

Klein, Heather

From: David Smith <dsmith@sticeblock.com>
Sent: Tuesday, May 03, 2016 7:32 AM
To: Klein, Heather; Cappio, Claudia
Cc: Wald, Mark
Subject: OAB: OBOT Comment Letter on ESA Scope
Attachments: 160502.OBOT Response to Revised ESA Scope of Work.pdf

Ms. Cappio,

Attached, please find a comment letter on behalf of our client, Oakland Bulk and Oversized Terminal, LLC. As you will see, we recommending deferring any action on the ESA proposal. By its own terms, the first two tasks for ESA require confirmation of the "Project Design" and "Activities" related to confirmed operations. As the City is aware, neither of these exist at this time. There is neither a confirmed operator for the terminal, nor is there a committed commodity confirmed for shipping. Thus, full design of this purpose-built facility would be speculative and premature. Accordingly, any proposal for ESA, or anyone else for that matter, would be similarly speculative and premature. We recommend deferral of the proposal.

Should you have any questions, please feel free to contact me.

Respectfully,
David Smith



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May 2, 2016

TRANSMITTED VIA ELECTRONIC MAIL
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Claudia Cappio
Assistant City Administrator
CITY OF OAKLAND
250 Frank H. Ogawa Plaza, Suite 2114
Oakland, California 94612

Re: Revised Proposed Scope of Work (April 6, 2016) for ESA for Review of Administrative Record as to the Presence or Absence of Health and/or Safety Effects of Handling Various Commodities

Dear Ms. Cappio,

On behalf of our client, Oakland Bulk and Oversized Terminal, LLC (OBOT), we write in response to the April 21, 2016 Agenda Report which includes a staff recommendation for the funding and retention of Environmental Science Associates (ESA) in connection with an ongoing "health and safety" review by the City. As stated plainly by ESA in its proposed scope of work, the essential prism through which ESA would conduct its analysis is the design specifications and operations regime for the bulk and oversized terminal to be constructed at the West Gateway property (Terminal). The fact is, however, that no such design specifications or operations regime yet exist. Therefore, any such review by ESA would be, at best, premature and at worst, unsubstantiated, speculative, and a true waste of taxpayer funds. Accordingly, we recommend the City defer, at this time, adoption of the recommendation to retain ESA for the proposed scope of work.

THE REVIEW OUTLINED IN THE ESA SCOPE OF WORK IS PREMATURE

There Is No Existing Design for the Terminal from Which ESA Could Conduct Its Proposed Review

In its April 6, 2016 revised Draft Approach and Preliminary Scope of Work (ESA Scope) included as Attachment 1 to the April 21, 2016 Agenda Report, ESA is very clear about the first two tasks essential to carrying out its proposed scope:

- *Task 1.1: Confirm OBOT Project Design*
- *Task 1.2: Characterize OBOT Activities for Coal and Other Hazardous Fossil Fuel Materials*

(ESA Scope, p. 2, *italics* in original.)

The simple fact is that there is no “OBOT Project Design” in existence today to be “confirmed.” Further, there are no confirmed “OBOT Activities” to be “characterized” for *any* commodity, let alone coal or “other hazardous fossil fuel materials.” The project simply is not yet at that stage. Before OBOT can design this purpose-built facility and its related operations regime, OBOT must know which commodity(ies) are confirmed for shipping through it. At this time, no commodity has been confirmed. Further, as a prerequisite to a confirmed commodity, there must be a confirmed operator of the facility. To date, the legal operator of the facility remains unconfirmed.

ESA is correct as establishing as its first two essential tasks confirmation of the “Project Design” and “Activities” proposed for the Terminal. How else could one substantively and without speculation assess the implications of any commodity shipping through the Terminal? At the time OBOT submits the full design of the Terminal as specifically proposed to handle a committed commodity, supplementing City resources with special expertise such as ESA may indeed be appropriate. But we are simply not there yet. Accordingly, the inescapable fact is that, by its own terms and proposed scope, ESA would be unable to conduct the analysis proposed in the ESA Scope.

