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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC

Plaintiff,

vs.

CITY OF OAKLAND,

Defendant.

Case No. 3:16-cv-07014-VC

PLAINTIFF OAKLAND BULK & OVERSIZED TERMINAL, LLC'S POST-TRIAL BRIEF

Hearing Date: March 28, 2018
Time: 10:00 a.m.
Honorable Vince Chhabria

Trial Date: January 16, 2018

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LIST OF ABBREVIATIONS

BAAQMD	Bay Area Air Quality Management District
BACT	Best Available Control Technology
BoD	Basis of Design
DA	Development Agreement
ESA	Environmental Science Associates
LDDA	Lease Disposition and Development Agreement
OBOT	Oakland Bulk & Oversized Terminal, LLC
Ordinance	Oakland Ordinance No. 13385 (2016)
PM	Particulate Matter
Resolution	Resolution No. 86234 (2016)

INTRODUCTION

Section 3.4.2 of the Development Agreement ("DA") permits the application of City regulations that post-date the DA's adoption date (July 16, 2013) to the Terminal only "if such application (a) is permissible pursuant to Laws (other than the Development Agreement Legislation), and (b) the 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." TX0584.0001 (DA) § 3.4.2. The City did not have—let alone base its decision upon—substantial evidence that a failure to apply a total ban on the shipment of coal and petcoke through the Terminal would result in a condition substantially dangerous to Terminal occupants', users' or adjacent neighbors' health or safety.

By applying the coal and petcoke ban to the Terminal, the City thus breached its contractual obligation not to apply "future" (post-July 16, 2013) ordinances to the Terminal.

ARGUMENT

I. SECTION 3.4.2 IS A "NARROW" AND "LIMITED" EXCEPTION TO OBOT'S VESTED RIGHT

The DA between the City and OBOT grants OBOT the right to develop and operate a terminal pursuant to the regulatory regime in place when the City and OBOT entered into the DA in July 2013—a "vested" right in development agreement parlance. D.E. 71 (Motion to Dismiss Order) at 1; DA § 3.2 ("This Agreement vests in Developer the right to develop the Project in accordance with the terms and conditions of this Agreement, the City Approvals and the Existing City Regulations . . . ."), § 3.4.1.[1]

[1] "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

This vested right is essential to providing the certainty necessary for the project to go forward—to develop, use and operate for *sixty-six years* a rail-to-ship bulk goods export terminal. DA Recital C[2] & Recital D ("City is therefore willing to enter into this Agreement to, among other things: (1) provide certainty to encourage the required substantial private investment in the comprehensive development and planning . . . ."); Ordinance 13183 (DA Ordinance) § 4 & Recital 4 ("WHEREAS**,** Developer now seeks to "vest" its rights for the Project for the term of the LDDA (approximately 70 years) through a Development Agreement with the City").[3]

As the City has admitted, Section 3.4.2 of the DA accordingly provides a "narrow" and "limited" health and safety exception to OBOT's vested right. PFF 22-24 (citing Sept. 10, 2015 Agenda Report (Section 3.4.2 is a "narrow exception for certain later-enacted health and/or safety regulations," and a "limited" exception to the "vested rights")); PFF 25 (citing Feb. 3, 2016 Agenda Report (Section 3.4.2 is a "narrow exception related to health and/or safety")); DA § 3.4.2 ("The Parties agree that the foregoing exception to Developer's vested rights . . . .").

Specifically, Section 3.4.2 permits the application of the Ordinance to OBOT only "if such

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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."

[2] "Developer applied for approval of this Agreement to: (1) vest the land use policies established in the General Plan . . . , 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 . . . . 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 . . . . and other Existing Regulations, will benefit City and Developer and will provide the Parties with certainty . . . ."

[3] Available at: https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-4343-B954-F848BC668685&Options=&Search=; *see also* DA §§ 1.1 (incorporating Recital H in definition of "Project"), 2.1-2.2, Recital H, Ex. D-2-2; TX1268.0001 ("LDDA") § 1.3.3, Attachment 3 (66 years); TX0096.0001 (Ground Lease) § 1.2 (same).

application (a) is otherwise permissible pursuant to Laws (other than the Development Agreement Legislation),[4] and (b) City determines based on substantial evidence[5] 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." DA § 3.4.2. In other words, the City may apply the Ordinance to OBOT *only if* this particular regulation—a complete ban on the shipment of coal and petcoke through the Terminal—is necessary to prevent a "condition substantially dangerous to the[] health or safety" of "occupants or users of the Project [or] adjacent neighbors." *Id.*[6]

The DA is similarly clear that a breach of the City's contractual obligations in Section 3.4.1 is *not* subject to review "akin" to administrative mandamus, as the City has argued. Section 3.4.1 states: "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." *Id.* § 3.4.1. Section 3.4.1 does not limit this Court's review of that challenge to administrative mandamus procedures, or otherwise curtail this Court's review of an alleged breach in a contract action. By contrast, Section 14.14 of the DA provides that a court challenge to "termination, modification, or amendment" of the DA—*not* breach of the DA—shall be subject to review "solely pursuant to

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[4] As set forth in OBOT's summary judgment briefing, the Ordinance and Resolution violate federal law, which is an independent ground for breach of the contract.

[5] California courts have defined "substantial evidence" in two ways: "first, as evidence of 'ponderable legal significance . . . reasonable in nature, credible, and of solid value . . .; and second, as 'relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" *Desmond v. Cnty of Contra Costa*, 21 Cal.App.4th 330, 335 (1993); *see also Bowers v. Bernards*, 150 Cal.App.3d 870, 873 (1984) ("It is now the settled law . . . , 'substantial evidence' . . . is evidence of . . . ponderable legal significance, . . . reasonable in nature, credible, and of solid value."). In the context of assessing the impairment of vested rights, it is more appropriate to construe "substantial evidence" to mean "evidence of ponderable legal significance … reasonable in nature, credible, and of solid value," *Bowers*, 150 Cal.App.3d at 873, but, in all events, as set forth herein, the City did not have the necessary "substantial evidence" under either definition.

