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December 7, 2016

VIA PERSONAL DELIVERY AND ELECTRONIC MAIL

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Honorable Members of the City Council
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RE: Notice of the City of Oakland's Noncompliance with and Breach of that Certain "Development Agreement By and Between the City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as 'Gateway Development/Oakland Global' "

Dear President Gibson McElhaney, Mayor Schaaf, Honorable Council Members, and City Officials,

INTRODUCTION AND OVERVIEW

On behalf of our client, Oakland Bulk and Oversized Terminal (OBOT), we hereby provide notice of the City of Oakland's noncompliance with and breach of that certain "Development Agreement By

and Between the City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as 'Gateway Development/Oakland Global' " (DA). As explained more comprehensively in the attached Summary and Factual Background, the City's noncompliance with and breach of the DA arise from:

- the City's adoption and application of Ordinance No. 13385 "AN ORDINANCE (1) AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT THE STORAGE AND HANDLING OF COAL AND COKE AT BULK MATERIAL FACILITIES OR TERMINALS THROUGHOUT THE CITY OF OAKLAND AND (2) ADOPTING CALIFORNIA ENVIRONMENTAL QUALITY ACT EXEMPTION FINDINGS" (Ordinance);

and

- the City's adoption and application of Resolution No. 86234 "A RESOLUTION (A) APPLYIING ORDINANCE NO. 13385 C.M.S. [AN ORDINANCE (1) AMENDING THE OAKLAND MUNICIPAL CODE TO PROHIBIT THE STORAGE AND HANDLING OF COAL AND COKE AT BULK MATERIAL FACILITIES OR TERMINALS THROUGHOUT THE CITY OF OAKLAND AND (2) ADOPTING CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) EXEMPTION FINDINGS] TO THE PROPOSED OAKLAND BULK AND OVERSIZED TERMINAL LOCATED IN THE WEST GATEWAY DEVELOPMENT AREA OF THE FORMER OAKLAND ARMY BASE; AND (B) ADOPTING CEQA EXEMPTION FINDINGS AND RELYING ON THE PREVIOUSLY CERTIFIED 2002 ARMY BASE REDEVELOPMENT PLAN EIR AND 2012 ADDENDUM (Resolution).

Accordingly, pursuant to the provisions of Section 8.3 of the DA, we hereby provide notice that the City must take the following actions to remedy its noncompliance with and breach of the DA:

- Immediately repeal the Ordinance and Resolution, as least as applied to the Project;
- Recognize OBOT's vested right to develop and operate the Terminal without limitation, condition, or future review obligation on a commodity-specific basis that is not expressly anticipated and required in one of the DA-innumerated City Approvals; and
- Commit in an enforceable manner to a schedule for completion of all outstanding agreements necessary and appropriate for the development and operation of the Terminal.

THE CITY'S NON-COMPLIANCE INCLUDES BOTH "EVENTS OF DEFAULT" AND NON-"EVENT OF DEFAULT" BREACHES OF THE DA WITH RELATED CONSEQUENCES, OR LACK THEREOF, AS PROVIDED IN THE DA

Section 8.8 requires the following notice to be included in notices to the City regarding noncompliance with the DA:

> **YOU HAVE FAILED TIMELY TO PERFORM OR RENDER AN APPROVAL OR TAKE AN ACTION REQUIRED UNDER THE AGREEMENT: [SPECIFY IN DETAIL]. YOUR FAILURE TO COMMENCE TIMELY PERFORMANCE AND COMPLETE SUCH PERFORMANCE AS REQUIRED UNDER THE AGREEMENT OR RENDER SUCH AI>PROVALTO TAKE SUCH ACTION WITHIN THIRTY (30) DAYS AFTER THE DATE OF THIS NOTICE SHALL ENTITLE THE UNDERSIGNED TO TAKE ANY ACTION OR EXERCISE ANY RIGHT OR REMEDY TO WHICH IT IS ENTITLED UNDER THE AGREEMENT AS A RESULT OF THE FOREGOING CIRCUMSTANCES.**

Article VIII of the DA addresses "Events of Default," related notice requirements, meet and confer processes, and remedy provisions, among other things. This letter serves as the "Notice of Noncompliance" provided for in DA section 8.2. Importantly, section 8.1 of the DA defines "Event of Default" as "any failure by a Party to perform any material term or provision of this Agreement."

The City's adoption of the Ordinance and Resolution are not a "fail[ure] timely to perform or render an approval or take an action required under the Agreement." Rather, it is an affirmative act in direct violation of the terms of the DA. Thus, adoption of the Ordinance and Resolution, being affirmative and ultra vires actions by the City, as opposed to a "failure to perform" required for an Event of Default, constitute breaches of the DA that do not meet the definition of Event of Default and thus do not implicate the procedural requirements for an Event of Default, nor the damages limitations provisions applicable to Events of Default in section 8.7 of the DA.

As you may know by now, OBOT has filed a complaint in federal court. The complaint seeks injunctive and declaratory relief with respect to the Ordinance and Resolution on the grounds that they violate the Commerce Clause of the United States Constitution and are preempted by federal law. The complaint additionally seeks relief for the City's breach of the DA. Accordingly, pursuant to Section 8.3 of the DA, we seek to meet and confer about all of these matters.

As you know, the City and OBOT representatives have been meeting for many months in an attempt to resolve these differences. Thus far, there has been no meaningful progress as a result of these discussions. Accordingly, we have been left with no choice but to file the complaint in federal court, a courtesy copy of which is included herewith. Notwithstanding the necessity of filing the complaint, we would be pleased to continue our discussions.

Attached to this Notice is a Summary and Factual Background pursuant to Section 8.2 of the Development Agreement that requires a specification in "reasonable detail … and all facts demonstrating" the City's noncompliance with the Development Agreement. As provided in Section 8.3 of the DA, the City must respond in writing to this letter within thirty (30) days, which response must address "the issues raised in [this] notice of noncompliance on a point-by-point basis." We look forward to receiving the City's response.

On behalf of our client, let us underscore that they did not take this action lightly. It was only upon the affirmative statements of intention by City officials, the actual action by the City, and consistent after-the-fact refusal to meaningfully engage in discussions of possible resolution that OBOT felt it had no alternative but to proceed to litigation. OBOT's paramount objective is simply to return to developing the project as originally approved and vested by the City.

We look forward to your reply, consistent with the terms of the DA.

Sincerely,

David C. Smith
Partner
Stice & Block, LLP

SUMMARY

In 2012 and 2013, after numerous failed proposals and nearly a decade of negotiation, research, and planning, the Oakland City Council vested OBOT's rights to develop and operate the Terminal without restriction or requirement for further review based upon the commodity being shipped. As the standard in the industry – unrestricted operational capacity, capable of quickly responding to market demand – this is what OBOT requested of the City, and it is indisputably what the City granted and vested. Inherent in and foundational to the legal principle of "vesting" is the prohibition on imposition of new or changed requirements on the vested project. Such change injects uncertainty into the viability of the project, not only at that point in time, but for all time going forward. If the commitment is breached once, one must assume it may be again in the future.

Additionally, it later became clear that the City had affirmatively and materially misrepresented its resources – monetary and otherwise – on hand for the Project as well as its ability to deliver key portions of City-own lands free from occupants and encumbrances. It then became clear to OBOT that the only way to keep the Project from having potentially fatal lapses in terms of both time and resources was for the OBOT and its affiliates (collectively, Developer) to advance and increase its own obligations with regard to financing and performance based upon commitments and material representations by the City. The Developer reasonably, though to its great detriment, relied on commitments by the City which ithe City has since failed and continues to fail to honor.

Years after the vesting approvals for the Terminal, and with years of work and millions of dollars spent in reasonable reliance by the Developer on those vesting approvals, the City made a political decision to breach the DA. That decision was not made on evidence, nor was it made after a public hearing. It was made based upon political agendas and timelines. It was only after a political decision to disregard the vested rights of OBOT to develop and operate the Terminal that the City sought to orchestrate a legally plausible construct within which to attempt to justify its illegal decision.

Internal emails, public statements, press releases, reports prepared at the City's direction, and records of meetings document the fact that at the time of the vesting approvals for the Terminal, the Council and staff were well informed of the existing market for bulk and oversized commodities and what commodities dominated the supply at facilities with which the Terminal would compete. It wasn't until political activists on a national campaign set their sights on Oakland that City officials and staff feigned surprise and concern. And it was not long before the Mayor and Council members had pledged, publicly or otherwise, to curtail OBOT's rights, whatever the cost, including knowing breach of its vested entitlements.

It was only after Council members had committed to this outcome that the City sought to put in play purported hearings and "evidence" in an attempt to justify, post-hoc, its decision and seek to avoid the legal consequences of its actions. It has failed to do so. The adoption of the Ordinance and Resolution are in direct violation of the vesting provisions of the DA. The staff report and "evidentiary" reports purportedly supporting and justifying the decisions are patently shams, and correspondence with the Council prior to the preparation of such reports demonstrates this fact. There is no evidence, let alone substantial evidence, that operation of the Terminal will impose health or safety concerns for the facility, the community of West Oakland, or the surrounding area. In fact, quite the contrary is true; the City Council approved and vested the Project specifically because the evidence showed its operations would be so environmentally superior to those on the Port waterfront today.

That the City Council has knowingly and intentionally breached its obligations under the vested entitlements puts in jeopardy the viability of the Project, implicates the potential disgorgement from the City's General Fund of over $100 million taken from the state, threatens jobs and economic vitality for Oaklanders, and projects a reputation of instability and uncertainty to the business community considering doing business in Oakland in the future. It is time for the City to right its wrong and honor its commitments.

FACTUAL BACKGROUND

The DA Vested OBOT's Right to Develop and Operate the Terminal Without Any Commodity-Specific Limitation or Future Review Obligation or Allowance for the City

One word characterizes the desire for and imperative of a vesting development agreement for complex, long-term development projects: certainty. This point was well known and understood by the City, as documented in the recitals for the DA:

> C. Developer applied for approval of this Agreement to: (I) vest the land use policies established in the General Plan, the Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date), the Oakland Army Base Reuse Plan (as amended prior to the Adoption Date), and other Existing City Regulations as of the Adoption Date; (2) vest its rights and City's obligations regarding current and future approvals necessary for the Project; (3) allocate responsibility for the cost and implementation of the Mitigation Monitoring and Reporting Program; and (4) memorialize certain other agreements made between City and Developer with respect to the Project. ***City and Developer acknowledge that development and construction of the Project is a***

> ***large-scale undertaking involving major investments by Developer, with development occurring in phases over a period of years. Certainty that the Project can be developed and used in accordance with the General Plan, the Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date), the Oakland Army Base Reuse Plan (as amended prior to the Adoption Date), and other Existing City Regulations, will benefit City and Developer and will provide the Parties certainty with respect to implementation of the policies set forth in the General Plan, the Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date), the Oakland Army Base Reuse Plan (as amended prior to the Adoption Date), and the other Existing City Regulations.*** (DA, Recital C, pp. 2-3, ***emphasis*** added.)
>
> D. . . . City is therefore willing to enter into this Agreement to, among other things: (I) p***rovide certainty to encourage the required substantial private investment in the comprehensive development and planning of the Project***; (2) secure orderly development and progressive fiscal benefits for public services, improvements and facilities planning in City; and (3) fulfill and implement adopted City plans, goals, policies and objectives, including, among others, those embodied in City's General Plan. (DA, Recital D, pp. 3-4, ***emphasis*** added.)

