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April 1, 2016

Via Electronic Mail

Oakland City Council
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Re: Draft Scope of Work for City of Oakland Review of Public Comments Received Regarding Potential Health and/or Safety Effect of Coal and other Hazardous Fossil Fuel Materials Proposed at the Oakland Bulk and Oversized Terminal

To the Oakland City Council:

The Sierra Club, Communities for a Better Environment (“CBE”), West Oakland Environmental Indicators Project, Asian Pacific Environmental Network (“APEN”) and San Francisco Baykeeper provide the following comments on the Draft Approach and Preliminary Scope of Work (“Scope of Work”) for ESA to assist in the City of Oakland’s (“City”) review of public comments received regarding potential health and safety impacts of coal proposed at the Oakland Bulk and Oversized Terminal (“OBOT”). The undersigned groups support the City of Oakland moving forward with its health and safety regulatory process in order to conclude it as soon as possible.

As a preliminary matter, we express our concerns with ESA’s environmental review of other fossil fuel-related projects. The company has recently prepared environmental review documents under the California Environmental Quality Act (“CEQA”) for various fossil fuel infrastructure projects around the Bay Area, including, for instance, the Valero Benicia Crude by Rail Project,¹ and the Phillips 66 Rodeo Propane Recovery Project.² Both environmental reviews for these projects have proven deficient and failed to properly consider significant health and safety impacts. In February 2016, the City of Benicia Planning Commission unanimously refused to certify the Environmental Impact Report for the Valero project. CBE, another local community group, and a labor/worker safety group are currently in litigation regarding the adequacy of the Rodeo environmental review document prepared by ESA. Providing adequate parameters and clarification of ESA’s role, as discussed below, could address, and avoid,

¹ Valero Benicia Crude by Rail Project, Revised Draft Environmental Impact Report, August 2015, available at <http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/RDEIR-NoAppendics.pdf>.

² Phillips 66 Propane Recovery Project, Overview available at <http://www.co.contra-costa.ca.us/4729/Phillips-66-Propane-Recovery-Project>.

several similar shortcomings in this particular summary of impacts for the proposed coal export activities at OBOT. Alternatively, the city could explore using other consultants that have more experience and credentials working on public health issues, and a more diverse staff.

We highlight the following concerns with the Scope of Work: (1) the inappropriate role of ESA to render legal determinations; (2) the inadequate scope of review of factors affecting the health and safety of Oakland residents; (3) the inappropriate reliance on past studies from a now defunct coal rail project; (4) the failure to outline a process for addressing additional commodities, which have not had public comment, and the erroneous omission of petcoke; (5) the inadequate scope of review of impacts to local communities; (6) the failure to include past relevant documents in the record; (7) erroneous reliance on unenforceable developer commitments; (8) failure to incorporate an adequate summary of cumulative and disproportionate impacts on low-income communities of color Low-Income Communities of Color; and (9) an inadequate period set for public comment.

For these reasons, we respectfully request the City of Oakland to clarify the scope of work for its consultant's role to organize evidence and not to stand in the shoes of the City to evaluate the record or provide a legal standard, and to consider our other comments below.

I. ESA May Not Render Legal Determinations

The Scope of Work notes that,

“[a]s articulated by the City, the purpose of this review is to assist the City in determining whether the information in its public record constitutes ‘substantial evidence’ that would support a finding of substantial endangerment, pursuant and consistent with the requirements of 2013 Development Agreement By and Between City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the property and Project Known as ‘Gateway Development/Oakland Global’, [“LDDA”] sections 3.4.2 and 3.4.4.”³

The City should clarify that the role of ESA as the consultant is mainly to organize the public comments received by the City in regards to this Project. It is inappropriate for ESA to render legal opinions, and specifically, to define what constitutes substantial evidence, substantial endangerment, and consistency with the LDDA. Those roles are reserved for the City of Oakland.

The Scope of Work's “review” of the public's comments includes a vague reference to “[a]ppropriate thresholds to be used in the determination of whether there is ‘substantial evidence’ that the project is ‘substantially dangerous’”.⁴ ESA's role is not to establish thresholds—that is an evaluation for the City to make based on the record

³ Draft Approach and Preliminary Scope of Work, March 25, 2016 (“Scope of Work”) at 1.

⁴ Scope of Work at 6.

before it. In addition, the Scope of Work's references to the consultant's "evaluation" of information triggers the same concern since it is ultimately the City that must make a decision and evaluate the information before it.⁵

II. The Scope of Work Fails to Include Factors Affecting the Health and Safety of Oakland Residents

One major omission from the Scope of Work is the failure to analyze pollutant blowback to Oakland from coal burned elsewhere (i.e., mercury deposition, etc.).

