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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO BAYKEEPER,

Defendant-Intervenors.

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

DEFENDANT CITY OF OAKLAND AND DEFENDANT-INTERVENORS' POST TRIAL BRIEF

Bench Trial
Date: January 16, 2018

Post-Trial Hearing
Date: March 28, 2018
Time: 10:00 a.m.
Ctrm.: No. 2, 17th Floor
Judge: Honorable Vince Chhabria

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I. INTRODUCTION

Plaintiff Oakland Bulk & Oversized Terminal, LLC ("OBOT") flees from the express terms of the Development Agreement ("DA"). In section 3.4.2, OBOT agreed that the City could apply a post-DA ordinance to protect the adjacent community and/or users of OBOT's project from substantially dangerous health and safety conditions, based on substantial evidence. OBOT ignores both the section's key provisions and applicable case law.

OBOT mangles the substantial evidence standard of review. Before the City adopted the subject Ordinance and Resolution, OBOT declined to present evidence of emissions estimates or combustion dangers, other than preliminary design plans and aspirational assurances, or to seek more time to respond to later-filed submissions. After the Council completed its nearly year-long public hearing process and reached its substantial-evidence-based decision, OBOT sued. It used the judicial process to gather extra-record evidence (*e.g.*, depositions of City and City-commissioned witnesses), and it hired experts. Using post-hearing evidence, OBOT attacked segments of the City's record, while ignoring extensive substantial evidence offered by professionals, who cited to reliable material, and others with personal knowledge. It now seeks to circumvent the DA by asking this Court to second-guess the Council based on a myopic review of the City's extensive record, and to consider inadmissible, extra-record evidence.

OBOT supplies no authority for its approach. Its post-trial brief, Dkt. 239 ("OB Br."), cites only four cases: two that define "substantial evidence" and two that discuss the inapplicable independent judgment test, which applies only when a local agency exercises its inherent authority to abrogate a vested right. Incontrovertible authority establishes that OBOT bore the burden to prove that the City's record entirely lacks substantial evidence, and it never shouldered the burden. In fact, substantial evidence establishes that the Council properly exercised its rights under the DA: it prevented OBOT from subjecting adjacent neighbors and existing or future occupants or users of OBOT's project to substantially dangerous health and safety conditions.[1]

[1] The Court may enter judgment in favor of the City and Intervenor-Defendants ("Defendants") on the breach of contract claim based on Defendants' Cal. Gov't Code § 65866 motion, which would obviate the need to affirm the City's decision for reasons addressed herein. The Court should also grant Defendants' motions for summary judgment on the federal claims.

II. DISCUSSION

A. OBOT Bore the Burden to Prove that No Substantial Evidence Supports the City.

1. Section 3.4.2 Provides for the Use of the Substantial Evidence Test.

Notwithstanding the agreed-upon substantial evidence standard set forth in section 3.4.2, OBOT continues to insist that the independent judgment test applies, OB Br. at 3-4, contradicting both the plain language of section 3.4.2 and the case law construing the terms used in it.

Irrespective of the title of the claim that OBOT attached to its challenge to the Council's action under DA section 3.4.2 (*i.e.*, breach of contract or writ petition), the gravamen is the same. OBOT contends that the Council failed to justify its application of the Ordinance to OBOT pursuant to section 3.4.2, which states that the Council's decision must be based on substantial evidence after a public hearing. Thus, the issue is whether substantial evidence supported the Council's decision, a test California courts regularly apply in analogous writ petition cases.

2. OBOT Bore the Burden to Prove the Lack of Any Substantial Evidence.

In Resolution No. 86234, the Council found, based on its independent review of the entire record, that substantial evidence supported application of the Ordinance to OBOT under DA section 3.4.2. Trial Ex. 598 at 0004-08. As previously briefed, OBOT bore the burden to prove that the entire record lacks substantial evidence supporting the Council's findings. *See, e.g.*, *Do v. Regents of the Univ. of Cal.*, 216 Cal.App.4th 1474, 1490 (2013); *Young v. City of Coronado*, 10 Cal.App.5th 408, 427 (2017) (courts review the "entire administrative record … [to] determine whether there is any evidence (or any reasonable inferences …)" that support the agency's decision) (citations omitted).[2] A plaintiff must "lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal." *Defend the Bay v. City of Irvine*, 119 Cal.App.4th 1261, 1266 (2004); *accord Hauser v. Ventura Cty.*, __ Cal.App.5th __, No. 56-2014-00455399-CU-WM-VTA, 2018 WL 947887, at *2 (Cal. Ct. App. Feb. 20, 2018) (issue is whether substantial evidence supports the agency's decision, discarding evidence favorable to plaintiff).

California courts regularly reject challenges because the plaintiff did not lay out all the evidence supporting a city's decision and show why it was not substantial. *See, e.g.*, *Citizens for*

[2] For prior briefing on these issues, *see* Dkt. 145 at 11-13, Dkt. 200 at 3-4; Dkt. 224 at 3-5.

a Sustainable Treasure Island v. City & Cty. of S.F., 227 Cal.App.4th 1036, 1064 (2014); *S. Cty. Citizens for Smart Growth v. Cty. of Nev.*, 221 Cal.App.4th 316, 331 (2013); *Sierra Club v. City of Orange*, 163 Cal.App.4th 523, 540-41 (2008).

Here, OBOT failed to lay out and challenge the full scope of the evidence supporting the City's decision. Accordingly, the Court should enter judgment against OBOT on this basis alone.

3. OBOT Ignores the Established Principles Governing Application of the Substantial Evidence Standard of Judicial Review.

The most fundamental tenet of the substantial evidence standard is that the court must confine its review to the record before the public agency. In its leading decision, the California Supreme Court emphasized that "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision." *W. States Petroleum Ass'n v. Super. Ct.*, 9 Cal.4th 559, 579 (1995); *see also Eureka Citizens for Responsible Gov't v. City of Eureka*, 147 Cal.App.4th 357, 366-67 (2007) (record rules apply similarly to quasi-judicial decisions). At most, extra-record evidence may be considered for limited background and explanatory purposes. *Cf. W. States*, 9 Cal.4th at 578-79. OBOT ignores this basic principle.