The recitals of the DA further make clear that the City was well aware that the Project would include the Terminal, and the recognition is notably devoid of any restriction based upon commodity type (as is universally the case in the entire record of vesting entitlements):

> H. Developer proposes the development of the Project Site for a mix of trade and logistics uses, a marine terminal for bulk and oversized cargo and other uses and improvements in accordance with the City Approvals, the LDDA and this Development Agreement, as further described in Exhibits D-I and D-2. (DA, Recital H, pg. 4.)

And although California law binds the contracting parties to the truth of matters contained in contract recitals, the DA went on to explicitly so provide:

> 14.26 Recitals True and Correct. The Parties acknowledge and agree that the Recitals are true and correct and are an integral part of this Agreement. (DA, Section 14.26, pg., 52.)

And the notion of "certainty" was not just an esoteric concept paid due homage in contract recitals. The core definitions and operative provisions of the DA painstakingly parse and memorialize the regulations fixed at that point in time (the "Adoption Date" of the DA) and would be applicable to the Project, the very narrow circumstances under which additional regulations could be imposed upon the Project in the future, and the overriding principle that, absent such narrow circumstances, no new obligations or regulations could be placed upon the project by the City in the future.

The DA includes, in pertinent part, the following definitions:

> 1.1 . . . Applicable City Regulations: The Existing City Regulations, as defined below, and such other City Regulations, as defined below, otherwise applicable to development of the Project pursuant to the provisions of Section 3.4.
>
> . . .
>
> 1.1 . . . City Approvals: Permits or approvals required under Applicable City Regulations to develop, use and operate the Project and granted on or before the Adoption Date of this Agreement as identified in Recital I[1] of this Agreement and described in Exhibit B. (See also "Subsequent Approval," defined below.)

[1] Recital I of the DA provides:

> I. City has taken several actions to review and plan for the future development of the Project. These include, without limitation, the following: (I) preparation and certification of the 2002 Oakland Army Base Redevelopment Plan Environmental Impact Report and the 2012 OARB Initial Study/Addendum("EIR"); (2) adoption and approval of the Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date); (3) adoption and approval of the Oakland Army Base Reuse Plan (as amended prior to the Adoption Date); (4) execution of the LDDA; (5) adoption and approval of the Gateway Industrial zoning district; and (6) adoption and approval of the Gateway Industrial Design Standards. This Agreement also anticipates City will timely consider and grant additional future approvals for the Project and that City will use the Environmental Impact Report prepared in support of this Agreement for those approvals and actions to the fullest extent allowed under applicable law.

. . .

1.1 . . . City Policies: The interpretations made by Ci ty of the manner in which Existing City Regulations will be applied to the development of the Project under Applicable City Regulations. "City Policies" shall include (a) those City Policies adopted prior to the Adoption Date, whether consistent or inconsistent with this Agreement, and (b) those City Policies adopted after the Adoption Date that are consistent with this Agreement (and exclude those City Policies adopted after the Adoption Date that are inconsistent with this Agreement). The term "City Policy" shall refer to any or all City Policies as the context may require.

1.1 . . . City Regulations. The General Plan of City, the Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date), Oakland Army Base Reuse Plan (as amended prior to the Adoption Date), and all other ordinances, resolutions, codes, rules, regulations and policies in effect as of the time in question. (DA, Definitions, pg. 8.)

. . .

1.1 . . . Existing City Regulations. The City Regulations and City Policies in effect as of the Adoption Date and to the extent such are consistent therewith, the City Approvals as such are adopted from time to time. (DA, Definitions, pg. 10.)

. . .

1.1 . . . Subsequent Approvals. Permits or approvals required under Applicable City Regulations to develop, use and/or operate the Project and applied for, considered or granted after the Adoption Date of this Agreement. Subsequent Approvals may include, without limitation, the following: amendments of the City Approvals, design review approvals, improvement agreements, encroachment permits, use permits, variances, grading permits, public improvement permits, building permits, tree removal permits, lot line adjustments, sewer and water connection permits, certificates of occupancy, subdivision maps,

> rezonings, development agreements, permits, resubdivisions, condominium maps or approvals, and any amendments to, or repealing of any of the foregoing, each as permitted by this Agreement. (DA, Definitions, pp. 12-13.)

These myriad terms differentiate between City regulations that would be applicable to the Terminal and those that would not. On the one hand, those that existed at the time of adoption of the DA would be applicable to and bind the Developer and the City. Conversely, the definitions also predict new enactments by the City in carrying out its governance responsibilities for the City at large but makes clear, as is the specific point of a development agreement in California, that such enactments, absent narrow enumerated circumstances, expressly would *not* be applicable to the Project.

Of particular note is the DA's meticulous memorialization and focus upon the "City Approvals." These are important because they are the universe of agreements and approvals that the City adopted prior to adopting the DA, and they are the primary source from which the City may allowably derive future approvals to be required of the Project. In other words, if one of the City Approvals anticipates a future approval by the City for the Project, then the Project will have to comply notwithstanding the DA's failure to specifically reference that particular future approval. This universe of City Approvals is noted in many places in the DA, including Exhibit B:

> "City Approvals" Includes:
> 1. The 2002 Oakland Army Base Redevelopment Plan Environmental lmpact Report and the 2012 OARB Initial Study/Addendum ("EIR");
> 2. The Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date);
> 3. The Oakland Army Base Reuse Plan (as amended prior to the Adoption Date);
> 4. The LDDA;
> 5. The Gateway Industrial zoning district (Ordinance No. 13182 C.M.S.); and
> 6. The Gateway Industrial Design Standards (Resolution No. 84498 C.M.s).
> True and correct copies of the above-mentioned City Approvals shall be included in the binders prepared by the City pursuant to Section 3.4.3. (DA, Exhibit B.)

It is noteworthy, as will be addressed in greater detail below, that no item included as a "City Approval" requires, anticipates, or allows the City to impose a future review process or regulatory requirement

based upon the nature or character of a given commodity proposed to be transported through the Terminal.

The interaction between these myriad defined terms and the authority to and prohibition against the City to impose regulations after the adoption date of the DA are provided in section 3.4 of the DA:

> 3.4 Applicable City Regulations. Except as expressly provided in this Agreement and the City Approvals, the Existing City Regulations shall govern the development of the Project and all Subsequent Approvals with respect to the development of the Project on the Project Site except that Oakland Municipal Code section 14.04.270 (Chapter 15, Signs Adjacent to Freeways, sections 1501-1506) shall not apply to the Project. City shall have the right, in connection with any Subsequent Approvals, to apply City Regulations as Applicable City Regulations only in accordance with the following terms, conditions and standards:
>
> 3.4.1 Future City Regulations. Except as otherwise specifically provided in this Agreement, including, without limitation, the provisions relating to (a) regulations for health and safety reasons under Section 3.4.2 below; (b) regulations for Construction Codes and Standards under Section 3.4.4 below; and (c) provisions relating to the payment of City Application Fees pursuant to Section 3.4.5, below, ***City shall not impose or apply any City Regulations on the development of the Project Site that are adopted or modified by City after the Adoption Date (whether by action of the Planning Commission or the City Council, or by local initiative, local referendum, ordinance, resolution, rule, regulation , standard, directive, condition, moratorium*** that would: (i) be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement; (ii) materially change, modify or reduce the permitted uses of the Project Site, the permitted density or intensity of use of the Project Site, the siting, height, envelope, massing, design requirements, or size of proposed buildings in the Project, or provisions for City Fees specified in Section 3.4.5 below and Exactions as set forth in the City Approvals, including this Agreement; (iii) materially increase the cost of development of the Project (subject to the acknowledgement as to the cost of Exactions specified in Section 3.4.6 below); (iv) materially change or modify, or interfere with, the timing,

phasing, or rate of development of the Project; (v) materially interfere with or diminish the ability of a Party to perform its obligations under the City Approvals, including this Agreement, or the Subsequent Approvals, or to expand, enlarge or accelerate Developer's obligations under the City Approvals, including this Agreement, or the Subsequent Approvals; or (vi) materially modify, reduce or terminate any of the rights vested in City Approvals or the Subsequent Approvals made pursuant to this Agreement prior to expiration of the Term. Developer reserves the right to challenge in court any City Regulation that would conflict with this Agreement or reduce the development rights provided by this Agreement, provided that such City Regulation directly affects the Project; provided, however, Developer shall first follow the dispute resolution procedures in Article VIII.

3.4.2 Regulation for Health and Safety. Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, 01' any portion thereof, or all of them, in a condition substantially dangerous to their health or safety. The Parties agree that the foregoing exception to Developer's vested rights under this Agreement is in no way intended to allow City to impose additional fees 01' exactions on the Project, beyond the City Fees described below in Section 3.4.5, that are for the purpose of general capital improvements or general services (except in the event of a City-wide emergency).

3.4.3 Existing City Regulations. The City shall, at the Developer's sole cost and expense, compile two binders which include copies of all Existing City Regulations within ninety (90) calendar days after the Adoption Date, sign both copies, and deliver one copy to Developer. The City shall make every reasonable effort to include all Existing City Regulations.

> 3.4.4 Construction Codes and Standards. The City shall have the right to apply to the Project at any time, as a ministerial act, the Construction Codes and Standards in effect at the time of the approval of any City Approval or Subsequent Approval thereunder. (DA, pp. 17 – 20, ***emphasis*** added.)

The Mayor and Members of the City Council Made Clear Their Resolve to Limit OBOT's Vested Rights to Develop and Operate the Terminal with Regard to Particular Politically Disfavored Commodities

By the time the City approved the DA in 2013, elected officials and staff alike were well aware of the market of bulk commodities being shipped through global facilities against which the Terminal was specifically designed to compete. A significant percentage of such commodities being shipped included coal and other petroleum-based products, both solid and liquid. According to internal emails, inter-agency correspondence, and even a report commissioned by the City's Community and Economic Development Agency, individual council members were briefed on this fact, staff corresponded about this potential, and it was recognized and encouraged that part of OBOT's business plan would be to go after existing transport from operating facilities that included coal, petcoke, and other petroleum-based products.

