

No. 18-16105

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF OAKLAND,
Defendant-Appellant,

and

SIERRA CLUB AND SAN FRANCISCO BAYKEEPER,
Intervenors-Appellants,

v.

OAKLAND BULK & OVERSIZED TERMINAL, LLC
Plaintiff-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 16-cv-07014-VC
Honorable Vince Chhabria

**BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN
SUPPORT OF APPELLANT AND REVERSAL**

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INTEREST OF AMICI

California Attorney General Xavier Becerra submits this amicus curiae brief on behalf of the State of California pursuant to Federal Rule of Appellate Procedure 29(a)(2). The State has a substantial interest in the proper interpretation of development agreements, particularly when the government's power to protect the health and safety of its citizens is in dispute. Development agreements can serve important economic and community needs by facilitating collaboration between developers and public agencies. Despite their value as planning tools, state and local governments always retain their police powers to protect the public health and safety of their residents. The City of Oakland's ("the City") proper assertion of that regulatory authority lies at the heart of this case.

California also has a strong interest in protecting the State's most vulnerable citizens from pollution exposures that interfere with their ability to thrive in a clean and safe environment. Those citizens include the residents of West Oakland, which is a community of color that historically has borne the brunt of industrial pollution in the Bay Area. The West Oakland community already suffers from disproportionate levels of pollution and the resultant health problems, such as asthma and cancer. This backdrop highlights the importance of the government's ability to regulate under the development agreement (also "contract") between the City and Oakland Bulk and Oversized Terminal, LLC ("OBOT" or "the terminal").

The State has a particular interest in ensuring the contract is properly construed to prevent undue harm to the vibrant, yet exposed, West Oakland neighborhood.

INTRODUCTION

The City's unique authority as a municipal government and trustee of State public trust lands is key to interpreting the contract between the City and OBOT. Long-established constitutional principles make clear that the City could not relinquish its police powers to protect its citizens from injury through its contract with OBOT. Similarly, as the trustee of public lands, the City has a duty to manage the lands underlying the terminal, which are tidelands subject to a public trust under state law, for the public good. That obligation also cannot be delegated away. The contract should be construed in light of these principles.¹

These principles confirm that the City appropriately determined that a coal terminal presented a substantial danger to the adjacent West Oakland community. In making its determination, the City relied on established methodologies under California environmental law for calculating the impact of emissions on the environment and public health. Having met California's rigorous environmental

¹ The parties have raised questions regarding the validity of the contract given the City's constitutionally retained police powers. This brief is limited to the trial court's breach of contract holding and does not address the question of the contract's validity. It is the State's position that because the contract was not breached, the Court need not reach the question of whether the contract unconstitutionally surrendered the City's police power.

review standards, the City clearly satisfied the contractual provision calling for a determination of whether new regulation of OBOT prevents a substantial danger to public health and welfare. The district court incorrectly disregarded the City's reliance on these prevailing environmental standards, and instead conducted its own analysis in a manner that inappropriately second-guessed the City's substantial evidence of harm to West Oakland.

West Oakland is a community that already bears more than its fair share of the Bay Area's pollution, making OBOT's significant, additional pollution load cause for concern. Despite acknowledging that burden, the district court suggested that the City's harm analysis should have compared the OBOT coal terminal's projected pollution to existing sources of local pollution or to other pollution-burdened port communities like Richmond and Long Beach. Any such methodological approach should be rejected because it discounts the danger of pollution increases in communities with high pre-existing pollution loads. If applied here and elsewhere, that approach could also impair communities' ability to avoid the inequity of concentrating pollution in already burdened areas.

I. THE CONTRACT SHOULD BE INTERPRETED IN LIGHT OF THE CITY'S POLICE POWER AND ITS ROLE AS TRUSTEE OF THESE PUBLIC LANDS.

Oakland has non-delegable authorities to both protect the public health and safety of its residents and preserve the public trust land at issue in this case. The contract's language must be analyzed in light of two key principles: (1) the City

cannot surrender its police power authority to protect its citizens from harm; and (2) the City has an additional obligation where, as here, it is the trustee over the public tidelands on which the terminal would sit. The district court's determination that Oakland violated the contract failed to account for these principles and should be reversed.

The authority of state and local government to protect the environment and the public health and safety of its citizens is enshrined in California's Constitution and has been recognized for generations. Cal. Const. art. XI, § 7; *Huron Portland Cement Co. v. City of Detroit, Mich.* 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."). The City's application of the ordinance to OBOT to protect public health was a permissible exercise of this bedrock police power authority.