OBOT compounds the problem by objecting on hearsay and relevance grounds to record evidence for which (1) a witness did not testify at trial, and/or (2) Defendants did not offer direct evidence showing that the Council actually relied upon that evidence. Dkt. 240 at 2-4. OBOT's two grounds, *offered without citation to any authority*, are meritless.

First, the rules of evidence—*e.g.*, regarding hearsay and sworn testimony—do not apply to record evidence submitted to the Council, and OBOT had no right to examine or cross-examine individuals who submitted such evidence. *Mohilef v. Janovici*, 51 Cal.App.4th 267, 289-302 (1996); *E.W.A.P., Inc. v. City of L.A.*, 56 Cal.App.4th 310, 323-34 (1997). Thus, OBOT's objections are an improper attack on the "substantial evidence" provision of section 3.4.2.

Second, the City need not show that the Council actually relied on any particular evidence. California courts presume agency decision makers regularly performed their duties and based their findings on substantial evidence from the record. Cal. Evid. Code § 664 (presumption

that official duty was performed); *Harrington v. City of Davis*, 16 Cal.App.5th 420, 436 (2017); *Cal. Clean Energy Comm. v. City of San Jose*, 220 Cal.App.4th 1325, 1341-42 (2013).[3] Courts thus have rejected contentions that an agency must prove its decision makers actually relied on particular evidence: "it is not within the province of the court to inquire into what evidence was or was not examined or relied on by a council member in reaching his or her decision." *S. Cal. Underground Contractors, Inc. v. City of San Diego*, 108 Cal.App.4th 533, 548 (2003).[4]

Therefore, where the agency made findings, as the Council did here, an "inquiry outside the administrative record to determine what evidence was considered, and reasoning employed," is "preclude[d]." *City of Fairfield v. Super. Ct.*, 14 Cal.3d 768, 779 (1975); *accord Cal. Clean Energy Comm.*, 220 Cal.App.4th at 1341-42; *City of Poway v. City of San Diego*, 155 Cal.App.3d 1037, 1042 (1984).[5] Here, OBOT seeks exactly that type of prohibited inquiry.

Finally, OBOT improperly requests that the Court reweigh the evidence and reach new, independent conclusions about the facts. It is improper for courts "to independently weigh conflicting evidence," because to do so "would [] usurp the agency's authority and violate the doctrine of separation of powers." *W. States*, 9 Cal.4th at 578-79.

4. Courts Defer to Agencies' Choices of Methodologies and Expert Evidence.

The deferential substantial evidence test applies, not just to lay evidence, but also to technical and expert evidence, including to the scope of analysis, appropriateness of the methodology, and the reliability of the data. *San Joaquin Raptor Rescue Ctr. v. Cty. of Merced*, 149 Cal.App.4th 645, 654 (2007); *Saltonstall v. City of Sacramento*, 234 Cal.App.4th 549, 581 (2015). In applying the substantial evidence test to such evidence, courts must exercise restraint.

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[3] These presumptions govern this state law claim. Fed. R. Evid. 302.

[4] Similarly, the Court must presume that the Ordinance and Resolution are valid. *See Sonoma Cty., Employees v. Cty. of Sonoma*, 1 Cal.App.4th 267, 274-75 (1991).

[5] The foregoing authorities are consistent with OBOT's burden to prove that "no reasonable municipality could have reached the same decision as the City." *Kutzke v. City of San Diego*, 11 Cal.App.5th 1034, 1042 (2017); *see also Sonoma Cty. Water Coal. v. Sonoma Cty. Water Agency*, 189 Cal.App.4th 33, 41-42 (2010). Under this objective standard, courts do not evaluate subjective rationales or motivations, *e.g.*, by extra-record inquiry. Rather, courts uphold a city's actions when supported by substantial evidence in the record. *W. States*, 9 Cal.4th at 576.

W. States Petroleum Ass'n v. S. Coast Air Quality Mgmt. Dist., 136 Cal.App.4th 1012, 1018 (2006) ("'In technical matters requiring the assistance of experts and the study of marshaled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible'").

Thus, a court reviewing technical environmental analyses submitted to a public agency must not perform its own scientific critique to independently determine reliability. *Town of Atherton v. Cal. High-Speed Rail Auth.*, 228 Cal.App.4th 314, 350 (2014) ("[O]ur Supreme Court has cautioned reviewing courts against performing our own scientific critiques of environmental studies, a task for which we have neither resources nor scientific expertise"). "In technical matters requiring the assistance of experts and the use and interpretation of scientific data, [the courts] give substantial discretion to administrative agencies," including cities. *O.W.L. Found. v. City of Rohnert Park*, 168 Cal.App.4th 568, 593 (2008); *accord S.F. Fire Fighters Local 798 v. City and Cty. of S.F.*, 38 Cal.4th 653, 667 (2006) ("principles of separation of powers and deference to administrative expertise apply [to] … local agencies"). "The courts should not substitute [their] own credibility determinations for those of the public agency." *Leonoff v. Monterey Cty. Bd. of Supervisors*, 222 Cal. App. 3d 1337, 1349 (1990). "[T]he issue [for judicial review] is not whether the studies are irrefutable or whether they could have been better[,] … only whether the studies are sufficiently credible to be considered *as part of* the total evidence. *Laurel Heights Improvement Ass'n of S.F. v. Regents of the Univ. of Cal.*, 47 Cal.3d 376, 409 (1988); *see also Greenebaum v. City of L.A.*, 153 Cal.App.3d 391, 413 (1984) (in light of "all the data," decision was valid even if some figures "were inaccurate").[6]

"'The fact that additional studies might be helpful does not mean that they are required.'" *Gray v. Cty. of Madera*, 167 Cal.App.4th 1099, 1016 (2008) (citation omitted). Similarly, a plaintiff cannot meet its burden merely by identifying deficiencies in a technical report. *Cal. Sportfishing Prot. All. v. State Water Res. Control Bd.*, 160 Cal.App.4th 1625, 1640 (2008). A

[6] The *Saltonstall* court held that the city "had the prerogative to resolve conflicting factual conclusions about the extent of traffic congestion that would result from the downtown arena project" and could thus rely on the methodology of its choosing. 234 Cal.App.4th at 582–83.

court is not "entitled to discount evidence unless it is physically impossible or inherently improbable and such inherent improbability plainly appears" in the agency's record. *Id.* (internal quotation marks omitted); *accord Save Round Valley All. v. Cty. of Inyo*, 157 Cal.App.4th 1437, 1467-68 (2007). Even if some evidence is discounted, courts reject the claim if other substantial evidence supports the decision, as discussed above.