But in mid-June 2014, nearly a year after the vesting approvals for the Terminal, members of the City Council began openly supporting and joining efforts by the Sierra Club and local activist groups opposed to the transport of petroleum-based products throughout California. And from that time in early- to mid-2014, members of the City Council made clear they would oppose the transport of petroleum-based products in and through Oakland, at any cost. For example:

- On June 17, 2014, the Oakland City Council unanimously passed Resolution No. 85054, a "Resolution to Oppose Transportation of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, and Petroleum Coke, Along California Waterways, through Densely Populated areas, through the City of Oakland." This resolution to oppose the transportation of coal and coke through Oakland was introduced by Councilmembers Kalb, McElhaney and Kaplan. Council Members Brooks, Gallo, McElhaney, Kalb, Kaplan, Reid, Schaaf and then-President Kernighan voted in favor of the resolution.
- On June 17, 2014, current Council President Lynette Gibson McElhaney stated: "Oakland is leading the way for Californians who want to tell Big Coal and Big Oil that we cannot bear the risk they impose upon our town."
- Council Member Dan Kalb joined this chorus: "I'm thrilled that Oakland City Council took a strong stand to protect our communities by opposing transport of dangerous Fossil Fuels by rail

through the heart of Oakland. . . . Let's protect the health and safety of our communities by investing our expertise and resources in choices that keep Oakland on the leading edge of the country's clean energy economy."

- In early 2015, representatives of the City and Port of Oakland threatened Jerry Bridges, President and CEO of Terminal Logistics Solutions (TLS), a potential operator for the Terminal, that based upon rumors of TLS' potential interest in shipping coal through the Terminal, one or more Port Board members were looking to table or stop negotiation and preparation of rail operating agreements between the Port, City, and Project proponents that are and at all relevant times have been known to the City to be essential to the timely development and operation of the Terminal.
- On April 29, 2015, Council President McElhaney, various members of her staff, and Council Member Kalb received an email initiated by Michelle Myers of the Sierra Club addressed to the "Oakland Fossil Fuel Resistance" that provided links to various internal Sierra Club and outside media resources. The email concludes with, "***I can't wait to shut this down with you all***!!! Onward." (***Emphasis*** added.)
- On May 2, 2015, a staff member for Council President McElhaney advised her and her chief of staff: "because this project is on City land, the Port does not have jurisdiction. The City could ban the passing of fossil fuels like coal since the project would stem from City property." Further, "I'll inquire with the staff about what it would take to make our [prior] reso an ordinance so that we ban coal experts not just oppose them."
- On May 6, 2015, Council President McElhaney exchanged drafts of a press release with her chief of staff entitled, "OAKLAND SAYS HELL NO! TO COAL SHIPMENTS AT THE PORT OF OAKLAND." In the body of the release, McElhaney says: "I have supported the development of the former Army Base, because the Port is an economic engine that has the potential to benefit all Oaklanders. Does this mean that I believe that we should keep our economic option open to include coal? Hell no!" In the email exchange, McElhaney noted that "hell" could remain in the title of the release, but that her personal quote should be change to "absolutely not."
- In a May 11, 2015 email from Mayor Schaaf to our client (which email was apparently leaked widely to the press), Mayor Schaaf stated: "I was extremely disappointed to once again hear Jerry Bridges mention the possibility of shipping coal into Oakland . . . Stop it immediately. . . . ***You must respect the owner and public's decree that we will not have coal shipped through our city.*** I cannot believe this restriction will ruin the viability of your project. Please declare definitively that you will respect the policy of the City of Oakland and you will not allow coal to come through Oakland. If you don't do that soon, we will all have to expend time and energy in

a public battle that no one needs and will distract us from the important work at hand of moving Oakland towards a brighter future." (***Emphasis*** added.)

- On May 13, 2015, Council President McElhaney's chief of staff forwarded to Council President McElhaney and other staff members an email entitled "No Coal in Oakland Protest (against Tagami) on Thursday 8:30 am/Rotunda Building!" and he stated in the email, "I'm worried that we are getting behind on this issue. I would like to release our statement widely before the demonstration tomorrow and possibly say that [McElhaney] will join the demonstrators."
- The next day, May 14, 2015, Council President McElhaney emailed her staff, "It appears we need to review the Development Agreement that we passed. . . . it appears we may have adopted language that exempted the development from any future regulations that we could pass. I recall us discussing what changes to the DA needed to be made but I think you had only minor tweaks at that time. I may want to go back and review the debate and proceedings. The Mayor is asking for a legal review as to whether the Council can so bind future council action. We need to slow down a formal press release. There is more to know before we go. "
- In response to the above email, McElhaney's chief of staff replied, "We can slow down on the rules request [to schedule a hearing], but I believe that we need a press release in opposition to coal right away. The Mayor was supposed to do it jointly with us last night, but we should go ahead on our own if she isn't ready. Who are you talking to? -- that information is what we told the Mayors office – something isn't right."
- Shortly thereafter in May 2015, Council President McElhaney released a revised version of the above noted press release, now entitled: "OAKLAND SAYS 'NO!' TO COAL SHIPMENTS AT THE OAKLAND ARMY BASE." In the release, McElhaney makes her position clear: "Lynette Gibson McElhaney, President of the Oakland City Council, is unequivocal in her opposition to coal being exported from City-owned lands, '. . . . [I]t is not the type of economic development that we want - no thank you!.'" McElhaney continued on: "The Oakland City Council, and the Port Board of Commissioners have already taken stances against coal exports, specifically: • In February of 2014, the Board of Port Commissioners rejected a proposal to ship coal from one of their terminals.
- In June of 2014, Councilmember McElhaney and her colleagues passed a resolution opposing the transport of coal, oil, petcoke (a byproduct of the oil refining process) and other hazardous materials by railways and waterways within the City."
- On May 14, 2015, Councilmember Abel Guillen posted on social media (under his Instagram moniker, "babocinco") a photograph of a large banner stating: "NO COAL IN OAKLAND" with the caption: "No Coal in #Oakland #savetheplanet #savetheearth #environment1st #environmental justice."

- On May 26, 2015, Council Member Dan Kalb emailed to the City Attorney, Barbara Parker, and others, "I'm meeting with Danny Wan and Port Commissioner Hamlin here in city hall about Coal potentially going through the former Army Base. Can someone from your office attend this meeting as well? Sorry for the short notice."
- On June 4, 2015, Council President McElhaney's chief of staff informed McElhaney and other staff of concerns with Project financing and the Terminal: "The bulk terminal OBOT is being privately financed – not paid for by [public funds]. The $200M going into the bulk terminal includes the cost of the railway connection and is part and parcel of the railway deal with the Citys land. The $200M is a big chunk of the Citys local match for the $240M grant that we received. That's the problem with losing the OBOT, is that it becomes more difficult (but not necessarily impossible to come up with the match."
- On July 17, 2015, Mark Wald of the Oakland City Attorney's Office sent an email to the City Administrator, Sabrina Landreth, and the Assistant City Administrator, Claudia Cappio, entitled: "Privileged and Confidential: Kalb's DRAFT Army Base CFD/Coal Script." In that email, Senior Deputy City Attorney Wald states:

> Sabrina and Claudia,
>
> As discussed with and voicemailed to Claudia, Councilmember Kalb requested we provide him a draft script (Kalb's question and your answers) relating to the Army Base CFD (Item #9.1) on the July 21st Agenda. Here is the Draft for your review/comment before we send it to Kalb. Please provide comment no later than Monday, July 20th at 4:00 p.m., if possible. Also, the Army Base CFD, CEQA and Coal item will be briefly discussed at the July 21st Closed Session with a more detailed discussion taking place at the Special Closed Session on July 30th.
>
> As you may know, the attorneys most familiar with the Project (Dianne Miler of our office and outside counsel Betsy Lake) are unavailable this week and next, so I'm filling it [sic] as best I can. One fact that I just learned was the "Early Take Down" of the West Gateway this September, which could result in the application for an issuance of building permits for the Break Bulk Facility soon thereafter. ***If a building permit is issued and substantially relied upon, then a vested right is acquired. If the City Council adopts a moratorium, then it will NOT apply to any previously acquired vested right.***

> So, while the adoption of the CFD will not prejudice the City from enacting a future moratorium on coal, ***the issuance/reliance of a building permit for the Break-Bulk Facility would do so***.[[2]]
>
> I understand that an informational Public Hearing on Coal is scheduled for September 21st and consideration of a moratorium could occur shortly thereafter. ***To preserve the status quo until such time the City Council can consider the adoption of a moratorium, City Staff need to be instructed NOT to issue any building-related permits for the Break-Bulk Facility. This information should also be conveyed to the City Council in Closed Session by your Office***.
>
> (FYI, a moratorium requires at least 7 votes and is effective immediately for a 45-day period, which can be extended for another 22 ½ months while appropriate studies are undertaken to develop permanent regulations.) (***Emphasis*** added.)

The "script" for the faux exchange between Council Member Kalb and the City Administrator's office referenced in and attached to Attorney Wald's email provided:

> **I would like the City Administrator to confirm a few items:**
>
> 1) I understand the city Council's approval of the CFD does not require further CEQA review.
>
> **CITY ADMINISTRATOR RESPONSE:** Correct. The Agenda Report and Resolution explain in detail why CEQA is not an issue here.
>
> 2) I also understand the City Council's approval of the CFD does **NOT** impede/prejudice the City's ability to "deal" with coal after the City Council returns from its summer recess.

[2] Deputy City Attorney Wald is both correct and mistaken in his direction to the City Administrators here. He is correct that no future limitation or other regulation would apply to a vested project. Where he is mistaken is his claim that the Terminal is not yet vested. While the issuance of and reliance on a building permit is one means to become vested under California law, another way is through the issuance of a development agreement, which the City had long since done, fully vesting OBOT's entitlement to develop and operate the Terminal.

> **CITY ADMINISTRATOR RESPONSE:** Correct. As stated in the Agenda Report (pages 4-5), the CFD adoption has nothing to do with the concerns about coal; rather, the CFD is merely maintaining general public infrastructure improvements – such as roadway, sewers, storm drains, lighting, roadways and sidewalks – regardless of any private development that may occur. The City's ability to address any coal-related issues does not change as a result of the CFD approval.
>
> 3) I also understand the City Council will be conducting a Public Hearing – tentatively scheduled for Monday, September 21, 2015 at 4:00pm – to Receive Information, Testimony and Other Evidence Regarding the Public Health and/or Safety Impacts of the Transportation, Transloading, Handling and/or Export of Coal or Petroleum Coke, In Part, as a Follow-up to the Council's June 17, 2014 Resolution Opposing such activities. (**Emphasis** in original.)

- On November 9, 2015, City of Oakland Planning Staff were provided a memorandum from Assistant City Administrator Claudia Cappio regarding the handling of Project approvals. Among other things, Ms. Cappio informs the staff of a highly irregular and unusual approach of taking what otherwise would be purely staff-level concerns directly to the City Council. The memo states:

> Due to the high-profile nature of the project it is important for the City Administrator's Office to provide updates to the City Council on the status of OBOT implementation. As such, I plan to notify the City Council of the following:
>
> - When an application for a building or construction-related permit is submitted and the estimated timeline for processing the application;
> - When a determination has been made that the application is complete; and
> - At least 15 working days prior to the issuance of any building or construction-related permits.