Oakland's police power authority is a critical function of state and local government that cannot be contracted away. *N. Pac. Ry. Co. v. State of Minn.*, 208 U.S. 583, 596 (1908); *Carty v. City of Ojai*, 77 Cal. App. 3d 329, 342 (Cal. Ct. App. 1978); *Delucchi v. City of Santa Cruz*, 179 Cal. App. 3d 814, 823 (Cal. Ct. App. 1986) ("The police power being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or irrevocable law. It cannot be bartered away even by express contract (citations omitted)."). It is

therefore presumed that parties entering contracts do so contemplating the government's inherent right to unhampered exercise of its police power. *Delucchi*, 179 Cal. App. 3d at 823. That presumption is particularly apt with regard to a highly-sophisticated developer such as OBOT.

In addition, the City's determination that a coal terminal would substantially endanger West Oakland must be considered in light of its role and obligations as public trustee of the tidelands on which the OBOT site rests. The public trust doctrine provides that tidelands—which are those lands lying between the lines of mean high and low tide that are covered and uncovered by the ebb and flow of tides—are held in trust for common uses of the people. *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 434 (1983). Pursuant to the Oakland Army Base Public Trust Exchange Act, 2005 Cal. Stat. ch. 446, §§ 1-18, the State granted the City the waterfront sovereign tidelands being proposed for development by OBOT.² Cal. Stats. *Id.* The City therefore holds this land in trust, subject to State oversight, and is required to manage it consistently with the terms and obligations of its grant and the public trust doctrine. Cal. Pub. Res. Code § 6009(c)-(d).³

² The California Legislature administers public trust lands and authorizes grants of public trust lands to local trustees. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n. 17 (1970).

³ Like its police powers, the City's duty to administer the public trust cannot be delegated to any other party. Cal. Pub. Res. Code § 6009.1(c)(13); *Nat'l Audubon*

The public trust doctrine limits how these sovereign lands may be used. Navigation, commerce, and fishing are common public trust uses, but the doctrine also includes recreation and conservation. *Marks v. Whitney*, 6 Cal. 3d 251, 259-260 (1971); *Nat'l Audubon Soc'y*, 33 Cal. 3d at 435 (public trust protects ecological values such as the “purity of the air”). Where such public trust land is at issue, “[t]he state acts for the public good, and all its grants, including the grant of municipal franchises, are to be construed in a manner most conducive to the general welfare.” *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 172 (1897). Similarly, grants to private parties of rights in public trust lands are to be construed extremely narrowly, in favor of the trustee. “[T]he state is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the state to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act, that interpretation must be put upon it which is most favorable to the state.” *Id.* (quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U. S. 387, 468 (1892)); *see also* Cal. Civ. Code § 1069 (“every grant by a

Soc'y, 33 Cal. 3d at 437-438, quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 453 (1892) (A trustee “can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”); *see City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980) (A trustee, “as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties”).

public officer or body, as such, to a private party, is to be interpreted in favor of the grantor”).

The Court’s interpretation of the contract must consider both the City’s retained authority to protect the public health and safety of its residents and its responsibility to maintain the public trust. Accordingly, the Court should interpret any ambiguity in the contract between OBOT and the City in a manner that is consistent with these precepts. *See* Cal. Civ. Code § 1643 (a contract must be interpreted “as will make it lawful, operative, definite, reasonable, and capable of being carried into effect . . .”). The district court’s interpretation of the contract failed to give adequate weight to the City’s obligations to both protect the health and safety of its citizens living in West Oakland and its obligation to maintain the proposed OBOT site in a manner consistent with the public trust. A proper analysis of the contract must consider this existing framework, which formed the backdrop for the City and OBOT’s negotiations.

Judicial recognition of the City’s obligations has the additional benefit of encouraging transparency in contract negotiations. Because cities have police and public trust powers, these powers form part of the legal context in which any contract is negotiated. Developers should therefore err on the side of increased transparency during development-related negotiations, especially when a developer knows that it will use property in a way that raises heightened public safety

concerns or that might be inconsistent with public trust obligations (like handling coal, a commodity well known to have pollution and human health risks).⁴ That way, municipal concerns about health and safety can be surfaced and addressed at the front end, during the contract negotiation.

II. THE CITY’S ENVIRONMENTAL ANALYSIS OF OBOT’S COAL TERMINAL REVEALED SUBSTANTIAL EVIDENCE OF A SUBSTANTIAL DANGER TO PUBLIC HEALTH.