In addition, when characterizing the commodities at issue, the analysis must include looking at the silica content of coal, a component that contributes to lung-related ailments in workers. Utah coal is known to have a high silica content.

Finally, the Scope of Work must acknowledge that the developer has only given the city vague plans. The developer has not been forthright with the city or the community about shipping coal, let alone the mines from which it will originate, or the planned rail routes. While the link to Utah coal is well borne out through public records and Utah legislation, this study must also acknowledge the possibility that Powder River Basin coals could also be transported through OBOT and should accordingly analyze those coals as well.

III. The Scope of Work Inappropriately Relies on Past Studies from a Now-Defunct Project

The Scope of Work includes multiple references to the Surface Transportation Board's (STB) analysis of the Tongue River Railroad Project.⁶ Notably, the Scope of Work states "[w]e presume the Final EIS is in progress and may provide independent confirmation as to the appropriateness and completeness of the scope of issues to be considered in this proposed Report."⁷

The Tongue River Railroad is a now defunct project, with the environmental review on indefinite hold. On November 25, 2015, the Tongue River Railroad Company filed a petition with the STB to hold the proceeding in abeyance due to delays in obtaining a mining permit for the Otter Creek mine and weak international coal markets.⁸ The STB granted a stay of the deadlines on December 3, 2015.⁹ Later, on March 10, 2016, Arch Coal announced it was suspending its permitting efforts for the Otter Creek mine also citing weak market conditions and a lack of capital.¹⁰ The Tongue River

⁵ *Id.* at 8.

⁶ *Id.* at 7-8, fn. 7-9.

⁷ *Id.* at fn. 9.

⁸ See Petition of Tongue River Rail Company to Hold Proceeding in Abeyance, November 25, 2015, <http://www.tonguerivereis.com/documents/239626.pdf>; <http://www.tonguerivereis.com/>

⁹ See <http://www.tonguerivereis.com/>.

¹⁰ Arch Coal Suspends Plans for Otter Creek Mine in Montana, March 10, 2016, Billings Gazette, http://billingsgazette.com/business/arch-coal-suspends-plans-for-otter-creek-mine-in-montana/article_3dcba267-d149-50c7-8cd8-ed107c1110eb.html

Railroad would have hauled Otter Creek coal to the West Coast for export through the proposed Pacific Northwest coal terminals. Arch Coal is currently in bankruptcy proceedings. The plans to build the Tongue River Railroad, and the environmental review for the railroad project, are indefinitely on hold.¹¹ Groups including the Sierra Club and Earthjustice submitted extensive comments on the Tongue River Draft EIS pointing out multiple flaws.¹² Because the EIS process is on indefinite hold, the STB will not weigh in on comments about the flawed Draft EIS or complete a Final EIS. Accordingly, the Tongue River Draft EIS should not be relied upon here. The Scope of Work should omit all references to the Tongue River EIS.

IV. The Scope of Work does not adequately outline a process for addressing additional commodities, which have not had public comment, and omits Petcoke

The Scope of Work fails to address petroleum coke (petcoke), one of the subjects of the September 21, 2015 hearing. This must be added to the study. We do think it is important that the Scope of Work include a variety of oil commodities, including fuel oils such as high-sulfur diesel, and other hazardous fossil fuels with similar characteristics to crude oil.¹³ The undersigned groups share concern that hazardous fossil fuel commodities pose a threat to health and safety for Oakland residents and do not want to see these commodities shipped through Oakland; however, we have not yet been offered the opportunity to provide public comment on those commodities. These oil commodities were not part of the scope for the original September 21, 2015 health and safety hearing, which was limited to coal and petcoke. A process for public comment on these additional fossil fuels is needed.

V. The Scope of Work Fails to Account for Project Impacts on Certain Oakland Communities

ESA's analysis notes that it will review whether terminal activities for the export of coal (or other hazardous fossil fuel materials) would be "substantially dangerous" to "workers or the nearby population." The term "nearby population" requires further definition. If it refers only to portside communities, then it must be revised to incorporate other communities in Oakland that the record illustrates would be affected by this Project, such as, but not limited to, those living near the rail lines. Similarly, the Scope of Work fails to define, but refers continually to, the "Study Area." The Scope of Work seems to reference only West Oakland. The City must clarify and ensure it addresses every potentially affected community.

¹¹ Tongue River Railroad Plans on Hold due to Mine Permitting Delays, The Missoulian, November 25, 2015, http://missoulian.com/news/state-and-regional/tongue-river-railroad-plans-on-hold-due-to-mine-permitting/article_7cdeed9b-db50-5ee9-bc07-85498227f61f.html

¹² See e.g., Comments on Tongue River Railroad

http://www.tonguerivereis.com/documents/deis_comments_organizations/FD-30186-000317.html

¹³ See Scope of Work at 2, 3, 5, 6, 8.