> Accordingly, upon receipt of any building or construction-related permit application for OBOT (including, without limitation, building permits, p-job permit, grading permit, creek protection permit, etc.), please take the following actions:
>
> 1. Notify the following staff:
>   a. Claudia Cappio, Assistant City Administrator;
>   b. Rachel Flynn, Director of Planning and Building; and
>   c. Darin Ranelletti, Deputy Director, Planning and Building; and
>
> 2. ***Do not deem the application complete or issue the permit*** until after consultation with the above staff. (***Emphasis*** added.)

- In or around November 2015, Council Member Kalb issued a solicitation and proposed scope of work entitled "Evaluation of Health and Safety Impacts of the Proposed Bulk Coal Terminal on the Former Oakland Army Base Adjacent to the Port of Oakland." Under a section entitled "Timing and Deliverables," the document states:

  > By January 30, 2016, we would need a completed written analysis/evaluation of the health and safety risks associated with the bulk coal terminal project with a summary in front, followed by a full description of the determination. If applicable, ***the deliverables shall include a series of findings that can be used to support the application of public health or safety regulations pursuant to section 3.4.2 of the development agreement***. The written report should be thorough (with citations) and, to the extent possible, easy to comprehend by non-scientists. (***Emphasis*** added.)

  Further, under a section entitled "Employment," the document stated: "The project staff person will be a part-time, limited duration employee of the City of Oakland working for City Councilmember Dan Kalb. Hours are flexible."

- On December 2, 2015, the San Francisco Chronicle reported on efforts by Mayor Schaaf and her staff confirming "a plan . . . to stop coal from being shipped . . . ." According to the Chronicle, "City leaders have hired a consultant to ***come up with enough ammunition*** to prove that coal is indeed dangerous, and thus allow Oakland to adopt a health regulation ***that would essentially make the coal deal unworkable***." Activist opponents of the Terminal provided confirming testimony to the Chronicle: " 'The city has telegraphed its intentions in a way it hadn't done

before,' Earthjustice attorney Irene Gutierrez said of Oakland's possible move to block coal shipments."

- On April 30, 2016, in anticipation of an upcoming City Council hearing to consider retention of an "expert" consultant purportedly to advise the Council and staff as to the nature of "evidence," or lack thereof, in the administrative record at the City regarding particular potential commodities to be handled at the Terminal, the chief of staff for Vice Mayor and Council Member Anne Campbell Washington forwarded to Council Member Washington an email that provided strategic options and timing considerations for enacting an ordinance banning coal (and applying it to the Terminal) irrespective of ESA's evidentiary findings. The email stated:

> We intended to present the attached chart at the Rules Cmtee this AM, but it was cancelled, so instead we had some conversations with various folks at City Hall.
>
> The chart which shows that the City Council timeline is out of synch with ESA's proposed time line in order for the Council to take action (2 votes) before the summer recess. The right hand column has been adjusted by us – advanced by 2 weeks from the ESA schedule that the Council removed from its April 19 agenda, and rescheduled for next week, May 3.
>
> I would like to discuss the chart with you. My number is (510) [xxx-xxxx].
>
> **We have come up with these options:**
>
> 1) The only way to vote on June 21 is if ESA process is dispensed altogether. We can rely on the report that Zoe Chafe is preparing and that independent public health panel will prepare.[3]
>
> 2) Or a June 21 vote may be possible if ESA scope of work is narrowed further so it submits its report a week or two earlier, such as deleting 40

[3] Importantly, neither the "report that Zoe Chafe is preparing" nor the "independent public health panel" report had been prepared at this point in time. Neither had there been any public notice provided of purported work being conducted by these individuals nor public notice of any interim or final analysis or conclusions by them prior to the June 27, 2016, release of the ESA Report and Staff Report.

hours of summarizing regulatory setting, 58 hours of commodity characterization, and dropping review of all the other fossil fuels.

3) There is no need for ESA to do a draft report AND a final report. Once ESA presents its report, the conversation can continue between the city and community. Also this can save the taxpayers over $10K.

4) Council can vote before the end of June, such as on June 23 or 24 or the week after if ESA submits its report on June 8 to both the city and public and the city review and public comment periods are collapsed from 5 weeks to 2 weeks ending June 22.

Can Annie support collapsing these two periods so a vote can take place before end of June? (**Emphasis** in original.)

The referenced "chart" included with the email is this:

COAL ORDINANCE VOTE

Vote Timeline				ESA Report Timeline	
				Based on 4/19 Council Approval	Based on 5/3 Council Approval
For first **VOTE** to be on:	June 21	July 5	July 19	June 27 - Public comment ends/final report thereafter	July 11 – Public comment ends/final report thereafter
Ordinance must be **Public** on:	June 10	June 24	July 8	June 10 - Made Public (2.5 week to comment)	June 24 – Made Public (2.5 week to comment)
Council must get **Draft Ordinance** by:	May 20	June 3	June 17	May 25 – Draft to City (2.5 week review)	June 8 – Draft to City (2.5 week review)
Second Vote can be on:	July 19	July 19	?		

Not so ironically, the gutting of the consultant's scope of work, collapsing of timeframes, and slashing of its budget as proposed in the above email is precisely what transpired, as explained in greater detail below.

- On May 3, 2016, Council Member Gallo, in an agenda matter having nothing to do with the Project or the Terminal (at issue was a proposed tax on soda and sweetened beverages), stated publicly to the entire City Council hearing chambers, "I am going to vote no on coal. I am ready to vote on it now."
- The City Council adopted the Resolution and conducted its first reading for adopting the Ordinance on June 27, 2016. Final adoption of the Ordinance occurred with its second reading on July 19, 2016.
- On June 28, 2016, Council Member Guillen posted a link to an article on social media declaring "Oakland bans coal shipments."
- In a July 31, 2016 email to the community, Council Member Rebecca Kaplan sought donations for her re-election campaign by touting her role in "banning the shipment and storage of coal."
- In an August 23, 2016 email to supporters, Council President McElhaney, discussing her bid for reelection, similarly emphasized that during her time on the City Council, she led Oakland in "Bann[ing] coal exports."

The Developer Agreed to Project Revisions that Increased and Accelerated Its Performance and Financial Obligations in Reasonable and Ultimately Detrimental Reliance on the Vested Entitlements and Ongoing Assurances by the City that It Would Abide by its Commitments

The negotiations leading up to adoption of the vesting entitlements for the Project took almost a decade. This is because realization of the full Project involves performance by multiple entities, both public and private, including without limitation the Developer, the City, the Port, the railroads, and others. Further, the funding sources for the Project are varied and complex, including commitments from the Developer, the City, the Port, the State of California, and potentially other public sources. The Terminal, however, will be completely privately financed.

At a critical juncture for the Project in 2014, after adoption of the vesting entitlements and significant performance and expenditures by the Developer in reliance thereon, it became clear that representations by the City as to both its on-hand financial resources and ability to timely perform its end of the bargain were in question. Specifically, among other things, City monies represented to have been available in segregated accounts did not exist. Further, delivery of City-owned parcels of land, free of tenants or encumbrances so that improvements and remediation could be conducted in accord with the agreed upon Project timeline, were not, in fact, available for delivery.

Based upon these circumstances, although the Developer was in full compliance with its obligations and fully able to continue performing according to the agreed-upon obligations and Project

timeline, it was clear the City's inability to perform was going to cause the Project not to meet its timeline, potentially at dire consequence to potential public funding and private financing sources. Accordingly, the Developer and City met repeatedly to discuss potential modifications to the overall allocation of responsibilities, financial performance, and timeline.

Realization of the City's inability to perform came at a critical juncture for OBOT. As the City was well aware, it was always OBOT's intention to sublease and subcontract the development and operation of the Terminal to a third party as operator of the Terminal. Up to this point in time, OBOT had been in an exclusive negotiating agreement with a company called Kinder Morgan that operates over a dozen such facilities worldwide. During this period, Kinder Morgan's focus and interest were to ship iron ore and copper concentrate through the facility. This fact was memorialized in a newsletter reporting progress on the Project, stating that, at that time, rumors that the potential operator of the Terminal was considering coal were mistaken and there were no such plans. As noted, at that time the focus was on iron ore and copper concentrate.

The circumstances at that point in time were aptly summarized in an April 20, 2016 email by a City representative working on the Project. "Sometime in 2013/14 the Iron Ore market tanked, Kinder Morgan exited, [OBOT] began talks with other established commodity export firms and TLS entered the scene. I was not working or under contract with the City, during the transition to TLS, but heard about them from Tagami, at a meeting in mid-June 2014, when I had just began [sic] working for the City, as a consultant." The reference to "TLS" refers to Terminal Logistics Solutions, the entity with whom OBOT began an exclusive negotiation relationship after Kinder Morgan had to abandon the previous proposed deal.

The revelations of the City's inability to perform as promised in mid 2014 were a significant factor that drove Kinder Morgan out of the deal with OBOT. The exclusive negotiation with Kinder Morgan was premised upon the milestone Project schedule and financial assurances of the City at the time of the execution of the DA. Once it came to light that the City has misrepresented its ability to meet and adhere to those representations, a fatal misalignment between Kinder Morgan's needs and likely Project delivery schedule became apparent, and Kinder Morgan exited.

OBOT had to reset and begin anew approaching and considering new potential operators. Shortly thereafter, TLS became the standout and it and OBOT executed a new exclusive negotiating agreement. It was clear to OBOT, however, that to be successful with TLS, the misrepresentations and inability to perform on the part of the City had to be remedied and the Project put back on a committed, dependable, and predictable schedule. OBOT was open and forthright with the City that Kinder Morgan had pulled out, that TLS was now very interested, and that the finance and performance issues had to be resolved or the entire Project was in jeopardy.

The outcome was what became known as the "Mid-Project Budget Revise" (MPBR), a significant alteration of the performance terms underlying the Project. Under the MPBR, the City made specific representations about the timing and performance of its obligations, in particular with regard to its own processing, negotiation, and approval of certain agreements for the Terminal and rail facilities it knew were essential to the timely development and operation of the Project and Terminal.

In exchange for and in direct and reasonable reliance on these assurances by the City, the Developer took upon itself additional financial and performance obligations. These included advancing funds that the City had previously and fallaciously represented were available and on hand, and taking the responsibility and cost for relocating major tenants present on City lands, including Caltrans, in order that the vacated lands could be made available for improvement according to the Project entitlements.

On November 4, 2014, City Staff formally presented to the City Council the proposed terms for the MPBR, and the City Council instructed the Staff to proceed with the revisions. On December 16, 2014, the City Council formally approved and adopted the MPBR.

