

No. 18-16105

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

OAKLAND BULK & OVERSIZED TERMINAL, LLC
Plaintiff-Appellee,

vs.

CITY OF OAKLAND
Defendant-Appellant,

and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER
Intervenor-Defendants

Appeal From The United States District Court
For The Northern District of California
Case No. 3:16-CV-07014-VC

**AMICUS BRIEF IN SUPPORT OF APPELLANT CITY OF OAKLAND
BY THE EAST BAY REGIONAL PARK DISTRICT**

Filed with Consent of All Parties. FRAP 29(a)

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae East Bay Regional Park District is a special district operating in California. Accordingly, a corporate disclosure statement is not required by the Federal Rules of Appellate Procedure Rules 29(a)(4)(A) and 26.1.

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INTRODUCTION

For almost two decades, the East Bay Regional Park District (“the Park District”) has planned to build a vibrant new “gateway” park at the foot of the San Francisco—Oakland Bay Bridge. Once completed, Gateway Park will provide a welcoming entrance to the Bay Bridge bicycle and pedestrian path (“Bay Bridge Path”), access to the bay, and recreation opportunities to residents from Oakland, the Bay Area, and beyond. Some aspects of Gateway Park are already open. Others are slated for development within a few years.

Gateway Park and portions of the Bay Bridge Path, however, are also located directly adjacent to the development owned by Plaintiff-Appellee Oakland Bulk and Oversized Terminal, LLC (“OBOT”). Once the Park District became aware that OBOT intended to develop a rail-to-ship coal terminal at the site, the Park District urged the City to take the steps necessary to protect future recreational users from the adverse health consequences associated with coal handling and storage.

As a result, the Park District was pleased when, in 2016, the City of Oakland adopted the Ordinance and Resolution that are the subjects of this litigation. The coal ban will protect users of the Gateway Park and the Bay Bridge Path—“adjacent neighbor[s]” of the OBOT’s terminal—from “conditions substantially dangerous to their health and safety.” Appellants’ Joint Excerpts of Record,

Volume 9, Page 1970 (“ER 9:1970”) (Development Agreement § 3.4.2). Given that the record contains unequivocal and substantial evidence of the health and safety risks presented by the coal project, including to recreational users of Gateway Park and the Bay Bridge Path, the City’s determination pursuant to its development agreement with OBOT must be upheld. The Park District therefore urges this Court to reverse the District Court’s contrary decision and to remand the case for entry of judgment in the City of Oakland’s favor on OBOT’s contract claim.

STATEMENT OF INTEREST

The East Bay Regional Park District is a special district operating in Alameda and Contra Costa Counties. It maintains and operates a system of regional parks spanning 121,397 acres across 73 parks, including over 1,250 miles of trails. See <https://www.ebparks.org/about/default.htm>.¹

¹ This citation, together with other extra-record citations in this brief, provide background information to the Court about Gateway Park, the Bay Bridge Path, and the District’s interest in this case, and not substantial evidence to support the City’s determination. *Funbus Systems, Inc. v. Cal. Pub. Util. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (permitting discussion of extra-record facts by government entity amicus curiae to explain their “substantial interest” in the outcome of the case). The District concurs with the City that the Court’s decision on the merits of OBOT’s contract claim is limited to the information before the City at the time of its determination. Opening Brief of Defendant-Appellant City of Oakland (“Op. Br.”), at ECF 41-46.

The Park District is “an active, committed leader in the international Healthy Parks Healthy People movement,” which seeks to “reframe the role of parks and public lands as an emerging, powerful health prevention strategy” and “harnesses the power of parks and public lands in promoting the health of people and the environment.” ER 6:1084. Part of the Park District’s mission is to “encourage the public to engage in [] outdoor exercise.” ER 8:1784. Meeting this mission requires the creation and management of outdoor spaces that have healthy air quality. *See* ER 8:1788.

For nearly two decades, the Park District has planned for a series of parks and outdoor recreation facilities directly adjacent to OBOT’s terminal. The Bay Bridge Path, a bicycle and pedestrian amenity on the south side of the Bay Bridge, is located within 1,000 feet of the terminal. ER 5:0846. And Gateway Park is designed as a shoreline park to connect the Bay Bridge Path to the Mandela Parkway in West Oakland. ER 6:1082, fn. 186.