[6] Section 3.4.2's contractual requirement that the application of a "future" (post-DA) regulation must be necessary to warrant an exception to OBOT's vested right is consistent with the holdings of *Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 650 (1996) and *Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410, 420 (2016), that a municipality may impair a vested right by subsequent regulation only if the regulation is "sufficiently necessary."

California Code of Civil Procedure Section 1094.5(c)." *Id.* § 14.14. Section 14.14 demonstrates that the parties knew how to contractually limit review to administrative mandamus when they wanted to; the parties did *not* contract to limit review of an alleged breach of the DA (and, more specifically, a breach of the "Future Regulations" obligations) to administrative mandamus.[7]

II. THE CITY'S DETERMINATION WAS NOT BASED ON SUBSTANTIAL EVIDENCE THAT A FAILURE TO APPLY THE ORDINANCE TO OBOT WOULD PLACE OCCUPANTS, USERS OR ADJACENT NEIGHBORS OF THE TERMINAL IN A SUBSTANTIALLY DANGEROUS CONDITION

A. Pre-Existing Regulations and Contractual Commitments Will Prevent Any Substantially Dangerous Condition to Occupants, Users or Adjacent Neighbors of the Terminal

Pre-existing health and safety regulations and contractual commitments will necessarily prevent any substantially dangerous condition from occurring. Accordingly, "failure" to apply the 2016 coal and petcoke Ordinance to the Terminal cannot place occupants, users or adjacent neighbors in a condition substantially dangerous to their health or safety.

1. Pre-Existing Air Quality Regulations and Contractual Requirements Will Prevent A Substantially Dangerous Air Quality Condition

Pre-existing regulations and contractual requirements will prevent an air quality condition substantially dangerous to health or safety, obviating the need for an ordinance and resolution specifically directed to coal and pet coke. PFF 55-93, 148-72, 180-204. For example:

- The pre-existing Bay Area Air Quality Management District ("BAAQMD") rules, regulations and permitting requirements will prevent the Terminal from producing particulate emissions that would create a substantially dangerous condition—as they would necessarily prevent the Terminal from operating were it to produce emissions that would create a substantially dangerous condition. PFF 180-204; *see also* 62-71, 81, 84, 131, 151, 155-60.[8]
- The CEQA Standard Conditions of Approval ("Standard Conditions") and Mitigation Monitoring and Reporting Program ("MMRPs") will also prevent the Terminal from producing particulate emissions that would create a substantially

[7] OBOT incorporates herein the law and arguments set forth in its Reply Brief in Support of its Motion for Summary Judgment (D.E. 182) at 23-25, rebutting the City's contentions that its determination under Section 3.4.2 of the contract are entitled to the deference afforded in the context of a petition for writ of administrative mandate under Cal. Code Civ. Proc. 1094.5.

[8] The City's argument that BAAQMD may not regulate rail transportation does not change the analysis. Given that air monitors cannot distinguish the source of particulate emissions (*i.e.*, whether PM came from a building or a train), BAAQMD will consider all potential emissions at or around the Terminal, irrespective of the specific source of the emission. PFF 188.

dangerous condition—as they would necessarily prevent the Terminal from operating were it to produce emissions that would create a substantially dangerous condition. PFF 82; *see also* 55, 74-79, 164, 167-68.

- Pre-existing Occupational Safety and Health Administration ("OSHA") and Cal/OSHA worker safety regulations will prevent the Terminal from creating a substantially dangerous condition to workers—as they would necessarily prevent the Terminal from operating were it to produce emissions that would create a substantially dangerous condition to workers. PFF 163; *see also* 55, 80, 151, 162.

2. Pre-Existing Fire Safety Regulations and Contractual Requirements Will Prevent A Substantially Dangerous Fire Safety Condition

Pre-existing regulations and contractual requirements will prevent a fire safety condition substantially dangerous to health or safety, obviating the need for an ordinance specifically directed to coal and pet coke. PFF 38-39, 48, 78-79, 372-98. For example:

- The pre-existing Oakland Fire Department ("OFD") rules, regulations and permitting requirements will prevent the Terminal from presenting a fire safety risk that would create a substantially dangerous condition—as they would necessarily prevent the Terminal from even being built if it were it to present a fire safety risk that would create a substantially dangerous condition. PFF 374; *see also* 38-39, 48, 390-91.
- The CEQA Standard Conditions and MMRPs will likewise prevent the Terminal from presenting a fire safety risk that would create a substantially dangerous condition—as the OFD may reject the required fire safety plan were it to present a fire safety risk that would create a substantially dangerous condition. PFF 78-79; *see also* 48, 374.
- Pre-existing OSHA and Cal/OSHA worker safety regulations would necessarily prevent the Terminal from presenting a fire safety risk that would create a substantially dangerous condition to workers—as they would necessarily prevent the Terminal from operating were it to present a fire safety risk that would create a substantially dangerous condition to workers. PFF 163.

3. The City Did Not Have Substantial Evidence to Determine That Pre-Existing Regulations or Regulatory Bodies Will Permit a Substantially Dangerous Condition to Occupants, Users or Adjacent Neighbors

There was no (let alone substantial) evidence before the City that pre-existing regulations or regulatory bodies—such as BAAQMD, OFD or OSHA—will permit the Terminal to operate in a manner that places occupants, users or adjacent neighbors in a condition substantially dangerous to their health or safety. PFF 148-72. In fact, the evidence is to the contrary.

