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TRANMITTED VIA ELECTRONIC MAIL
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Lynette Gibson McElhaney, Council President
Honorable Members of the City Council
CITY OF OAKLAND
City Hall, 1 Frank H. Ogawa Plaza
Oakland, California 94612

Re: Proposed Ordinances Banning Coal in Oakland and Potential Application to the Bulk Commodities Terminal at the West Gateway of the Oakland Global Trade and Logistics Center

Council President McElhaney and Honorable Council Members,

INTRODUCTION

On behalf of our client, Oakland Bulk and Oversized Terminal, we write in response to the "Notice of Hearing" issued just three days ago on June 24 for tonight's hearing on the potential adoption of an ordinance banning coal and petcoke in the City of Oakland (Ordinance) and a resolution applying that ban to the approved and vested bulk commodities terminal (Terminal) at the Oakland Global Trade and Logistics Center (Project) on the former Oakland Army Base (Resolution and collectively Ordinances). When elected officials of the City of Oakland take their oath of office, they swear to uphold the laws of the City of Oakland. The 2013 Development Agreement for the Oakland Global Trade and Logistics Center (DA) ***is*** a "law of the City of Oakland" as a duly enacted ordinance. For all of the reasons provided herein, should members of the City Council choose to follow the staff recommendation for tonight's hearing, they risk at least three unfortunate consequences:

(1) Conscious and intentional breach of their oath of office;

(2) Pronouncement to the world that Oakland is not a trustworthy or reliable place to invest or do business in that even City-recognized vested property rights are summarily abandoned in the face of ever-evolving political agendas; and

(3) Exposing the City and its General Fund to hundreds of millions of dollars in liability, beginning with the return of almost $150 million to the State of California and hundreds of millions more in damages to the developers of the project. [1]

[1] Undoubtedly, the City Attorney would refer to Section 8.7 of the DA as to this final point. As discussed below, Section 8.7 would be inapplicable in this instance. Section 8.7 applies expressly and exclusively to "Events of

The package of materials disseminated three days ago on Friday afternoon consists of a 225-page staff report that includes a report by Environmental Science Associates (ESA), the Ordinances, and additional exhibits. Also disseminated were materials by Council Member Kalb (collectively Kalb Memo) purportedly relating to health concerns for coal and petcoke. Collectively, these materials reiterate repeatedly one consistent theme: that there are no circumstances whatsoever – regardless of resources or technology employed – under which coal can be transported, stored, or handled safely. Period. Ever. No matter what. Such a position is irrational, conflicts with on-the-ground realities throughout the country, and is legally indefensible.

What is abundantly clear, based on the express statements of Oakland elected officials driven by local and outside activist groups, is that there are no circumstances whatsoever under which coal being transported, stored, and handled in Oakland is *politically* palatable, regardless of what means must be employed to prohibit it. In their private capacity, individuals are certainly entitled to their viewpoints. However, political determination and the rule of law are two very different things that implicate very different consequences. That certain elected officials are committed to "do anything" to keep coal (and apparently a long list of yet-to-be-disclosed other politically disfavored commodities) out of Oakland may land them political support and votes, but they must also realize and own that such actions breach existing and binding legal obligations, exposing the City to potentially unprecedented legal liability.

That the City Council in 2016 may want to invoke all means at their disposal to keep certain commodities out of Oakland may be their prerogative. What is not within their political discretion is disregarding the rule of law. The Developer of the Project has materially and detrimentally relied on the 2012 and 2013 vested Project entitlements. Millions of private dollars have been expended, binding legal commitments have been executed, and other opportunities have been foregone, all in reliance on the City's prior actions. The City may not now shift the consequence and expense of its changed mind and disappointment in the commitments it has inherited from prior Councils to the Project Developer. Should it proceed along the course recommended by Staff, the City must be prepared to bear the consequences and costs of that decision.

THE CITY KNOWINGLY DEPRIVED THE DEVELOPERS OF DUE PROCESS BY INTENTIONALLY DELAYING THE RELEASE OF THE ORDINANCES AND NOTICE OF THE CITY'S INTENDED COURSE OF ACTION TO JUST THREE DAYS

The Friday Afternoon Document Dump and the Dubious Character of the Report

While the Ordinances never reference it explicitly, the 225-page staff report issued three days prior to this hearing (Staff Report) relies extensively on a report by ESA (ESA Report). The base text and

Default" as defined in the DA (i.e., failure of the City to fulfill one of its obligations under the DA). The City's contemplated action here is not a failure to act, but rather an *ultra vires*, extraordinary affirmative action, not supported by law or substantial evidence, designed and calculated to deprive the developers of their rights under the DA. Section 8.7 would not apply.

analysis of the Staff Report is 25 pages and is dated June 23, 2016. The ESA Report is 163 pages and is also dated June 23, 2016. The Staff Report makes no effort to reconcile how a report dated the exact date of the Staff Report itself could possibly serve as the evidentiary support for that Staff Report. Nor does it explain how the Council is expected to evaluate the credibility, or lack thereof, of the ESA Report, the Staff Report, or the recommended course of action therein by tonight's hearing.