The Park District supported the City’s adoption of the Resolution and Ordinance at issue in this case. *E.g.*, ER 8:1784-85 (Letter from Park District Director to Oakland Mayor Schaaf); ER 8:1788-89 (Park District Resolution supporting coal ban). The Park District is deeply concerned about OBOT’s intention to handle and store coal products directly adjacent to these recreational amenities and the adverse impact of such activities on park users. Yet, the District

Court's opinion never even mentioned Gateway Park or potential impacts to recreational users. Dkt. 249. To ensure this Court adequately considers potential impacts to the Park District and the public it serves, the Park District submits this amicus curiae brief in support of Defendant-Appellant City of Oakland.

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief. No person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. The Park District and Other Agencies Have Invested Significant Resources in New Recreational Facilities Directly Adjacent to OBOT's Terminal.

For nearly two decades, the Park District and other public agencies have planned to construct significant recreational amenities adjacent to OBOT's terminal. The former Army Base property and new eastern span of the Bay Bridge provided unique opportunities to facilitate shoreline access, link regional bicycle and pedestrian trails, and add recreational amenities to serve park-poor West Oakland neighborhoods nearby. *See* ER 6:1082; <http://www.parksforcalifornia.org/>

[parkaccess](#) (search “Oakland, City of” for information on distribution of public open space).

Two of these amenities are directly relevant to this appeal. The Bay Bridge Path opened in 2016 as a segment of the Bay Trail. The 2.2-mile bicycle and pedestrian path has become a “designation of regional significance.” ER 8:1788; *see also* <http://baybridgeinfo.org/path>. The Park District expects use to increase as the Path is further linked to other bicycle infrastructure. ER 8:1788; ER 6:1084. The beginning of the Path—which includes a 3.5 percent incline as it climbs to parallel the Bridge elevation (<https://www.strava.com/segments/9268003>)—is located just over 1,000 feet from OBOT’s terminal (ER 5:922).

Gateway Park is even closer. After the United States Army closed the Oakland Army Base, the Park District entered into an agreement to lease and ultimately purchase a 15-acre spit of land at the east end of the Bay Bridge, immediately adjacent to OBOT’s terminal. ER 8:1788; ER 5:0923; ER 6:1083. Together with other public agencies,² the Park District is working to develop this land, with other acquisitions, into a regional park. ER 6:1082-83. Once completed, these park facilities will surround OBOT’s terminal. *See* Figures 1 and 2.

² The other agencies include the City of Oakland, the Bay Area Toll Authority, the Port of Oakland, the Bay Conservation and Development Commission, the California Transportation Commission, the East Bay Municipal Utility District, and the Association of Bay Area Governments Bay Trail Project.