In short, the California courts have proscribed the judicial inquiry that OBOT asks this Court to undertake. *See, e.g., W. States*, 9 Cal.4th at 577-78 (courts cannot consider a plaintiff's extra-record evidence to call into question whether the record evidence was substantial, including whether the agency considered "all relevant factors" or misapplied a methodology).

B. Section 3.4.2 Does Not Require any Particular Methodology to Support a Substantially Dangerous (*i.e.*, Significant and Non-Trivial) Condition Finding.

"When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." *Founding Members v. Newport Beach Country Club*, 109 Cal.App.4th 944, 955 (2003); *see also* Cal. Civ. Code § 1639. Language should be construed objectively, as a reasonable person would. *Beard v. Goodrich*, 110 Cal.App.4th 1031, 1038 (2003). A court may consider extrinsic evidence that a contract phrase has common usage in similar contexts. *See Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist.*, 264 Cal.App.2d 603, 607 (1968). Here, the parties agreed the DA was jointly drafted and should not be construed in favor of any party. DFF 34. Thus, the Court should interpret the plain text of the contract objectively, consistent with common usage in public entity matters.

1. Section 3.4.2 Does Not Dictate a Particular Methodology for Determining When a Substantially Dangerous Condition Would Exist.

Section 3.4.2 did not dictate any methodology, *e.g.*, CEQA analysis, modeling, particular methods of either quantitative or qualitative analysis, or comparative analysis to actual or hypothetical commodities or operations. OBOT agreed to this broad reservation of the City's police power without any constraints on the analysis chosen by the City. *See* DFF 33, 34.[7]

[7] OBOT could have requested inclusion in section 3.4.2 of required methodologies, *e.g.*, comparisons among bulk goods. But OBOT did not, presumably because it knew such a request would have made the City aware of OBOT's intentions regarding coal—which would surely have resulted in a coal prohibition as a DA condition.

2. A "Substantially Dangerous" Condition Excludes Only Conditions that Present Minor, Trivial, or Insignificant Dangers.

Section 3.4.2 does not define "substantially dangerous." Thus, this phrase must be given its ordinary and popular meaning, Cal. Civ. Code § 1644, consistent with use in similar contexts.

The Merriam-Webster dictionary defines "substantial" as "consisting of or relating to substance," and "not imaginary or illusory: real, true." *Substantial*, *Merriam-Webster Dictionary*, *available at* https://www.merriam-webster.com/dictionary/substantial (accessed February 20, 2018). The definition of "substantial evidence" is consistent: "[s]ubstantial evidence" is (1) "evidence of ponderable legal significance … reasonable in nature, credible, and of solid value"; or (2) "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Desmond v. Cty. of Contra Costa*, 21 Cal.App.4th 330, 335 (1993).[8]

California statutes governing dangerous conditions on public property provide a similar definition. "'Dangerous condition' means a condition of property that creates a substantial (*as distinguished from a minor, trivial or insignificant)* risk of injury …." Cal. Gov't Code § 830(a) (italics added). California case law is in accord, defining "substantial danger" to mean a non-trivial danger: "substantial danger … does not mean any danger, however remote, or a trivial danger[;] nor conversely is the term synonymous with great or extreme danger…. The term substantial danger means danger which is real and not insignificant." *Cavers v. Cushman Motor Sales*, 95 Cal.App.3d 338, 349 (1979) (where product presented "substantial danger" to consumers). *Cavers* provides a useful multi-factor test: "Whether a danger is substantial or insubstantial must be determined from the evidence and measured in light of several criteria, none of which is totally controlling, including [1] the potentially injurious consequences of such danger, [2] likelihood that injury might result, [3] the quality and extent of danger … and [4] whether a danger is latent or patent." *Id.* at 349.

Federal statutes also emphasize the breadth of circumstances that present "substantial dangers." For example, under the Resource Conservation and Recovery Act, a citizen may sue "

[8] *See also Sonoma Cty. Water*, 189 Cal.App.4th at 41 ("Substantial evidence is defined as enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached").

any person … who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Whether "endangerment" is "substantial" "does not require quantification of the endangerment (*e.g.*, proof that a certain number of persons will be exposed, that 'excess deaths' will occur, or that a water supply will be contaminated to a specific degree) …." *Cal. Dep't of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F.Supp.2d 930, 980 (E.D. Cal. 2003). Instead, "endangerment is substantial if there is some reasonable cause for concern that someone or something may be exposed to a risk of harm … if remedial action is not taken." *Id.*; *see also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210–11 (2d Cir. 2009).

An activity that presents even a low risk of a serious consequence (*i.e.*, bodily injury or death) is substantially dangerous, particularly if a large number of people are exposed to the risk. Here, the record before the City Council contains substantial evidence of substantially dangerous conditions on multiple fronts over the 66-year term of the DA if the storage and handling of coal and coke are not prohibited. In particular: (1) fine particulate matter ($PM_{2.5}$) emissions will result in seriously injurious consequences to members of the adjacent, disproportionately-impacted, and vulnerable West Oakland community (*e.g.*, premature death, hospitalization for heart and lung disease, asthma), and (2) a persistent threat of a fire or explosion would constitute a substantially dangerous condition, placing individuals at risk of life and bodily injury from the fire or explosion itself and from the release of bioavailable toxics—all in a location next to a densely populated neighborhood and Bay Bridge Toll Plaza.[9]

C. The City Retains Full Authority to Prevent Substantially Dangerous Conditions.

As a charter city, *see* DFF 3, Oakland "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." Cal.

[9] To impose a stricter standard would conflict with the City's role to protect the public health and safety, and would improperly interpret the DA in a manner that unlawfully contracts away the City's police power. *See 108 Holdings, Ltd. v. City of Rohnert Park*, 136 Cal.App.4th 186, 194-95 (2006); *Delucchi v. Cty. of Santa Cruz*, 179 Cal.App.3d 814, 823-24 (1986).