The ESA Contract and Report Were Shams

While the Ordinance and Resolution never reference it explicitly, the 225-page staff report issued three days prior to the public hearing for their adoption (Staff Report) relies extensively on a report by ESA (ESA Report). The base text and analysis of the Staff Report is 25 pages and is dated June 23, 2016. The ESA Report is 163 pages and is also dated June 23, 2016. The Staff Report makes no effort to reconcile how a report dated the exact date of the Staff Report itself could possibly serve as the evidentiary support for that Staff Report. Nor does it explain how the Council is expected to evaluate the credibility, or lack thereof, of the ESA Report, the Staff Report, or the recommended course of action therein by a hearing held just two weekend-days later.

Further, the history of the retaining and completion of the ESA Report casts significant doubts over its credibility as any sort of authoritative resource.

On September 21, 2015,[4] the City held a public hearing and received volumes of testimony and "evidence" regarding the handling of coal generally. The City kept the public hearing open through October 6, 2015, for the purpose of receiving additional materials. At this hearing, among other things,

[4] This hearing date is erroneously noted to be September 15, 2015 in at least one place in the Ordinance andResolution.

staff was directed to review the materials compiled and report back to the Council with a recommendation on its contents by the end of the year. That did not happen. As far as the public knew, the compiled "record" simply sat somewhere within City Hall for over four months.

Then the San Francisco Chronicle reported on efforts of Mayor Schaaf and her staff confirming "a plan . . . to stop coal from being shipped . . . ."[5] Additional troubling reports from the Chronicle piece included:

- "City leaders have hired a consultant to *come up with enough ammunition* to prove that coal is indeed dangerous, and thus allow Oakland to adopt a health regulation that would essentially make the coal deal unworkable." (*Empahsis* added.)
- "The mayor believes Oakland has the authority to act as long as [the developer] hasn't taken out the final permits for the project. He isn't likely to do so until spring."[6]
- " 'The city has telegraphed its intentions in a way it hadn't done before,' Earthjustice attorney Irene Gutierrez said of Oakland's possible move to block coal shipments."

In the wake of this reporting, the City agendized a hearing for February 16, 2016, to retain ESA to review the record compiled to date regarding coal. In the proposed retention, the staff recommended waiving all standard advertising, competitive bidding, and request for proposals/qualifications competitive selection requirements mandated in the Oakland Municipal Code for such work. According to the proposed scope of work, the cost would be $208,000 and would take seven to eight (7-8) months.

But just before the hearing was called to order, Mayor Schaaf asked the Council to refrain from acting on the proposal " 'so that we may further evaluate other, potentially more effective options,' to bar coal shipments through Oakland. 'I remain strongly opposed to the transport of coal and crude oil through our city,' Schaaf wrote in her letter."[7] The next day, California State Senator Loni Hancock,

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[5] San Francisco Chronicle, December 2, 2015

[6] The Mayor, apparently, was still operating under the mistaken direction by Deputy City Attorney Wald that the Terminal was not vested until it obtained and relied upon one or more building permits. (See, fn. 2, above.) It is significant to recognize the City's own recognition here that any action on its part after a vesting event would prohibit the City from applying a new regulation regarding coal against the Project. The problem for City is, as was stated before, the vesting of OBOT's entitlement to develop and operate the Terminal had long since occurred.

[7] East Bay Express, February 17, 2016.

flanked by outspoken Project opponents, held a press conference announcing the introduction of four legislative bills, all of which were expressly designed to limit the operations of the Terminal.

Shortly thereafter, following a Senate Committee hearing where several members questioned the purpose for the bill and why the City of Oakland was not present to explain its position on the matter, Senator Hancock abandoned two of the four bills. The City re-engaged. On March 25, 2016, a new request for comment on the ESA proposed scope of work was issued. But this time the proposed scope of work was not limited to the record compiled to date on coal; it added "other hazardous fossil fuel materials." On April 1, 2016, we wrote to the City pointing out that City had never solicited or otherwise compiled "evidence" regarding "other hazardous fossil fuel materials" as it had purported to do on coal at the September 21, 2015, hearing.

The noted hearing on the ESA proposal was again put off. Instead, on April 26 with a revision on April 28, 2016, the City noticed an evidentiary hearing to be held on "the Health and/or Safety Impacts of Fuel Oils, Gasoline and/or Crude Oil Products" for May 9, 2016. Additionally, the ESA proposal was re-agendized for hearing by the City Council on May 3, 2016.

By this time, however, significant changes wholly in line with the April 30 email and attached schedule referenced above had been made to the proposed ESA Scope. The staff recommendation still included a waiver of the Municipal Code mandated competitive selection requirements, but the terms of the ESA proposal were vastly different:

- The scope of review was substantially ***expanded*** to include the now almost eight month old "record" on coal as well as the yet-to-be-compiled record on "other hazardous fossil fuel materials;"

- Notwithstanding the significant expansion in work and scope, the budget for the effort was ***slashed*** from $208,000 to $120,000; and

- Notwithstanding the significant expansion in work and scope, the time frame for completing the review and reporting back to the Council was ***cut*** from "7-8 months" to six weeks.

At the May 3, 2016 City Council hearing, not only did the Council approve the ESA scope proposal, they also unanimously voted to override normal City Council scheduling protocols for scheduling hearings through the City Rules Committee and directly scheduled the June 27 hearing on the proposed Ordinance and Resolution.

At no point prior to the June 24 Notice of Hearing did the City provide the public notice that the Ordinance and Resolution were drafted and were being considered for adoption by the City Council. Moreover, there was no information provided on the outstanding ESA Report. However, on June 1, 2016, Senator Hancock issued a press release regarding the status of her two remaining bills in the Legislature. Buried in that June 1 press release was a remarkably accurate foretelling of the plans and intentions of the City: "At the local level, the Oakland City Council plans to make public a coal ordinance on Friday, June 24 and on Monday, June 27 the City Council will vote on whether to stop the coal proposal or move forward with the developer's plans." Thus, the City's intention to hold back the draft Ordinance and Resolution and ESA Report, affording the public only a weekend of review prior to the hearing, was intentional and calculated.

This back-room, outcome-determinative rouse is a sham and, more critically, a denial of both substantive and procedural due process. For the substantive reasons explained below, the ESA Report is nothing but opinion based on speculation and thus can never qualify as "substantial evidence" as required in the DA. But the proceedings called out above evidence a process intentionally deceptive and lacking in transparency, fairness, and due process.

The City Avoided And Rebuffed Offers By The Bay Area Air Quality Management District To Help It Ensure That The Terminal Was Appropriately Regulated And Conditioned To Operate In A Safe Condition

The agency with jurisdiction to regulate air quality matters in the region, including particulate matter concerns, is the Bay Area Air Quality Management District (BAAQMD). As soon as BAAQMD staff learned of potential operations at the Terminal, they reached out to the City for more information on the Project. And when the City sent out the notice of the September 21 "evidentiary hearing," BAAQMD provided testimony. Specifically, in follow up to oral testimony at the September 21 hearing, BAAQMD provided the following in writing:

> **The Air District is Available to Assist the City**
> Air District staff is available to meet with City staff and assist in the evaluation of Terminal Logistics Solutions' proposed mitigation measures and discuss additional measures. As Air District staff stated at the Sept. 21 hearing, potential air quality emissions and impacts to public health from the proposed Project include fugitive dust and equipment engine emissions. Dust emissions can be reduced through aggressive containment of all aspects of material handling – rail cars, conveyers, storage piles, etc. To address engine emissions, the Air District encourages the City of Oakland to require that the Project

> proponents commit to the cleanest engines available, including Tier III locomotive engines, electric-powered cranes, cleanest available cargo handling equipment, and shore power for bulk ships.
>
> I look forward to our continued collaboration and working together to ensure that the Project is as health-protective as possible.
>
> Air District staff is available to assist the City in addressing these comments. If you have any questions, please contact Alison Kirk, Senior Planner, at (415) 749-5169 or akirk@baaqmd.gov.

BAAQMD ***never*** provided comments opposing the Terminal or the handling of any specific commodity at the Terminal, including coal. As is illustrated above, BAAQMD staff repeatedly reached out to the City to offer its expertise to craft a plan of operation for the Terminal that would ensure its safe operation without health risk to Terminal workers or the surrounding community.

Following the hearing and public comment period, BAAQMD continued to reach out to the City and seek to engage and be a resource. When the City in a November 10, 2015 email largely put off BAAQMD staff's efforts to help and suggested others within the City and BAAQMD, BAAQMD made clear that no engagement of any substance was occurring:

> All – Several weeks ago Darin [Ranalletti of the City] asked me if the Air District would be willing to assist the City in reviewing technical information that might be prepared by consultants retained by the City. I responded that we would be willing to do so. That is the extent of our discussions. It would be very helpful to hear what the City's plans are moving forward and the schedule.

But in its zeal for a political victory to "ban coal" outright, the City continued to ignore the efforts of BAAQMD to find a workable and collaborative solution for all involved. A notable example is outreach by BAAQMD's Alison Kirk to the City regarding the proposed retention of ESA on May 3, 2016:

> I wanted to follow up with you on the City's proposed contract with ESA to study the potential health and/or safety impacts of rail transportation and related handling of coal within the Bay Area and the City of Oakland.

> When we last spoke in February, I expressed to you that the Air District is very interested in being involved in this study (and it appeared the city was interested in having the Air District participate in developing the scope of work for this study). I have not heard from you since then, so I was surprised to find out while speaking with Heather Klein on the phone last week that a draft scope of the contract was sent out for public comment on March 25, 2016. Unless I am mistaken, the City did not contact the Air District or make us aware of this opportunity to comment on the draft scope.
>
> The Air District continues to be interested in this study and offers our expertise to ensure potential air quality impacts are appropriately evaluated in the study. However, it would appear that due to the contract's short timeline, the only way for the Air District to be involved at this point would be to comment on the public draft study report, due to be released for public comment on June 10, 2016. I have asked Heather to add my name to the OBOT interested parties email list to help ensure the Air District receives a copy of the study report in time to provide written comments. Please let me know if there is another way of ensuring the Air District receives public documents regarding this project.

Thus, the record is clear: BAAQMD is the primary authority and expert with regard to air quality impacts in the Bay area, and it repeatedly offered its assistance, experience, and expertise to assist the City in its evaluation and regulation of the Terminal. But despite repeated affirmative efforts by BAAQMD staff to engage, the City shunned BAAQMD in favor of the sham ESA scope of work and retention it had carefully designed to guarantee the result it had already settled on. The inescapable conclusion arising from such conduct is that the City never wanted a collaborative, defensible solution. The only outcome satisfactory to the City Council was an outright ban of coal for political reasons, regardless of the true facts and applicable law.