For example, ESA did ***not*** determine that if BAAQMD issued a permit for the Terminal to

operate, operations at the Terminal would be dangerous. PFF 156, 158, 166.[9] Indeed, BAAQMD has stringent requirements and processes to ensure that operations of any facility will not create substantially dangerous air quality conditions. PFF 180-204. Accordingly, the Assistant City Administrator who authored the June 23, 2016 Agenda Report recommending passage of the Ordinance and Resolution did *not* determine that BAAQMD's rules and regulations were inadequate to ensure adequate air quality with respect to the shipment of coal and petcoke through the Terminal, and had no reason to think BAAQMD would enforce EPA standards in a way that would permit a substantial danger to anyone in Oakland. PFF 159-61. The City even relied upon BAAQMD's particulate matter ("PM") thresholds to assess emissions in its CEQA analyses, and in the Agenda Report recommending adoption of the Ordinance and Resolution. PFF 68-71, 164-66. That Agenda Report also does not state that regulation by BAAQMD of the Terminal would permit a substantial danger to the health and safety of occupants, users or adjacent neighbors. PFF 151. The City has such confidence in BAAQMD's ability to protect air quality in Oakland that it granted (within the Ordinance) an exception to the coal and petcoke ban to an unlimited number of manufacturing facilities of any size that "consume" coal or petcoke within Oakland, so long as the facilities obtain a BAAQMD permit and operate pursuant to it. PFF 152-55.

Similarly, the Assistant City Administrator who authored the June 23, 2016 Agenda Report did not reach a determination that OSHA's rules and regulations would be inadequate to ensure worker's safety at the Terminal. PFF 162. Nor does the Agenda Report state that OSHA regulations would permit a substantial danger to the health and safety of workers at the Terminal. PFF 151. The OFD did not make any determination that existing fire safety regulations were inadequate to address any fire safety concerns presented by the shipment of coal or petcoke through the Terminal. PFF 374. Instead, the OFD directed OBOT to apply for a permit from OFD once the design and construction departments are completed, just as it would for any other project in Oakland. PFF 38-39.

[9] Notably, ESA's February 4, 2016 proposed Scope of Work underscored that the "***primary purpose*** of the draft proposal [was] to assist the City in determining whether existing regulations are adequate to protect the public's health and/or safety . . . ." PFF 120 (emphasis added). The reduced scope of work requested and approved by the City jettisoned that analysis. PFF 121.

In fact, the City made no determination that pre-existing regulations would fail to prevent a "condition substantially dangerous" to occupants, users or adjacent neighbors of the Terminal. Despite containing extensive "Findings," the Ordinance and Resolution do *not* include a finding that pre-existing local, state and/or federal laws (and contractual obligations) are insufficient to prevent a substantial danger from befalling occupants, users and adjacent neighbors. PFF 150. Instead, the Ordinance and Resolution include recitals that "pre-existing local, state and/or federal laws are inapplicable and/or insufficient to protect and promote the health, safety and/or general welfare of citizens, residents, workers, employers and/or visitors." PFF 148-49. While such a finding might justify the passage of a general welfare ordinance, it is insufficient to meet the contractual terms of Section 3.4.2, which require that the City determine, based on substantial evidence, that existing regulations are insufficient to prevent a "condition *substantially dangerous*" to the health or safety of occupants, users and/or adjacent neighbors of the Terminal. DA § 3.4.2 (emphasis added).

B. Because the City's Determinations Were Premature, the City Did Not Have Substantial Evidence to Determine Whether the Proposed Terminal Would Result in Any Condition

Due to the early stage of design of the Terminal, the materials presented to the City in support of the Ordinance and Resolution could not have constituted "substantial evidence" that a substantial danger would result absent a coal and petcoke ban.

The City based its findings on a document called the "Basis of Design." PFF 31. The Basis of Design ("BoD") represents only about 8-10% of the anticipated final design of the Terminal, and even that 8-10% was (and is) subject to change. PFF 32-36, 47. The BoD documented many regulations that the Terminal will have to comply with, but did not yet contain the kind of design details necessary to assess the specific health and safety impacts of the Terminal. PFF 42-49.[10] Indeed, the design of the Terminal is not even sufficiently complete to apply for the 76 permits it will require. PFF 36, 49. Without the information necessary to apply

[10] As such, the evidence provided to the City was not tailored to the specific terminal that was under development. PFF 42-49. Instead, ESA and the City considered evidence of a generic hypothetical terminal lacking the features that will be implemented in the Terminal once fully designed, *id.*, an approach the City's expert Dr. Ranajit Sahu disagreed with. *See* PFF 54.

for an air quality, fire safety or other permits, PFF 38-39, 49, the City's "findings" concerning health and safety impacts are speculation, not "substantial evidence."

Under the Standard Conditions and MMRPs, OBOT (or its sublessee) is required to submit an air quality and a fire safety plan to the City for its approval before the Terminal can operate. PFF 76-79. That is the time for the City to evaluate the potential air quality and fire safety implications of the Terminal, not before. *See* DA § 3.5. At the time the Ordinance and Resolution were enacted, it was too premature even to submit air quality and fire safety plans to the City—let alone for the City to pass judgment on whether the eventual, final plans for the Terminal could adequately address any concerns about air quality and fire safety impacts. PFF 31-49.

