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Via electronic mail

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Re: Permitting Process for Proposed Oakland Coal Facility

Dear Dr. Fine and Mr. Crockett:

This letter is sent on behalf of Earthjustice, West Oakland Environmental Indicators Project, San Francisco Baykeeper, and Sierra Club to address the forthcoming permitting process that the Air District is expected to engage in for a proposed coal storage and handling terminal in West Oakland. Promoted by Oakland Bulk & Oversized Terminal, LLC (OBOT), Insight Terminal Solutions (ITS), and affiliated entities (“the developers”), the project is opposed by an overwhelming majority of residents and local and state leaders owing to the air pollution and health risks it poses to the West Oakland community.

Although the developers themselves have made few public statements in recent months, on June 4, 2026, the Trump administration announced it intends to provide \$75 million in funds for the construction of the project.¹ According to the federal Department of Energy, OBOT “aims for an initial 9 to 10-million-ton throughput capacity” and ITS “plans to finalize design, secure outstanding permits, and complete terminal construction to enable the first cargo shipment by the end of 2028.”²

¹ U.S. Department of Energy, *Energy Department to Use Defense Production Act Funding to Expand Coal Capacity at 13 Plants and Build Export Infrastructure* (June 4, 2026), <https://www.energy.gov/articles/energy-department-use-defense-production-act-funding-expand-coal-capacity-13-plants-and>; U.S. Department of Energy, *Defense Production Act Title III Project Selections: Coal Fleet Projects and West Gateway Terminal*, <https://www.energy.gov/hgeo/defense-production-act-title-iii-project-selections-coal-fleet-projects-and-west-gateway> (last visited June 28, 2026).

² U.S. Department of Energy, *Defense Production Act Title III Project Selections: Coal Fleet Projects and West Gateway Terminal*.

As described below, the Bay Area Air District (Air District) will play a singularly important role in evaluating the project and imposing effective mitigation measures, especially for fugitive coal dust emissions. More specifically, the Air District must evaluate whether to issue the facility both an authority to construct and a permit to operate. As you know, such permits are discretionary, triggering a duty for the Air District to perform an analysis pursuant to the California Environmental Quality Act (CEQA). Further, any permits issued by the Air District should require the developers to institute the facility design elements and fugitive dust control measures that OBOT has represented publicly and in court that it will implement at the facility.

I. OBOT has acknowledged the proposed coal project must obtain discretionary permits from the Air District.

In 2015, after the developers' plans to build a coal (and petroleum coke) facility were exposed, plans that flatly contradicted their previous, public denials of such a project,³ the City of Oakland adopted an ordinance and resolution that purported to ban the storage and handling of coal within City limits. OBOT successfully sued the City in federal court to void application of the ordinance to the project on the grounds that it violated a development agreement that limited the City's authority to impose new laws and regulations.⁴

One of OBOT's principal arguments in the litigation was that the City's ordinance was unneeded because the City and public could rely on the Air District's permitting process to prevent any air quality issues.⁵ As OBOT testified to the court: "There is no dispute that OBOT must obtain an Authority to Construct and Permit to Operate . . . before it may construct, operate and continue to operate the Terminal" and these permits, if issued, "will protect against a substantially dangerous air quality condition."⁶

Similarly, in a sworn declaration filed with the court, Phil Tagami, the President and CEO of California Capital Investment Group, Inc. (CCIG), the sole member of OBOT, averred:

³ A newsletter emailed by the developers to community members in December 2013 denied that OBOT would handle coal, quoting Phil Tagami: "It has come to my attention that there are community concerns about a purported plan to develop a coal plant or coal distribution facility as part of the Oakland Global project," Tagami said. "This is simply untrue. The individuals spreading this notion are misinformed. CCIG is publicly on record as having no interest or involvement in the pursuit of coal-related operations at the former Oakland Army Base." Oakland Global Trade & Logistics Center and California Capital & Investment Group, *Oakland Global News: Monthly Updates on the Oakland Global Trade & Logistics Center Project* (Dec. 2013).

⁴ See generally *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland (OBOT I)*, 321 F. Supp. 3d 986, 988 (N.D. Cal. 2018).

⁵ See, e.g., Plaintiff OBOT's Memorandum of Points and Authorities in Support of Summary Judgment, Dkt. No. 135, *OBOT I*, Case No. 3:16-cv-07014-VC at ECF pp. 38-41 (N.D. Cal. Nov. 20, 2017).

⁶ *Id.* at ECF p. 40; accord *id.* at ECF p. 16 ("OBOT has always acknowledged that whatever terminal it builds and operates may not be built or operated without a multitude of permits . . . includ[ing] permits from BAAQMD."); accord Plaintiff OBOT's Trial Brief, Dkt. No. 208, *OBOT I*, Case No. 3:16-cv-07014-VC at ECF p. 8 (N.D. Cal. Jan. 1, 2018) ("OBOT must obtain an Authority to Construct and Permit to Operate . . . before it may construct, operate and continue to operate the Terminal.").