Further, the history of the retaining and completion of the ESA Report casts significant doubts over its credibility as any sort of authoritative resource.

On September 21, 2015,[2] the City held a public hearing and received volumes of testimony and "evidence" regarding the handling of coal generally. The City kept the public hearing open through October 6, 2015, for the purpose of receiving additional materials. At this hearing, among other things, staff was directed to review the materials compiled and report back to the Council with a recommendation on its contents by the end of the year. That did not happen. As far as the public knew, the compiled "record" simply sat somewhere within City Hall for over four months.

Then the San Francisco Chronicle reported on efforts of Mayor Schaaf and her staff confirming "a plan . . . to stop coal from being shipped . . . ."[3] Additional troubling reports from the Chronicle piece included:

- "City leaders have hired a consultant to *come up with enough ammunition* to prove that coal is indeed dangerous, and thus allow Oakland to adopt a health regulation that would essentially make the coal deal unworkable." (*Empahsis* added.)
- "The mayor believes Oakland has the authority to act as long as [the developer] hasn't taken out the final permits for the project. He isn't likely to do so until spring."
- " 'The city has telegraphed its intentions in a way it hadn't done before,' Earthjustice attorney Irene Gutierrez said of Oakland's possible move to block coal shipments."

In the wake of this reporting, the City agendized a hearing for February 16, 2016, to retain ESA to review the record compiled to date regarding coal. In the proposed retention, the staff recommended waiving all standard advertising, competitive bidding, and request for proposals/qualifications competitive selection requirements mandated in the Oakland Municipal Code for such work. According to the proposed scope of work, the cost would be $208,000 and would take seven to eight (7-8) months.

But just before the hearing was called to order, Mayor Schaaf asked the Council to refrain from acting on the proposal " 'so that we may further evaluate other, potentially more effective options,' to bar coal shipments through Oakland. 'I remain strongly opposed to the transport of coal and crude oil

[2] This hearing date is erroneously noted to be September 15, 2015 in at least one place in the Ordinances.
[3] San Francisco Chronicle, December 2, 2015

through our city,' Schaaf wrote in her letter."[4] The next day, California State Senator Loni Hancock, flanked by outspoken Project opponents, held a press conference announcing the introduction of four legislative bills, all of which were expressly designed to limit the operations of the Terminal.

Shortly thereafter, following a Senate Committee hearing where several members questioned the purpose for the bill and why the City of Oakland was not present to explain its position on the matter, Senator Hancock abandoned two of the four bills. The City re-engaged. On March 25, 2016, a new request for comment on the ESA proposed scope of work was issued. But this time, the proposed scope of work was not limited to the record compiled to date on coal; it added "other hazardous fossil fuel materials." On April 1, 2016, we wrote to the City pointing out that City had never solicited or otherwise compiled "evidence" regarding "other hazardous fossil fuel materials" as it had on coal at the September 21, 2015, hearing.

The noted hearing on the ESA proposal was again put off. Instead, on April 26 with a revision on April 28, 2016, the City noticed an evidentiary hearing to be held on "the Health and/or Safety Impacts of Fuel Oils, Gasoline and/or Crude Oil Products" for May 9, 2016. Additionally, the ESA proposal was re-agendized for hearing by the City Council on May 3, 2016.

By this time, however, significant changes had been made to the proposed ESA Scope. The staff recommendation still included a waiver of the Municipal Code mandated competitive selection requirements, but the terms of the ESA proposal were different:

- The scope of review was substantially expanded to include the now almost eight month old "record" on coal as well as the yet-to-be-compiled record on "other hazardous fossil fuel materials;"

- Notwithstanding the significant expansion in work and scope, the budget for the effort was slashed from $208,000 to $120,000; and

- Notwithstanding the significant expansion in work and scope, the time frame for completing the review and reporting back to the Council was slashed from "7-8 months" to six weeks.

At the May 3, 2016, City Council hearing, not only did the Council approve the ESA scope proposal, they also unanimously voted to override normal City Council scheduling protocols for scheduling hearings through the City Rules Committee, and directly scheduled tonight's June 27 hearing on the proposed Ordinances.

At no point prior to the June 24 Notice of Hearing did the City provide the public notice that the Ordinances were drafted and were being considered for adoption by the City Council. Moreover, there was no information provided on the outstanding ESA Report. However, on June 1, 2016, Senator Hancock issued a press release regarding the status of her two remaining bills in the Legislature. Buried

[4] East Bay Express, February 17, 2016.

in that June 1 press release was a remarkably accurate foretelling of the plans and intentions of the City: "At the local level, the Oakland City Council plans to make public a coal ordinance on Friday, June 24 and on Monday, June 27 the City Council will vote on whether to stop the coal proposal or move forward with the developer's plans." Thus, the City's intention to hold back the draft Ordinances and ESA Report, affording the public only a weekend of review prior to the hearing, was intentional and calculated.