C. The City Did Not Have Substantial Evidence to Determine that a Complete Ban of Coal and Petcoke—as Opposed to a Less Restrictive Ordinance—Was Necessary to Avoid A Substantially Dangerous Condition

The City also had no evidence to determine whether this particular Ordinance—a complete ban on the shipment of coal and pet coke through the Terminal—was necessary to avoid a substantially dangerous condition. The City Council was not provided with any evidence concerning alternative new regulations to mitigate any health and safety impacts that might result from the shipment of coal and petcoke through the Terminal—so as to compare them to the proposed ban. PFF 169-72.[11] Without such evidence to perform a comparison, the City could not determine whether the failure to apply this particular Ordinance, as opposed to a less restrictive ordinance, would result in a substantially dangerous condition, as is required by Section 3.4.2.[12]

D. The City Did Not Have Substantial Evidence to Determine that the Shipment of Coal and Petcoke Through the Terminal Would Present a Substantially Dangerous Air Quality Condition Because the Analyses Presented to the City Were Flawed

The evidence provided to the City could not provide substantial evidence of a substantial

[11] As noted, pre-existing regulations and contractual commitments already mitigate potential impacts of the shipment of coal and petcoke—and every other bulk good—through the Terminal.

[12] Notably, the evidence relied upon by the City focused upon potential impacts common to many commodities, such as the release of PM and the ability of the commodity to burn, not any risk particular to coal or petcoke. PFF 65, 366-67, 388. The City did not have evidence to find that coal and petcoke present inherent health and safety risks unique to those commodities that would require an outright ban as opposed to less restrictive mitigation measures that could be applied to other bulk goods that may be shipped through the Terminal.

air quality danger to occupants, users and adjacent neighbors of the Terminal because the emissions estimates presented to the City were flawed. As the Court has recognized: "If these numbers are wrong and if the conclusions are based on the numbers, then this cannot be substantial evidence." D.E. 221 (1/10/18 Hr'g Tr.) 64:6-8. For each of the potential sources of emissions that ESA analyzed for the City, the numbers were wrong in multiple respects.

The City Council was sent the ESA Report as an attachment to the June 23, 2016 Agenda Report recommending the Council pass an ordinance and resolution banning the shipment of coal through the Terminal. Table 5-7 in the ESA Report is the only quantification of purported PM2.5 (and PM10)[13] emissions that may be caused by handling coal at the Terminal which appear in the ESA Report and in the June 23, 2016 Agenda Report sent to the Council on June 24, 2016. PFF 205. Table 5-7 purports to estimate PM2.5 emissions associated with the Terminal.[14] PFF 206. Table 5-7 is divided into two portions; the top portion purports to estimate emissions from "Rail Transport," the bottom portion relates to emissions estimates from "OBOT Operations." PFF 207. The "Rail Transport" section is further divided into sub-sections for purported emission estimates for various geographical areas along the mainline rail (BAAQMD, Oakland, South Emeryville, and San Leandro),[15] and separately for "Staging at Port Railyard, Rail Spur Trip to OBOT." *Id.*

1. Errors in Mainline Rail Transport Emissions Data

ESA's data for the mainline rail transportation is flawed in many respects. PFF 212-25. Perhaps most fundamentally, ESA's estimates for PM2.5 emissions associated with Rail Transport in "Oakland" were based on an assumption of a "constant rate" of emission from the mine in Utah until it arrives at the Terminal. PFF 212. The rate of emissions ESA assumed was a constant one pound per car per mile. PFF 214. The only purported justification for this "constant rate" assumption offered at trial by ESA was that there was no other data available. PFF 213. At trial, however, the City's expert, Dr. Sahu, conceded that the rate of emissions varies depending on a variety of factors, including wind, mechanical stress, vibration stress, movement of the coal and

[13] No evidence was presented that exposure to PM10 is substantially dangerous. PFF 363.

[14] Table 5-7 appears at page 5-17 of the ESA Report, and is reprinted with no material variation in the Agenda Report sent to the City Council on June 24, 2016. PFF 206.

[15] The City Council was not instructed about which rows in Table 5-7, or which geographical areas, it should consider in evaluating "substantial danger" to "adjacent neighbors." PFF 208-11.

train speed. PFF 217. Even ESA recognized that the speed at which a train travels would impact emissions, but Victoria Evans (of ESA) testified that ESA did *not* have information regarding this or other factors (such as conditions during other portions of the trip from Utah) impacting potential emissions at the Terminal. PFF 218. Moreover, a study relied upon by ESA in its report for the City established that there was no measurable emissions after approximately 500 miles of rail transport, PFF 224; this would mean there would be no emissions at the end of the approximately 700-mile from Utah to Oakland, PFF 225, the only location in which there might be "adjacent neighbors." DA § 3.4.2.

2. Errors in Staging Emissions Data

Aside from the emissions estimate for the entire BAAQMD region (which undisputedly is not limited to occupants, users or adjacent neighbors of the Terminal, PFF 210), ESA's largest emissions estimate for PM2.5 for Rail Transport are those for "Staging at the Port Railyard." PFF 226. These estimates are also fatally flawed.

(a) **ESA's Unexplained "Typo"**

ESA's PM2.5 emissions estimate in Table 5-7 for Staging was "18" tons per year and "67" pounds per day. PFF 230. The "18" tons per year figure in Table 5-7 is a "typo"; the number should have been 11.7 according to ESA's trial testimony. PFF 231.[16]

(b) **ESA's Use of the Wrong Standard (EPA AP-42 § 13.2.5)**

ESA applied Section 13.2.5 of EPA's AP-42 standard to estimate PM2.5 emissions for Staging. PFF 235. Section 13.2.5 should ***not*** be used to estimate emissions from Staging because it is not appropriate for estimates of continuous, hour after hour emissions. PFF 237. In fact, Section 13.2.5 expressly states: "Calculated emissions represent intermittent events and should not be input directly into dispersion models that assume steady-state emission rates." *Id.* Even the City's litigation air quality expert, Dr. Sahu, testified that AP-42 should not be applied to non-stationary, *i.e.*, moving, piles. PFF 239. During staging, rail cars are moving. *Id.*

(c) **ESA's Threshold Friction Velocity Errors**

[16] No explanation for this "typo" was offered at trial. There is no evidence any City Staff or Councilmember was informed about this "typo," or otherwise made aware of this error. PFF 232.