Under the development agreement, the City retained the right to protect public health and safety. Appellants’ Joint Excerpts of Record (“ER”) 1970, § 3.4.2. OBOT and the City specifically agreed that “substantial evidence”—or reasonable and credible evidence—of a “substantial danger” would justify the application of new regulatory requirements to OBOT.⁵ *Id.* After the City learned of OBOT’s plans to export coal at the terminal, the City examined the resulting threat to public health. In doing so, the City chose a rigorous approach that tracked the California Environmental Quality Act (“CEQA”), a law that requires government

⁴ Here, OBOT failed to disclose its plans to handle coal during contract negotiations. ER 1777, 1238-39, 1240-41

⁵ As extensively briefed by appellants, the “substantial evidence” standard of review that the parties agreed to has a technical meaning under California law, meaning evidence that is “reasonable in nature, credible, and of solid value.” *Braewood Convalescent Hosp. v. Workers’ Comp. Appeals Bd.*, 34 Cal. 3d 159, 164 (1983); Cal. Civ. Code § 1645 (when interpreting a contract, “technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense”).

agencies in California to analyze, disclose, and mitigate the significant environmental impacts—including public health impacts—of projects that are subject to discretionary approval. *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App. 4th 889, 897-898 (2009); Cal. Pub. Res. Code § 21083(b)(3) (requiring a finding of significant environmental impact under CEQA where “the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly”).⁶

Where its requirements apply, CEQA establishes a structure for evaluating a project’s risk to human health. In particular, CEQA directs agencies to: 1) use numeric thresholds to identify the level of pollution that risks harm; 2) rely on existing conditions at the project site to establish a baseline from which to measure a project’s pollution impact; and 3) ensure that mitigation measures reduce a project’s pollution in a feasible and enforceable manner. As discussed below, the City appropriately used these CEQA concepts to determine that OBOT posed a substantial danger to the West Oakland community. Because the City’s analysis satisfied CEQA’s rigor, there can be no doubt that the City complied with the contract.

⁶ While the City was not required to adhere to CEQA’s principles in this case, the fact that it did so strengthens the City’s determination.

A. CEQA Significance Thresholds for Particulate Matter Pollution Are Reasonable and Credible Evidence of a Substantial Danger to Public Health.

The City investigated and found a number of dangers associated with OBOT's plans to handle coal, including increased air pollution. In conducting its air pollution analysis, the City first considered what level of emissions would in fact cause a substantial danger. The City's air quality analysis relied in part on established CEQA standards, known as "thresholds," which mark a "significant" environmental impact under CEQA. The City specifically analyzed the coal terminal's likelihood of exceeding the CEQA threshold for particulate matter pollution that is smaller than 2.5 microns in diameter ("PM2.5"). This alone formed a reasonable basis for the City's determination that the handling of coal posed a substantial danger.

More specifically, the City determined that OBOT's projected emissions of 21 tons per year far exceed the City's CEQA significance threshold of 10 tons per day for PM2.5. ER 848, fn. 9.⁷ The City borrowed this 10-ton threshold from the Bay Area Air Quality Management District ("Air District").⁸ The terminal's PM2.5

⁷ City Council Agenda Report (June 23, 2016).

⁸ Air District Revised Draft Options and Justification Report for CEQA Thresholds of Significance at p.32, Table 11 (Oct. 2009), <http://www.baaqmd.gov/~/media/files/planning-and-research/ceqa/revised-draft-ceqa-thresholds-justification-report-oct-2009.pdf?la=en>

emissions are a key measure of danger to OBOT's neighbors because PM2.5 "is by far the most harmful air pollutant in the [Bay Area] in terms of the associated impact on public health."⁹

The Air District set this 10-ton threshold in light of the fact that the Bay Area region does not meet the federal Clean Air Act's human health-based air quality standards for particulate matter.¹⁰ 42 U.S.C. § 7409 (b)(1) (describing the Clean Air Act's ambient air quality standards as necessary to protect public health). In the Air District's expert opinion, project emissions that exceed this threshold would exacerbate the region's unhealthy air, and therefore cause a significant environmental impact under CEQA.¹¹ After reviewing air quality data from a monitoring station in West Oakland, the City's experts also noted "that Oakland and West Oakland both have experienced exceedances of the state and federal ambient air quality standard levels," thus demonstrating West Oakland's particular