OBOT has always understood, stated and agreed that whatever terminal it wishes to build and operate will be subject to a multitude of permits. Among the agencies that I understand and agree will have to issue permits to OBOT before any permit to build and/or operate the terminal would be granted will be the Bay Area Air Quality Management District⁷

Consultants retained by OBOT also highlighted that the coal storage and handling project could proceed only after the Air District issues the needed authorizations. For example, Lyle Chinkin of Sonoma Technology, an OBOT expert witness, testified during trial that both a construction permit and a permit to operate “are required of stationary sources, like the proposed terminal operation.”⁸ Mr. Chinkin’s expert report, filed with the court, similarly explained that OBOT would need to obtain permits, including “a permit to operate its facility . . . which would require use of [Best Available Control Technology], among other requirements.”⁹

Significantly, not only did OBOT acknowledge to the court that the proposed coal facility would need to obtain permits from the Air District, but it also emphasized the Air District’s authority and discretion to institute stringent, site-specific requirements to control fugitive coal dust emissions that would protect local residents. For example, one OBOT filing described the Air District’s permitting process as “an iterative, cooperative process between [the agency] and an applicant,” which involves “‘a dialogue’ to discuss the design and construction aspects before a permit is issued or any development takes place.”¹⁰ These assertions confirm the testimony of OBOT’s expert, Lyle Chinkin, who told the court that a source typically “negotiate[s] . . . permit conditions” with the Air District.¹¹

OBOT also underscored the scope of the Air District’s permitting discretion. It represented to the court that “BAAQMD may condition the issuance of a permit on an applicant’s compliance with various restrictions, the simplest of which is a limitation on throughput.”¹² A report by HDR Engineering (HDR) submitted to the court by OBOT made the same point, stating the Air District “will ensure that Best Available Control Technology (BACT) for emissions reduction is applied as required, and will enforce any additional appropriate air permit conditions needed for

⁷ Declaration of Phil Tagami, Dkt. No. 137, *OBOT I*, Case No. 3:16-cv-07014-VC at ¶ 3 (N.D. Cal. Nov. 20, 2017).

⁸ Trial Transcript, *OBOT I*, Case No. 3:16-cv-07014-VC at 333 (N.D. Cal. Jan. 17, 2018) (testimony of Lyle Chinkin).

⁹ Supplemental Declaration of Lyle Chinkin, Exhibit G, *Expert Report of Mr. Lyle Chinkin*, dated Oct. 6, 2017 [hereinafter Chinkin Expert Report], Dkt. No. 185, *OBOT I*, Case No. 3:16-cv-07014-VC at ECF p. 98 (N.D. Cal. Dec. 18, 2017); accord Declaration of David E. Myre, Exhibit 47, *Oakland Bulk and Oversized Terminal, Air Quality & Human Health and Safety Assessment* prepared by HDR Engineering, dated Sept. 2015 [hereinafter HDR Engineering Report], Dkt. No. 141-47, *OBOT I*, Case No. 3:16-cv-07014-VC at ECF p. 16 (N.D. Cal. Dec. 18, 2017) (“Operations at OBOT will require an air permit through BAAQMD”).

¹⁰ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238, *OBOT I*, Case no. 3:16-cv-07014-VC at ECF p. 25 (N.D. Cal. Feb. 9, 2018).

¹¹ Trial Transcript at 334.

¹² Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 25; see also Trial Transcript at 334, 337 (Lyle Chinkin’s testimony discussing the Air District’s authority to impose “conditions”).

these specific operations.”¹³ According to HDR, the Air District is “one of the most stringent regulatory agencies in the U.S.”¹⁴ The agency, it went on, will “impose emissions limits with monitoring, recordkeeping, and reporting requirements to ensure that the facility will not cause or contribute to a violation of air quality standards”¹⁵

The federal district court accepted these statements in overturning the Oakland coal ordinance. It concluded that “the Air District would require OBOT to obtain permits to operate and that the Air District could impose conditions to limit emissions from the project.”¹⁶ According to the court, “the Air District can, and typically will, impose conditions on both the authority to construct and the permit to operate. And the Air District will not issue the permit to operate if the developer does not comply with the conditions associated with the authority to construct.”¹⁷ Most importantly, the court cited the Air District’s rules in underscoring the scope of the Air District’s regulatory discretion. It found that “[t]he Air District has a fair amount of latitude: it can impose almost any condition that it deems necessary to ensure compliance with its emissions limits and other regulations.”¹⁸

II. Before issuing any permits for the proposed coal project, CEQA requires the Air District to perform a subsequent or supplemental environmental review.

Before issuing any discretionary permits for the coal project, CEQA requires the Air District to independently assess the environmental review performed by the City to ensure that the analysis and mitigation measures are adequate for the Air District’s own decision making. Here, the outdated reviews for the coal project wholly fail to address coal and therefore are plainly inadequate. Given OBOT’s repeated promises of stringent regulatory controls and the documented health risks posed by fugitive coal dust emissions, a complete analysis of the project’s air impacts is unquestionably needed, with CEQA playing a central role in that analysis.

A. CEQA imposes independent obligations upon the Air District.

CEQA applies when an agency like the Air District “can use its judgment in deciding whether and how to carry out or approve a project.”¹⁹ The permitting decisions the Air District will make for the proposed coal storage and handling facility are subject to CEQA because, as discussed above, it is beyond dispute (and OBOT in fact has conceded) that the Air District “has the power to shape” the design, pollution controls, and operations of the facility “in ways that are responsive to environmental concerns.”²⁰

¹³ HDR Engineering Report, Dkt. No. 141-47 at ECF p. 8.

¹⁴ *Id.* at ECF p. 14.

¹⁵ *Id.*

¹⁶ *OBOT I*, 321 F. Supp. 3d at 1001.

¹⁷ *Id.*

¹⁸ *Id.* at 1001-02 (citing BAAQMD Regulation 2, Rule 2 at 2-2-16, 2-2-18).

¹⁹ CEQA Guidelines, Cal. Code Regs. tit. 14, §§ 15002(i); 15060(c); *accord* Cal. Pub. Res. Code § 21081(a).

²⁰ *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286, 302 (Cal. Ct. App. 2010).