Const., art. XI, § 5. Oakland thus has inherent authority over its municipal affairs, unless there is a direct conflict with state law. *Horton v. City of Oakland*, 82 Cal.App.4th 580, 584-85 (2000), *abrogated on other grounds by O'Connell v. City of Stockton*, 41 Cal.4th 1061 (2007).[10]

Nonetheless, OBOT suggests that because third party regulatory agencies, *e.g.*, the Bay Area Air Quality Management District ("BAAQMD"), will subsequently consider permit applications, the City must cede its authority to regulate whether and how OBOT may store and handle coal and coke. OB Br. at 4–7. The suggestion is a red herring. First, OBOT has not identified and cannot identify any limitation in the Oakland City Charter that requires the City to cede to any other public agency, including BAAQMD, the City's authority to regulate (including to prohibit) the storage and handling of coal and coke. Second, OBOT has not identified, nor could it identify, any state law that conflicts with or preempts the City's authority to regulate whether, and under what conditions, OBOT may store and handle coal and coke.

Moreover, federal and state air quality law directly rebuts OBOT's contention. Those laws leave undisturbed the City's authority to address air quality issues. Indeed, the pertinent provision of the federal Clean Air Act "saves from preemption 'the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution,'" so long as the state or local requirement is not less stringent than federal requirements. *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015) (quoting 42 U.S.C. § 7416). As to state law, "[l]ocal and regional authorities have the primary responsibility for control of air pollution from all sources other than vehicular sources." Cal. Health & Saf. Code § 39002; *see also* Cal. Health & Saf. Code § 39037 (a city is a local authority under the state law). Absent express authority to the contrary, cities "may establish additional, stricter standards than those set forth by law or by the state board for nonvehicular sources." Cal. Health & Saf. Code § 41508.

[10] All California cities "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., art. XI, § 7. The purpose of the police power is to protect public health, safety and welfare. *See City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal.4th 729, 738 (2013).

With respect to substantially dangerous conditions related to combustion, the City is the sole governing agency; there is no third party regulator. The City Council retains discretion to adopt and apply new rules to protect against substantial fire dangers. Indeed, since state-of-the-art designs and regulations have not prevented fires at coal-handling terminals, DFF 197–201, the City Council's decision to prohibit the storage and handling of coal and coke was clearly within its discretion to exercise its police powers and authority under section 3.4.2 and under state and federal law. *See Sonoma Cty. Employees*, 1 Cal.App.4th at 279 (courts must not require a public agency acting to prevent anticipated harm to "calibrate[] with the accuracy of a jeweler's scale" its measures to prevent harm).

D. The City Did Not Breach the DA.

1. OBOT Did Not Meet Its Burden to Prove Lack of Substantial Evidence re Substantially Dangerous Health Conditions.

a. OBOT Has Not Challenged and Cannot Challenge Extensive Substantial Evidence Regarding Health Impacts.

A large body of evidence on the various health dangers posed by the Terminal, including fugitive coal dust, was submitted to the City by air quality experts, doctors, public health professionals, and many other credible commenters. *See*, *e.g.*, DFF 115-184.[11]

OBOT failed to acknowledge—let alone disprove—the overwhelming majority of the evidence in the record (choosing instead to present a misguided, inaccurate attempt to discredit certain aspects of the ESA report, OB Br. at 9-13, which the City refutes below). The multiple and extensive submissions from qualified independent sources showed, *inter alia*:

- The Terminal and associated staging and rail activities will generate fugitive coal

[11] This evidence includes, without limitation: (1) the reports by ESA, DFF 63-65, 74, Dr. Zoe Chafe, DFF 66, 75, the Public Health Advisory Panel ("PHAP") (which was endorsed by other prominent Bay Area scientists and physicians), DFF 73, DFF 143, Dr. Phyllis Fox, DFF 16, 178, and Sustainable Systems Research (*i.e.*, Dr. Deb Niemeier and her colleagues), DFF 178; (2) comments by Dr. Bart Ostro, former Chief of the Air Pollution Epidemiology Section of the California EPA (and author of more than 100 peer-reviewed publications, including many articles on the health effects of air pollution), DFF 55 n.6, 181; (3) comments by the Alameda County Public Health Department, DFF 180(a); and (4) detailed comments, substantiated with citations to scientific literature and multitudinous attachments, submitted by concerned community groups like Sierra Club, San Francisco Baykeeper, No Coal in Oakland, and others, DFF 182, 184.

dust, including fine particulates ($PM_{2.5}$). DFF 122-123. $PM_{2.5}$ is a dangerous and sometimes fatal air pollutant that causes significant health effects, including premature death, hospitalization for cardiovascular and respiratory disease, emergency room visits, asthma, adverse birth outcomes and school absenteeism. DFF 124(a), (b). $PM_{2.5}$ is particularly harmful to infants and children, asthmatics and others with pre-existing conditions, and the elderly. DFF 124(c). Community members with lower education, income, or employment status also face a higher risk of death from $PM_{2.5}$. DFF 124(c). The West Oakland community is already disproportionately burdened by and especially vulnerable to air pollution, as the California EPA and BAAQMD have recognized. DFF 115-116(c).[12]

- The ESA, PHAP, and Sustainable Systems Research Reports estimated Terminal and associated activities would generate 276 to 646 tons of coal dust annually, including *at least* 21 tons of $PM_{2.5}$. DFF 104(a)-(c), 128-129, 131(a)-(b), 136-142.

- The minimum emissions estimate, at 21 tons of $PM_{2.5}$ per year, is more than double the 10-ton threshold of significance that the City uses to identify a significant air pollution impact pursuant to CEQA. DFF 130.

- Separate and independent reports also assessed the dangers posed by this increase in $PM_{2.5}$ emissions by referring to the national ambient air quality standards (NAAQS) for $PM_{2.5}$. Recognizing that the Bay Area is already classified as a non-attainment area for the annual $PM_{2.5}$ NAAQS and that recent monitoring data from the West Oakland already shows concentrations just below the annual NAAQS limit of 12 $\mu g/m^3$, DFF 115-121, multiple experts predicted that OBOT's activities likely or very likely would cause exceedances of the $PM_{2.5}$ NAAQS and cause adverse health impacts in West Oakland. DFF 133-135, 145-146, 152.