This back-room, outcome-determinative rouse is both a sham and a denial of both substantive and procedural due process. For the substantive reasons explained below, the ESA Report is nothing but opinion based on speculation and thus can never qualify as "substantial evidence" as required in the DA. But the proceedings called out above evidence a process intentionally deceptive and lacking in transparency, fairness, and due process.

And even more recently on June 7, 2016, the City adopted "The 2016-2021 Oakland Local Hazard Mitigation Plan as an Amendment to the Safety Element of the Oakland General Plan." We know from the Senator Hancock press release that the City already intended to spring the Ordinances on the public at large just two weeks later. And yet, the City staff and Council considered and voted to amend its General Plan's Safety Element as to "Local Hazard Mitigation." Knowing the evidence for and Ordinances proposing a response to a purported immediate need to "act" to forestall a "condition substantially dangerous" to the community, the City forged ahead on this action without any inclusion or discussion whatsoever of this "condition." If the purported "condition" was truly so certain, so dire, and so imminent, how could it not have been relevant to the Hazard Mitigation aspect of the Safety Element of the City's General Plan?

The ESA Report Is Biased in Its Analysis

In its consideration of materials submitted to the City, the ESA report is openly biased, giving undue credence to comments opposing the Project and summarily dismissing expert testimony and evidence that coal can be and is daily transported safely throughout the United States today. For example, the multi-disciplinary White Paper submitted to the City by HDR documented nationally recognized protocols and procedures for the shipment of coal nationwide. The bona fides of the expert authors of the White Paper were included with it.

But ESA summarily disregards the analysis and conclusions of the White Paper based upon the un-challenged, speculative, and summary critique by "an air pollution expert." (See ESA Report, pg. 2-14.) This pattern of biased consideration runs throughout the ESA Report and it is accordingly compromised as any kind of substantive resource document.

But perhaps more important than teasing out critiques of this evidence, or the exalting of speculative opinion is the framework methodology and conclusions here. Given the lack of a specific facility to be considered and analyzed, the White Paper took a responsible and rational approach: it acknowledged the lack of specificity for a facility in this instance and then openly went on to analyze the best technologies currently available and referenced the best practices used today by commodities

handlers. It then articulated the minimally mandatory measures that must be implemented for a yet-to-be designed Terminal at the Project site. All of those mandates were presented to the potential operator of the Terminal, Terminal Logistics Solutions (TLS), and TLS on the record expressly accepted all such requirements. A logical process: here's what is required and affirmation by the responsible parties that it will be done.

Conversely, the framework approach of ESA is to hypothesize a generic facility and conduct an analysis "applicable to any such facility" and present an outcome-determined case that essentially concludes that there are no circumstances, ever, regardless of resources expended, technology employed, or mandates adhered to under which coal can be safely handled, ever. Absolutely none.

And ESA's bias is not just as to materials provided by consultants supporting the Project. Extraordinarily, ESA summarily dismissed a comprehensive analysis by the federal Surface Transportation Board in an environmental impact statement (EIS) under the Nation Environmental Policy Act (NEPA). Prepared for the Tongue River rail project, the EIS concluded that all "detects" from the transportation of coal were within acceptable levels under regulations promulgated by the U.S. Environmental Protection Agency (EPA). Further, ESA ignored or failed to research the fact that in commenting on the EIS, while EPA was critical of some aspects, it took no issue with that aspect of the analysis.[5] (*See*, ESA Report, pg. 5-8 – 5-9.)

THE PROJECT'S VESTED RIGHTS PROHIBIT IMPOSITION OF THE ORDINANCES ON THE PROJECT

The Staff Report and Ordinances claim that it is within the City's authority and not an impingement or violation of the vested rights granted to the Project via the DA to impose restrictions on the Project operations because "the Developers do not have a vested right not to be subject to the Ordinance . . . ." (Staff Report, pg. 2.) This is a position never previously espoused by the City. Instead, the City's focus, while regularly and expressly acknowledging the vested status of the Project under the DA, has been on a potential "health and safety" exception in the DA and under California law (see discussion below). Never before has the City claimed that it can impose operational restrictions on the Project without violating the DA independent of the health and safety clause.

Nonetheless, the City now claims that because the DA does not explicitly grant the Project the right to transport "any commodity" through the Terminal, the City is free to disallow any and all commodities to which it has a political objection. Presumably, based upon the Staff Report and the Ordinances, this authority is absolute and without limitation, even to the point of disallowing *any* commodities to be transported. Obviously, the Staff is mistaken.