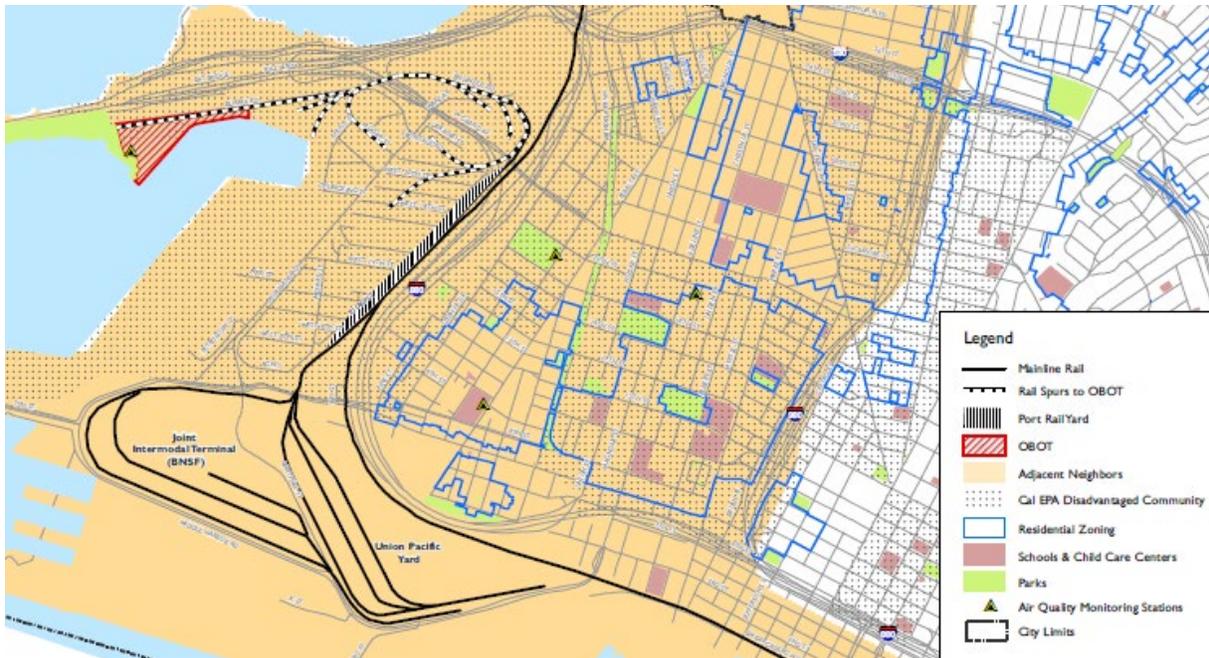


Figure 1. ESA Report on the Health and/or Safety Impacts Associated with the Transport, Storage, and/or Handling of Coal and/or Coke in Oakland, including at the Proposed Oakland Bulk and Oversized Terminal (June 23, 2016) (ER 5:0892).

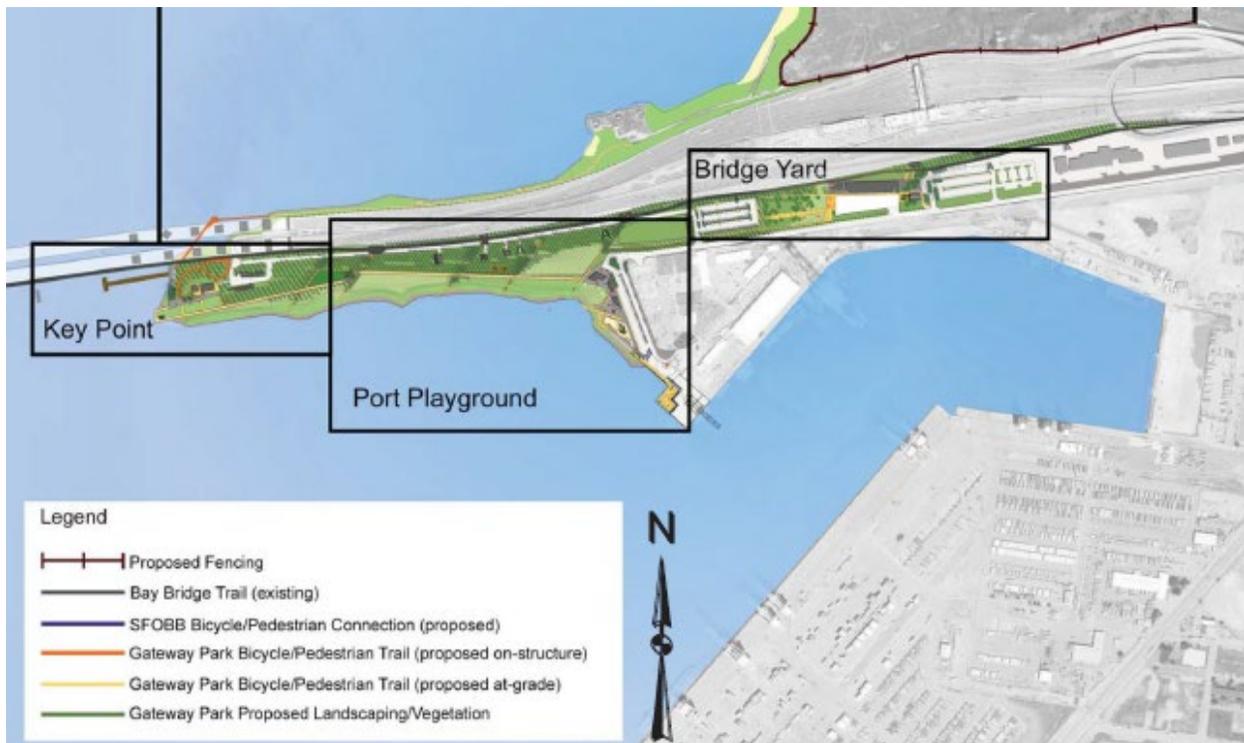


Figure 2. Gateway Park Revised Draft Environmental Impact Report, Figure ES-3 (Park Areas), available at https://mtc.ca.gov/sites/default/files/GatewayParkFEIR_Vol_II_Revised_DEIR.pdf.