There Has Been No Commitment to Ship Any Particular Commodity Through the Terminal, thus a Formal Design Submittal to the City Would Be Premature and Speculative

OBOT is proceeding with design and planning of the non-commodity-specific aspects of the Terminal and expects to submit such plans to the City in the near term. This initial scope includes things such as wharf repairs, grading, utilities capacities and connections, access, and other mitigations negotiated with the Bay Conservation and Development Commission. However, OBOT will not be able to progress beyond this initial design stage until it has confirmed a particular operator for the Terminal and committed to a commodity to be shipped.

As we have confirmed previously, at this time there is no commitment to ship any particular commodity through the Terminal. Accordingly, it is premature to expend the substantial amount of dollars and professional expertise to design a facility that may prove obsolete based on ever-evolving market forces. Until there is a commitment to ship one or more specific commodities, design of the facility is premature. Until design of the facility is confirmed, the proposed efforts by ESA as outlined in the ESA Scope are similarly premature.

There Is Not Yet a Confirmed Terminal Operator that Would Confirm What Commodities Have Been Committed for Shipping through the Terminal

The City is aware that CCIG has extended an exclusive option to Terminal Logistics Solutions (TLS) to become the operator at the Terminal. To date, however, that option agreement has not been exercised. Thus, today, the operator of the Terminal remains undetermined.

Much attention has been given in the press and elsewhere to TLS’s due diligence efforts exploring commodity producers that may have an interest in contracting for the services of the Terminal. But those contracts have decades-long duration and commit tens of millions of dollars on

both sides. So they are not lightly entered into. It is our understanding the TLS's due diligence efforts continue in earnest, examining a broad variety of potential commodities and customers. And, again, to date TLS has not exercised its option to become the operator of the Terminal.

Until there is a confirmed operator at the Terminal, there will not be a commitment to ship any particular commodity(ies) through the Terminal. Until there is a commitment to ship one or more specific commodities, design of the facility is premature. Until design of the facility is confirmed, the proposed efforts by ESA as outlined in the ESA Scope are similarly premature.

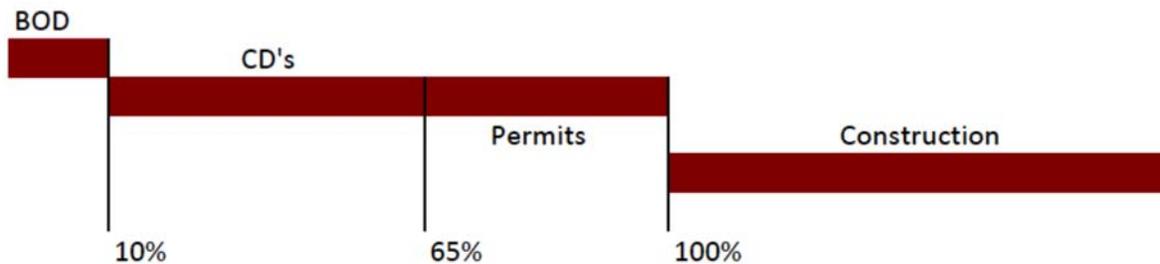
ESA AND THE CITY MISUNDERSTAND THE PURPOSE, BREADTH, AND CONTENT OF THE BASIS OF DESIGN DOCUMENT

That such a clearly and patently premature proposed course of action has advanced this far appears attributable, at least in part, to a misunderstanding of the Basis of Design (BoD) submittal for the Terminal. The ESA Scope places much emphasis on an initial review of the BoD as a foundation for its review. However, the BoD is not and never was intended to serve as a "Project Design" or confirmation of specific "Activities" for operations at the Terminal as is clearly anticipated in Tasks 1.1 and 1.2 of the ESA Scope. In fact, the opening pages of the BoD explain what the BoD is and is *not*:

In general, a Basis of Design document is the first step in a project's design process. The BOD describes a project's operating environment and the desired project performance parameters. The operating environment includes the physical attributes and limitations of project location, available utilities, and regulatory constraints. The BOD leavens project purpose with environmental limitations and policy oversight. As illustrated in the graphic below, the BOD is the first step in the design process. The next phase in the design process will be design development (10% to 65%) which will be advised by and in coordination with the Terminal Logistics Solutions (TLS) operating plan which will be adopted by TLS prior to the final construction documents (as applicable) or prior to the award of any design build element or procurement package. Permitting/agency approvals to proceed to construction will be requested as the design progresses as proscribed by the permitting agencies. Permits to operate the project will be obtained before the project is put into operation.