Section 3.4 of the DA could not be more clear: "City shall not impose or apply any City Regulations on the development of the Project Site that are adopted or modified by the City after the Adoption Date" of the DA. Specifically disallowed by DA Section 3.4.1 are any attempts at new regulations that would:

[5] The Tongue River EIS is available at: http://www.tonguerivereis.com/

- "be inconsistent or in conflict with the intent, purposes, terms, standards or conditions of this Agreement;"
    - Clear and explicit in the record are the fact that the description of the Project -- exhaustively reviewed by the City, including full review under the California Environmental Quality Act (CEQA) -- are the inclusion of the Terminal as a core part of the Project, exhibits expressly presenting the full array of legal commodities then being shipped in bulk commodity terminals including coal, and the fact that the application was presented and approved *without* restriction as to commodities to be shipped. Now imposing the operational restrictions in the Ordinances would absolutely "be inconsistent and in conflict with the intent, purposes, terms, standards and conditions of this Agreement."

- "materially change, modify, or reduce the permitted ***uses*** of the Project Site, the permitted density or intensity of use of the Project Site . . . " (***emphasis*** added.)
    - The Ordinances are an explicit limitation and legal prohibition of uses and intensity of uses expressly approved and allowed under the DA.

- "materially increase the cost of development of the Project . . . "
    - Disallowing fully lawful operations of the Project increases the cost of the Project not only by disallowing a potential revenue source, but also by increasing the cost and accessibility of financing for the Project by injecting a significant level of uncertainty into the Project viability based on politics.

- "materially change or modify, or interfere with, the timing, phasing, or rate of development of the Project . . . "
    - As the City is well aware, the operation of the Terminal is the subject of an existing exclusive option agreement, and the proceedings regarding coal and the other noted substances have already violated this provision. Adoption of the Ordinances and attempts to impose them on the Project most certainly would exacerbate and interfere with the timing, phasing, and rate of development of the Project.

- "materially interfere with or diminish the ability of a Party to perform its obligations under the City Approvals, including this Agreement, or the Subsequent Approvals, or to expand, enlarge or accelerate Developer's obligation under the City Approvals including this Agreement or the Subsequent Approvals . . ."
    - The illegal prohibitions imposed by the Ordinances would have a devastating impact and would absolutely interfere with or diminish the ability of the Developer Parties to perform their obligations under the City Approvals. The most prominent issue is not simply the elimination of a single commodity or group of commodities, but the cloud of uncertainty and unpredictability about similar future actions by the City in the future destabilizing potential interest in the facility.

- "materially modify, reduce, or terminate any of the rights vested in City Approvals or the Subsequent Approvals made pursuant to this Agreement prior to expiration of the Term."
    - The City itself recognized, in the Staff Report for the September 21, 2015 hearing on coal, the vested nature of the Project pursuant to the DA: "*Major Components of the Army Base Redevelopment.* . . . (4) a Development Agreement ('DA'), which vested the rights to develop, among other things, the Break Bulk Terminal on the West Gateway, subject to a narrow exception for certain later-enacted health and/or safety regulations."[6] The vested approval of the Project, including the Terminal, is without restriction and the Ordinances would fundamentally and foundationally modify, reduce, and potentially terminate rights vested in City Approvals or the Subsequent Approvals.

As noted, never before has the City suggested an independent right to regulate or prohibit legal commodities proposed to be shipped through the Terminal outside of the, to use the City's own words, "narrow exception for certain later-enacted heath and/or safety regulations." The assertion now in the Ordinances is only one of many examples that desperation has taken over such that no measures, even at the expense of the rule of law and exposing the City to significant legal liability, will stand in the way of political expediency on this issue.

THE ORIDNANCES ARE PREEMPTED BY FEDERAL LAW

The DA, and California law generally, recognize that a City cannot contract away its police power to keep its citizens safe. In the DA, that principle is embodied in Section 3.4.2:

> 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. . . .

The Staff Report, ESA Report, and the Ordinances recognize this as the one potential "narrow exception" allowing the City to impose new regulations on the Project. The first required showing to invoke Section 3.4.2 and impose a new regulation on the Project is that such regulation, "(a) is otherwise permissible pursuant to Laws . . . ." In other words, it has to be legal under state and federal law. The Ordinances are not. They are preempted by federal law as was demonstrated by the materials submitted to the City during the September 21, 2015 proceedings.

[6] September 10, 2015 Staff Report, pg. 3.

Kathryn Floyd of the Venable Law Firm in Washington, D.C., a noted expert on federal preemption for commodity transport, provided the evidence and analysis as to why efforts by the City to block coal, or any other legally transported commodity, are preempted. That testimony – written and oral – are hereby incorporated by reference and renewed.

