety."

The first of these conditions—regarding the viability of regulation of OBOT's use as a coal export facility—involves purely legal issues that will not be clarified by the work of Environmental Science Associates (ESA).[1] The second prong forms the basis for the staff

[1] To our knowledge, the only proposed defenses to regulation based on federal or state law have been the dormant commerce clause, raised in the City's original call for the September 21, 2015 public hearing, and federal preemption, raised in the September 8, 2015 letter by Stice & Block LLP to the City Council. The preemption argument was effectively rebutted in the comment letter dated September 21, 2015 from Irene Gutierrez of Earthjustice to the Oakland City Council. The dormant commerce clause was rebutted in the comment letter dated September 18, 2015 from No Coal in Oakland, to Mayor Schaaf and the City Council. Given the passage of nearly six months since the last of these submissions, the City has had sufficient time to determine whether a prohibition on use

recommendation that the City contract with ESA "to ascertain whether there is substantial evidence to base any new rule change governing the bulk commodities terminal." Agenda Report dated February 3, 2016 from Claudia Cappio to Sabrina B. Landreth, at p. 2.

Although legislation banning coal must be supported by substantial evidence, whether sufficient evidence was presented by coal opponents in last September's public hearing process is a legal question, amenable to determination by legal counsel without the need for a $253,000 study. The proposed evaluation of the evidence presented at the public hearing by a private outside consultant is not a legal requirement under section 3.4.2. Far from it. The only procedural prerequisite to regulation under section 3.4.2 is the holding a public hearing—a requirement that the City Council met last September.

A court, reviewing a petition to challenge an ordinance banning coal, will do so within a legal framework that is highly deferential to the City Council. A petitioner will have to argue that the City Council abused its discretion in enacting the ordinance prohibiting bulk export of coal from Oakland's new marine terminal. A reviewing court will not ordinarily set aside a legislative act unless it is arbitrary, capricious, or unlawful. An ordinance barring coal would easily meet this test which considers whether there is a legitimate governmental interest served by the legislation. In this case, the ordinance would also need to meet the test set forth in the Development Agreement that limits the right of the City to apply a newly enacted ordinance to the developer only if the City determines based on substantial evidence that allowing coal to pass through OBOT would "place existing or future occupants or users of the Project [or] adjacent neighbors … in a condition substantially dangerous to their health and safety."[2]

Review under the substantial evidence rule is extremely deferential and asks not whether the City evaluated the weight of the evidence correctly, but only whether there was enough evidence to support the decision, disregarding the other information. The most common application of the substantial evidence rule is where an appellate court reviews the factual determinations made by a trial court. Judicial decisions from the appellate courts make clear that judges are not reevaluating the evidence from scratch. "When the trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination."[3] Substantial evidence is not just any evidence to support the factual finding. The evidence must be reasonable in nature, credible and of solid value.[4] However, the fact that there may be

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of OBOT for coal can meet the permissibility prong of the two-part test, and we assume it has already concluded that the first part of the two-part test can be met. In any case, the City's legal analysis will not be aided by a consultant whose scope of work is limited to environmental issues.

[2] Development Agreement, § 3.4.2.

[3] *Bowers v. Bernards* (1984) 150 Cal. App. 3d 870, 872-73.

[4] *Id.* at 873.

conflicting evidence, and even that most of the evidence supports the challenger, will not support overturning the decision.[5]

II. The Opponents of Coal Exports Met the Substantial Evidence Test

Considered in the light of this deferential standard, coal opponents have already met their burden. After the City Council announced a public hearing to consider the health and safety impacts of the project, environmentalists and others marshalled their resources to present extensive evidence in support of a ban on use of OBOT as a coal export terminal. Among the contributors, Earthjustice submitted several well-researched comments on behalf of Sierra Club, West Oakland Environmental Indicators Project, Communities for a Better Environment, and San Francisco Baykeeper, andextensive health and safety reports by veteran environmental analyst and consulting engineer Phyllis Fox, Ph.D., and University of California Davis professor of civil and environmental engineering Deb Niemeier, Ph.D.[6] No Coal in Oakland submitted an extensive and heavily annotated comment with supporting reports by Dr. Bart Ostro, former chief of the Air Pollution Epidemiology Section of the California Environmental Protection Agency, and Paul English, Ph.D., a public health epidemiologist with over 25 years of experience in assessing public health impacts of environmental exposures.[7] By the time the record closed on October 6, 2015, coal opponents had provided many other reports as well as oral testimony by other medical professionals and environmental experts addressing the dangers of opening OBOT up to coal.