While the Air District's obligations under CEQA are greatest when it serves in the role of "lead agency" for a project,²¹ CEQA still imposes meaningful substantive duties on the Air District when it acts as a "responsible agency" (i.e., where another agency conducts its own CEQA review).²² As the CEQA Guidelines explain, the Air District must "reach[] its own conclusions on whether and how to approve the project involved."²³

The Air District's important, independent obligations as a responsible agency to evaluate and mitigate the impacts of its permitting decisions include the following:

- The Air District must determine whether the environmental impact report (EIR) prepared by the lead agency is "adequate" for purposes of the Air District's own approval(s).²⁴
- If a change in circumstances, project modifications, or new information indicates the possibility of new or substantially more significant impacts than those disclosed by the lead agency, then the Air District must prepare a subsequent or supplemental EIR.²⁵
- The Air District itself must evaluate and *impose* "any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment."²⁶ According to the Guidelines, "the Responsible Agency *shall not approve the project as proposed* if the agency finds any [such] feasible alternative or feasible mitigation measures within its powers."²⁷
- Further, the Air District must record independent findings and a statement of facts for each significant effect of the permitted project, supported by substantial evidence.²⁸

B. The outdated environmental reviews for the proposed coal project do not address project operations, fugitive coal dust impacts, or feasible mitigation measures for coal handling and storage.

Regarding the proposed coal storage and handling facility, the City of Oakland, as lead agency, prepared (1) an initial EIR for the much broader Oakland Army Base (OARB) Area Redevelopment Plan in 2002,²⁹ and (2) an Initial Study/Addendum in 2012 that focused more

²¹ See, e.g., Cal. Pub. Res. Code §§ 21002.1(d), 21067; CEQA Guidelines, § 15042.

²² Cal. Pub. Res. Code §§ 21002.1(d), 21069; CEQA Guidelines, §§ 15042, 15096.

²³ CEQA Guidelines, § 15096(a).

²⁴ *Id.* § 15096(e), (f).

²⁵ *Id.* §§ 15096(e), (f); 15162, 15163; *accord* Cal. Pub. Res. Code § 21166.

²⁶ CEQA Guidelines, § 15096(g).

²⁷ *Id.* (emphasis added).

²⁸ *Id.* §§ 15064(a)(2), 15091, 15096(h); see also *We Advocate Thorough Environmental Review v. City of Mount Shasta*, 78 Cal. App. 5th 629, 640 (Cal. Ct. App. 2022).

²⁹ See generally City of Oakland, *Environmental Impact Report for Oakland Army Base Redevelopment Plan*, draft (Apr. 2002) and final EIR (July 2002) [hereinafter, collectively, 2002 EIR], <https://www.oaklandca.gov/Planning-Building/General-Plan-Neighborhood-Plans/Neighborhood-and->

narrowly on project changes to an area referred to as the “OARB sub-district,” including the “West Gateway” area, where the proposed coal facility would be located.³⁰ However, these reports are not remotely adequate under CEQA to support the Air District’s forthcoming air permitting process for the proposed coal project.

First and foremost, the existing reports neither explicitly contemplate, let alone evaluate, the development of a coal facility at the site. In the 2002 EIR, the City only examined using the Gateway area for “light industrial, research and development (R&D), and flex-office space uses, with business-serving retail space” along with “some warehousing and distribution facilities and ancillary maritime support facilities.”³¹ The EIR did not assess rail use or a new maritime terminal.³² And nowhere does the document mention—let alone address—the impacts of storing or handling dusty, toxic coal.

The 2012 Addendum does acknowledge that the West Gateway might be used for either a “working waterfront” where “[c]argo would move directly between ships and rail,” or for R&D and open space.³³ But, for the working waterfront project variant, the Addendum only notes vaguely that “[e]xport cargo would consist of non-containerized bulk goods.”³⁴ The Addendum provide no further discussion about potential commodities, and it wholly fails to examine the possibility that coal will be stored, handled, or shipped through the facility.

Second, neither the 2002 EIR nor the 2012 Addendum considers the possibility that, after the West Gateway site is redeveloped, future site operations might generate significant quantities of harmful fine particulate matter (PM_{2.5}) or coarse particulate matter (PM₁₀) as fugitive dust. Instead, both reports focus exclusively on fugitive PM_{2.5} and PM₁₀ emissions generated from construction and remediation activities.³⁵

But studies show the *operations* of a coal terminal pose the greatest threat to air quality and the public. For example, a recent study funded by the California Air Resources Board measured significant, coal-related increases in air pollution associated with coal and petroleum coke operations at the Levin Richmond Terminal.³⁶ The study found that rail conveyance of coal through Richmond, storage of full and empty coal rail cars at a holding yard, and coal storage

[Citywide-Plans/Gateway-Industrial-District-Oakland-Army-Base/2012-Oakland-Army-Base-Project-Initial-Study-and-Documents.](#)

³⁰ City of Oakland, *2012 Oakland Army Base Project Initial Study / Addendum* at 4-9, 19-20, 30, Figure 2-5a, 44 (May 2012) [hereinafter 2012 Addendum], <https://www.oaklandca.gov/Planning-Building-General-Plan-Neighborhood-Plans/Neighborhood-and-Citywide-Plans/Gateway-Industrial-District-Oakland-Army-Base/2012-Oakland-Army-Base-Project-Initial-Study-and-Documents>.

³¹ 2002 EIR at 3-31; *accord id.* at 1-9, 3-8, Table 3-1, 3-31.

³² *See id.* at 3-8, Table 3-1.

³³ 2012 Addendum at Figure 1-2, 7, Table 1-1, 30, 44.

³⁴ *Id.* at 30.

³⁵ 2002 EIR at 4.4-15 to 4.4-31; 2012 Addendum at 123-24, 133, Table 3.3-1, 147-53.