- The PHAP also used peer-reviewed studies to assess background concentrations of $PM_{2.5}$ and to calculate the increase in concentrations expected from OBOT's operations. DFF 146-149. Coal trains (alone) could add 0.25 to 0.625 $\mu g/m^3$ to the annual average $PM_{2.5}$ concentration in West Oakland. DFF 149. Because the estimated annual average $PM_{2.5}$ level in West Oakland is at 11.5 $\mu g/m^3$, the upper range of the Panel's estimate would exceed the NAAQS limit of 12 $\mu g/m^3$.[13]

- Credible reports from qualified professionals also cautioned that increases in $PM_{2.5}$ levels below the NAAQS limit will still cause adverse health effects, as there is no safe level of exposure to $PM_{2.5}$. DFF 125-126.

- Dr. Chafe, the PHAP, and other qualified professionals also advised the City that, in addition to the inherent dangers of $PM_{2.5}$, coal dust contains numerous toxics—metals, metalloids, and polycyclic aromatic hydrocarbons ("PAHs")—that are harmful to human health and not safe at any level of exposure. DFF 127(a)-(h).

- While the South Coast Air Quality Management District ("SCAQMD") has a rule that addresses coal and coke operations (Rule 1158), BAAQMD does not.

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[12] OBOT does not dispute any of these facts, nor could it, though it does not accept the City's specific emissions estimates or conclusions on health impacts.

[13] In *United States v. Cinergy Corp.*, the court—citing OBOT expert Lyle Chinkin—concluded that "[w]hen communities are within just a few tenths of a µg from compliance with the annual and/or daily NAAQS, contributions on the order of one-tenth of a µg are significant." 618 F.Supp.2d 942, 953 (S.D. Ind. 2009), *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010).

DFF 173. Moreover, while OBOT has touted its pledge to abide by Rule 1158 voluntarily, the rule does not actually require physical covers on coal cars and, even then, it generally exempts coal cars "that originated from outside of California"—which is where all coal cars originate. DFF 174.

In light of this and other un-refuted substantial evidence, OBOT has failed to meet its burden. Accordingly, Defendants are entitled to judgment.

b. OBOT's Select Challenges and Contentions Fail to Show the Lack of Substantial Evidence Regarding Health Impacts.

In addition, OBOT's attacks on select items of evidence are without merit:

- Relying on inadmissible after-the-fact testimony, OBOT critiqued ESA's calculation of rail emissions in West Oakland. OB Br. at 9-10. But ESA's approach was supported in the record by the PHAP and Sustainable Systems Research Reports, which used the same approach. DFF 131(b), 139. Contrary to OBOT's assertion, OB. Br. at 10, citing PFF 224, ESA did not rely on a 2010 BNSF emissions study (offered to the City by OBOT's consultants) and dismissed it as not credible. DFF 169. Further, ample additional evidence confirms that (i) the ongoing stresses of transit constantly create erodible coal dust from traveling coal cars, even at the end of a long journey, DFF 170; and (ii) ESA's estimates of mainline rail emissions likely understate the air pollution impact because coal dust, once emitted, may be repeatedly re-entrained, DFF 139(c). OBOT neglects to acknowledge, or disprove, this substantial evidence.

- For ESA's calculation of staging emissions, OBOT pointed out a typo in Table 5-7. OB Br. at 10. ESA acknowledged the typo in this summary table, which incorrectly identifies the quantity of $PM_{2.5}$ staging emissions that was earlier stated correctly in the report—in Table 5-4. DFF 140(a); *id*. at n.16. Further, OBOT did not dispute that, despite the small transcription error for the "Staging" emissions entry, Table 5-7 still accurately displays ESA's bottom-line calculation for "Project Total" emissions, calculated to be 21 tons of $PM_{2.5}$ per year. DFF 129.

- OBOT raised a post-hoc, extra-record challenge to the methodology that ESA used for calculating staging emissions, questioning the applicability of section 13.2.5 of EPA's AP-42 manual. OB Br. at 10. However, the record fully supports ESA's methodological choice. For example, a study in the record on coal dust emissions prepared for the Canadian government noted that EPA has not published emissions factors for coal train losses—in AP-42 or otherwise—and stated that the wind erosion estimates in section 13.2 (which includes 13.2.5) "would be as applicable as anything" for estimating rail emissions. DFF 140(c). Likewise, Sustainable Systems Research utilized section 13.2.5, DFF 140, underscoring its appropriateness. OBOT's brief pointedly fails to address this substantial evidence or to identify an alternative methodology.

- OBOT further asserted that ESA chose an "incorrect" value for "threshold friction velocity," which is an input for calculations using section 13.2.5 of AP-42. OB Br. at 11. But none of the friction threshold velocities supplied in AP-42 directly applies to moving coal cars. DFF 140(c), (d). ESA's choice among reasonable options is not subject to challenge under the substantial evidence test. Note also that Sustainable Systems Research stated in the record that the value was "relatively conservative" and therefore it "may underestimate the actual amount of fugitive emissions occurring." DFF 140(d).

- OBOT asserted that the ESA Report did not account for proposed controls, citing an irrelevant, inadmissible, extra-record, pre-decisional spreadsheet as "evidence" that control measures such as covered conveyor belts and storage were ignored. OB Br. at 11-12. But as stated on the face of the report and confirmed by Victoria Evans at trial, for each component of Terminal operations (*e.g.*, unloading and storage), ESA accepted the operational descriptions provided by OBOT and concluded in each instance that the control measures proposed by OBOT would constitute the Best Available Control Technology ("BACT") as defined by BAAQMD regulations. DFF 141(a). Indeed, even OBOT's expert acknowledged that ESA's calculations reflected controls. DFF 140(a), n.16.

- OBOT faulted ESA for its alleged "refusal" to consider the use of covered cars and surfactants. OB Br. at 12-13. Nonsense. OBOT's "promise" to use covered cars and/or surfactants was evaluated extensively by ESA and other professionals and commenters. The record, which documented extensive contacts with potential cover manufacturers, demonstrates that covers for coal cars are not used and not commercially available. DFF 157-161. The record also shows that OBOT cannot credibly promise that covered cars will be used given its limited role as sub-lessor, DFF 162 & 164, and the "promise" would be unenforceable, DFF 163. As to surfactants, the record shows that such topping agents are not regularly used by the coal industry, that OBOT lacks the authority to promise or enforce their use, and, in any event, that they are ineffective. DFF 165-171. For example, surfactants degrade over distance and time, and even when correctly and freshly applied, do not diminish the coal lost from the bottom of coal cars. DFF 168-171.