Heather Kuiper, a public health expert, recently reviewed the evidence and testimony submitted by coal proponents and opponents during last year's process and has prepared a summary of evidence showing that the coal opponents had easily met the substantial evidence test. A copy of Kuiper's report is attached as Attachment A to this letter.

From a legal standpoint, the City has already received sufficient quantity and quality of evidence to adopt an anti-coal ordinance. Should the developer sue, it would confront a high hurdle to show that the City has received insufficient evidence to support the adoption of the ordinance banning coal export. Moreover, the sufficiency of evidence, like the questions of federal preemption and the dormant commerce clause, is a legal determination that is beyond the expertise of the proposed environmental consultant.

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[5] *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60 ("we review the entire record in the light most favorable to the judgment to determine whether there are sufficient facts, contradicted or uncontradicted, to support the judgment."); *see also Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633 (in evaluating the evidence, courts accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence).

[6] See letter dated September 2, 2015 from Irene Gutierrez to Oakland City Administrator; letter dated September 21, 2015 from Irene Gutierrez to the Oakland City Council and Exhibits B & C thereto.

[7] See letter dated September 18, 2015 from No Coal in Oakland to Mayor Schaaf and City Council and Attachments A & B thereto.

III. Privatizing the City Council's Evaluation of Evidence Poses a Risk of Unintended Consequences

Given that coal opponents have already submitted substantial evidence that a failure to ban coal will result in substantial danger to public health and safety, there is no need to turn the next step of the decision-making over to a private environmental consulting firm. In fact, there is substantial risk that involving ESA in the process will undermine the City's legal position should the developer ultimately sue the City.

The City is inviting a possible Trojan Horse into the legislative process envisioned in section 3.4.2. If the City Council were to proceed to enact findings and an ordinance based on the record that already exists, no court, properly applying the deferential substantial evidence test, would reject its actions. The City could easily show that there is substantial evidence to support the City's adoption of an ordinance, even if there is substantial contradictory evidence as well. However, if the City turns evaluation of the evidence over to ESA, a court may be tempted to look at ESA as an objective arbiter of the merits of the controversy, even if the substantial evidence test has already been met. The process envisioned in the Agenda Report will be to start the review process over with a draft report, a public comment period, public meetings, and a response in which ESA gets the last word.

The major risk in ceding so much apparent authority on ESA stems from the institutional role environmental consultant firms such as ESA play in the environmental review process. In this respect, a private firm differs from, say, a Mayor's "blue-ribbon" commission of scientists and public health officials convened solely for the purpose of aiding the City in its deliberations. ESA's bread and butter, like that of most environmental consulting firms, is drafting environmental impact reports and mitigated negative declarations to facilitate approval of development projects by lead agencies. It is not in an environmental consultant's playbook to write a report concluding that a project should not be undertaken or, in this case, stating that the impacts of coal cannot be mitigated to nonsignificance by the adoption of conditions. It is generally understood in the environmental community that environmental consultants are not neutral players despite the appearance of words like "science" in their names. In most jurisdictions, they are chosen by the developers and paid for by the developers, even if they are nominally hired through public agencies, and an environmental consulting firm that does not deliver the goods will find fewer contracts coming its way. Both the review process to which they are accustomed and the fact that their regular income comes from project proponents creates an institutional bias that strongly favors finding a way to justify approval of a project.

If ESA were to play such a role here and does not limit itself to the question of whether the evidence presented by coal opponents last year was reasonable in nature, credible, and of solid value, it would undermine the already substantial evidence for the City Council to adopt a finding of substantial danger to public health and safety posed by turning Oakland into the largest coal export city on the West Coast.

The expenditure of $253,000 on consulting by ESA is, therefore, neither necessary nor prudent. A more prudent approach would be to proceed with the drafting of a set of findings rooted in the testimony and evidence already submitted by coal opponents and an ordinance that would ban coal. Drafting findings and a proposed ordinance is lawyer's work and, unless the City Attorney concludes that the evidence already submitted is insufficient to defend an ordinance under the applicable legal standards, the expenditure of City funds on the ESA study will be a waste of the taxpayer's money.

Respectfully,

/s Lora Jo Foo

Lora Jo Foo
No Coal in Oakland

Cc: Barbara Parker, City Attorney