³⁶ *See generally* Bart Ostro et al., *Assessment of Coal and Petroleum Coke Pollution; Air Quality, Health, and Environmental Justice* (Apr. 2023), <https://ucdavis.app.box.com/s/sh55sgeix0r39k07zfsailtcamux8qpw>; *see also* Bart Ostro et al., *The impact of coal trains on PM_{2.5} in the San Francisco Bay area*, 16 *Air Quality, Atmosphere & Health* 1173 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10015136/>.

and handling activities at the terminal all increased community exposure to PM_{2.5}.³⁷ The 2002 EIR and 2012 Addendum do not account for any operational fugitive dust emissions from the site, let alone the toxic emissions from fugitive coal dust expected during the planned 66-year lifespan of the project. Accordingly, further environmental review is necessary.

Third, putting aside that the 2002 EIR did not discuss a bulk goods terminal at the site and that the 2012 Addendum provides scant details and never mentions coal as a bulk commodity, the project proponents apparently intend to build a higher-volume facility than the Addendum evaluated. As noted above, the Trump administration's announcement of funding for the project stated that OBOT "aims for an initial 9 to 10-million-ton throughput capacity."³⁸ A second release by the Trump administration raises the figure even higher, asserting the facility will be "capable of handling *more* than 10 million tons of bulk commodities annually."³⁹

Such a capacity is significantly higher than the project described in the 2012 Addendum. Although the 2012 Addendum did not directly state the project's throughput capacity, it did offer that the anticipated volume of train activity "would serve one 'panamax' vessel call per week," with each such vessel "65,000 to 80,000 deadweight tonnage in size."⁴⁰ This equates to an annual facility throughput of 4.16 million tons or less.⁴¹ A 2015 submission by OBOT to the City offered a higher figure, stating the project was targeting a "minimum throughput of 6.3 million metric tons of bulk products" with a potential maximum capacity of "up to 7.5 million metric tons of 2 bulk commodities annually."⁴² In any event, both the 2012 Addendum and OBOT's subsequent report to the City identify volumes that are significantly smaller than the current reported capacity of 9 to 10 million tons or more annually.

Fourth, beyond substantial changes to the purpose and size of the project itself, in the 24 years since the original EIR was prepared and 14 years since the Addendum was issued, circumstances have changed and new information has emerged. These factors indicate both that the coal project poses new significant impacts not yet examined and that significant impacts previously identified will be more severe. For example:

³⁷ Ostro et al., *Assessment of Coal and Petroleum Coke Pollution* at iv-v, 52-53.

³⁸ U.S. Department of Energy, *Defense Production Act Title III Project Selections: Coal Fleet Projects and West Gateway Terminal*.

³⁹ U.S. Department of Energy, *Energy Department to Use Defense Production Act Funding to Expand Coal Capacity at 13 Plants and Build Export Infrastructure* (emphasis added).

⁴⁰ 2012 Addendum at 30.

⁴¹ One panamax vessel each week for a year (52 weeks), multiplied by the maximum described size of 80,000 deadweight tonnage, equals 4.16 million tons. Actual facility throughput necessarily would be lower because deadweight tonnage "is not the same as cargo capacity," which is less, since deadweight tonnage "includes everything loaded onto the ship: cargo, fuel, freshwater, ballast water, provisions, crew, and stores." Charles Hays, *What Is Deadweight Tonnage (DWT) and How Is It Calculated?*, American Nautical Services (Apr. 8, 2026), https://www.amnautical.com/blogs/the-mariners-blog/deadweight-tonnage?srsId=AfmBOorTG1D5GD9Jm_B47bqL-3mSTfnF4i2tvZNZXUO6yt49EVNqXRGp.

⁴² Letter from Phil Tagami of CCIG and OBOT and Jerry Bridges of TLS to Claudia Cappio, Assistant City Administrator, City of Oakland at PC_007662 (Oct. 6, 2015) [hereinafter October 2015 Letter from Tagami to City] (response to question #6: "How much coal would actually go to Break Bulk Terminal . . . ?").

- As noted above, a new study fully documents the significant quantities of fugitive coal dust and harmful PM2.5 emissions generated by coal terminal operations (passing train cars, rail car staging, and terminal operations).⁴³
- The body of studies addressing particulate matter pollution and health impacts has grown, demonstrating new and more harmful health consequences.⁴⁴
- Consistent with these studies, in 2024, EPA strengthened the national ambient air quality standard for PM2.5, lowering it from a level of 12 micrograms per cubic meter to 9 micrograms per cubic meter to better protect public health.⁴⁵
- Since the original EIR in 2002, the Air District updated its CEQA Guidelines for criteria air pollutants like PM2.5, amending the thresholds of significance that the Air District uses to address local risks and hazards.⁴⁶
- “Climate change and greenhouse gas emissions were not expressly addressed in the 2002 EIR.”⁴⁷ The 2012 Addendum, for informational purposes only, included “an analysis of the proposed 2012 Project” that used “recommended May 2011 BAAQMD CEQA Guidelines and Thresholds.”⁴⁸ Although the 2012 Addendum calculated that greenhouse gas emissions would exceed the Air District’s then-recommended 2011 thresholds of significance, it nonetheless concluded there was no significant impact and no mitigation was required because there were no applicable greenhouse gas thresholds that applied when the 2002

⁴³ Ostro et al., *Assessment of Coal and Petroleum Coke Pollution*.

⁴⁴ For example, since the 2012 Addendum, COVID-19 has emerged as a significant health concern and studies demonstrate that infection rates and mortality are higher in areas with elevated levels of PM2.5 pollution. See, e.g., Paul B. English et al., *Association between long-term exposure to particulate air pollution with SARS-CoV-2 infections and COVID-19 deaths in California, U.S.A.*, 9 Environmental Advances 100270 (2022), [10.1016/j.envadv.2022.100270](https://doi.org/10.1016/j.envadv.2022.100270) (“The increased risks for SARS-CoV-2 Infections and COVID-19 mortality associated with highest long-term PM2.5 concentrations at the neighborhood-level in California were consistent with a growing body of literature from studies worldwide, and further highlight the importance of reducing levels of air pollution to protect public health.”).