Just as important, ESA used a number of incorrect inputs in its application of Section 13.2.5 of EPA AP-42. PFF 241-311. The input that "drives"—or has the largest impact on—the EPA Section 13.2.5 calculation for emissions from staging is Threshold Friction Velocity ("TFV"). PFF 242. TFV measures the minimum wind speed required (*i.e.*, how hard the wind needs to blow on a particle) to make it start moving. PFF 243. A low TFV means lower wind speeds are needed to start the particles of a material to move. PFF 244. A higher TFV means a higher wind speed is required to move the particles. *Id.* ESA's Staging estimates are based on the TFV for fine coal dust on a concrete pad as opposed to an uncrusted coal pile. PFF 264-66. It was incorrect for ESA to use the TFV for fine coal dust on a concrete pad when estimating PM2.5 emissions associated with Staging at the Terminal. PFF 273-83. Indeed, even Ms. Evans of ESA admitted that it is "obvious" to use the TFV values for an uncrusted coal pile rather than the fine coal powder on a concrete pad in this context. PFF 256. Using the (incorrect) TFV for fine coal dust on a concrete pad, ESA arrived at the staging values contained in Table 5-7, namely 66.69 pounds of PM2.5 a day, and 11.67 tons of PM2.5 per year (after correction for a typographical error by ESA). PFF 265. If the TFV for an uncrusted coal pile were used instead of fine coal dust on a concrete pad, however, ESA Table 5-7's values for "Staging" would be 3.12 pounds per day of PM2.5 instead of 67 pounds per day, and 0.68 tons per year instead of 18 tons per year (which, when corrected for a "typo," should have read 11.7, or rounded, 12 tons per year). PFF 286.

3. Errors in OBOT Operations Emissions Estimates

ESA's estimates of emissions from "OBOT Operations" are also wrong, as they include estimates of emissions that are *uncontrolled*—that is, emissions before the application of Best Available Control Technology ("BACT"), which undisputedly will be applied at the Terminal. PFF 315-16. ESA's Table 5-7 used the numbers from the top half of Exhibit 432 at page 432.0005. PFF 313. These numbers represent the estimates for the uncontrolled emissions from the OBOT operations (emissions before the application of BACT). PFF 312. The bottom half of 432.0005 states that it represents controlled emissions, showing numbers reduced by approximately 90%. *Id.* Indeed, a draft of the ESA Report stated that BAAQMD had informed ESA that the application of BACT would result in a 90-99% reduction in emissions from the

Terminal. PFF 325. The application of BACT controls would, in fact, have resulted in emissions reduction in the range of 90-99 percent. PFF 327. OBOT and its sublessee, the terminal operator, plan to develop and construct a state-of-the-art Terminal that will implement BACT using the newest available technologies and protective measures. PFF 315-16.

4. ESA's Refusal to Consider Covers & Surfactants

Moreover, ESA's (and other) estimates provided to the City assumed that covered rail cars and surfactants would *not* be used for rail cars bringing coal through the Terminal, PFF 287, despite the fact that OBOT agreed to be contractually bound to use rail car covers and surfactants on any coal-carrying train coming into the Terminal. PFF 91-93. ESA never found that rail car covers were ineffective at reducing particulate emissions—in fact, ESA acknowledged that rail covers would be effective if used. PFF 303. ESA simply contended that OBOT had not proven that rail car covers could work for coal cars (as they routinely do for rail cars carrying other commodities). PFF 311; *see also* 304-10.[17] Moreover, ESA simply chose not to apply any suppression rate for surfactant in its Table 5-7 emission estimates, even though Ms. Evans testified that ESA had no basis to disagree with a BNSF study cited in the ESA Report that found a 75-93% suppression rate from surfactant at the time of application. PFF 293. ESA (and the City) also failed to take into account that surfactant could be applied to the trains as they entered the Port Railyard, which would have further reduced the emissions estimates for Staging. PFF 287-96.

To be clear, while OBOT and TLS contractually committed to use rail car covers and surfactants if the City so desires, the use of rail car covers and surfactants is not necessary to achieve particulate emission levels that are within safe limits. PFF 341-55. Air quality expert Lyle Chinkin prepared a "corrected" version of ESA's PM2.5 estimates for Rail Transport, Staging, and OBOT Operations that did not depend on the use of rail car covers or surfactants, and in fact assumed no rail car covers or surfactants were used. PFF 343, 348.[18] Mr. Chinkin (1) accounted for wind and train speed for his Rail Transport estimate, unlike ESA (PFF 344-47);

[17] As even the City's rail operations expert admits, rail covers are currently in use for train cars carrying lignite coal. PFF 302. The City's rail operations expert further assumed that any rail cars coming into the Terminal carrying coal would indeed be covered. PFF 301.

[18] There is no dispute that the "OBOT Operations" will be covered. PFF 315-17, 322-23.