⁹ Air District CEQA Air Quality Guidelines, at p. 5-2 (May 2012 Update), http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines_final_may-2012.pdf?la=en

¹⁰ Air District Revised Draft Options and Justification Report for CEQA Thresholds of Significance at p.10, *supra*, <http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/revised-draft-ceqa-thresholds-justification-report-oct-2009.pdf?la=en>

¹¹ Air District staff recommended this significance threshold after staff explained that particulate pollution above the 10-ton level "would result in a considerable adverse contribution to the [Bay Area's] existing air quality conditions." Air District Revised Draft Options and Justification Report for CEQA Thresholds of Significance, *supra*, at p. 37.

vulnerability to an increased pollution load. ER 875 (ESA Report). For all of these reasons, the City's use of a 10-ton-per-year significance threshold constitutes reasonable and credible evidence of a substantial danger to West Oakland residents.

B. The City Reasonably and Credibly Assumed No Baseline Air Pollution from OBOT's Project Site.

On the issue of baseline, the trial court explained that, “[d]eciding what is ‘substantial’ requires context. To understand whether something poses a ‘substantial danger,’ you need a baseline against which to compare the danger.” ER 30. The district court thus erroneously concluded that the City had failed to establish a baseline against which to measure pollution resulting from the handling of coal at the terminal. ER 30.

In fact, the City's emissions calculations, which assumed that no baseline pollution existed at the undeveloped OBOT site, was appropriate. ER 950 (ESA Report, pp. 5-17, Table 5-7 (indicating that the City's experts did not subtract any baseline emissions from their emissions estimates). It is well established under CEQA that project emissions are compared to a default baseline of “existing conditions” at the time of the analysis. Cal. Code Regs. tit. 14, § 15125(a). Here, where there have been no on-site operations for nearly twenty years, the pre-existing pollution levels to compare against the terminal's new pollution load are

zero.¹² The City's approach is entirely consistent with the routine understanding of baseline under CEQA.

Compounding its error, the district court also suggested that using emission levels from other nearby sources of pollution or pollution caused by bulk terminals in Richmond and Long Beach—two other environmental justice communities burdened with significant air pollution loads—as a point of comparison was an appropriate baseline. ER 32. This was the approach urged by OBOT, which argued that its operation would pose no danger because its pollution would be no worse than existing sources of local pollution. OBOT Post-Trial Brief at 17-18, Dkt No. 239 (Feb. 9, 2018). Under OBOT's analysis, the incremental danger posed by a new source of dangerous pollution should be considered insignificant because there is already a high level of pre-existing pollution in the area. *Id.* OBOT's approach is inconsistent with the baseline analysis required by CEQA and should not have been adopted by the district court. Rather, the court should have deferred to the City's analysis which, in addition to being consistent with how environmental impacts are measured when a city is asked to approve a project

¹² This baseline conforms to the Air District's instructions for calculating project emissions for the purpose of comparing those emissions to the Air District's significance thresholds. Air District CEQA Air Quality Guidelines at pp. 4-1 to 4-2. *Supra*, http://www.baaqmd.gov/~media/files/planning-and-research/ceqa/baaqmd-ceqa-guidelines_final_may-2012.pdf?la=en.

under CEQA, was also informed by its authority to protect public health and safety.

The district court's analysis also ignores CEQA's foundational requirement that agencies must consider a project's emissions in combination with other nearby pollution sources to determine whether the project's impacts are cumulatively significant. Cal. Pub. Res. Code § 21083(b)(3). "In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *Communities for a Better Env't v. California Res. Agency*, 103 Cal. App. 4th 98, 120 (2002).

Accordingly, the City's approach is consistent with California environmental legal principles that an area's high pollution burden makes it *more likely* that a project's additional pollution will pose a substantial danger to the public.

C. The City Reasonably and Credibly Refused to Count Infeasible and Unenforceable Mitigation When It Calculated OBOT's Emissions.

The district court further faulted the City for failing to credit emission reductions from rail car covers and surfactants—OBOT's proposed mitigation measures—when the City estimated OBOT's particulate emissions. ER 15. The City's refusal to count infeasible, unenforceable mitigation measures in its emissions calculations, however, was reasonable and consistent with the approach required under CEQA for assessing a proposed project's environmental risks.