This fact was further underscored during the City's update of its own General Plan. On June 7, 2016, the City adopted "The 2016-2021 Oakland Local Hazard Mitigation Plan as an Amendment to the Safety Element of the Oakland General Plan." We know from the Senator Hancock press release that the City already intended to spring the Ordinance and Resolution on the public at large just two weeks later. At no point in the consideration and adoption of the General Plan Amendment relating safety and "local hazard mitigation" were the concerns about coal and petcoke even mentioned. If the purported "condition" presented by coal was truly so certain, so dire, and so imminent, how could it not

have been relevant to the Hazard Mitigation aspect of the Safety Element of the City's General Plan? The City's action make clear that it was never interested in mitigation or resolving the situation with anything short of what the Sierra Club politically demanded, outright ban.

THE CITY VESTED OBOT'S ENTITLEMENT TO DEVELOP AND OPERATE THE TERMINAL WITHOUT ANY COMMODITY-SPECIFIC LIMITATIONS OR FUTURE REVIEW MANDATES

As discussed above, the DA's provisions vesting OBOT's rights and constraining the City's ability to impose new mandates or prohibitions are clear. Perhaps the City's own characterization of the vested status of the Project is illustrative. In the Staff Report for the September 21, 2015 "evidentiary hearing," the City itself explained the status of the entitlements based on the DA:

> *Major Components of the Army Base Redevelopment*. For purposes of the discussion of coal, the major components of the Army Base redevelopment include: (1) the private development of the Break Bulk Terminal, . . ., and (4) ***a Development Agreement ("DA"), which vested the rights to develop, among other things, the Break Bulk Terminal on the West Gateway, subject to a narrow exception for certain later-enacted health and/or safety regulations***.[1]
>
> . . .
>
> FN. 1. The DA between the City and CCIG provides vested rights to CCIG to operate the Break Bulk Terminal subject to the "laws on the books" at the time the DA was approved, with limited exceptions. The most relevant exception to vested rights is DA section 3.4.2 which authorizes the City to adopt regulations that would bind the Break Bulk Terminal if the regulations are related to health and/or safety. (A copy of DA section 3.4.2 in its entirety as Attachment B.) Specifically, the DA creates a two part test to determine if the adoption of a health and/or safety regulation is permissible. First, the regulation must be permissible under federal and state constitutions, statutes, and laws. Second, 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, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety." Unless the City meets both of the aforementioned criteria, the Break Bulk Terminal will be governed by

> the rules and regulations that existed when the DA was executed. (***Emphasis*** added.)

Conspicuously absent from this overview of the vested nature of OBOT's entitlement to develop and operate the Terminal is any claim or even suggestion that future commodity-specific approvals are required or that the vested status of the entitlements is subject to a blanket exception that there is no vesting for any particular commodity because none was specified. Such an exception, had it existed, would swallow the entirety of the vesting and make the entitlement meaningless.

ADOPTION OF THE ORDIANCE AND APPLICATION OF IT TO THE TERMINAL VIOLATES SECTION 3.4 OF THE DA

Nonetheless, incredibly, the Staff Report, Ordinance, and Resolution claim that it is within the City's authority and not an impingement or violation of the vested rights granted to the Project via the DA to impose restrictions on the Project operations because "the Developers do not have a vested right not to be subject to the Ordinance . . . ." (Staff Report, pg. 2.) This was a position never previously espoused by the City. Instead, the City's focus, while regularly and expressly acknowledging the vested status of the Project under the DA, has been on a potential "health and safety" exception in the DA and under California law (see discussion below). Never before had the City claimed that it can impose operational restrictions on the Project without violating the DA independent of the health and safety clause.

Nonetheless, the City claimed that because the DA does not explicitly grant the Project the right to transport "any commodity" through the Terminal, the City is free to disallow any and all commodities to which it has a political objection. Presumably, based upon the Staff Report and the Ordinance and Resolution, this authority is absolute and without limitation, even to the point of disallowing *any* commodities to be transported. Obviously, the Staff was mistaken.

Section 3.4 of the DA could not be more clear: "City shall not impose or apply any City Regulations on the development of the Project Site that are adopted or modified by the City after the Adoption Date" of the DA. Specifically disallowed by DA Section 3.4.1 are any attempts at new regulations that would:

- "be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement;"
    - Clear and explicit in the record are the fact that the description of the Project -- exhaustively reviewed by the City, including full review under the California Environmental Quality Act (CEQA) -- are the inclusion of the Terminal as a core part of

the Project, exhibits expressly presenting the full array of legal commodities then being shipped in bulk commodity terminals including coal, and the fact that the application was presented and approved *without* restriction as to commodities to be shipped. Now imposing the operational restrictions in the Ordinance and Resolution is absolutely "inconsistent and in conflict with the intent, purposes, terms, standards and conditions of this Agreement."

- "materially change, modify, or reduce the permitted ***uses*** of the Project Site, the permitted density or intensity of use of the Project Site . . . " (***emphasis*** added.)
    - The Ordinance and Resolution are an explicit limitation and legal prohibition of uses and intensity of uses expressly approved and allowed under the DA.

- "materially increase the cost of development of the Project . . . "
    - Disallowing fully lawful operations of the Project increases the cost of the Project not only by disallowing a potential revenue source, but also by increasing the cost and accessibility of financing for the Project by injecting a significant level of uncertainty into the Project viability based on political motives of the City Council.

- "materially change or modify, or interfere with, the timing, phasing, or rate of development of the Project . . . "
    - As the City is well aware, the operation of the Terminal is the subject of an existing exclusive option agreement, and the proceedings regarding coal and the other noted commodities have already violated this provision. Adoption of the Ordinance and Resolution and attempts to impose them on the Project most certainly would exacerbate and interfere with the timing, phasing, and rate of development of the Project.

- "materially interfere with or diminish the ability of a Party to perform its obligations under the City Approvals, including this Agreement, or the Subsequent Approvals, or to expand, enlarge or accelerate Developer's obligation under the City Approvals including this Agreement or the Subsequent Approvals . . ."
    - The illegal prohibitions imposed by the Ordinance and Resolution would have a devastating impact and would absolutely interfere with or diminish the ability of the Developer to perform its obligations under the City Approvals. The most prominent issue is not simply the elimination of a single commodity or group of commodities, but the cloud of uncertainty and unpredictability about similar future actions by the City in the future destabilizing potential interest in the facility.

- "materially modify, reduce, or terminate any of the rights vested in City Approvals or the Subsequent Approvals made pursuant to this Agreement prior to expiration of the Term."
    - The City itself recognized, in the Staff Report for the September 21, 2015 hearing on coal, the vested nature of the Project pursuant to the DA: "*Major Components of the Army Base Redevelopment.* . . . (4) a Development Agreement ('DA'), which vested the rights to develop, among other things, the Break Bulk Terminal on the West Gateway, subject to a narrow exception for certain later-enacted health and/or safety regulations."[8] The vested approval of the Project, including the Terminal, is without restriction and the Ordinance and Resolution would fundamentally and foundationally modify, reduce, and potentially terminate rights vested in City Approvals or the Subsequent Approvals.

As noted, never before had the City suggested an independent right to regulate or prohibit legal commodities proposed to be shipped through the Terminal outside of the, to use the City's own words, "narrow exception for certain later-enacted heath and/or safety regulations." The assertion now in the Ordinance and Resolution is only one of many examples that desperation has taken over such that no measures, even at the expense of the rule of law and exposing the City to significant legal liability, will stand in the way of political expediency on this issue.

THE DA'S SO-CALLED "HEALTH AND SAFETY EXCEPTION" DOES NOT APPLY

The City's Adoption of the Ordinance Is Not Otherwise Lawful

The DA, and California law generally, recognize that a City cannot contract away its police power to keep its citizens safe. In the DA, that principle is embodied in Section 3.4.2:

> Notwithstanding any other provision of this Agreement to the contrary, City shall have the right to apply City Regulations adopted by City after the Adoption Date, if such application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety. . . .

[8] September 10, 2015 Staff Report, pg. 3.

The Staff Report, ESA Report, and the Ordinance and Resolution recognize this as the one potential "narrow exception" allowing the City to impose new regulations on the Project. The first required showing to invoke Section 3.4.2 and impose a new regulation on the Project is that such regulation, "(a) is otherwise permissible pursuant to Laws . . . ." In other words, it has to be legal under state and federal law. The Ordinance and Resolution are not. As explained in detail in OBOT's federal court complaint, the Ordinance and Resolution are unconstitutional in violation of the Commerce Clause of the United States Constitution and are preempted by federal law.

The City Committed to Breaching OBOT's Vested Rights In Advance of a "Public Hearing" on the Issue

As extensively documented and explained above, the City's decision and determination to "ban coal" were fixed and committed long before any public hearing was conducted for an objective, good-faith consideration of the merits of any health and safety concerns. Therefore, section 3.4.2's mandate of a decision "after a public hearing" was not satisfied.

There Is No Substantial Evidence in the Record that Development and Operation of the Terminal Would Result in a Substantially Dangerous Condition for the Terminal or the Surrounding Area

Even were the Ordinance and Resolution not unconstitutional and federally preempted, the City's Friday afternoon document-dump of the Staff Report, ESA Report, and other papers just three days in advance of the June 27 hearing was inadequate to satisfy the second requirement of Section 3.4.2: "substantial evidence . . . that a failure to [act] would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety."

On or about Thursday, June 23, 2016, ESA sent to the City its "Report on the Health and/or Safety Impacts Associated with the Transport, Storage, and/or Handling of Coal and/or petcoke in Oakland, Including at the Proposed Oakland Bulk and Oversized Terminal in the West Gateway Area of the Former Oakland Army Base." As was noted in the April 30 scheduling email, there was no time under the City's pre-determined timeline to ban coal prior to the summer recess for the City Council for a draft version of the report to issue for review and comment. Only one version of the ESA Report was ever produced.

The very next day, Friday, June 24, 2016, the City publicly released for the first time the ESA Report, a Staff Report purported premised upon the ESA Report which it had only received the day before, and other papers. The Staff Report alone was 225 pages. And just three days later, the City Council voted to ban coal and petcoke in the Ordinance and Resolution. We find it highly dubious that

this expedited and rushed timeframe gave members of the City Council any meaningful opportunity to consider the materials provided to them.

The ESA Report separated its finding with respect to the potential "health effects" of coal, "safety effects" of coal, and "climate effects" of coal. With respect to the purported "health effects" of transporting coal, the ESA Report merely concluded that the rail transportation and storage and handling of coal, taken together ***could*** "impact" the health of adjacent neighbors by increasing particulate matter in the air, and ***could*** impact the health of adjacent neighbors from the expected increase into the ambient air in the form of total suspended particulates and fine particulates (TSP, PM_{10}, and $PM_{2.5}$) . . . ."[9] (emphasis added).

Even these speculations by ESA about what "could" happen are unsupported. Nothing in the ESA Report or any other evidence provides a basis for a complete ban on coal or petcoke by the City of Oakland. The ESA Report relies principally on estimates of particulate matter ("PM") emissions resulting from the transportation of coal and petcoke. PM_{10} and $PM_{2.5}$ are standard metrics for measuring PM found in the air. PM is not unique coal and petcoke: a large number of other sources produce PM including, for example, windblown soil, vehicle exhaust, grain storage, and woodburning fireplaces. Thus, any activity—including shipping any commodity to and through the Terminal could increase the levels of PM in the air.