(2) used the correct TFV for "uncrusted coal pile" as opposed to "fine coal dust on a concrete pad" for Staging (PFF 348-49); and (3) applied a 90% reduction for OBOT Operations, which is the effectiveness of "controls" that ESA itself had estimated (but then ignored) in internal spreadsheets. PFF 350-52. Applying these (and only these) corrections, ESA's estimates for PM2.5 emissions decreased from approximately 21 tons per year to 1.06 tons per year. PFF 353. This falls far below the BAAQMD threshold of 10 tons of PM2.5 per year, which was used in the 2012 Environmental Impact Report ("EIR") Addendum for the project and was cited by the City in the June 23, 2016 Agenda Report. PFF 354.

There are multiple tools to reduce particulate emissions from the shipment of *any* bulk commodity (including coal) through the Terminal—from covered conveyances, to air filtration systems, to unloading procedures, to throughput limitations, to rail car covers, to surfactants, to water sprays and beyond. *See, e.g.*, PFF 200-03, 288-92, 315-18, 322-27. Regulatory bodies like BAAQMD will set any necessary emission limits for activities associated with the Terminal regardless of the specific source or commodity, and the Terminal will then have to use whatever safe and effective technologies and procedures are available to meet those limits to BAAQMD's satisfaction. PFF 55, 57, 180-204, 316. If the Terminal is unable to do so, it will not be permitted to operate. PFF 190, 204. It is telling, therefore—and not surprising—that the Assistant City Administrator in charge of the City's handling of this issue had "no answer" for why the City did not simply set a numerical limit on emissions (*e.g.*, the CEQA thresholds used in the June 23, 2016 Agenda Report) and leave it to OBOT to comply. PFF 161.

E. The City Did Not Have Substantial Evidence to Determine that the Shipment of Coal and Petcoke Through the Terminal Would Place Occupants, Users or Adjacent Neighbors in a *Substantially Dangerous Condition* Because the Scientific Evidence Presented to the City Failed to Provide the Necessary Risk Assessments

The analysis provided to the City also could not provide substantial evidence of a substantial danger to occupants, users and adjacent neighbors of the Terminal because they did not contain the risk assessments necessary to make the required determinations. PFF 173-79, 356-98. Put simply, a risk assessment is necessary to make judgments about the level of potential risk. PFF 174. And the City had no such risk assessment evidence before it. Instead, the analyses

provided to the City identified generic potential risks—such as the potential for coal to release PM or burn—without quantifying or substantiating a specific health or safety risk posed by the shipment of coal and petcoke through this Terminal, under the conditions specific to it, to the populations identified in Section 3.4.2 of the DA. PFF 173-79, 356-98.[19]

1. The City Had No Air Quality Modeling—and Thus No Air Quality Risk Assessment—Evidence

The City had no air quality modeling estimates of PM air concentrations that could result from the shipment of coal and petcoke through the Terminal, and thus could not have had substantial evidence of an air quality condition substantially dangerous to the populations identified in DA Section 3.4.2.

A risk assessment is the standard method used to evaluate potential health risks of exposure to PM. PFF 173. A risk assessment for the shipment of goods through the proposed Terminal requires consideration of the "dose," *i.e.* the PM concentration levels, to which the populations identified in DA Section 3.4.2 (occupants, users and adjacent neighbors of the Terminal) could be exposed. PFF 175. There are two fundamental steps to determining air concentration levels of PM a population in a particular location could be exposed to: (1) calculating emissions estimates; and (2) performing air quality modeling based on those estimates and other factors. PFF 176. As air quality expert Lyle Chinkin explained: "[I]f you put your mouth on the tail pipe [of a car] and you just breathe all that air in, that's the emissions coming out of the tail pipe. But if you move 10 feet away or 100 feet way or a mile away, you're breathing air quality concentrations, and the only way to know how much you're breathing would be to model how much of those emissions got to where you were and breathe that air." PFF 178.

Air quality modeling is thus required to determine the potential "dose" of exposure to PM air concentration levels to which a specific population—such as adjacent neighbors of the

[19] *See Stewart*, 248 Cal. App. 4th at 423-24 ("The vast majority of the evidence the City cites establishes there were concerns about what impacts the crematorium *might* have on the public . . . . But although the record is full of statements about which chemicals crematoria in general can emit and the public-health problems, particularly asthma, that East Oakland residents face, there is no evidence that Stewart's crematorium in particular posed a danger to public health. . . . Therefore, we conclude there was insufficient evidence of a danger or nuisance to the public that justified the City's application of the emergency ordinance to Stewart's project.").

Terminal—could be exposed. PFF 112, 177. Air quality modeling is done using a computer model that takes into account weather data and facility-specific emissions information, then mathematically estimates what air quality concentrations will exist at a given location. PFF 113. This modeling takes a variety of factors into account, including the amount of wind that would be expected at the specific location in question, and how much dispersion there would be under those conditions. PFF 114.

ESA proposed performing air quality modeling as part of a proposed "Phase 2" of its proposed Scope of Work. PFF 111. To ESA, modeling would have been "useful and important." *Id.* The City, however, rejected ESA's proposal that air quality modeling be performed. PFF 117. In fact, the City rejected the entirety of ESA's proposed "Phase 2" Scope of Work, opting instead to have ESA perform only a "preliminary review" of the material submitted to the City "based on limited information." PFF 110, 125.

Accordingly, ESA did not perform air quality modeling,[20] and the City did not have the air quality modeling evidence necessary to determine that any PM emissions from the shipment of coal and petcoke even could present a substantially dangerous air quality condition to occupants, users or adjacent neighbors of the Terminal. PFF 117, 179. Dr. Zoe Chafe testified that her report also did not contain a risk assessment for any of the potential health or safety risks that she identified in her report. PFF 357.