Specifically, the future “Port Playground” will provide different types of recreational amenities.³ As required by the San Francisco Bay Conservation and Development Commission, this area will include public shoreline access, including a possible kayak launch. Plans also include several play areas, a board walk, a meadow and bluff walk, and a meadow viewpoint, along with a visitor center. These facilities will be directly adjacent to the proposed staging and operation areas at OBOT’s terminal. *See* Figures 1 and 2.

In addition, Gateway Park will include “Key Point,” a passive recreation area to link the Bay Bridge Path to these new amenities. Plans also include visitor services, a pier, and a Park District ranger station. The pier is slated for opening in 2019.

Finally, Gateway Park includes the “Bridge Yard,” which features venues for community events and art installations, highlighting the natural, maritime, industrial, and transportation history of the East Bay. The main building is already open for special events. Other indoor and outdoor event spaces, an arrival plaza, and historical display areas are also planned. These amenities will be directly

³ Information about Gateway Park is taken from the Gateway Park Revised Draft Environmental Impact Report (June 2018), *available at* https://mtc.ca.gov/sites/default/files/GatewayParkFEIR_Vol_II_Revised_DEIR.pdf.

adjacent to the proposed staging areas at OBOT's terminal, and thus subject to the greatest particulate matter pollution. *See* ER 5:0943-45.

Together, Gateway Park and the Bay Bridge Path will represent a multi-million-dollar investment in public facilities for outdoor recreation and the promotion of healthy communities.

II. Handling and Storage of Coal at OBOT's Terminal Will Result in Substantially Hazardous Conditions to Recreational Users.

Members of the public using these two recreational amenities—the Bay Bridge Path and Gateway Park—would be directly adjacent to OBOT's terminal. As noted in the City's Opening Brief, handling and storage of coal products at OBOT's terminal would likely result in both significant air pollution and an increased risk of catastrophic accidents. These impacts present substantially hazardous conditions to recreational users of the Bay Bridge Path and Gateway Park.

Specifically, the record before the City first demonstrates that the handling and storage of coal at OBOT's terminal will result in significant particulate matter pollution. Expert reports reveal that coal transport would generate between 276 and 646 tons of coal dust annually. ER 5:0949; ER 8:1688-89; ER 7:1336. The City's expert estimated that staging activities would lead to 11.7 tons of annual PM2.5 pollution and terminal operations would contribute 2.7 tons of annual PM2.5 pollution. ER 5:0943-46. These activities will occur directly adjacent to Gateway

Park. And for a portion of the year, predominant winds will blow this hazardous dust directly onto the Park. ER 7:1337. Accordingly, the City's expert concluded that recreational users "will be impacted by the projected increase in air pollutants from fugitive dust emissions." ER 5:0950-51; *see also* ER 5:0849; ER 5:0875.

Though recreational users may have only occasional exposure to coal dust from OBOT's terminal, one of the City's experts noted that the nature of park use could increase hazards. Recreational users, particularly runners or cyclists, "will likely have increased respiration rates and air volume intake due to their physical exertion." ER 6:1057; *see also* ER 6:1082-83. This exercise may be even more pronounced while users travel the incline along the Bay Bridge Path. The combination of exercise and increased air pollution can lead to adverse health consequences such as asthma. *See* ER 7:1338.

In addition, Gateway Park would be used by the very residents that would be impacted by coal dust at their residences. West Oakland is a park-poor neighborhood, meaning that residents have fewer recreational amenities than other neighborhoods. The development of Gateway Park is intended to improve this ratio. However, the handling and storage of coal at OBOT's terminal will result in repeated exposure for these residents. ER 6:1082-83 ("Given the elevated levels of respiratory illness and other diseases among those living close to the proposed coal facility, expected air pollution in the park, as a result of this proposed project, is of

particular concern.”). The Park District will be unable to meet its mission if its facilities are too polluted for regular use.