VI. The Scope of Work Fails to Include Past Relevant Documents in the Record

Our prior comments on this Project have stressed its unstable and ever-shifting project description. The Scope of Work states that ESA will look at the proponent's current plans for OBOT operations.¹⁴ ESA should also look at prior proposals and documents describing OBOT (i.e., TIGER grant documents, the LDDA, California Transportation Commission grant applications, prior EIRs) to compare how the project objective has shifted over time.

VII. The Scope of Work Erroneously Relies on Unenforceable Developer Commitments

The Scope of Work should be limited to only demonstrably enforceable mitigation. The review should not accept as foundational facts any promises or projections by the developer that are not enforceable through existing contracts or regulations. Further, the developer has only provided a Basis of Design for the terminal, which is conceptual only. For instance, the Scope of Work notes that it will “describe the operations to be evaluated in this analysis, including structural and procedural measures *proposed* to control emissions and prevent spills of bulk commodities.”¹⁵ To unnecessarily broaden the review of evidence to merely hypothetical measures would simply result in illusory and insufficient mitigation of significant environmental impacts.

VIII. The Scope of Work Fails to Incorporate an Adequate Summary of Evidence of Cumulative and Disproportionate Impacts on Low-Income Communities of Color.

The record includes evidence of the disproportionate impact of fossil fuel-related goods movement on low-income communities of color. The City should ensure that the Scope of Review include a summary of such evidence.

IX. The Scope of Work Establishes an Inadequate Period for Public Comment

The Scope of Work establishes a preliminary draft schedule for moving forward, including a public review period of 17 days. Based on the highly technical information in the record, our organizations will require significantly more time to ensure the accuracy of ESA's summary of evidence and report our conclusions to our several members and allied organizations. A mere 17 days will not allow for adequate public participation. At the same time, it is imperative that this study stick deadlines allowing for a summer City Council determination.¹⁶ City Council took evidence on September 21, 2015 on this issue

¹⁴ Id at 3-4.

¹⁵ Id. at 4 (emphasis added).

¹⁶ Id. at 3 and 11 (noting a City review period of May 25-June 8, public review from June 10-27, and a July 2016 public hearing.)

and this study should not further delay any action. We suggest a quicker deadline for the initial draft study to allow more time for public comment.¹⁷

We appreciate the City of Oakland taking proactive steps forward to conclude the health and safety regulatory process. Thank you for considering our comments. We are available to answer any questions.

Sincerely,



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On behalf of Sierra Club, Communities for a Better Environment, West Oakland Environmental Indicators Project, Asian Pacific Environmental Network (“APEN”) and San Francisco Baykeeper

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¹⁷ For instance, an initial draft deadline of 5/18 would allow a city review from 5/19-6/1 and would thus allow more time for public comment without delaying final action.

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April 1, 2016

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Re: Proposed Scope of Work for ESA and Review of Administrative Record as to the Presence or Absence of Health and/or Safety Effects of Coal at the OBOT

Dear Ms. Klein,

On behalf of our clients, California Capital & Investment Group and Oakland Bulk and Oversized Terminal, we write in response to your March 25, 2016 request for comments on a proposed scope of work provided to the City by ESA (Scope) regarding the above-referenced review. We are confused by the Scope. It specifically purports to review the administrative record the City has compiled regarding the potential transport of coal, which record was generated from a September 21, 2015 public hearing and request for submission of additional material on October 6, 2015. All such information gathering related exclusively to coal. Yet, the scope of work purports to be for both coal and "other hazardous fossil fuel materials." The City has never requested, nor have entities ever submitted materials or "evidence" regarding "other hazardous fossil fuel materials." Thus, the proposed scope is inaccurate, overbroad, and, at best, premature.

Characterizing ESA's proposed work, the Scope states: "The ESA analysis of the public record will be presented in a Report that will categorize and assess the public comment and information that was submitted in support of those comments to assist the City Council in making a determination regarding whether or not the information in the public record constitutes substantial evidence that would support a finding of substantial endangerment."

The sole potential commodity for which the City solicited and accepted "evidence" from the public is coal. After the October 6, 2015 supplemental submission deadline, the public comment period on the matter was closed by prior motion of the City Council. Never has there been a request for similar submittals related to "other hazardous fossil fuel materials."