California’s environmental law conventions prohibit state and local governments from relying on infeasible or unenforceable mitigation. Cal. Code Regs. tit. 14, § 15126.4, subs. (a)(1) & (a)(2). “‘Feasible’ means capable of being accomplished in a successful manner . . . taking into account . . . technological factors.” Cal. Pub. Res. Code, § 21061.1. Because OBOT failed to produce any evidence supporting the feasibility of rail car covers and surfactants, these measures were appropriately discounted by the City. ER 16 (acknowledging a “lack of existing data about the effectiveness” of OBOT’s proposed mitigation).

Moreover, OBOT itself refused to be bound to a commitment to use rail car covers and further argued that any regulation of rail activity would be preempted by federal law. ER 1746 (“[S]uch responses shall not be binding on OBOT.”); OBOT Mot. Summ. J. at 20-22, Dkt. No. 135 (Nov. 20, 2017). Accordingly, the City was not obligated to rely on emissions reductions characterized as non-binding by OBOT itself.

The City’s emissions calculations reflect that the handling of coal at the terminal would cause a significant pollution increase under environmental law conventions that are designed to protect public health and safety. Those emission estimates thus constitute reasonable and credible evidence, or “substantial evidence,” of a condition that is “substantially dangerous” to the health and safety

of the adjacent West Oakland community. *See Braewood Convalescent Hosp.*, 34 Cal. 3d at 164.

III. THE CITY’S ANALYSIS OF OBOT’S COAL TERMINAL PROPERLY AVOIDS EXACERBATING THE HIGH POLLUTION LOAD IN WEST OAKLAND, A COMMUNITY OF COLOR.

The district court correctly noted that the existing pollution burden and resulting vulnerability of West Oakland residents “can and absolutely should” be considered when assessing whether OBOT’s proposed operations would present a substantial danger. ER 32. In fact, West Oakland’s existing pollution load was a strong motivating force for the City’s disputed ordinance against coal. *Id.* In light of West Oakland’s high pollution burden, the City properly avoided comparing the coal terminal’s emissions to other local sources of pollution or to areas with high pollution as the means to measuring the coal terminal’s danger. *Id.* This relative approach, which the district court mistakenly suggested as appropriate, minimizes the incremental danger posed by a new source of pollution and risks adding pollution to communities of color that already bear a disproportionate pollution burden. *Id.* For these additional reasons, the Court should reject any method of measuring substantial danger that relies on such comparisons.

The community that would be most impacted by OBOT’s coal terminal, West Oakland, already suffers from significant levels of pollution in general and air pollution in particular. In addition to the terminal to the west, West Oakland is

adjacent to the Port of Oakland—the seventh largest container port in the United States—to the south and is surrounded by three interstate highways.¹³ As a result, West Oakland faces persistent air pollution problems, including having some of the highest diesel particulate matter (“PM”) levels in the State.¹⁴ The California Office of Environmental Health Hazard Assessment’s (“OEHHA”) CalEnviroScreen tool, which measures pollution burden and vulnerability of all census tracts in the State, ranks West Oakland census tracts as worse off than 90 percent of the State for diesel PM.¹⁵ The air pollution problems in West Oakland are compounded by the community’s exposure to multiple other sources of pollution, including contaminated cleanup and hazardous waste sites.¹⁶

¹³ Port of Oakland Website, *Seaport Facts & Figures*, <https://www.oaklandseaport.com/performance/facts-figures/>; City of Oakland, West Oakland Specific Plan, *Introduction* at p. 7-8, available at <http://www2.oaklandnet.com/Government/o/PBN/OurOrganization/PlanningZoning/OAK028334>.

¹⁴ ER 925, Table 4-2. *See also* California Air Resources Control Board (“CARB”), Diesel Particulate Matter Health Risk Assessment for the West Oakland Community, (Dec. 5, 2008), <https://www.arb.ca.gov/ch/communities/ra/westoakland/westoakland.htm> (last visited Dec. 14, 2018.) Diesel PM is a subset of PM2.5, and is widely understood to cause lung cancer and other health conditions. <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health> (last visited on Dec. 14, 2018).