The ESA Report divided its emission estimates between "Rail Transport" (the period when the coal would be in transit in a rail car) and "OBOT Operations" (the period when the coal would be unloaded, stored, transferred and transloaded after arriving at the Terminal). These estimates are contained in Table 5.7 of the ESA Report:

[9] ESA Report at ES-4 (emphasis added).

TABLE 5-7
SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT, STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT OBOT

Fugitive Coal Dust Emissions Source	tons/yr			lbs/day		
	TSP	PM_{10}	$PM_{2.5}$	TSP	PM_{10}	$PM_{2.5}$
Rail Transport*						
BAAQMD	2,102	988	148	12,012	5,646	847
Oakland	82	38	6	468	220	33
So Emeryville	35	17	3	203	95	14
San Leandro	98	46	7	562	264	40
Staging at Port Railyard, Rail Spur Trip to OBOT	156	78	18	889	445	67
SUBTOTAL - Oakland	238	116	18	1,357	665	100
OBOT Operations						
Unloading	11.9	5.7	0.9	66.0	31.2	4.7
Storage	3.2	1.5	0.2	17.7	8.4	1.3
Transfer	10.4	4.9	0.7	57.6	27.2	4.1
Transloading	11.9	5.7	0.9	66.0	31.2	4.7
SUBTOTAL	37.5	17.7	2.7	207.3	98.1	14.8
PROJECT TOTAL – Oakland	276	134	21	1,564	763	115

* Uncontrolled air emissions of fugitive dust from open coal filled rail cars. .

The ESA estimates of "TSP" are irrelevant for all practical purposes: TSP is not regulated and measurements of TSP are not relied upon in assessments of air quality.

The ESA estimates of PM_{10} and $PM_{2.5}$ emissions from the unloading, storage, transfer and/or transloading of coal at the "OBOT Operations" were not based on evidence. The Terminal and its emission controls have not yet been fully designed, much less constructed. Accordingly, it is impossible to specify the precise amount of possible emissions that might be associated with the proposed Terminal. Nonetheless, ESA did not provide a range of estimated potential emissions from the Terminal but instead purported to estimate the precise level of emissions.

ESA provided no detail or back up or any indication of the numerical inputs it used to reach the values in Table 5-7. In fact, it is our belief that no set of inputs grounded in fact would support the values set forth in Table 5-7 of the ESA Report.

ESA did not take into account in Table 5-7 the emission levels of two terminals in California that transport coal or petcoke. The terminal at the Port of Pittsburg is a multiple commodity terminal, which stores and ships petcoke. ESA did not take into account the Pittsburg terminal's emission values in the values it reported in Table 5-7 of the ESA Report. ESA did not explain this omission.

The terminal at the Port of Long Beach is a multiple commodity terminal, which stores and ships coal, among other commodities. ESA did not take into account the Long Beach terminal's emission values in the values it reported in Table 5-7 of the ESA Report. ESA did not explain this omission.

The Pittsburg terminal and the Long Beach terminal are either totally enclosed or partially enclosed and otherwise covered. The reported emissions for these facilities are far lower than the values predicted by ESA for the Terminal.

It is our understanding that the Pittsburg terminal and the Long Beach terminal operate pursuant to permits from their respective Air Quality Management Districts. These Districts regulate air quality pursuant to delegation from the State of California. Apparently, the Pittsburg terminal publicly reported emissions of 0.1 tons a year of PM_{10} and 0.1 tons a year of $PM_{2.5}$; these emissions are based on a total throughput of 500 thousand tons of petcoke per year.

Also, it is our understanding that the Long Beach terminal publicly reported emissions of 0.8 tons per year of PM_{10} and 0.2 tons per year of $PM_{2.5}$; these emissions are based on a total throughput of bulk commodities of approximately 7 million tons per year, including approximately 1.7 million tons of coal.

As noted above, bulk commodities other than coal and petcoke also emit PM_{10} and $PM_{2.5}$; the rate of emissions from other bulk commodities is similar to coal and petcoke. And, in fact, other commodities besides coal are shipped through the Long Beach terminal, such that the reported PM emissions noted above that are attributable to coal are actually less than the total reported PM emissions.

Even if coal was responsible for the entire quantity of PM emissions at the Long Beach terminal, those values reflect emissions rates far below those assumed in the ESA Report. The ESA Report does not contain any explanation about why the enclosures and/or covers of the Pittsburg or Long Beach terminals would not work at the Terminal. The ESA Report does not contain any explanation about why it did not assume emissions rates comparable to the Pittsburg and Long Beach terminals.

As part of the Redevelopment Plan for the former Oakland Army Base, and before a bulk commodities Terminal was proposed for the West Gateway, the City in 2002 approved an Environmental Impact Report (2002 EIR). The 2002 EIR estimated PM emissions of 12 tons per year of PM_{10} and 12 tons per year of $PM_{2.5}$. In 2012, after the Terminal was proposed for the West Gateway, the City reassessed and reapproved the anticipated air quality impact of operations at the West Gateway under an

Addendum to the 2002 EIR (collectively, EIR), and in doing so anticipated emissions of 0.8 tons per year of PM_{10} and 0.7 tons per year of $PM_{2.5}$.

The emissions rates alleged above are below the levels of PM emissions already approved by the City in the 2002 EIR. Further, the emissions rates are consistent with the anticipated emissions subsequently approved in 2012 in the EIR. Additionally, the emissions rates are below the BAAQMD significance thresholds of 15 tons per year of PM_{10} and 10 tons per year of $PM_{2.5}$, as further described below.

The EPA has delegated certain regulatory authority regarding air quality to the states. The State of California has delegated regulatory responsibility for air pollution from non-vehicular sources to Air Quality Management Districts. In the nine county Bay Area, this regulatory body is BAAQMD. The ESA Report acknowledges, the "Bay Area Air Quality Management District (BAAQMD)" is "the regional agency responsible for air pollution control in San Francisco Air Basin (Bay Area) . . . ."[10] BAAQMD has established thresholds over which it deems emissions "significant." With respect to PM_{10}, BAAQMD considers a new source of emissions significant if it emits over 15 tons of PM_{10} per year. With respect to $PM_{2.5}$, BAAQMD deems a "new source" of emissions significant if it emits over 10 tons of $PM_{2.5}$ per year.

The levels of emissions at the Terminal would not exceed BAAQMD's thresholds of significance for either PM_{10} or $PM_{2.5}$. No BAAQMD rule or regulation requires a ban on the transportation of coal or the proposed activities at the Terminal.

Pursuant to BAAQMD Regulations, the Terminal would be required to obtain an operational permit. The permit would be conditioned on installation of Best Available Control Technology (BACT). We understand that BACT includes control measures such as enclosures, baghouses, wind screens, spillage control for conveyors, and water sprays. The installation of BACT will ensure that PM emissions at the Terminal are negligible.

The ESA Report failed to address that the South Coast Air Quality Management District (SCAQMD) adopted a regulation known as Rule 1158 at least in part to regulate the Long Beach terminal. Nothing in the ESA Report or any other evidence addresses, much less establishes, that there is any substantial danger to neighbors or users of the Long Beach terminal as it is operating today. Nothing in the ESA Report or other evidence addresses why the requirements of Rule 1158, if applied to the Terminal as opposed to the ban imposed by the Ordinance and Resolution, would result in any substantial danger to neighbors or users of the Terminal or other residents of Oakland.

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[10] ESA Report at 4-5.

On October 5, 2015, BAAQMD wrote to the City Council: "Air District staff is available to meet with City staff and assist in the evaluation of Terminal Logistics Solutions' proposed mitigation measures and discuss additional measures. As Air District staff stated at the Sept. 21 hearing, potential air quality emissions and impacts to public health from the proposed Project include fugitive dust and equipment engine emissions. Dust emissions can be reduced through aggressive containment of all aspects of material handling – rail cars, conveyers, storage piles, etc." Such containment is planned for the Terminal and related activities. ESA did not take these containment measures into account in Table 5.7 and did not address or explain why it rejected BAAQMD's views on these containment measures.

Storage domes and enclosed conveyors are currently used in coal and petcoke facilities, including in the Bay Area. The ESA Report so states and recognizes these mitigation measures would be regarded by BAAQMD as "Best Available Control Technology". ESA does not state that it took these measures into account in calculating the values in Table 5-7.

The Pittsburg and Long Beach terminals are not the only facilities in California that handle coal or petcoke. As the ESA Report acknowledges, "In the San Francisco Bay area all of the five refineries produce petcoke"[11] which is a "commonly exported commodity".[12] The ESA Report contains no indication of the emissions levels from these facilities. The ESA Report contains no indication of any adverse health consequences from these facilities.

With respect to "Rail Transport", ESA's estimates for PM emissions from Rail Transport were explicitly based on an assumption of "uncontrolled air emissions of fugitive dust from open coal filled rail cars". There was no basis for this assumption. In fact, potential coal dust emissions from rail cars transporting coal to the Terminal could be controlled by measures such as rail car covers and/or surfactants (spray-on adhesive coating that can be employed in rail transport for the purpose of preventing fugitive dust releases). ESA cited no evidence that such measures would not work. Further, even with respect to uncovered rail cars, the rate of coal dust emissions decrease rapidly as the rail car begins to travel. As a result, PM emissions from a rail car travelling through Oakland would be significantly less than any such emissions at the departure point.

Apparently, ESA relied upon numerical values concerning emission rates for uncovered rail cars at the departure point and assumed that rate would be constant along the entire trip. The currently projected starting point for coal shipments to the Terminal is Utah—almost a thousand miles from Oakland. There was no basis for ESA to use emissions rates from the departure point in Utah to predict the emissions while the trains were moving in Oakland.

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[11] ESA Report at 3-10.

[12] ESA Report at 1-10.

NONE OF THE CITY APPROVALS REQUIRES OR ALLOWS A SUBSEQUENT APPROVAL BASED ON COMMODITY BEING TRANSPORTED

Incredibly, and for the first time ever, the City claimed in the Staff Report, Ordinance, and Resolution that adoption of ban on coal and petcoke does not violate the DA because the Project has no express vested right as to any particular commodity and, therefore, no such right exists. The position is nonsensical and contrary to the record.

Included in the vesting entitlements is a bulk commodity marine terminal, clearly identified, described with no limitation whatsoever or further review obligation relative to the type of commodity proposed to be shipped. As is the industry standard for such facilities, the Developer applied for, and the City approved and vested, the right to develop and operate a Terminal that can swiftly and predictably respond to ever shifting and evolving market forces with regard to global commodity demand and production.