Nonetheless, the Scope goes on: "The scope of this review is focused on those commodities listed in the Proponents Draft Basis of Design (BOD) dated July 21, 2015 and that are also directly or indirectly addressed in the 2014 Oakland City Council Resolution No. 85054 C.M.S., opposing transportation of coal and other 'hazardous fossil fuel materials' through the Oakland (sic). Specifically, these commodities are:

Heather Klein
CITY OF OAKLAND
April 1, 2016
Page 2

- a) bituminous coal (washed coal, clean coal, or soft coal);
- b) fuel oils (heating oil, off-road diesel fuel, high-sulfur diesel, residual fuel oils for furnaces and boilers, and fuel for low and medium speed diesel engines); and
- c) gasoline (all grades)."

The City has never solicited comment or evidence on any of these materials, other than coal. But the Scope specifically states that ESA "will consider the public comments as they may apply to health and/or safety effects, regardless of whether the mechanisms for these effects are fully understood or documented in peer-reviewed scientific sources."

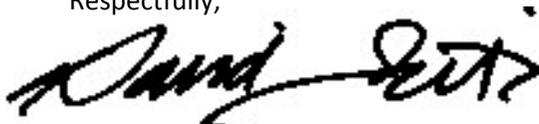
So what exactly is the City's intention in retaining ESA? If it is to review and report on the evidentiary record compiled to date, that report would related to coal and only coal. If it is to report to the City on "other hazardous fossil fuel materials," query what ESA would be reviewing in that there has been no public comment or solicitation period for such materials.

The Scope references the Basis of Design submitted by our clients. However, as the City is well aware, the Basis of Design simply compiles and documents the universe of statues, regulations, and conditions of approval with which the project must comply. It is not a confirmed articulation of what commodities will or will not pass through the terminal over its useful life, nor is it a full or even partial articulation of the suites of specific safety measures that will be implemented on the project site relative to each commodity once confirmed for transport. Again, it is a foundation and minimal-standard starting-point upon which all such commodity-specific safety measures will be based.

Accordingly, we must object to the proposed Scope. As noted in the staff's prior Staff Report on this matter, the purpose of retaining ESA, at least originally, was to review the administrative record already compiled. But this Scope outlines an excursion without bounds far beyond the breadth of the current record, the purpose of which and information upon which it would reach its conclusions are unclear to us.

We would ask that ESA be directed to focus its efforts on the matter at hand, reviewing and hopefully bringing to conclusion the City's seemingly interminable review of coal. As to any further review, as has proven the case with coal, any such review in advance of clear determination of commodities that will or will not come through the project is premature and a waste of the City's, the project's, and the community's time and resources.

Respectfully,



David C. Smith
STICE & BLOCK, LLP

Klein, Heather

From: ALBERT KUEFFNER <albertkueffner@sbcglobal.net>
Sent: Friday, April 01, 2016 3:00 PM
To: Kalb, Dan; Klein, Heather
Cc: Office of the Mayor; McElhaney, Lynette; Campbell Washington, Annie; Guillen, Abel; Gallo, Noel; Brooks, Desley; Reid, Larry; At Large; OCOP; Salinas, Victoria; Alameda ICAN; Ella Teevan; Will Scott; rockyspad@earthlink.net; bawswa@juno.com
Subject: Proposed Scope of ESA Coal Study
Attachments: SOW Oakland Review_PUBLIC REVIEW DRAFT_032516-1.pdf

Dan,

Thank you for your exemplary commitment to finding an equitable solution to the coal issue..

In this regard, ESA's proposed scope of study (attached) covers the health and safety effects of OBOT through-put of fossil fuels in isolation from other already-permitted sources of pollution, when its effects are in addition to, not separate from these other sources.

To be more credible as a study to determine whether there is substantial evidence that OBOT through-put of fossil fuels would be a threat to the health or safety of West Oakland workers or residents, its scope may include, in addition with those of OBOT fossil fuel-through-put, quantitative time-line projections of these effects on or from:

1. Increases by 2035, of 4,500 housing units, 92 acres of non-residential floor space, 10,000 in population and 10,000 in employment projected and permitted in 30 percent of West Oakland by the West Oakland Specific Plan and EIR, approved by the City Council, July, 2014*
2. The 2000 non-OBOT workers expected to be employed on the redeveloped army base site**
3. Non-coal train traffic to and from the seventeen 4,000 foot rail spurs constructed near the OBOT
4. Truck and auto traffic on, from or to the freeways surrounding West Oakland
5. The massive new recycling plant near the OBOT site

*The current population of West Oakland is 36,000, and the OBOT lease is for 66 years.

**The OBOT is expected to employ 120.

Best,

Al Kueffner

No Coal In Oakland

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April 1, 2016

Via Electronic Mail

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Dear Assistant City Administrator Cappio,

In February, No Coal in Oakland opposed the hiring of private consulting firm ESA to play a central, and likely decisive, role in the City's evaluation of the evidence that supports a ban on handling coal at the Oakland Bulk and Oversized Terminal (OBOT) at the former Oakland Army Base ("Project").