2. The City Had No Fire Safety Risk Assessment Evidence

Similarly, the City lacked the necessary risk assessment evidence to determine that the shipment of coal and petcoke through the Terminal will result in a substantially dangerous fire safety condition for occupants, users or adjacent neighbors of the Terminal. The reports provided to the City did ***not*** quantify the risk of fire associated with the proposed facility. PFF 372. That is not surprising, given that there are no documented incidents of bituminous coal dust explosions or spontaneous combustion of bituminous coal at any coal facilities. PFF 378, 383. In fact, the City has acknowledged that bituminous coal "is a commodity that has a NFPA rating of one (1) for

[20] The City was also not provided with any quantification or modeling estimates regarding the volume of greenhouse gases or impact on climate change that could potentially be caused by shipment of coal or petcoke through the Terminal. PFF 360-62.

health risks and a rating of one (1) for fire risks as there are no reactivity or low fire risks associated with that commodity." PFF 385, 388-90.

3. The City Had No Trace Metals Risk Assessment Evidence

The Ordinance, ESA Report and Chafe report discussed metals contained in coal such as mercury, arsenic and lead. PFF 359. However, there was no evidence provided to the City to show that occupants, users or adjacent neighbors of the Terminal would ever be exposed to these metals through inhalation of coal dust, let alone risk assessment evidence to determine that the shipment of coal would present a substantially dangerous condition to occupants, users or adjacent neighbors of the Terminal based on exposure to these metals. PFF 358-59. Again, that is not surprising, because these metals are not "bioavailable"—meaning that they cannot enter the bloodstream through the inhalation of coal dust. PFF 359.

4. The City Made No Determination that A Failure to Apply the Ordinance to the Terminal Would Place Occupants, Users or Adjacent Neighbors in a Substantially Dangerous Condition

In fact, the City did ***not*** determine that, based on substantial evidence, a failure to apply the Ordinance ***would*** (not *could*) place ***occupants, users or adjacent neighbors*** of the Terminal in a condition substantially dangerous to their health or safety. PFF 148-72, 356-57. The Ordinance's and Resolution's findings[21] include a host of abstract, unsupported statements regarding health and safety, such as "[c]haracteristics of Coal and Coke pose many risks to public health and/or safety" and the "rail transport of Coal or Coke through the City, including without limitation to and from West Oakland, would have substantial public health and safety impacts . . . ." TX0004.0005 ("Ordinance") § 8.60.020 B(1)(c). Without health and safety risk assessment evidence, however, the City could not have determined "based on substantial evidence" that a failure to apply the Ordinance to the Terminal would "place existing or future occupants or users of the Project, adjacent neighbors . . . in a condition substantially dangerous to their health or safety." DA § 3.4.2. The City's findings in the Ordinance and Resolution only confirm that fact.

[21] The Ordinance sets forth "Findings" in Section 8.60.020. The Ordinance states that "[e]ach individual finding . . . constitutes a separate and independently sufficient basis to adopt the Ordinance." Ordinance § 8.60.020. The Resolution incorporates its recitals as "findings." TX0598.0007 ("Resolution") at § 4.

F. The City Did Not Have Substantial Evidence to Determine that the Shipment of Coal and Petcoke Through the Terminal Will Place Occupants, Users or Adjacent Neighbors in a *Substantially Dangerous Condition* Because the Scientific Evidence Provided to the City Provided No Comparative Evidence to Determine Whether Any Danger Was Substantial

The City also did not have evidence necessary to determine whether any purported health or safety risk was a *substantial* danger because the City had nothing to compare to the purported risks of shipping coal and petcoke through the Terminal. At the pre-trial conference, the Court identified the primary question for the City to address at trial: "How do we know it's substantial, it's a substantial danger, if we haven't received a comparison of how much the air is polluted by this project compared to how much the air is polluted by any number of things that happen?" D.E. 221 (1/10/18 Hr'g Tr.) 78:1-4, 83:6-14. The Court elaborated:

> Context matters. And that's . . . the big question . . . ***was the City Council given the ability to judge whether the amount of emissions from the facility would pose not merely a danger, but a substantial danger***. And that's what the trial is going to be about. *Id.* 130:17-22.

The evidence at trial confirmed that the evidence provided to the City gave no basis to make that comparative finding. There was no evidence that compared the health and safety impacts of shipping coal or petcoke through the Terminal to any other activity or source of PM in Oakland—including the Terminal's neighbor to the north, the Bay Bridge Toll Plaza; the Terminal's neighbor to the south, the Port of Oakland; or any and all other activities and sources of PM in Oakland, individually or combined. PFF 368-69.

The City also did not have the evidence necessary to compare the health and safety impacts of shipping coal or petcoke through the Terminal to any other development or activity at the West Gateway. PFF 366-67. The City concedes, however, that *any* industrial development at the West Gateway would increase PM2.5 and PM10. PFF 65. In fact, the City found in its 2012 EIR Addendum that the development of a bulk goods terminal at the West Gateway of the former Oakland Army Base would not "result in significant new air quality impacts or substantial increase in severity of previously identified air quality impacts" for the Oakland Army Base redevelopment project. PFF 72. The City further found that the project as conceived of in 2012, now including a bulk goods terminal, "would generate less ROG, NOx, PM10 and PM2.5

emissions than identified in 2002" for the project (when the anticipated development did not include a bulk goods terminal). *See* PFF 73.

The City did not have the evidence necessary to determine that the impact of shipping coal or petcoke through OBOT would have any greater health or safety impact than shipping any other commodity through the Terminal. PFF 366-67. If anything, the evidence provided to the City showed that the health and safety impacts of shipping coal and petcoke had the potential to be equal to or less than the impacts of shipping other (non-politically controversial) commodities, such as ground corn, through the Terminal. *See, e.g.*, PFF 385-88. If shipping food fit for human consumption through the Terminal could be considered to present a "substantial danger," then the health and safety exception of Section 3.4.2 would swallow the entire DA, as it would necessarily render the development and operation of a "ship-to-rail" export terminal impossible.