¹⁵ ER 925, Table 4-2; OEHHA, CalEnviroScreen 3.0, available at <https://oehha.ca.gov/calenviroscreen>

¹⁶ CalEnviroScreen ranks most of West Oakland’s census tracts as having a higher concentration of contaminated and hazardous waste sites than 95 percent of the

Unsurprisingly, West Oakland residents experience disproportionately worse health outcomes and life expectancy than other, more affluent parts of Oakland and Alameda County as a whole. Alameda County Department of Public Health reported that asthma hospitalizations and emergency department visit rates in West Oakland are nearly double the county-wide rates.¹⁷ And West Oakland residents are dying from other diseases that are associated with air pollution, such as cancer, heart disease, and stroke, at higher rates than the rest of the county.¹⁸ Contributing to the community's vulnerability, West Oakland is home to a relatively low-income community, where more than 30 percent of the community lives below the poverty level.¹⁹ For these reasons, the California Environmental Protection Agency

State. California Office of Environmental Health Hazard Assessment, CalEnviroScreen 3.0, available at <https://oehha.ca.gov/calenviroscreen>. *See also* Alameda County Public Health Dept., *East and West Oakland Health Data Existing Cumulative Health Impacts*, at p. 7, (Sept. 3, 2015), <http://www.acphd.org/media/401560/cumulative-health-impacts-east-west-oakland.pdf> (the county's industrial chemical and fuel release sites are four times more concentrated in high poverty areas, including West Oakland).

¹⁷ Alameda County Public Health Dept., *East and West Oakland Health Data Existing Cumulative Health Impacts*, *supra*, at p. 9, <http://www.acphd.org/media/401560/cumulative-health-impacts-east-west-oakland.pdf>

¹⁸ Alameda County Public Health Dept., *Air Pollution Risk & Vulnerability to Health Impacts: A Look at West Oakland*, at Slide 9, (Mar. 26, 2018), <http://acphd.org/media/496252/air-pollution-health-impacts-west-oakland-acphd-2018.pdf>.

¹⁹ *Id.* at Slide 13; ER 1071-72 (Chafe Report).

has designated West Oakland as a “disadvantaged community,” defined as an area disproportionately burdened by and vulnerable to multiple sources of pollution.

ER 874 (ESA Report); Cal. Gov. Code § 39711 (defining “disadvantaged community”).

West Oakland is also predominantly a community of color. Alameda County reports that 84 percent of West Oakland is non-White. While West Oakland residents overall experience significant health risks associated with high pollution levels, Black West Oakland residents bear a singular exposure and life expectancy impact from cumulative health risk.²⁰ And, that differential risk starts early.

“African Americans in West Oakland are 1.5 times more likely to be born premature or of low birth weight, and 5 times more likely to be hospitalized for diabetes, compared to Whites in Oakland Hills.” ER 1330-31 (Public Health Panel on Coal Report). Likewise, Black children in West Oakland experience twice the rate of asthma emergency department visits than White or Hispanic children in West Oakland. ER 1332 (*Id.*).

The disproportionate pollution experienced by the West Oakland community is consistent with a large and growing body of literature confirming that race, even

²⁰ <http://acphd.org/media/496252/air-pollution-health-impacts-west-oakland-acphd-2018.pdf> at Slide 15.

more than income, is the strongest predictor of exposure to pollution.²¹ This is particularly true when it comes to PM2.5. Earlier this year, U.S. Environmental Protection Agency researchers published a report in the American Journal of Public Health finding that Black Americans are exposed to 1.54 times more PM2.5 than the population at large, while those in poverty have a 1.35 times higher PM2.5 burden than the overall population.²² The study found the racial disparity to hold across most states and counties.²³

Given the documented racial disparities in exposure to particulate matter pollution, the City properly avoided an analytical methodology that compares pollution in other communities of color to West Oakland for the purpose of evaluating harm. The City's CEQA-based approach, which measured OBOT's emissions against a baseline of zero, offers a more equitable view of the existing environment, thus avoiding the risk of disparate impact. *See* Cal. Gov. Code §

²¹ *See, e.g.,* Fleischman, L. et al, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities* NAACP Clean Air Task Force (Nov. 2017), http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf; Lee, C., et al., *Toxic Waste and Race in the United States*, United Church of Christ Commission for Racial Justice (1987), <https://www.nrc.gov/docs/ML1310/ML13109A339.pdf>

²² Mikati, et al, *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, American Journal of Public Health, at Abstract (Apr. 2018) at Abstract, <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2017.304297>

²³ *Id.*

11135; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d), et seq. (as a recipient of state and federal funds for its redevelopment of the former Oakland army base, the City must avoid a disparate impact in its redevelopment efforts). For this additional reason, the City's environmental baseline, which assumes no pre-existing pollution at the OBOT site, is the appropriate analytical methodology.

CONCLUSION

The judgment of the district court should be reversed.

Dated: December 17, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

The following related case is pending: *OBOT v. City of Oakland*, et al. Case No. 18-16141, which has been consolidated with this appeal.

Dated: December 17, 2018

/s Suma Peesapati

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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