- OBOT argued that the record lacks evidence that workers or community members would be exposed to metals from the inhalation of coal dust, insisting that such metals are not "bioavailable". OB Br. at 16. But numerous scientific sources in the record establish that the metals are bioavailable. DFF 127(a), (c), (e). And OBOT wholly overlooks that metals are not the only toxics at issue. Metalloids like silica and arsenic also are also well-known health hazards, as are PAHs. DFF 127(b), (d), (g)-(h). OBOT neglected to mention silica or PAHs in its proposed findings of fact or brief.[14]

OBOT also argues, mistakenly, that the City simply "could not have had substantial evidence" of a dangerous air quality condition without conducting air quality modeling and a full risk assessment. OB Br. at 14-15. But section 3.4.2 does not require either, and no legal requirement dictates the City's choice of methodologies. This "affords substantial discretion" to the City, *O.W.L. Found.*, 168 Cal.App.4th at 592-93, and "[a]ll that is required is that whatever

[14] OBOT has implied that the City improperly targeted OBOT and ignored other polluters or pollutants. The contention lacks any basis. Governments may confront societal problems incrementally. *Massachusetts v. E.P.A.*, 549 U.S. 497, 524 (2007) (agencies may "whittle away" at "massive problems") (citation omitted); *Coal. for Reasonable Regulation of Naturally Occurring Substances v. Cal. Air Res. Bd.*, 122 Cal.App.4th 1249, 1263–64 (2004) (deferring to state agency's decision regarding how far to extend new asbestos regulation). Moreover, prohibiting a new source of pollution is a rational first step. It is easier than requiring existing sources to reduce their emissions, and the City has no authority to regulate vehicle emissions, a large source of air pollution in West Oakland.

methods are used result in substantial evidence." *Evans v. City of San Jose*, 128 Cal.App.4th 1123, 1147 (2005). OBOT's insistence on modeling and risk assessment as the *only* way to adduce evidence of a substantial danger improperly asks the Court to go beyond the record, and likewise improperly asks the Court to make its own scientific judgment overriding the City and its experts. The Court should reject OBOT's call to institute a requirement for additional, unnecessary analyses given the substantial evidence already before the City.

c. OBOT Is Mistaken that Other Agencies or Less Restrictive Regulations Would Prevent Substantial Dangers from Air Pollution.

OBOT erroneously contends that other regulatory mechanisms or authorities will prevent any substantial danger. OB Br. at 4-7. For example, OBOT insists that mitigation measures developed in the general CEQA review for the Army Base redevelopment necessarily will prevent substantial danger. OB Br. at 4-5. But neither coal nor coke were evaluated as commodities during the CEQA process. DFF 16. Consequently, none of those mitigation measures were designed for the unique harms for coal or coke. DFF 172.

OBOT also offers a facile argument that dangerous emissions from the Terminal and its associated rail and staging operations are impossible because BAAQMD enforces the $PM_{2.5}$ NAAQS. But if the Air District were infallible, as OBOT suggests, the Bay Area would not be designated as a non-attainment area for multiple air pollutants, including $PM_{2.5}$. DFF 118-119.[15]

OBOT also misrepresents the scope of BAAQMD's authority. BAAQMD's authority is generally limited to stationary sources and only applies to activities "inside the fenceline of the facility." DFF 162 (quoting OBOT's expert Chinkin). Thus, BAAQMD lacks jurisdiction over the planned staging and rail activities, which will occur outside of the Terminal and are expected to generate more $PM_{2.5}$ emissions than the Terminal itself. *Compare* DFF 141(b) *with* DFF 139,

[15] The Bay Area will not be redesignated as attaining the $PM_{2.5}$ NAAQS until BAAQMD proves to the EPA that the improved air quality "is due to permanent and enforceable emissions reductions" and secures approval of a plan "which demonstrates that the area will maintain the NAAQS for at least 10 years." *S. Coast Air Quality Mgmt. Dist. v. EPA*, Nos. 15-1115 & -1123, 2018 WL 911201, at *1 (D.C. Cir. Feb. 16, 2018); *accord* DFF 119 & n.12. The Bay Area has not been redesignated as in attainment because BAAQMD has not proven that its regulations are adequate to continue to meet the PM2.5 NAAQS. DFF 118-19, 119 n.12.

139(a), 140(a), 140(e). These activities beyond the Terminal's fenceline will not be subject to BAAQMD permitting requirements in the first instance, nor will BAAQMD be able to exercise control over these sources if they cause violations of the $PM_{2.5}$ NAAQS.

Finally, OBOT contends that the City should have considered less restrictive mitigation approaches than the Ordinance. OB Br. at 8. But the City's analysis assumes BACT for the Terminal, and control measures for staging and rail—including surfactants and covers—were thoroughly evaluated and found to be ineffective at best. In other words, the City's analysis actually assessed less restrictive options for regulating the storage and handling of coal and coke, but determined they would not prevent substantially dangerous conditions.

2. Safety Impacts: OBOT Did Not Meet Its Burden to Prove Lack of Substantial Evidence to Support the City Council's Determination that the Ordinance Is Necessary to Prevent Substantially Dangerous Safety Conditions.

Largely ignoring combustion dangers, OBOT has failed to carry its burden to show that the City's record lacks substantial evidence to support the Council's finding that the failure to apply the Ordinance to the Terminal would cause substantially dangerous safety conditions. Indeed, there was abundant evidence in the record supporting the Council's finding, which serves as an independent basis to enter judgment for Defendants.

a. Coal Dust and Off-Gassed Methane Would Create Substantial Combustion Dangers.

Coal is well known for generating coal dust. DFF 185. Apart from the danger to health such dust poses to humans who breathe it, coal dust is well known for its danger of exploding. DFF 186. This risk is enhanced for bituminous coal (which is the coal proposed for the Terminal), because bituminous coal off-gasses methane. DFF 186, 190.