The Park District also raised concerns about the composition of coal dust during the City’s development of the Ordinance. In a letter to the City, the Park District noted that “coal dust contains substances known to impact human health including arsenic, lead, chromium, nickel, selenium, and other toxic heavy metals.” ER 6:1082-83. These toxic metals are associated with increased risk of cancer, birth defects, genetic defects, endocrine disruption, and neurological damage. ER 6:1052.

Finally, while the probability of a coal fire may be low, the risk to recreational users could be devastating. As noted in the City’s brief, coal fire smoke contains compounds like mercury, hydrogen cyanide, and cadmium, leading to potentially “catastrophic” health effects. Op. Br. at ECF 28; *see also* ER 7:1317. A coal fire would expose recreational users to particularly dangerous conditions, given both the proximity of Gateway Park to OBOT’s terminal, and the potential for coal trains to block Burma Road and other arteries leading to the Park. ER 8:1784. Gateway Park’s isolated location could make it difficult for park users to adequately evacuate or seek emergency services in the event of a coal fire. *Id.*; *see also* ER 5:0957.

III. Substantial Evidence, including Evidence of Hazards to Recreational Users, Supports The City’s Decision to Adopt the Resolution.

In response to the risks posed by coal transport, handling, and storage to both recreational users and West Oakland residents, the City considered its contractual rights under the development agreement with OBOT. Fortunately, the City anticipated that it might enact new ordinances to protect the health and safety of its residents, and that these ordinances should apply to OBOT’s terminal. As a result, the parties included the following clause in the development agreement governing development of OBOT’s terminal:

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

ER 9:1970 (Development Agreement § 3.4.2). The plain language of the development agreement thus makes clear that the City can impose new health and safety regulations on OBOT’s terminal, so long as the decision is supported by substantial evidence.

As explained in the City’s brief, “substantial evidence” is a term of art common in California administrative law and borrowed by the parties. Op. Br. at

ECF 37-41. The agreement's reference to California law reinforces the City's position. ER 9:2000. As the California Supreme Court has held, substantial evidence is evidence that is "reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion." *E.g.*, *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal.4th 291, 303 (2015).

When reviewing an administrative or governmental decision for substantial evidence, the reviewing court is to be "highly deferential." *See Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 572 (1995); *MHC Operating Limited P'ship v. City of San Jose*, 106 Cal.App.4th 204, 219 (2003). So long as the record contains substantial evidence to support the agency's determination, the court is not permitted to reweigh the evidence or determine that another decision would have been more reasonable. *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1114-15 (2015). This standard acknowledges that the agency is in the best position to assess technical information and make credibility determinations, and that the reviewing court therefore should not second-guess the agency's decision. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393 (1988) (noting that courts "have neither the resources nor scientific expertise to engage in such analysis, even if the [] standard of review permitted [courts] to do so").

Evidence regarding impacts to recreational users of the Bay Bridge Path and Gateway Park was both presented to the City prior to its determination and is of sufficient credibility and weightiness to support its determination. For example, on October 5, 2015, the Park District's Director John Sutter sent a letter to Mayor Schaaf urging the City to prohibit coal transportation through the City based on impacts to recreational users. ER 8:1784-85; *see also* ER 5:873. The Park District also passed a resolution supporting the ban, which it forwarded on to the City. ER 8:1788-89; *see also* ER 8:1786 (follow-up email from Park District Director Sutter).

In response, ESA, the City's expert, evaluated potential impacts on users of the Bay Bridge Path and Gateway Park as "adjacent neighbors" of OBOT's terminal. ER 5:0845-46. ESA concluded that such users would "be impacted by the projected increase in air pollutants from fugitive dust emissions." ER 5:0950-51. Likewise, Dr. Chafe, a public health professional retained by Councilmember Dan Kalb, concluded that recreational users would suffer shorter exposure times but increased respiration rates and air volume intake due to physical activity. ER 6:1057.

This information—especially when taken in conjunction with the voluminous information regarding potential health impacts to West Oakland residents—is more than sufficient to uphold the City's determination.