In our judgment, if this proposal had been adopted, ESA, an organization that enjoys little credibility in Oakland's environmental justice community, would have usurped the judgment of elected officials to decide whether substantial evidence supports a determination that "a failure to [adopt an ordinance banning coal] would place existing or future occupants or users of the Project [or] adjacent neighbors ... in a condition substantially dangerous to their health or safety."¹

ESA's original proposal called for a lengthy eight-month review process. ESA has now returned with a revised draft scope of work that eliminates some of the bulk of ESA's prior proposal, but retains for ESA—a company that earns its keep by writing environmental impact reports funded by developers—a central role in determining the level of danger to health or safety that the community should tolerate.

For the reasons set forth in our letter to Mayor Schaaf in February, we consider the involvement of any consulting firm that is in the business of writing EIRs as unnecessary and potentially prejudicial to the City's right and duty to protect its residents' health and safety. We did not

¹ 2013 Development Agreement By and Between the City of Oakland and Prologis CCIG Oakland Global, LLC Regarding the Property and Project Known as "Gateway Development/Oakland Global ("DA"), section 3.4.2.

single out ESA for criticism because our objection was based on the institutional bias that is common to all such consulting firms. A review of the resumes of the team of experts ESA proposes to assign to the review shows that our fears of institutional bias were not unfounded. We don't doubt ESA's intimate familiarity with the fossil fuel industries but so far as we can determine from their resumes, they have overwhelmingly supported developers, rather than the communities affected by the developments they analyze.

We proposed, as an alternative to hiring a private consulting firm that depends on the goodwill of the fossil-fuel and other industries for their livelihood, the appointment of an independent commission consisting of public health experts including scholars and researchers, as well as practitioners familiar with the health issues of the disadvantaged minority communities that live "down by the tracks." ESA's team includes not a single public health expert.

No Coal in Oakland understands that some City Councilmembers feel the need for a distillation of the evidence that was provided to them with great effort and at great expense in connection with the September 21, 2015 public hearing. However, it is the City Council and not a private firm like ESA that must determine whether the weight of the evidence is sufficient to support the adoption of an ordinance under 3.4.2. Accordingly, we think it is important to establish more clearly the limited role that a third party can constructively play. Most importantly, the job of the reviewer should be to summarize the evidence that supports an ordinance banning coal or imposing other restrictions. It is also to present in clear, non-technical language the facts concerning potential health and safety impacts of a coal terminal in OBOT, based upon relevant factual research and expert opinions. The presentation should leave to the City Council the question of whether the risks rise to the level of "substantial endangerment," a term that we assume ESA intends as shorthand to the substantive legal standard under section 3.4.2.

We remain skeptical of ESA's ability to fairly summarize evidence that contradicts their record of EIRs supporting refinery and pipeline interests and we continue to urge that the City accept the substantial evidence received in 2015 or employ an independent panel over commercial consulting firms such as ESA. Nevertheless, we appreciate the opportunity to offer specific suggestions on the draft scope of review, and we submit the following recommendations:

1. The review must be conducted by a team that includes relevantly trained public health experts and it must include analysis of the baseline public health setting in West Oakland and other Oakland communities that may be impacted by coal shipments.

The potential health and safety effects of rail transportation and handling of coal at an Oakland maritime facility must be evaluated in the context of the public health of the impacted neighborhoods and populations. In September, there was substantial testimony concerning the health problems of West Oakland, in particular, that are already present and in violation of health equity. Any assessment of coal impact must be made relative to this baseline context.

Failure to include in the draft SOW any baseline health assessment of the populations identified in section 3.4.2. might derive from the fact that the ESA team does not contain a single public

health expert. Given that *the* central issue is the health and safety impacts of coal export, for any team to be qualified it must include public health professionals with expertise in air, noise, water and socio-behavioral-related health impacts.

2. The review should be limited to coal and petcoke.

The draft scope would expand the City's review process beyond coal and petcoke to encompass fuel oils including heating oil, off-road diesel fuel, high-sulfur diesel, residual fuel oil for furnaces and boilers, and fuel for low- and medium-speed diesel engines as well as all grades of gasoline.

The draft scope, citing "information provided to date," states that these commodities are "expected to be imported to and exported from OBOT." We do not know who has provided this information so we cannot comment on the accuracy of ESA's expectations, but we know that the public controversy that the City needs to resolve promptly is the result of a coal company's efforts to find an outlet for coal from its mines in Utah.