The risk of an explosion is further enhanced because OBOT proposes to enclose the conveyor and storage areas. DFF 187, 190. Such enclosures create the necessary conditions to allow dust and methane to concentrate and create a flammable mixture, due to the absence of wind to dilute it. *Id.* The absence of wind in the enclosure also allows dust to accumulate on surfaces. When that dust is disturbed, it can create a suspended cloud with sufficient mass to be flammable and explosive. DFF 188, 190. OBOT's proposal to enclose coal in covered rail cars

presents the same danger of fire or explosion. DFF 189, 190.

b. Coal's Propensity to Self-Combust, Ignite Easily, and Burn Hotter than Other Material Creates Substantial Danger.

Coal self-heats and spontaneously combusts. DFF 191. This is a serious danger because coal will catch on fire if left alone over time, and, as discussed below, such fires are dangerous and difficult to put out. Notwithstanding OBOT's false suggestion that bituminous coal is safer than other coals, the City's record documented multiple spontaneous combustion fires involving bituminous coal. DFF 191(a). Further, enclosing the stored coal at the Terminal and covering rail cars (if feasible) to control dust emissions may heat up the coal on hot days, warming the already self-heating substance to increase the danger of spontaneous combustion. DFF 191(c).

Apart from spontaneous combustion, coal ignites easily, *e.g.*, due to mechanical factors such as an overheated conveyor belt bearing, as happened twice at the Los Angeles Export Terminal ("LAXT"). DFF 192. This ready ignition compounds the substantial dangers from spontaneous combustion.

Coal also burns very hot—that is why it is used to fuel some power plants. DFF 193. Bituminous coal burns hotter than sub-bituminous coal, and twice as hot as grain. *Id.* This property adds to the danger from a coal fire because, once started, the high heat output of a coal fire can ignite other proximate materials. *Id.*

c. Coal Fire Smoke's Toxicity Enhances the Substantial Danger.

Coal fires emit combustible products that are dangerous to human health. DFF 194(a). Such products include hydrogen cyanide, sulfur nitrate, and other toxics. *Id.*; *see, e.g.*, Trial Ex. 281 [ESA Report] at 0095 ("Emissions from coal fires also would include fine particulate matter, a wide variety of metals, especially mercury, toxic hydrocarbon/volatile organic compound species and small amounts of uranium. These would become bio-available during combustion."). Bituminous coal fires off-gas carbon monoxide and methane, which are both toxic and highly explosive and can further complicate efforts to fight such fires. DFF 194(b).

d. OBOT's Proposed Mitigations to Contain Fugitive Dust Compound the Substantial Dangers from Fire or Explosion.

OBOT's proposed mitigations to contain fugitive dust on the one hand, and to contain fire

and explosion dangers on the other, work against each other.

As noted, OBOT proposes to enclose the conveyors, storage operations, and rail cars (with top covers) to mitigate fugitive dust emissions. But these proposed enclosures increase fire and explosion dangers. DFF 187-89. Perhaps for this reason, there do not appear to be many fully enclosed coal terminals, as noted in the PHAP Report. DFF 196(a) (citing Trial Ex. 960 [PHAP Report] at 0057 ("The proposal to wholly encapsulate the terminal seems to represent a departure from practice at any other coal terminal that we can identify and so seems to be an unproven technology")).

Further, OBOT's proposal to use air filtering technologies to mitigate fugitive dust emissions can contribute to explosive ignition of coal dust. DFF 196(b). OBOT also proposes to spray or fog the coal at various points in the Terminal operation in order to quell the dust to control fugitive dust emissions into the neighborhood. DFF 196 (c). However, applying water to coal creates an exothermic reaction that can promote self-heating and spontaneous combustion. *Id.* Combining wet and dry coal is a "dangerous scenario." *Id.* (quoting AR0095 [Hossfeld and Hatt article] at OAK17310).

e. The History of Fires at Other Coal Terminals Confirms the Substantial Dangers.

Fires at coal storage, handling, and shipping terminal facilities have regularly occurred through the years. For example, in 1993, the Department of Energy noted "[a]t least a dozen coal fires occurred within the Department of Energy (DOE) over the last decade." DFF 197. There have been coal fires in recent times at terminals located in Los Angeles, CA, Norfolk, VA, Scotland, and Australia, including in conveyor systems. *Id.* There were also multiple bituminous coal fires in a bunker at a Green Bay, Wisconsin power plant. *Id.* Notably, there were multiple spontaneous combustion coal fires at a DOE demonstration project in or around 2001—and the bituminous coal involved in the DOE incidents came from Bowie's Utah "SUFCO" mine and was stored in a dome. *Id.* The DOE's solution to the coal dome fires: *store the coal outside*. *Id.* The fires at LAXT are particularly instructive because they occurred:

- At a modern, "state-of-the-art" coal terminal, that had infrared temperature sensors, demonstrating that regulation, permits, best practices and mitigation

measures are not enough to prevent coal fires, DFF 199 (a);

- As a result of accumulated coal and coke debris that was exposed to an overheated bearing, demonstrating that all it takes to start a coal fire is exposure to an overheated piece of equipment, DFF 199(b);
- Twice within six months, demonstrating that even the experience of one fire will not necessarily prevent a second fire at the same facility, and that even the best of intentions will not prevent coal-related fires, DFF 199(c); and
- At least one of the fires had to be fought from the sea side, because it occurred in the shiploading conveyor, demonstrating the potential difficulty in fighting a coal fire at a rail-to-ship terminal, DFF 199 (d).

f. Regulations and Permit Requirements Are Not Sufficient.

OBOT falsely suggests that the Terminal will present no danger from fire or explosion because of regulatory requirements and control technologies. Indeed, this was close to the entirety of OBOT's discussion of these dangers in the City's record. *See* OB Br. at 5-6.

Regulatory requirements and best practices will not prevent fires under the circumstances. LAXT was a regulated, permitted "state of the art" coal terminal, with infrared heat sensors, and still experienced two fires in six months in 2000 and 2001. DFF 195, 199. Fires frequently occur at regulated facilities. DFF 191(a), 195(c), 197-98. Recent local examples of highly regulated facilities experiencing fires are the refinery fires in Richmond and Benicia that required residents to shelter in place and occasioned thousands of emergency room visits. DFF 201.

g. A Fire or Explosion at the Proposed Terminal Is Likely.