In addition to the normal California regulatory regime of existing federal, state, and local regulations, the Terminal Logistics Solution (TLS) project must be designed, constructed, and operated within and in conformance to the Oakland Army Base Redevelopment program Standard Conditions of Approval /Mitigation Monitoring and Reporting Program (SCA/MMRP) requirements.

In addition, the BoD includes a graphic to illustrate the “10% of design” embodied in the BoD:



Put another way, the BoD was intended to memorialize the floor or foundation from which any specific Terminal design would rise. It includes all laws, regulations, and protocols with which any proposed facility must comply and from which it must begin. As illustrated in the graphic above, this foundation is the first 10% of whatever facility the Terminal will actually become based upon the needs and requirements of the commodity(ies) to be shipped, as committed to by the future operator of the Terminal.

As the graphic shows, once the operator and commodity(ies) to be shipped are confirmed, the next step will be construction documents, a phase which will take the facility design to 65% complete. The last 35% is submittal to the City for permitting.

The BoD is simply not, nor was it ever intended to be, specific or detailed enough to carry out the scope of review and analysis proposed in the ESA Scope.

ESA UTILIZES AN INAPPROPRIATE DEFINITION OF “SUBSTANTIAL EVIDENCE”

Should supplement of City resources by ESA (or others) prove appropriate and timely, we point out that the ESA Scope utilizes an incorrect statutory definition of “substantial evidence” for its review and potential advice to the City. As noted in footnote 1 of the ESA Scope, ESA utilizes the definition of “substantial evidence” included with the California Environmental Quality Act (CEQA), codified in Public Resources Code section 15384. However, on page 2 of the ESA Scope, ESA correctly points out, “This is not a CEQA review.”

The appropriate definition of “substantial evidence” for use in considering provisions of the Development Agreement between the City and our client is well established in case law:

It is now the settled law of this state that in civil and criminal cases alike, “substantial evidence” is such as was elaborated and defined in *Estate of Teed* (1952) 112 Cal.App.2d 638, 644, 247 P.2d 54. It is evidence (the emphasis is ours) “**of ponderable legal significance, . . . reasonable in**

nature, credible, and of solid value.” [Citations.] “Obviously the word cannot be deemed synonymous with ‘any’ evidence.” (*People v. Bassett* (1968) 69 Cal.2d 122, 139,[citations].) And: “The [reviewing] court does not [as defendant here contends] limit its review to evidence favorable to the respondent.” [Citation.] (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, ***emphasis*** added.)

Accordingly, the definition of “substantial evidence” appropriately relied upon by the City and any consultants assisting it with regard to the Development Agreement is “of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.”

In this instance given the lack of specific “Project Design” information and “Activities” specification in terms of operations at the Terminal, as those terms are utilized by ESA in Tasks 1.1 and 1.2 of its ESA Scope, any analysis as envisioned in the ESA Scope would be wholly speculative and fall well short of this definition of substantial evidence or related analysis thereof.

CONCLUSION

That the City may at some point in the future wish to supplement its own internal resources with specialized resources may prove appropriate and advisable. But this is not that time. the Terminal has:

- No determined operator at this time;
- No determined commodity(ies) confirmed for shipping;
- No determined “Project Design” given the lack of a committed commodity(ies);
- No determined “Activities” in terms of operations regimes for the same reason.

Given these circumstances, the ESA Scope is premature and would be a squandering of taxpayer general fund dollars. Accordingly, we suggest consideration of the ESA Scope be deferred.

Respectfully,



David C. Smith
STICE & BLOCK, LLP

cc: Lynette McElhaney, City Council President
Honorable Members of the City Council
Mark Wald, City Attorney’s Office