The City's efforts to regulate coal and petcoke in all instances but simultaneously and disingenuously claim to exempt and not regulate the rail transportation aspects are unavailing. The bottom line is that the City is trying to block transport of this legal commodity and keep it "out of Oakland," and such an effort, however allegedly nuanced, is federally preempted and illegal under federal law. Accordingly, it fails the first criteria of Section 3.4.2 rendering the clause inapplicable in this instance.

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD THAT WOULD SUPPORT THE IMPOSITION OF THE ORDINANCES ON THE PROJECT

Even were the Ordinances not federally preempted, the City's Friday-afternoon document-dump is inadequate to satisfy the second requirement of Section 3.4.2: "substantial evidence . . . that a failure to [act] would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof, or all of them, in a condition substantially dangerous to their health or safety."

As a threshold matter, the City has failed to identify what it claims is the "condition substantially dangerous to their health or safety." A fair reading of the Staff Report, the ESA Report, and the Kalb Memo garners only one such purported "condition:" coal in Oakland, anywhere, anytime, under any circumstances, at least as it relates to the Project. Admittedly, yes, the City exempts a myriad of other contexts where coal is allowed and not implicated by the Ordinances. But that far from cures the situation; it only highlights that it is illegal as arbitrary and capricious, as discussed below.

The City has not identified a given "condition" that is "substantially dangerous" to those at and around the Project. What is it exactly, other than a blanket and absolute ban on coal in any and all instances, they are trying to prevent?

The next factor is timing. Section 3.4.2 is clear that a "failure to act" will be the conduit to the "condition" of concern. But as the City has repeatedly been made aware, there is no commitment to transport coal, or any other commodity for that matter, through the Terminal. Nor has there been submitted to the City any permit application for the construction of the Terminal. As a "purpose-built" facility, it is premature to apply for a permit prior to determination of what may or may not be shipped. And there is, at this point, no determined or committed commodity. But it is indisputable that the Terminal construction will not be able to proceed without coming back to the City for such a permit. So, again, why now? What is the specific instance at this point in time, such that the requisite "failure to act" is triggered? Again, what is the "condition," today, that will otherwise proceed to fruition should the City "fail to act" now?

Even assuming the City had satisfactory answers to these two preliminary questions, it has provided no "substantial evidence" to back up the claim of a "condition substantially dangerous" posed by the Project, requiring them to now "act." The Staff Report references vaguely the extensive "record" submitted over the past nine months and even before, and more specifically to the ESA Report, but none of that material provides any "substantial evidence" that can back up the Ordinances relative to the criteria in Section 3.4.2 in that all such materials are mere speculation and opinion which do not meet the criteria for "substantial evidence" under California law.

California law is abundantly clear that speculation, conjecture, or assumptions cannot provide a foundation for "substantial evidence."

> Although it is true that the testimony of a single witness, including the testimony of an expert, may be sufficient to constitute substantial evidence (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 487), when an expert bases his or her conclusion on factors that are "speculative, remote or conjectural," or on "assumptions ... not supported by the record," the expert's opinion "cannot rise to the dignity of substantial evidence" and a judgment based solely on that opinion "must be reversed for lack of substantial evidence." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135–1136.) Similarly, "[a]n expert's opinion that assumes an incorrect legal theory cannot constitute substantial evidence." (*Corrales v. Corrales* (2011) 198 Cal.App.4th 221, 226). *Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191-92.

More specifically:

> The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. (*People v. Coogler* (1969) 71 Cal.2d 153, 166; *People v. Bassett* (1968) 69 Cal.2d 122, 141.) Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338–339; *Richard v. Scott* (1978) 79 Cal.App.3d 57, 63.) In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. (*Hyatt v. Sierra Boat Co*., *supra.*) *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-36.

"Of course, the inference or inferences indulged in must be reasonable, must be based on the evidence, and cannot be the result of mere guess, surmise or conjecture. *Reese v. Smith*, 9 Cal.2d 324;

Puckhaber v. Southern Pac. Co., 132 Cal. 363; *McKellar v. Pendergast*, 68 Cal.App.2d 485, 156 P.2d 950." *Oregon-Nevada-California Fast Freight v. Fruehauf Trailer Co.* (1948) 83 Cal.App.2d 620, 624.

As the City was advised repeatedly, most recently in a comment letter on the last of the myriad City's multiple efforts to actually retain ESA, there is nothing for ESA, or anyone else for that matter, to yet evaluate in terms of health and safety concerns, or lack thereof. The Project has not yet delivered to the City any substantive design or operations proposal for the Terminal. As noted above, any such submittal would be premature prior to definitive determination and commitment as to the commodity or commodities to be shipped, and that has not yet happened.

Indeed, as the Developers readily predicted in their comment letter, the first thing ESA did after being retained by the City was request from the Developers specifics regarding the design and operations specifications for the Terminal. As the Developers had already informed the City, none yet exist and this analysis, therefore, is premature. Nonetheless, the City and ESA forged ahead.