Expanding the range of commodities under review to cover myriad fossil fuel products, each with its own public health and safety risks would delay resolution of the coal issue and bury coal opponents in a high-stakes battle to respond to a mountain of research by fossil-fuel interests allegedly proving that each of their products poses no danger to human health or safety. We are fighting coal—the clear and present danger facing Oakland given the state of Utah's recent legislative action to allocate \$51 million to build a coal terminal at OBOT. Widening the range of commodities at issue to numerous products threatens to dilute the City's and the public's limited resources to deal with coal.

The draft scope is largely silent on how it will review these other commodities which were not covered in the September 21, 2015 hearing and related submissions. Is ESA going to simply cut and paste from environmental impact reports it has written on behalf of fossil fuel projects elsewhere? Obviously, there is no time for original research to be completed or for the public to respond adequately. The City would have to hold an additional public hearing under section 3.4.2 to consider the health and safety impacts of each of the other commodities identified by ESA. ESA's proposal to consider numerous commodities other than coal and petcoke at this time would manufacture a crisis where one does not exist.

We submit that the most efficient path forward is to finish the City's work on coal and let it be a model of how other commodities will be dealt with, both in terms of procedure and substance.

3. The reviewers should not establish "appropriate thresholds".

No Coal in Oakland opposes the proposal that ESA define "appropriate thresholds to be used in the determination of whether there is 'substantial evidence' that the project is 'substantially dangerous.'" It is appropriate for the City Council to be provided with an organized summary of the evidence concerning health and impacts of use of coal as well as of the "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" in the record. In

contrast, thresholds are not evidence but are standards developed for a variety of purposes such as screening when certain levels of reporting and analysis are required under environmental laws. They may or may not offer adequate protection of human populations from “substantial danger” as that term is used in section 3.4.2 of the DA. The City Council should not hand ESA (or any third party) what amounts to final say over the definition of “substantial danger” when it is ultimately their responsibility to evaluate.

4. The definition of “substantial evidence” in CEQA is generally acceptable, but contains some language that is specific to CEQA and should not be used here.

The draft scope incorporates parts of the definition of “substantial evidence” contained in section 15384 of the California Environmental Quality Act guidelines. Although this definition is in general accord with how courts have interpreted “substantial evidence,” the definition contains some language that is specific to inquiries under CEQA. The draft scope eliminated some of this language but inappropriately kept the CEQA language providing for the exclusion of “evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment.” This phrase should be eliminated from the SOW. As the draft scope acknowledges on page 2, “This is not a CEQA review, and is not limited to CEQA topics.” Section 3.4.2 limits relevant evidence to evidence that bears on public health and safety, a scope that is both narrower and broader than what may be considered under CEQA.

5. The “Study Area,” adjacent neighbors” and “nearby population” are undefined and unspecified, and if these terms are to be used at all, they must be defined and specified explicitly in the next draft of the scope of work.

On page 4, the draft scope states that ESA will “[c]haracterize the OBOT activities to be considered within the scope of the Review, which include rail transportation of coal, fuel oils, and gasoline within the West Oakland ‘Study Area’ (to be specified by the City); and terminal activities....” This implies that any impact outside West Oakland (or in parts of West Oakland that are deemed outside the currently undefined “Study Area” will not be considered by ESA even if coal transport activities place these populations in a condition substantially dangerous to their health or safety.

This point is made more explicit on page 5, where the draft scope “assumes” that the scope of review excludes the “rail transportation of coal, fuel oils, or gasoline from the point of origin to the Study Area, except as the effects occur along the rail lines within the Study Area” and “transportation of coal, fuel oils, or gasoline by ship from the point at which the commodity is on-boarded in the Study Area to its ultimate destination.” These limitations are not found in section 3.4.2 and should be eliminated.

ESA should not exclude any evidence that bears on danger to the health and safety of the project’s occupants or adjacent neighbors. “Adjacent neighbors” should not be so narrowly defined. The review must include all impacted Oakland neighborhoods, including at a minimum those where coal trains, whether they arrive from northern or southern corridors, will pass

through, including Fruitvale, San Antonio, East Oakland, Chinatown, and Jack London Square. The Study Area should also include neighborhoods such as North Oakland that are downwind from OBOT.

In addition, on page 2, the draft scope of work states that ESA will review whether terminal activities for the export of coal (or other hazardous fossil fuel materials) would be “substantially dangerous” to “workers or the nearby population.” The term “nearby population” is undefined. If it refers only to waterfront communities, then it must be revised to include other communities in Oakland that would be affected by coal transport through Oakland.

The references to an undefined “Study Area” and “nearby population,” – the defining of which is left to the unconstrained discretion of City staff and/or ESA – are not acceptable. If the next revision of the scope of work uses these terms or the terms “adjacent neighbors,” they must be defined precisely in terms of geography and their function within ESA’s analysis. Those definitions must incorporate our comments above.