During 66 years of operation, millions of tons of throughput every year, over two hundred rail cars dumping coal onto conveyors every day, and with conveyor belts carrying self-heating, easily ignited, abrasive coal chunks and their pulverized residue and dust rolling over bearings hour after hour, while off-gassing methane, an accident leading to a fire or explosion is likely. DFF 202. The Terminal operators may aspire to perfection in design, construction, equipment, and operation, but the reality of human experience is that aspirations alone will not eliminate substantially dangerous conditions. *Id.*[16]

[16] "Several scientific studies have found that many (perhaps even the majority of) explosions in coal processing and storage facilities occur as a result of 'human error' and 'technical failure/malfunction of component or equipment' in areas such as silos and hoppers." DFF 203 (quoting Trial Ex. 961 [Chafe Report] at 0064). Fires often result from unforeseen

h. The Difficulty of Fighting Coal Fires Is a Substantial Danger; Given OBOT's Location, a Fire or Explosion Would Be Catastrophic.

Coal fires are particularly difficult to extinguish, require specialized equipment and training, and create danger to emergency responders. DFF 195(a)-(b). In many cases, water cannot be used to fight a coal fire. DFF 195(b). The DOE notes, "certain chemicals such as carbon dioxide or nitrogen may mitigate fire effects, but their use has had mixed success …." *Id.* Firefighters have been killed attempting to fight a fire at a coal storage facility. *Id.*

OBOT's location makes fighting a coal fire even more dangerous. Such a fire may require a sea-side approach—particularly if the fire is in the shiploading conveyor system, as happened at the LAXT two times in the 2000s. DFF 195(c); *see also* Trial Ex. 915 [LAXT Report] at 0007 (photograph of LAXT fire). Fighting such a fire within an enclosure, *e.g.*, an enclosed conveyor or storage dome, would add to the danger. DFF 195(c). The proximity to the Bay Bridge presents even further safety and emergency response logistical concerns. *Id.*

Given the location of the Terminal, a coal fire or explosion would be catastrophic and an unacceptable danger. The location is proximate to the densely populated West Oakland neighborhood, adjacent to key Bay Area infrastructure—the Bay Bridge and Toll Plaza—and to a bike/pedestrian path. DFF 204(a). The health effects of a fire are very serious. DFF 194. Such a fire could place workers, nearby occupants of businesses, residents in the adjoining neighborhood (like the thousands that inundated emergency rooms after a Chevron fire in Richmond, DFF 201), commuters, and emergency responders at significant risk of injury, and could cause a nightmare on the Bay Bridge and for Bay Area traffic. As described by Dr. Pello, who consults for NASA, fires at some locations are so dangerous that "you just can't have a fire." DFF 204(f) (quoting 1/19/18 Tr. [Pello] at 644:18-645:2). By comparison, it appears that most coal terminals are not in close proximity to dense urban environments and critical infrastructure. DFF 204(g). OBOT's

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circumstances. The LAXT coal fires are examples of two fires that resulted from coincidence of design and housekeeping deficiencies at a modern "state of the art" terminal with heat sensors on the conveyor system. DFF 199. As noted in a recently published case regarding danger from caged tigers: "No matter how well designed and constructed the enclosure, no matter how stringent the safety protocol, if there is one thing that is reasonably foreseeable, indeed, almost inevitable, it is human error." *Hauser*, __ Cal.App.5th __, 2018 WL 947887, at *3.

proposed Terminal is the wrong location to handle or store coal or coke.

i. OBOT's Select Challenges and Contentions Fail to Show the Lack of Substantial Evidence Regarding Safety Impacts.

OBOT largely ignored the substantial evidence in the City's record regarding combustion dangers. Notably, OBOT said *nothing* in the record before the Council about the added dangers caused by (1) methane off-gassing, (2) enclosing the operation, (3) adding water in the operation, (4) the high heat released by a coal fire, (5) the difficulties and complexity of fighting coal fires, or (5) OBOT's location. Nor did OBOT address the fires at other facilities.

Instead, OBOT sought to offer inadmissible, extra-record, post hoc evidence from Dr. Rangwala and others to contradict the record. That effort fails. For instance:

- Dr. Rangwala testified that spontaneous combustion dangers might be mitigated through compacting. 1/17/18 Tr. [Rangwala] at 422:13-24. However, there was no evidence presented to the City Council or at trial as to whether or how stored coal could or would be compacted within any enclosed structure, or whether such compacting would be feasible. Further, compacting would create coal dust within the enclosure, DFF 191(b)(i), and would necessarily involve equipment and physical forces that could create a spark, thus creating a risk of explosion. *See* DFF 187-89. Even if it were to be attempted, such compacting must be done to an exacting level of density or it will not be effective. DFF 191(b)(ii).

- Dr. Rangwala also testified that some of the past coal terminal or storage fires may not have involved bituminous coal, 1/17/18 Tr. [Rangwala] at 427:8-12, and OBOT now contends that "there are no documented incidents of … spontaneous combustion of bituminous coal at any coal facilities." OB Br. at 15:24-25. In fact, the record contained abundant evidence of multiple *bituminous coal* fires at coal storage facilities, including bituminous coal from Bowie's SUFCO mine. DFF 198. Although reports on other fires did not always indicate the type of coal involved, that is not evidence that they did *not* involve bituminous coal. *Id.*

OBOT also misleadingly contends that coal's NFPA rating somehow wipes away the fire and explosion risk. OB Br. at 15:26-16:2. In fact, that rating only applies to emergency response circumstances, and does not govern the fire safety of coal handling operations or coal terminals. 1/19/2018 Tr. [Cappio] at 461:12-25 and 485:16-19; Trial Ex. 1261.

III. CONCLUSION

For the foregoing reasons, the Court should enter judgment for Defendants.[17]

[17] Even if OBOT were to prevail, it has no basis to seek attorney's fees as the DA lacks a fee provision. *See* Trial Ex. 584 [DA]; *Bos v. Bd. of Trustees*, 818 F.3d 486, 489 (9th Cir. 2016).

Dated: February 23, 2018

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Dated: February 23, 2018

EARTHJUSTICE

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SIERRA CLUB and SAN FRANCISCO BAYKEEPER

ATTESTATION

I, Kevin D. Siegel, am the ECF user whose ID and password are being used to file this DEFENDANT CITY OF OAKLAND AND DEFENDANT-INTERVENORS' POST TRIAL BRIEF. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that Colin O'Brien has concurred in the filing of this document.

DATED: February 23, 2018

/s/ Kevin D. Siegel
Kevin D. Siegel