The ESA Report is premised, by its own terms, almost exclusively on the Basis of Design (BoD) submittal to the City. However, as the introductory pages of the BoD make explicitly clear, the BoD is not, and was never intended to be, a full or even near-full design proposal for the Terminal or its operations. Rather, the BoD is a foundational floor with which any future facility must comply. Comprised primarily of federal, state, regional, and local regulations and the Standard Conditions of Approval and Mitigation Monitoring Reporting Program with which the Project must comply. It is not in any way elaborative on the design of the facility, technology to be employed, operational parameters to be implemented, or other critical variables that have yet to be determined. In its own words, the BoD represents the starting "10 percent" of what will be required to be shown for whatever the Terminal ultimately is proposed to be.

And while the ESA Report expressly acknowledged as much, it nonetheless irresponsibly and inappropriately purported to draw conclusions. But were those conclusions as to a particular facility? No. The ESA Report repeatedly caveated and premised its analyses and conclusions to state it was evaluating, effectively, a hypothetical facility of generic character. For example:

> The analysis below would generally apply to any bulk commodity facility which proposes the rail transport, handling, and storage, and transloading of coal and petcoke for export. As one illustrative example of such a facility, ESA analyzed the proposed new Oakland Bulk and Oversized Terminal (OBOT) facility to be located at the former Oakland Army Base in West Oakland. ESA relied upon the OBOT Proponent's Basis of Design (BoD)[1] and correspondence with the City of Oakland for this analysis of the proposed OBOT.[2'3] The BoD is considered conceptual at this stage by the OBOT Proponents.[4] However, ESA notes that this design might be used as a basis for any similar bulk commodity facility located at a port. (ESA Report, p. 2-1.)

And:

> This study is based upon a screening level review of the preliminary BoD for the Terminal. It is anticipated that the OBOT will submit detailed design plans beyond this initial design stage when it has confirmed a particular operator for the Terminal and committed to a commodity to be shipped. These design features might be used as a basis for any similar new bulk commodity facility handling coal and/or petcoke that is located at a port. (2-1 – 2-2.)

There was and is no facility to evaluate. Therefore, by definition, ESA's analysis of potential health and safety implications of the Terminal is speculative and conjecture. California law is clear that such hypothesizing cannot and does not rise to the level of "substantial evidence." Thus, Section 3.4.2, again, is not satisfied.

THE ORDINANCES ARE ARBITRARY AND CAPRICIOUS

Not only are the Ordinances inconsistent with Section 3.4.2 because (1) they are not otherwise legal, and (2) they are not supported by substantial evidence, they are independently invalid because they are arbitrary and capricious.

As explained above, because there were no actual design specifications or operational parameters for ESA to utilize in its analysis – including type of commodity to be shipped, quantities of respective commodities at any given time, facility design, containment technologies, ventilation systems, or operational safety regimes – the conclusions of ESA are definitionally conjecture and speculative and therefore not "substantial evidence" under California law. And, again, the absence of those defining and essential variables only highlights that, at this time, there is not and cannot be any imperative to "act" given that there is no pending "condition substantially dangerous" to the community.

But even were we to consider the data assumed and speculated by ESA, as presented in the table below, it still does not support the staff-recommended action. The Staff Report finds: "Per the table below, the overall emissions from the OBOT project are ***expected*** to exceed both the daily and annual PM_{10} and $PM_{2.5}$ City of Oakland CEQA Thresholds of Significance[9], which would be considered a significant unavoidable impact under CEQA and thus ***presumptively*** a substantially dangerous condition to health." (Staff Report, pg. 12, ***emphasis*** added.) Even indulging the speculative nature of ESA's assumptions, Staff itself recognizes the uncertain nature of the conclusions, falling back on terms like "expected" and "presumptive."

TABLE 5-7
SUMMARY OF EMISSIONS ESTIMATES FROM RAIL TRANSPORT, STAGING/SPUR TRAVEL, UNLOADING, STORAGE, TRANSFER AND SHIP LOADING OF COAL AT OBOT

Fugitive Coal Dust Emissions Source	tons/yr			lbs/day		
	TSP	PM_{10}	$PM_{2.5}$	TSP	PM_{10}	$PM_{2.5}$
Rail Transport*						
BAAQMD	2,102	988	148	12,012	5,646	847
Oakland	82	38	6	468	220	33
So Emeryville	35	17	3	203	95	14
San Leandro	98	46	7	562	264	40
Staging at Port Railyard, Rail Spur Trip to OBOT	156	78	18	889	445	67
SUBTOTAL - Oakland	238	116	18	1,357	665	100
OBOT Operations						
Unloading	11.9	5.7	0.9	66.0	31.2	4.7
Storage	3.2	1.5	0.2	17.7	8.4	1.3
Transfer	10.4	4.9	0.7	57.6	27.2	4.1
Transloading	11.9	5.7	0.9	66.0	31.2	4.7
SUBTOTAL	37.5	17.7	2.7	207.3	98.1	14.8
PROJECT TOTAL – Oakland	276	134	21	1,564	763	115

* Uncontrolled air emissions of fugitive dust from open coal filled rail cars. .