6. The review should cover dangers not just from coal dust, but from diesel exhaust and other health and safety impacts from the transport of coal.

An important consequence of the dedication of all or a large portion of the throughput of OBOT to coal will be the incremental impacts from the heavier and higher volume loads associated with coal. These include but are not limited to diesel exhaust, vibrations, noise, and traffic congestion, and accidents / derailments.

7. The review must consider impacts on water.

The draft scope states that ESA will not consider any impacts on water, even though they may pose a danger to human health and safety. As discussed in the report of Dr. Phyllis Fox, the impacts on water could be quite severe and pose a danger to public health in West Oakland and many other places, for example through contamination of drinking water and food supply. Review of the evidence on potential fresh and Bay water contamination, environmental destruction of the shoreline and of marine life and their impact on human health should be included in the scope of review.

8. The review must include analysis of the cumulative impacts of this terminal on this population.

Because humans live longer than the 66 year sunset of the Development Agreement, the projections of health and safety impacts must reach and exceed the duration of that agreement. Further, the cumulative effects of extended exposure to coal transport must be considered for current – and future – residents and generations. We note that for these reasons, epigenetic hazards of coal must also be considered.

9. The review must consider the GHG-related health and safety impacts of 66 years of coal shipments as CO₂ accumulates in the atmosphere and remains there for thousands of years.

The quantities of coal to be shipped over an extended period of time will have a measurable and increasing impact on climate such that local effects of climate change in the near and long-term can be attributable to OBOT.

10. The commodities characterization is irrelevant and should be eliminated.

The clear and present danger facing Oakland is coal from Utah. Ultimately though, *where* the coal will be shipped from, be it from Utah, Colorado, New Mexico Wyoming, or elsewhere, and *what type* of coal will arrive at OBOT, are not within the control of the City, or, for that matter, of TLS. Market forces control the type of coal that will be transported to Oakland. Furthermore, there is no such thing as clean coal and so the impact of variations in coal types would not meaningfully diminish the risks to human health and safety. The plan to, “Describe and compare U.S. coal types generally, and specifically Utah coal types by County and/or mine” should be abandoned.

11. The analysis of the regulatory setting should be eliminated or curtailed.

Analysis of the regulatory setting is not critical to protecting health and safety in Oakland. Regulations may establish the floor but not the ceiling for what protecting health and safety actually requires. In fact, no law prevents the City from providing greater protections than is afforded through regulations.

Yet, all too often, fossil fuel proponents cite regulatory limits on exposures as if compliance with those limits is equivalent to proof of no danger. This misuse of standards is pervasive. Two days ago, on the radio, the developers’ representative asserted that coal is not hazardous because it is not on California’s Proposition 65 list of chemicals known to the State to cause cancer or reproductive toxicity. Exceedance of recognized standards for exposure to toxic substances is strong evidence of a hazard. However the reverse is not true; even if an exposure to coal does not exceed a current standard adopted by a governmental agency, or even if coal is not on a list of *chemicals*, that does not ensure human health and safety are being protected. It is widely recognized that U.S. toxics regulations are out of date and do not address all the mechanisms that characterize many of the substances in coal. In an analogy, cigarettes are legal in all 50 states, yet no one today disputes that they cause illness and death

Although the regulatory setting may be relevant from a legal point of view, defining the regulatory setting is not an innocuous undertaking. The legal issues should be dealt with by the City Attorney and not be outsourced.

12. The review should explicitly use the precautionary principle as its guiding framework.

Under the precautionary principle, an action or policy that has a suspected risk of causing harm, must be assumed to be harmful unless proven to be safe – with the burden of proof that it is *not* harmful falling on those who wish to take the action. In other words, coal must be factually proven to be safe and if there is any doubt, it should be considered harmful. The City Council should also be guided by the precautionary principle in its decision-making.

13. The review should not accept as foundational facts or evidence any promises or projections by the developer that are not enforceable through existing contracts or regulations.

The review should be based on verifiable facts and conditions that are enforceable, and that the developer agrees are enforceable, through existing contracts and regulations. Accordingly, promises or projections concerning how coal will be transported, stored, or handled should not be treated as facts unless they are enforceable. The draft scope refers in several places to information received or to be received from the developer, none of which should be included as evidence in the review unless verifiable and enforceable. The developers have suggested that they will use covers on their coal cars. That product may be in the design stage, but is not in use anywhere in the world and is therefore untested. Thus the review cannot represent as evidence promises and speculation that such covers will be used unless there is a mechanism to compel such use. Since Federal law prohibits the City from directly regulating rail traffic, the City would have no ability to enforce covering coal cars. Furthermore, train covers cannot be considered evidence of effective mitigation unless verifiable tests of their efficacy are submitted.