Indeed, simply increasing PM2.5 or PM10 in the atmosphere cannot equate to "substantially dangerous" under Section 3.4.2 because almost any activity that would take place at the West Gateway would increase PM2.5. PFF 65. Truck traffic, by definition, emits PM2.5. PFF 66. The development of an office park, or even a building where coffee is roasted, would increase PM2.5 emissions. PFF 67. Any reading of "substantially dangerous" that would encompass risks posed by common activities in Oakland or any industrial development at the West Gateway would read OBOT's vested right to develop a rail-to-ship bulk goods terminal out of the contract formed precisely to create it.[22]

In sum, the City had not been provided the evidence necessary to determine that any purported danger resulting from the failure to apply this ordinance (banning the shipment of the coal and petcoke through the Terminal) was *substantial*.

[22] As *Stewart* makes clear, the health and safety impact that is required to justify an exception to a vested right must be far more serious than the "pedestrian public-welfare concerns that justify normal regulations." 248 Cal.App.4th at 422-23; *see also id.* at 423 ("Consistent with *Davidson*, the trial court determined that the evidence of the public's 'desire for transparency and . . . participation' 'would easily afford a rational basis for an ordinance applicable to proposed projects' if no vested right were implicated, but it did not constitute 'actual evidence' of an effect on the public health or any other sufficiently serious impact on the public welfare necessary to impair a vested right.").

III. THERE IS NO EVIDENCE THAT THE CITY'S DETERMINATION WAS *BASED ON* SUBSTANTIAL EVIDENCE

Finally, the City's application of the Ordinance to OBOT breached the DA because its decision was not "based on" any substantial evidence concerning the potential health and safety impacts of shipping coal and petcoke through the Terminal. Section 3.4.2 of the DA states that its narrow exception to OBOT's vested right is invoked only if the "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." DA § 3.4.2 (emphasis added). It does ***not*** state that its narrow exception to OBOT's vested rights is invoked if "substantial evidence" of a substantially dangerous condition is simply "in the record" submitted to the City.

In connection with the proposed retention of ESA, the City acknowledged that it did not have the expertise to evaluate the information submitted to the City concerning the health and safety impacts of shipping coal and petcoke through the Terminal, and accordingly needed ESA to prepare a report summarizing that information for it. PFF 100.

On Friday, June 24, 2016, the City Council was presented with an Agenda Report recommending passage of the Ordinance and Resolution at a City Council meeting scheduled for the next business day, Monday, June 27, 2016. PFF 139. That Agenda Report attached nine documents: (1) the TLS Basis of Design; (2) 2014 Oakland Resolution No. 85054 ("A Resolution Opposing the Transportation of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal and Petroleum Coke, Through the City of Oakland"); (3) the ESA Report; (4) a Map of Rail Routes between Utah and the Bay Area; (5) June 22, 2016 Correspondence from the Port of Oakland "regarding coal/coke shipments from the Port"; (6) Screenshots of CARE Program Oakland Impacted Communities; (7) "CARE Impacted Communities (Oakland Zip Codes Only)"; (8) a "Map of the West Oakland Army Base"; and (9) "Adopted Plans and Policies Related to Health, Safety and General Welfare, including the General Plan and Energy and Climate Action Plan". *See* PFF 137; TX0976.0001 (Agenda Report). The June 24, 2016 Agenda Report also included a link to additional documents posted on a web site. *Id.* There is no evidence that any member of

the City Council (or their staff) ever accessed that linked web site or the documents posted on it.

June 24, 2016 was the first time that the City Council was given access to the 154-page ESA Report or any of the other materials in the Agenda Report. PFF 139. ESA employee Crescentia Brown wrote that giving three days notice of the ESA Report (over a weekend no less) was "crazy to do, but the opponents and Council are MORE interested in getting the report done so the Council can ACT/VOTE (BAN)." PFF 136. There is no evidence in the trial record that the City Council ***based*** its decision to apply the Ordinance to OBOT on any of the evidence provided to it concerning potential impacts of the shipment of coal and pet coke through the Terminal at the West Gateway (on the Friday before its Monday vote).[23] The City thus cannot invoke the exception of Section 3.4.2—and breached the DA—for this additional reason.

CONCLUSION

The evidence at trial shows that the City breached the DA by applying the Ordinance to the Terminal. OBOT thus respectfully requests that the Court:[24]

1) Issue a declaratory judgment:

   a. that the City breached the DA through its application of the Ordinance to the Terminal/OBOT through the Resolution;

   b. that pre-existing (pre-DA) regulations and contractual agreements will prevent the shipment of coal and petcoke through the Terminal from placing "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" as stated in Section 3.4.2 of the DA;

   c. that the City did not determine based on substantial evidence that a failure to apply the Ordinance to the Terminal "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" as stated in DA Section 3.4.2;

2) Issue a permanent injunction enjoining the City from applying or enforcing the Ordinance and Resolution to the Terminal/OBOT; and

3) Award reasonable attorneys' fees and costs to OBOT.

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[23] In fact, the evidence demonstrates that the City Council did not ask any questions about Table 5-7 of ESA Report, or its facially apparent mathematical errors. PFF 142, 232.

[24] Section 8.7 of the DA provides that "each Party shall have the right, in addition to all other rights and remedies available under this Agreement, to (a) bring any proceeding in the nature of specific performance, injunctive relief or mandamus, and/or (b) bring any action at law or in equity as may be permitted by Laws or this Agreement." DA § 8.7.

Dated: February 9, 2018

Respectfully submitted,

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