(ESA Report, pg. 5-17.)

But even further, the conclusion is arbitrary and capricious beyond being speculative. The table shows that the vast majority of suspected potential emissions come from the "rail transport" and not the "OBOT Operations." And even with the intertwined operations, the ESA analysis remains tentative and speculative:

> Thus, the OBOT operations at the terminal itself, OBOT operations at the new Port Railyard, and the new OBOT rail spur (serving the OBOT) ***could impact*** the health of adjacent neighbors from the expected increase into the ambient air in the form of total suspended particulates and fine particulates (TSP, PM_{10}, and $PM_{2.5}$) and increased days of exceedances of the PM_{10} and $PM_{2.5}$ standards, from the transport by rail, staging/spur transit, unloading, storage, transfer, and transloading of coal for export." (ESA Report, pg. ES-4.)

Additionally, the conclusion of the Staff Report, premised upon Table 5.7, is incorrect. The table is based upon an ESA-presumed 5 million metric tons of through-put per year.[7] At this presumed level of throughput, the table estimates that the $PM_{2.5}$ emissions from the OBOT Operations are less than the noted threshold of significance, and the estimated PM_{10} emissions only slightly exceed the daily and annual load thresholds. Based on this estimated data, the Staff Report concludes that there is no amount of coal or petcoke that can safely be transported through the Terminal. This is incorrect. The appropriate reading of the analysis represented in Table 5.7 is that a lesser quantity of throughput, even by ESA's assumption-rich analysis, presents no such risk relative to the ESA-invoked threshold.

But the Staff Report itself contends that the Ordinances do not apply to nor regulated rail transport:

> The Ordinance does not regulate the transportation of coal or coke, for example, by train or marine vessel, through the City of Oakland or to or from a Coal or Coke Bulk Material Facility. The Ordinance also exempts from the definition of Coal or Coke Bulk Material Facility (i) noncommercial facilities (e.g., educational facilities or residential property on which persons may Store or Handle small amounts of coal or coke for personal, scientific, recreational or incidental use), and (ii) on-site manufacturing facilities where all of the coal or coke is consumed on-site at that facility's location and utilized on-site as an integral component in a production process, and which are operated pursuant to, and consistent with, permits granted by the (BAAQMD). (Staff Report, pg. 6.)

And by the City's own intention and design, they are not seeking to regulate the major source of emissions they claim to identify. Clearly, the City's assumption is that if they block the handling of the commodity at the facility, they necessarily block the transport. Clever, perhaps, but this sort of regulatory gerrymandering is precisely why Congress occupied the field of commodity transport and federally preempted proposed regulations such as this.

Also arbitrary and capricious is the second category expressly exempted from the Ordinances: "on-site manufacturing facilities where all of the coal or coke is consumed on-site at that facility's location and utilized on-site as an integral component in a production process, and which are operated pursuant to, and consistent with, permits granted by the (BAAQMD)." (Staff Report, pg. 6.) The ESA Report repeatedly notes that the manufacturing process specifically exempted here presents the identical concerns and impacts in terms of fugitive dust and emissions from incorporation of the commodity into the manufacturing process as that assumed for the Terminal.

[7] Again, all such figures are sheer speculation and conjecture by ESA, no specific commodity or quantity of commodity having been confirmed to this date.

> Coal combustion and petcoke/coal use for iron and steel production emit other air pollutants that can have impacts to human health and the environment, both locally and globally. Although those emissions can be difficult to quantify due to the number of variables influencing emissions, there is substantial and credible scientific evidence that some of these air pollutants would be transported to Oakland, including West Oakland, southern Emeryville, and western San Leandro, where these pollutants would contribute to already high pollutant concentrations, contribute to the existing number of days of exceedances of the ambient air quality standards (for PM2.5 in particular) and exacerbate health effects in three local communities classified as disadvantaged. (ESA Report, pg. ES-7.)

THE ESA REPORT'S "SAFETY" ANALYSIS IS ENTIRELY PREMISED ON THE ASSUMPTION AND SPECULATION THAT A FIRE WILL NECESSARILY OCCUR

Premised upon the fact that history records "13 rail car fires" over 15 years throughout the entire world, "***most of which were likely caused by*** spontaneous combustion," the ESA Report grounds it entire "Safety" analysis on the speculative assumption that there *must eventually be* a fire at the Terminal. (*See, generally,* ESA Report Chapter 6.) However, even the ESA Report itself notes that the variables potentially contributing to a fire are well understood and readily managed and mitigated:

> Spontaneous combustion is a time-dependent phenomenon. ***Early attention to the potential sources of problems may prevent occurrences of heating progressing to full-scale spontaneous combustion***. In comparison, petcoke is much less volatile than bituminous coal, and has a substantially lower risk of fires and explosions." (ESA Report, pg. 6-2, ***emphasis*** added.)