⁴⁵ See generally Reconsideration of the National Ambient Air Quality Standards for Particulate Matter, 89 Fed. Reg. 16202 (Mar. 6, 2024); accord U.S. Environmental Protection Agency, *EPA Finalizes Stronger Standards for Harmful Soot Pollution, Significantly Increasing Health and Clean Air Protections for Families, Workers, and Communities* (Feb. 7, 2024), <https://www.epa.gov/newsreleases/epa-finalizes-stronger-standards-harmful-soot-pollution-significantly-increasing>.

⁴⁶ Compare 2012 Addendum at 133, Table 3.3-1 (summarizing the Air District’s 1999 and 2011 CEQA significance thresholds) with Bay Area Air Quality Management District, *California Environmental Quality Act, Air Quality Guidelines* at 3-4 to 3.5, Table 3-1 (2022) (identifying current significance thresholds). The 2012 Addendum prepared for the project identified the Air District’s 2011 thresholds of significance but did not apply them to evaluate whether air quality impacts were significant; instead, it applied the 1999 thresholds originally utilized in the 2002 EIR. 2012 Addendum at 11, 123, 144.

⁴⁷ 2012 Addendum at 217.

⁴⁸ *Id.* at 217; accord *id.* at 231.

EIR was prepared.⁴⁹

- Since the 2012 Addendum was issued, the Air District has updated the significance thresholds that it uses to evaluate climate impacts.⁵⁰
- Beyond the Air District’s revised CEQA thresholds of significance for criteria pollutants and climate change impacts, many studies released over the past two decades document the major role that fossil fuel production and combustion play in bringing us closer to the serious consequences of climate change, including triggering more frequent and severe droughts, forest fires, floods, heatwaves, and other extreme weather—all of which affect the health and welfare of Bay Area residents.⁵¹

A full itemization of the changed circumstances, new studies, and other new information is beyond the scope of this letter. Beyond question, however, the existing environmental analyses of the proposed coal project are woefully outdated and cannot support informed decision making by the Air District.

Finally, the original 2002 EIR and 2012 Addendum utterly fail to identify, let alone evaluate, the mitigation measures necessary to address fugitive dust emissions from operations at a high-volume coal facility. The two documents never even acknowledge that the facility might store or handle coal, much less assess operational fugitive dust emissions of PM2.5 or PM10. As a result, the generic and incomplete mitigation measures in the two documents⁵² in no way meet CEQA’s requirement to identify and then impose all feasible mitigation.

⁴⁹ *Id.* at 231 (“[T]he 1999 BAAQMD Thresholds that are the applicable thresholds for this project do not contain a greenhouse gas threshold, therefore this impact would not be considered significant.”), 232 (stating no mitigation required), 234 (same).

⁵⁰ Compare 2012 Addendum at 229 (“listed below are the BAAQMD’s May 2011 quantitative significance criteria:”) with Bay Area Air Quality Management District, *California Environmental Quality Act, Air Quality Guidelines* at 3-6 to 3-7, Tables 3-2 & 3-3.

⁵¹ Recent studies show that climate change exacerbates poor air quality. See, e.g., Barrak Alahmad et al., *Connections Between Air Pollution, Climate Change, and Cardiovascular Health*, 39 Canadian Journal of Cardiology 1182 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11097327/> (“[I]ncreases in hot climates as a result of climate change have increased the risk of major air pollution events such as severe wildfires and dust storms. In addition, . . . altered atmospheric chemistry and changing patterns of weather conditions can promote the formation and accumulation of air pollutants: a phenomenon known as the climate penalty.”). Further, recent studies show that extreme heat amplifies the adverse health effects of particle pollution. See, e.g., Mostafijur Rahman et al., *The Effects of Coexposure to Extremes of Heat and Particulate Air Pollution on Mortality in California: Implications for Climate Change*, 206 American Journal of Respiratory and Critical Care Medicine 1117 (2022), <https://doi.org/10.1164/rccm.202204-0657OC> (“Short-term exposure to extreme heat and air pollution alone were individually associated with increased risk of mortality, but their coexposure had larger effects beyond the sum of their individual effects.”).

⁵² See, e.g., 2012 Addendum at 124-128, 147, 149, 151-55, 157, 165-66 (adopting no mitigation beyond the measures set forth in the 2002 EIR and the City of Oakland’s “Standard Conditions of Approval” that “apply to all projects withing the City regardless of a project’s environmental determination”)

In previous CEQA litigation concerning the proposed coal project, OBOT explicitly recognized that CEQA sometimes requires further review. In *Communities for a Better Environment et al. v. City of Oakland*, local environmental groups, reacting to the news that the developers intended to store and handle coal despite prior public claims to the contrary, filed suit seeking to compel the City to perform additional CEQA review.⁵³ OBOT, as a real party in the case, filed a demurrer, arguing that the case was untimely because, at the time, no discretionary action was pending or recently taken.⁵⁴ In so arguing, however, OBOT acknowledged that “[i]f significant new information [after project approval] develops, a supplemental or subsequent EIR might be required in connection with the agency’s next discretionary approval.”^{55, 56}

Similarly, in state court litigation against the City of Oakland, OBOT recognized that “[t]here are legal principles that would justify re-opening of CEQA” including “a significant change in the Project proposed by OBOT.”⁵⁷ In that litigation, OBOT asserted that “none of those principles were or are present in this instance,” but it premised its argument on the assertion that “[n]o further permits are required to develop and construct the Project that require discretionary review by the City.”⁵⁸ OBOT also pointed out that the City had contractually committed in its development agreement to “rely on the EIR to satisfy the requirements of CEQA to the fullest extent permissible by CEQA.”⁵⁹

Whether or not the City still has discretionary decisions to make, it is undisputed that the Air District must engage in its own discretionary review before the coal project may proceed, a duty unaffected by the City’s contractual commitments to the developer. Moreover, CEQA charges the Air District with its own, independent obligations as a responsible agency. It must ensure that an EIR’s analysis and mitigation measures are adequate and not superseded by significant changes in the project, other changed circumstances, or the emergence of new information that indicates impacts will be worse than initially disclosed. In this case, all these factors compel further environmental review of the proposed coal project.