14. The review may not exclude evidence in support of an ordinance merely because it is not part of the public record.

The draft scope implies that only public comments and other information in the City public record that were received by October 7, 2015 may be considered by the City.

Nowhere does section 3.4.2 state that evidence to support an ordinance must be limited to evidence produced at a public hearing. In order to impose an ordinance on the project under section 3.4.2, the City must (1) hold a public hearing and (2) make a determination that there is substantial evidence to support the ordinance. The plain language of section 3.4.2 does not require that the determination of substantial evidence be based only on evidence submitted at a public hearing for the adoption of a valid ordinance.

Accordingly, in categorizing, synthesizing, and summarizing information, the review should not overlook other evidence submitted since October 7 that would support the conclusion that failure to adopt an ordinance would result in danger to public health or safety.

15. The review should include only information supplied by the developer that has been or will be promptly made public by the City.

The review must be limited to evidence that is publicly available. Any information that is provided to ESA aside from what is already indexed as part of the public record of the public hearing last fall must be made available for immediate public access without requiring public records act requests. On page 2, the draft scope states that ESA will “provide the City a list of questions and specific requests for clarifying information from the proponent.” Both the questions posed and answers received should be made available to the public simultaneous with their transmittal to and from the developers. In addition, The City’s web page devoted to the project should include a separate section of documents received after October 7, 2015 that were not included in the City’s index.

16. ESA’s contract should end with the preparation of its report and opponent groups must have adequate time to provide rebuttal to ESA’s report in advance of any Council deliberation or decision-making.

On page 11, in Table 2 – Preliminary Draft Schedule, ESA proposes allocating 2.5 weeks to the City to review its Draft Report and thereafter a 17 day public comment period. To ensure adequate opportunity and time for the community of residents, neighbors, and coal opponent groups to review, critique and rebut the Draft Report, ESA’s report should be submitted to the City and the public simultaneously.

The SOW also states that ESA “understands” that it will get a chance to rebut any criticisms of its report and draft a revised report. In other words, ESA would get the “last word” on any disputed issues. We strongly disagree with this reservation of the final word to an outside body. If the public’s criticism and rebuttal of the ESA Draft Report leads to conflicting evidence, the City Council – not ESA – should decide what evidence it finds credible or not credible.

Respectfully,

/s Lora Jo Foo

Lora Jo Foo
No Coal in Oakland

Cc: Sabrina Landreth, City Administrator
Libby Schaaf, Mayor
Barbara Parker, City Attorney
City Councilmembers

Klein, Heather

From: Dan Nourse <dan@rojeconsulting.com>
Sent: Monday, March 28, 2016 8:57 AM
To: Klein, Heather
Cc: Phil Tagami; Mark McClure; Megan Morodomi; Jeff Wynton
Subject: Re: Public Review Draft Scope of Work regarding Health and/or Safety Effects of Coal at the OBOT

Heather,

I am the senior environmental project manager for the Oakland Army Base redevelopment project. In my review of the scope of work for ESA, I note that they have not included a search for similar projects or similar studies on coal transport. One such study exists in an EIS just released late last year. It is for the Tongue River Railroad Company 83 mile expansion for coal transport in Montana. It can be found here <http://www.tonguerivereis.com>. The EIS is extensive in its study of dispersion and environmental impacts of coal rail transport. It is an extremely relevant document that ESA would be remiss in not analyzing as part of their scope of work.

I hope to see a revised SOW that includes this analysis.

Sincerely,

Dan

— Daniel Nourse
Senior Environmental Project Manager
ROJE Consulting

From: "Klein, Heather" <HKlein@oaklandnet.com>
Date: Friday, March 25, 2016 at 4:50 PM
Subject: Public Review Draft Scope of Work regarding Health and/or Safety Effects of Coal at the OBOT

To interested parties:

Attached is the revised Draft Scope of Work regarding health and/or safety effects of coal and other hazardous fossil fuel materials that may be proposed for the Oakland Bulk and Oversized Terminal. The revised draft hopefully addresses concerns that have been raised regarding the previous draft. We understand there still may be concerns about the need for the work, but **if you any substantive comments, please submit them no later than April 1, 2016 by 4:00 p.m.**

City staff will consider all comments received and will revise the scope, as necessary, prior to the tentatively scheduled City Council meeting on April 19, 2016, to consider <http://www.tonguerivereis.com> award of the professional services contact.

Best,

Heather Klein, Planner III | City of Oakland | Bureau of Planning | 250 Frank H. Ogawa, Suite 2114 | Oakland, CA 94612 |
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