Further, the ESA Report conveniently ignores substantial evidence in the record that the fire risk are well understood and mitigated in the industry. In an attachment to the HDR White Paper by Jensen Hughes, expert testimony specifies the measures necessary to ensure a safe facility from a combustibility standpoint and concludes:

> In conclusion, the risks of fire and explosion occurrences in coal handling and storage are well understood and can be readily managed. If an event did occur, there would be systems in place to limit the risk to life and property. The design of the facility will follow well-established industry guidelines and will implement the measures identified above to mitigate, to the greatest extent reasonably possible, the risk of fire or explosions. (*Technical Memorandum with respect to the potential bulk transfer of coal at the proposed Oakland Bulk and Oversized Terminal*

Project, September 15, 2015, submitted to the City in conjunction with its September 21, 2015 hearing on coal.)

THE ESA REPORT'S CONCLUSIONS REGARDING GREENHOUSE GAS EMISSIONS LACK CREDIBILITY

The ESA Report seems to argue that if coal or petcoke are transported through the Terminal, they will, without doubt, be shipped to China where they will be burned producing additional greenhouse gases and that the consequence of that "incremental" (ESA's terminology) contribution directly impacts the health and safety of Oaklanders. With full recognition of the threat posed by climate change, including sea level rise, the direct correlation is nonsensical and absurd.

As a preliminary matter, indulging ESA's assumption that the material would make its way to China and be burned there, there is no evidence, nor does ESA even feign to argue, that this would result in *new* energy production facilities contributing new emissions. If these facilities did not get the necessary materials from this assumed chain of delivery, they would get them someplace else. The assumed and unchallenged premise that these would result in new emissions is beyond speculative and conjecture. Accordingly, it is not substantial evidence.

Next, even assuming the volume of coal and petcoke assumed by ESA were shipped and further indulging the speculation by ESA of the material being burned and emissions produced, there is far from any material contribution in this "increment," even if they were all shown to be new emissions. With the backdrop of 46 billion metric tons of greenhouse gas emissions globally in 2010,[8] the maximum increment indulging all speculation and assumptions by ESA, is 0.000398%. It is not surprising that the ESA Report failed to include this math, far from a material "increment."

Finally, are we going to attribute to mere transport and handling providers all consequence of the end-user of the commodity being shipped? Will the City begin to apply that policy across the board to all materials shipped through Oakland facilities? Every product shipped in containers? Every truckload of fuel? Under this approach, the City would have to hold gas station owners responsible for greenhouse gas emissions from cars that re-fuel at their facility.

THE ORDINANCE'S EXHAUSTION PROVISIONS ARE UNENFORCABLE

The Ordinance includes an administrative procedure that purports to be a condition precedent for any claim that application of the Ordinance constitutes an unconstitutional taking of property. The process as outlined is unduly burdensome and, in this instance would be futile. Accordingly, it is unenforceable. (See *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830.)

[8] https://www3.epa.gov/climatechange/science/indicators/ghg/global-ghg-emissions.html

CONCLUSION

It is abundantly clear that the City is not interested in a good-faith determination of design, practices, and procedures that would be required to ensure the health and safety of Terminal-related operations. Politically, no quantity of handling coal or petcoke under whatever extraordinary standard will be tolerated. And the paper trail dumped last Friday was clearly and attempt to justify a course of action that had long-since been committed to. While that may accomplish a political outcome, it is only the first steps towards an unfortunate legal outcome.

As addressed above, action consistent with the staff recommendation comes with consequences. It will constitute a breach of the DA for which the Developer will seek full recovery of all damages, including consequential and punitive damages. As explained in the beginning of this letter, the clause in the DA purporting to limit recovery of damages will be inapplicable in this instance. That clause expressly applies only to "Events of Default" which are defined to be a failure to carry out an obligation under the DA. Acting in according with the staff recommendation would not be a "failure to act." It would be an affirmative action, illegal and in excess of the Council's power and authority. Accordingly, that limitations clause would be inapplicable.

As futile as it seems at this point, we strongly urge and the request to reconsider what appears to us to be a foregone conclusion and work with the Developer to find a mutually acceptable solution, as admittedly vexing and elusive as that has proven to date.

Sincerely,

David Smith
STICE & BLOCK, LLP

cc: Libby Schaaf, Mayor
Claudio Cappio, Assistant City Administrator
Mark Wald, Office of the City Attorney