Finally, the report submitted by OBOT’s proffered air quality expert, Lyle Chinkin, explained that “CEQA provides the basis and guidelines for compliance with [stationary source]

⁵³ See generally Verified Petition for Writ of Mandate CBE Complaint, *Communities for a Better Environment et al. v. City of Oakland* (CBE v. City of Oakland), Case No. RG15788084 (Alameda Cnty. Super. Ct. Oct. 2, 2015).

⁵⁴ See generally Real Parties in Interest Notice of Hearing on Demurrer and Demurrer, and Memorandum of Points and Authorities, *CBE v. City of Oakland*, Case No. RG15788084 (Alameda Cnty. Super. Ct. Nov. 9, 2015).

⁵⁵ *Id.* at 6, 8 (emphasis in original) (quoting *El Morro Community Association v. California Department of Parks and Recreation* 122 Cal. App. 4th 1341, 1360-61 (2004)).

⁵⁶ In its own briefing on demurrer, the City of Oakland noted it was evaluating potential discretionary actions to address the coal project, including additional permit requirements and new legislation. Consequently, petitioners *Communities for a Better Environment et al.* agreed to stipulate to a dismissal of their case without prejudice. See Joint Stipulation, *CBE et al. v. City of Oakland*, Case No. RG15788084, at 2 (Alameda Cnty. Super. Ct. Dec. 1, 2015).

⁵⁷ Plaintiffs’ Complaint, *Oakland Bulk and Oversized Terminal, LLC et al. City of Oakland (OBOT II)*, Case No. RG18930929, at 20, fn.8 (Alameda Cnty. Super. Ct. Dec. 4, 2018).

⁵⁸ *Id.* at 18, 20, fn.8 (emphasis added).

⁵⁹ *Id.* at 18.

requirements in California.”⁶⁰ Here, the 2002 EIR and 2012 Addendum unquestionably lack the information needed to develop lawful permits for the proposed coal facility.

III. The Air District must require the developers to institute the design elements and fugitive dust control measures for the facility that OBOT has committed to implementing both publicly and in court.

As noted above, OBOT emphasized in its federal court filings that the Air District would require it to install BACT at its proposed coal storage and handling facility. Indeed, not only did OBOT acknowledge that “[t]he use of BACT at the Terminal will be required by BAAQMD,” it further represented that the developers “intend to develop and construct a state-of-the-art Terminal that will implement BACT, using the newest available technologies and protective measures.”⁶¹ As OBOT’s expert Lyle Chinkin explained, “BACT are generally defined as the most effective emissions controls or the most stringent emissions limitations that apply to specific types of equipment or industrial processes as determined on a case-by-case basis” by the Air District.⁶²

Having represented in public court documents that the proposed coal project will “be a state-of-the-art covered bulk terminal which would minimize all fugitive PM emissions to the fullest extent practicable,”⁶³ the facility design elements and fugitive dust control measures identified by OBOT should be deemed components of BACT for the project’s operational fugitive dust emissions. They should be memorialized as requirements in its permits.⁶⁴

Those design elements and measures include the following:

- **Covered rail cars** – OBOT has declared it is willing “to only accept covered rail cars carrying coal at the Terminal.”⁶⁵ In the federal litigation, the court credited OBOT’s representation that OBOT has “require[ed] the terminal operator to use covered rail cars as part of its lease agreement.”⁶⁶ Notably, the court also concluded that “[n]ot only could the Air District in the Bay Area require the use of covers as a condition of issuing a permit to operate, but it could pass similar regulations that would apply more generally.”⁶⁷

⁶⁰ Chinkin Expert Report, Dkt. No. 185 at ECF p. 94.

⁶¹ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 38; *see also* Chinkin Expert Report, Dkt. No. 185 at ECF pp. 95, 98 (“For new stationary sources, the BAAQMD requires that the Best Available Control Technology (BACT) permit conditions are applied,” meaning “OBOT would be unable to obtain a permit to operate its facility without first receiving a BAAQMD permit which would require use of BACT.”).

⁶² Chinkin Expert Report, Dkt. No. 185 at ECF p. 95.

⁶³ *Id.* at ECF p. 75; *see also* October 2015 Letter from Tagami to City at PC_007653 (stating the project “will incorporate . . . state-of-the art controls for handling of bulk material at a marine terminal”).

⁶⁴ This letter addresses facility design elements, control technologies, and permit conditions necessary to address harmful fugitive dust emissions from operation of the proposed terminal. The proposed coal project would also generate significant emissions during construction, as well as significant operational emissions from expected train, truck, and vehicle exhaust, which are beyond the scope of this letter.

⁶⁵ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 12.

⁶⁶ *OBOT I*, 321 F. Supp. 3d at 996 (citing testimony of Phil Tagami).