More specifically, the DA is clear that future review and regulatory approvals are limited to those required by and anticipated in "City Approvals." That term, again, is defined in the DA as:

> 1.1 . . . City Approvals: Permits or approvals required under Applicable City Regulations to develop, use and operate the Project and granted on or before the Adoption Date of this Agreement as identified in Recital I of this Agreement and described in Exhibit B. (See also "Subsequent Approval," defined below.) (DA, Definitions, p. 7.)

More specifically, Exhibit B to the DA itemized the "City Approvals":

> Exhibit B: "City Approvals" Includes:
> 1. The 2002 Oakland Army Base Redevelopment Plan Environmental lmpact Report and the 2012 OARB Initial Study/Addendum ("EIR");
> 2. The Oakland Army Base Redevelopment Plan (as amended prior to the Adoption Date);
> 3. The Oakland Army Base Reuse Plan (as amended prior to the Adoption Date);
> 4. The LDDA;
> 5. The Gateway Industrial zoning district (Ordinance No. 13182 C.M.S.); and

6. The Gateway Industrial Design Standards (Resolution No. 84498 C.M.s).
True and correct copies of the above-mentioned City Approvals shall be included in the binders prepared by the City pursuant to Section 3.4.3. (DA, Exhibit B.)

In adopting the Ordinance and Resolution, nowhere does the City identify any provision, allowance, or mandate in any of the City Approvals for any future commodity-based review or necessary approval. That is because none exists. The vesting of OBOT's right to develop and operate the Terminal was approved by the City without limitation relative to commodity type. Therefore, the City's adoption of the Ordinance and Resolution violated the DA.

THE CITY NEVER CONSIDERED OR INVESTIGATED AN ALTERNATIVE REGULATORY MEASURE THAT WOULD SATISFY ITS PURPORTED HEALTH AND SAFETY CONCERNS SHORT OF AN OUTRIGHT BAN

There is no evidence in the record that the City ever meaningfully considered a regulatory approach or strategy to address purported health and safety concerns related to the Terminal's operations short of an outright ban. As noted above in relation to the fatal deficiencies in the ESA Report, there was never investigation of lesser restrictive measures to mitigate supposed potential concerns, including a complete failure to consider other similar facilities and regulatory rules in other air districts. The Oakland City Council approved and vested OBOT's right to develop and operate the Terminal in 2012 and 2013. It was required to and in fact did support those approvals with adherence to the California Environmental Quality Act. Additionally, in conjunction with that review and those vesting entitlements, the City imposed a comprehensive suite of Standard Conditions of Approval and Mitigation Monitoring and Reporting Program requirements.

The ESA Report and Staff Report never examined or proposed revisions to those measures to address purported health and safety concerns. The City, both in general and specifically as to the work by ESA, ignored and rebuffed multiple efforts by staff for the primary regulatory agency in the region with jurisdictional authority and expertise over all such issues, BAAQMD.

The absence of any research or effort to mitigate, reduce, or otherwise contain purported health and safety concerns related to OBOT evidence one single fact – this was an outcome-determined, post-hoc exercise to seek to justify after-the-fact the City's illegal breaching of OBOT's vested rights.

THE CITY ARBITRARILY AND CAPRICIOUSLY EXEMPTS POTENTIAL EMISSION SOURCES THAT THE ESA REPORT CLAIMS WILL EMIT VASTLY MORE PARTICULATE MATTER THAN WOULD PURPORTEDLY BE EMITTED FROM THE TERMINAL

Not only are the Ordinance and Resolution inconsistent with Section 3.4.2 because (1) they are not otherwise legal, (2) they were not adopted "after a public hearing," and (3) they are not supported by substantial evidence, they are independently invalid because they are arbitrary and capricious.

The Staff Report itself contends that the Ordinance and Resolution do not apply to nor regulate the largest purported emitter of particulate matter, rail transport:

> The Ordinance does not regulate the transportation of coal or coke, for example, by train or marine vessel, through the City of Oakland or to or from a Coal or Coke Bulk Material Facility. The Ordinance also exempts from the definition of Coal or Coke Bulk Material Facility (i) noncommercial facilities (e.g., educational facilities or residential property on which persons may Store or Handle small amounts of coal or coke for personal, scientific, recreational or incidental use), and (ii) on-site manufacturing facilities where all of the coal or coke is consumed on-site at that facility's location and utilized on-site as an integral component in a production process, and which are operated pursuant to, and consistent with, permits granted by the (BAAQMD). (Staff Report, pg. 6.)

And by the City's own intention and design, they are not seeking to regulate the major source of emissions they claim to identify. Clearly, the City's assumption is that if they block the handling of the commodity at the facility, they necessarily block the transport. Clever, perhaps, but this sort of regulatory gerrymandering is precisely why Congress occupied the field of commodity transport and federally preempted proposed regulations such as this.

Also arbitrary and capricious is the second category expressly exempted from the Ordinance and Resolution: "on-site manufacturing facilities where all of the coal or coke is consumed on-site at that facility's location and utilized on-site as an integral component in a production process, and which are operated pursuant to, and consistent with, permits granted by the (BAAQMD)." (Staff Report, pg. 6.) The ESA Report repeatedly notes that the manufacturing process specifically exempted here presents the identical concerns and impacts in terms of fugitive dust and emissions from incorporation of the commodity into the manufacturing process as that assumed for the Terminal.

> Coal combustion and petcoke/coal use for iron and steel production emit other air pollutants that can have impacts to human health and the environment, both locally and globally. Although those emissions can be difficult to quantify due to the number of variables influencing emissions, there is substantial and credible scientific evidence that some of these air pollutants would be transported to Oakland, including West Oakland, southern Emeryville, and western San Leandro, where these pollutants would contribute to already high pollutant concentrations, contribute to the existing number of days of exceedances of the ambient air quality standards (for PM2.5 in particular) and exacerbate health effects in three local communities classified as disadvantaged. (ESA Report, pg. ES-7.)

Neither the ESA Report nor the Staff Report offer any explanation whatsoever as to why the identical presumed impacts are acceptable in one instance (steel production) though unacceptable in another (the Terminal).

THE ESA REPORT'S "SAFETY" ANALYSIS IS ENTIRELY PREMISED ON THE ASSUMPTION AND SPECULATION THAT A FIRE WILL NECESSARILY OCCUR

Premised upon the fact that history records "13 rail car fires" over 15 years throughout the entire world, "***most of which were likely caused by*** spontaneous combustion," the ESA Report grounds it entire "Safety" analysis on the speculative assumption that there *must eventually be* a fire at the Terminal. (*See, generally,* ESA Report Chapter 6.) However, even the ESA Report itself notes that the variables potentially contributing to a fire are well understood and readily managed and mitigated:

> Spontaneous combustion is a time-dependent phenomenon. ***Early attention to the potential sources of problems may prevent occurrences of heating progressing to full-scale spontaneous combustion***. In comparison, petcoke is much less volatile than bituminous coal, and has a substantially lower risk of fires and explosions." (ESA Report, pg. 6-2, ***emphasis*** added.)

Further, the ESA Report conveniently ignores substantial evidence in the record that the fire risk are well understood and readily mitigated in the industry by standard practices. In an attachment to the HDR White Paper by Jensen Hughes, expert testimony specifies the measures necessary to ensure a safe facility from a combustibility standpoint and concludes:

> In conclusion, the risks of fire and explosion occurrences in coal handling and storage are well understood and can be readily managed. If an event did occur, there would be systems in place to limit the risk to life and property. The design of the facility will follow well-established industry guidelines and will implement the measures identified above to mitigate, to the greatest extent reasonably possible, the risk of fire or explosions. (*Technical Memorandum with respect to the potential bulk transfer of coal at the proposed Oakland Bulk and Oversized Terminal Project*, September 15, 2015, submitted to the City in conjunction with its September 21, 2015 hearing on coal.)

The ESA Report asserted merely that fires have occurred at coal piles and in rail cars (of unspecified contents) in unspecified conditions, and that coal fires can present a danger to persons in close proximity to them, such as firefighters. The ESA Report identified no evidence, however, that a coal fire is likely to occur at the Terminal or in rail cars carrying coal to or through the Terminal in Oakland. The ESA Report provided no evidence of a coal fire occurring at any of the coal rail terminals throughout the United States that it mentions in its report. In particular, the ESA Report contained no evidence that there has been a fire at the Long Beach Terminal or the Pittsburg terminal, which use covers and/or enclosures. ESA did not cite any evidence regarding mitigation measures for fire safety.

THE ESA REPORT'S CONCLUSIONS REGARDING GREENHOUSE GAS EMISSIONS LACK CREDIBILITY

The ESA Report seems to argue that if coal or petcoke are transported through the Terminal, they will, without doubt, be shipped to China where they will be burned producing additional greenhouse gases and that the consequence of that "incremental" (ESA's terminology) contribution directly impacts the health and safety of Oaklanders. With full recognition of the threat posed by climate change, including sea level rise, the direct correlation is nonsensical and absurd.

As a preliminary matter, indulging ESA's assumption that the material would make its way to China and be burned there, there is no evidence, nor does ESA even feign to argue, that this would result in *new* energy production facilities contributing new emissions. If these facilities did not get the necessary materials from this assumed chain of delivery, they would get them someplace else. The assumed and unchallenged premise that these would result in new emissions is beyond speculative and conjecture. Accordingly, it is not substantial evidence.

Next, even assuming the volume of coal and petcoke assumed by ESA were shipped and further indulging the speculation by ESA of the material being burned and emissions produced, there is far from any material contribution in this "increment," even if they were all shown to be new emissions. With

the backdrop of 46 billion metric tons of greenhouse gas emissions globally in 2010,[13] the maximum increment indulging all speculation and assumptions by ESA, is 0.000398%. It is not surprising that the ESA Report failed to include this math, far from a material "increment."

Finally, are we going to attribute to mere transport and handling providers all consequence of the end-user of the commodity being shipped? Will the City begin to apply that policy across the board to all materials shipped through Oakland facilities? Every product shipped in containers? Every truckload of fuel? Under this approach, the City would have to hold gas station owners responsible for greenhouse gas emissions from cars that re-fuel at their facility.

CONCLUSION

For all of the reasons provided herein, the City is hereby notified that it is in noncompliance and has affirmatively breached the DA. In order to remedy this noncompliance and breach, the City must:

- Immediately repeal the Ordinance and Resolution, as least as applied to the Project;
- Recognize OBOT's vested right to develop and operate the Terminal without limitation, condition, or future review obligation on a commodity-specific basis that is not expressly anticipated and required in one of the DA-innumerated City Approvals; and

Commit in an enforceable manner to a schedule for completion of all outstanding agreements necessary and appropriate for the development and operation of the Terminal.

As provided in Section 8.3 of the DA, the City must respond in writing to this letter within thirty (30) days, which response must address "the issues raised in [this] notice of noncompliance on a point-by-point basis." We look forward to receiving the City's response.

[13] https://www3.epa.gov/climatechange/science/indicators/ghg/global-ghg-emissions.html