⁶⁷ *Id.*

OBOT's expert, Lyle Chinkin, stated in his expert report that he conducted a thorough literature review, and the literature "indicates that the optimal solution to reduce or eliminate fugitive coal dust is to cover rail cars transporting coal, and covers for rail cars exist and are used to cover other bulk commodities as OBOT has proposed."⁶⁸

In documentation submitted to the court and the City, OBOT indicated it planned to use removable fiberglass covers on the rail cars.^{69, 70}

- **Covered facility and operations** – OBOT told the federal district court that it would build "a state-of-the-art covered bulk terminal" that would effectively enclose nearly all facets of its operations to eliminate fugitive coal dust.⁷¹

According to OBOT's expert and consultants, coal cars "will be unloaded systematically in a rail car unloading system that is a covered building."⁷² Next, "[t]he coal will then be moved to different parts of the OBOT facility by a system of enclosed conveyors."⁷³ The transfer points between these conveyors will likewise be covered.⁷⁴ Any onsite storage of coal will occur in "two enclosed storage buildings and one dome storage building."⁷⁵ From this storage area, coal will be placed "onto the ship loading conveyor" that likewise "will

⁶⁸ Chinkin Expert Report, Dkt. No. 185 at ECF p. 106 (drawing on "more than a dozen sources of peer-review and gray literature").

⁶⁹ Declaration of David E. Myre, Exhibit 49, *Oakland Bulk and Oversize Terminal Basis of Design*, dated July 21, 2015 [hereinafter *Basis of Design*], Dkt. No. 141-49, *OBOT I*, Case No. 3:16-cv-07014-VC at ECF p. 15 (N.D. Cal. Dec. 18, 2017) (describing "cars . . . with removable, fiberglass covers"); *see also* October 2015 Letter from Tagami to City at PC_007691-94 (describing plans to use rail car covers manufactured by "EcoFab").

⁷⁰ OBOT has insisted that it will use covered railcars at the facility but also identified surfactants as another available option for dust suppression. Letter from Tagami to City at PC_007695; *accord* Plaintiff OBOT's Proposed Findings of Fact, Dkt. No. 238, *OBOT I*, Case no. 3:16-cv-07014-VC at ECF pp. 12, 35 (N.D. Cal. Feb. 9, 2018); *see also* *OBOT I*, 321 F. Supp. 3d at 997 ("[T]he Air District or another agency could impose regulations or permitting conditions requiring OBOT to use surfactants.").

⁷¹ Chinkin Expert Report, Dkt. No. 185 at ECF p. 75; *see also* October 2015 Letter from Tagami to City at PC_007653 (stating the project will use "state-of-the-art controls" that "represent enclosed operations for purposes of transferring commodities, including coal, from rail to ship"); *id.* at Exhibit 15-A, *Best Practices for the Design of Multi-Commodity Loading Terminals*, prepared by Cardno and dated Oct. 2015, at PC_007713 [hereinafter *Cardno Report*] ("[S]tate-of-the-art controls and best operating practices" will "ensure that all potential dust emissions . . . are negligible.").

⁷² Chinkin Expert Report, Dkt. No. 185 at ECF p. 120; *accord* HDR Engineering Report, Dkt. No. 141-47 at ECF p. 7 (describing "[r]ail car unloading buildings").

⁷³ Chinkin Expert Report, Dkt. No. 185 at ECF p. 120; *Basis of Design*, Dkt. No. 141-49 at ECF p. 13 ("All conveyors will be housed in fully-enclosed galleries . . .").

⁷⁴ HDR Engineering Report, Dkt. No. 141-47 at ECF p. 7 ("Coal conveyed to coal storage buildings or directly to docked ships should be conveyed in totally enclosed systems (including transfer points from one conveyor to another)."); *Basis of Design*, Dkt. No. 141-49 at ECF p. 14 (describing "enclosed transfers"); *see also* Chinkin Expert Report, Dkt. No. 185 at ECF p. 125 (noting that Chinkin's analysis assumes "the transfer towers are enclosed").

⁷⁵ Chinkin Expert Report, Dkt. No. 185 at ECF p. 120; *accord* HDR Engineering Report, Dkt. No. 141-47 at ECF p. 7 ("Coal not immediately loaded to a ship should be conveyed to piles in the fully enclosed storage buildings . . ."); *Basis of Design*, Dkt. No. 141-49 at ECF p. 13 (describing "covered" storage).

be enclosed.”⁷⁶

OBOT’s expert recognized and endorsed the feasibility of enclosing all operations at the terminal. He stated that “[c]overed bulk terminals . . . where essentially all of the unloading, movement, handling, and transloading of material occur in covered or enclosed systems” “have become more widespread.”⁷⁷ Indeed, he noted that there are “several covered bulk terminals currently operating in California.”⁷⁸

OBOT’s representations to the court align with statements it made to the City, asserting “[a]ll material handling systems will be enclosed to the maximum extent possible” and “[c]ommodities at the . . . facility will be stored in fully enclosed buildings or domes.”⁷⁹ These statements track a report submitted by OBOT to the City that “describe[s] what are considered best practices for the design of dry bulk loading terminals.”⁸⁰

- **Bottom-dumping coal cars** – OBOT represented to the court that “[c]oal would be unloaded from the bottom of the rail cars . . . over ‘dumper pits,’” with “bottom outlet gates . . . used on these rail cars to prevent the release of fugitive coal dust.”⁸¹
- **Additional pollution controls** – Even within the facility’s contained systems, OBOT’s expert and consultants identified the need for further dust control with the use of dry fogging and/or water spray systems during coal car unloading, conveyance of coal within the facility, and during ship loading.⁸²

In materials submitted to the City, OBOT also stated that “[t]he drop height of material that is transferred from railcars to conveyors to storage to shiploading will be reduced to the maximum extent possible to prevent dust” and “[c]ontrolled flow transfer chutes will be used to gently slide the material from one belt to another to prevent dust.”⁸³

In addition to committing to the installation of BACT at the proposed coal project, OBOT has acknowledged that the Air District will not issue a permit to the facility where its “operation would result in air concentration levels that exceed the [National Ambient Air Quality

⁷⁶ Chinkin Expert Report, Dkt. No. 185 at ECF p. 120.

⁷⁷ *Id.* at ECF p. 96.

⁷⁸ *Id.*

⁷⁹ October 2015 Letter from Tagami to City at PC_007703.

⁸⁰ Cardno Report at PC_007713.

⁸¹ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 38; *accord* HDR Engineering Report, Dkt. No. 141-47 at ECF p. 7; Basis of Design, Dkt. No. 141-49 at ECF p. 15 (“[C]ars will be bottom hopper, rapid discharge style cars.”).

⁸² Chinkin Expert Report, Dkt. No. 185 at ECF at pp. 125-27; HDR Engineering Report, Dkt. No. 141-47 at ECF p. 7-8; Basis of Design, Dkt. No. 141-49 at ECF p. 14 (noting “[d]ry fog and/or water sprays at the covered railcar dumper building” and “transfer points and stockpiles”); October 2015 Letter from Tagami to City at PC_007703 (stating “a ‘dry fog’ dust suppression system will be installed before and after each commodity transfer point including the railcar unloading station, conveyor system, and shiploader”); Cardno Report at PC_007713, PC_007715-16.

⁸³ October 2015 Letter from Tagami to City at PC_007703; *accord* Cardno Report at PC_007713.

Standards]” or otherwise “would cause an unacceptable increment in pollution.”⁸⁴ To prevent these consequences, OBOT agreed that the Air District “may condition the issuance of a permit on an applicant’s compliance with various restrictions.”⁸⁵ OBOT’s expert noted that example conditions include “limits on throughput, operating parameter ranges, or dust mitigation measures.”⁸⁶

The federal district court endorsed OBOT’s acknowledgment of the Air District’s authority to impose additional permit conditions as needed, stating “[t]he Air District has a fair amount of latitude: it can impose almost any condition that it deems necessary to ensure compliance with its emissions limits and other regulations.”⁸⁷

During court proceedings, OBOT offered two conditions that should be included in any permits for the proposed coal project:

- **Limit the type of coal** – OBOT represented to the court a willingness “to handle only western bituminous” or higher grade coal.⁸⁸ Previously, it made the same representation to the City.⁸⁹ Limiting the type of coal that can be stored and handled at the facility is an important air quality restriction because, as the federal district court noted, lower-rank “Powder River Basin coal is far dustier and likelier to emit particulate matter than western bituminous coal from Utah.”⁹⁰
- **Limit the throughput of coal** – OBOT also represented that it would be appropriate for the Air District to “condition the issuance of a permit on . . . a limitation on throughput.”⁹¹ According to OBOT and its expert Lyle Chinking, “If OBOT’s throughput were cut in half, its emissions would correspondingly be cut in half.”⁹²

The federal district court emphasized this approach, agreeing that “the Air District could impose permitting conditions that would limit the amount of coal that could be processed at the terminal.”⁹³ Crucially, “[l]imiting the magnitude of the coal operations would have a significant impact on emissions, even if the Air District did not directly regulate coal dust from the rail transport or staging phase.”⁹⁴

⁸⁴ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF pp. 24-25.

⁸⁵ *Id.* at ECF p. 25; accord HDR Engineering Report, Dkt. No. 141-47 at ECF p. 8 (“the [Air District] . . . will enforce any additional appropriate air permit conditions needed for these specific operations”).

⁸⁶ Chinkin Expert Report, Dkt. No. 185 at ECF p. 95.

⁸⁷ *OBOT I*, 321 F. Supp. 3d at 1001-02 (citing BAAQMD Regulation 2, Rule 2 at 2-2-16, 2-2-18).

⁸⁸ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 12.

⁸⁹ October 2015 Letter from Tagami to City at PC_007654 (stating that, “[w]ith respect to coal, if it is a commodity exported through the . . . bulk terminal, [the operator] will agree to handle only high-rank bituminous or anthracite-grade coal”).

⁹⁰ *OBOT I*, 321 F. Supp. 3d at 1003.

⁹¹ Plaintiff OBOT’s Proposed Findings of Fact, Dkt. No. 238 at ECF p. 12.

⁹² *Id.* (citing Trial Transcript at 337 (testimony of Lyle Chinkin: “The simplest, most common restriction that was put on a permit is the amount of throughput. If your emissions are too high, you can cut them in half by cutting your throughput in half. That’s the most common approach.”)).

⁹³ *OBOT I*, 321 F. Supp. 3d at 1002.

⁹⁴ *Id.*

IV. Conclusion

The proposed coal project threatens to release significant quantities of harmful fugitive coal dust emissions, to the detriment of West Oakland and nearby communities that must already endure unhealthy levels of PM2.5 and other pollution. As the developers continue to push forward, the Air District must exercise strict oversight during its discretionary permitting process, ensuring the completion of a thorough and up-to-date assessment of air quality impacts and mitigation pursuant to CEQA. Further, the Air District must mandate the modern facility design elements, pollution control technologies, and operational limits that OBOT has promised the public, and assured the court, the Air District will impose to limit fugitive coal dust.

We hope this letter provides additional clarity regarding legal matters within your jurisdiction. In support of this letter, under separate cover, we will provide you with the key court documents and reports that we have cited. Please let us know if you have any follow-up questions or concerns that we can address.

We reserve the right to modify or add to these comments in response to any actual permit application(s) for the project.

Sincerely,



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