CITY OF OAKLAND

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AGENDA REPORT

TO:	Sabrina B. Landreth City Administrator	**FROM:**	Claudia Cappio Assistant City Administrator
SUBJECT:	Informational Public Hearing On Fuel Oils and Gasoline in Oakland	**DATE:**	April 22, 2016

City Administrator Approval Date: 4/27/16

RECOMMENDATION

Staff Recommends That The City Council Conduct A Public Hearing To Receive Information, Testimony And Other Evidence, Oral Or In Writing, Regarding The Public Health And/Or Safety Impacts Of Transportation, Transloading, Handling And/Or Export Of Fuel Oil, Gasoline And/Or Crude Oil In And Through The City Of Oakland, In Part, As A Follow-Up To Resolution No. 85054 C.M.S. (Resolution Opposing The Transportation Of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, And Petroleum Coke, Through The City Of Oakland) Adopted On June 17, 2014.

EXECUTIVE SUMMARY

The purpose of this informational public hearing is to receive written and/or oral testimony and other evidence regarding: 1) health and/or safety impacts of the transportation, transloading, handling and/or export of fuel oils, gasoline and crude oil in and through the City of Oakland and at the Oakland Bulk and Oversized Terminal (OBOT), 2) the adequacy of existing regulations, and 3) the City's ability to regulate the transportation and handling of such products.

Staff has provided the following questions as potential guidance, but in no way limits, how the discussion may be focused.

1) How much fuel oil, gasoline, and crude oil products (Product) would actually go to the OBOT, considering the East Bay Municipal Utility District, California Capital Investment Group and City Memorandum of Understanding restricting train movements in the area and how much time would the Product train and/or Product actually spend in Oakland? How should the City calculate:
   a. Maximum
   b. Minimum
   c. Reasonable Business Model Forecast?

2) If the Product does not go through the OBOT, what are the reasonable assumptions for what will happen to that Product and why?

3) How much Product currently goes through the City of Oakland and/or Port of Oakland on its way to the Richmond Port (or elsewhere)?

4) What specific Standard Conditions of Approval and/or Mitigation Measures contained in the 2012 Addendum's Standard Conditions of Approval/ Mitigation Monitoring Report (SCAMMRP) would address the potential health and/or safety impacts of Product?

5) Does the Basis of Design for the OBOT contain specific measures to address the potential health/safety impacts of the Product?

BACKGROUND/LEGISLATIVE HISTORY

On June 17, 2014, the Oakland City Council adopted Resolution No. 850454 C.M.S. (2014 Resolution), Opposing the Transportation of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, and Petroleum Coke, through the City of Oakland. Concerns were later raised by community stakeholders with respect to transportation, transloading, handling and/or export of coal through the OBOT located on a portion of the Oakland Army Base Project. In response, the City Council held an informational public hearing on September 21, 2015 to receive written and oral testimony regarding the health and/or safety effects of coal and types of coal, including petroleum coke (petcoke), to help inform potential future City Council actions. The written public hearing comment period ended on or about October 6, 2015. (Comments received after that date are part of the administrative record (and will be posted on the City's website), but the City may choose not to consider them.)

Subsequent to the September 21st informational public hearing, the City Council requested that staff evaluate all of the information and public testimony and assess what types of expertise and assistance may be necessary to develop potential follow up actions for the City Council. On February 16, 2016, staff returned to the City Council with a preliminary scope of work from Environmental Science Associates (ESA) to determine, pursuant to, in part, Sections 3.4.2 of the 2013 Development Agreement (DA) between the City of Oakland and Prologis CCIG Oakland Global, LLC, (DA), whether based upon substantial evidence, existing or future occupants or users of the Project and adjacent neighbors, or any portion thereof, or all of them, would be placed in a condition substantially dangerous to their health and/or safety.

In addition to coal, other potential fossil fuel commodities, which are listed in the BOD for the OBOT, include fuel oils and gasoline which are fossil fuels and have characteristics similar to crude oil per the 2014 Resolution. As such, ESA's March 25, 2016 draft scope of work included a health and/or safety analysis of fuel oils and gasoline, which was circulated for public review/comment. Staff received five comment letters which noted, in part, concerns with the lack of a public hearing to address fuel oils and gasoline. It is therefore, the intent of the Council to obtain more information about the health and/or safety impacts as the result of the transport and handling of fuel oils, gasoline and crude oil.

ANALYSIS

Previous City Council Actions

Two previous City Council actions are most relevant to the current set of concerns about the transportation, transloading, handling and export of fuel oils and gasoline at the Oakland Army Base. In June, 2014, the Council adopted Resolution No. 85054 C.M.S., A Resolution Opposing the Transportation of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, and Petroleum Coke, Through the City of Oakland (***Attachment 1).***

In 2013, the City Council adopted a Development Agreement (DA) for a bulk commodities terminal (OBOT) at the Army Base West Gateway Parcel. This agreement vested rights to the developer (CCIG) to operate the facility under the current set of laws at the time of adoption, with limited exceptions. No specific restriction or prohibition on coal, fuel oils, gasoline, crude oil or pet coke were made as part of that agreement. There is an exception related to health and/or safety (Section 3.4.2 of the DA). Specifically, the DA creates a two part test to determine if the adoption of a new health and/or safety regulation is permissible. First, the regulation must be permissible under federal and state constitutions, statutes and laws. Second the City must determine, "based on substantial evidence and after a public hearing that a failure to [adopt the ordinance] 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."

OBOT Basis of Design

Prologis CCIG Oakland Global, LLC submitted a draft BOD to the City in September 2015 (dated July 21, 2015) which included a list of twenty commodities that could potentially be processed through the OBOT as well as Material Safety Data Sheets (MSDS). This list included coal as well as different types of 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 gasoline (all grades) (***Attachment 2***), both of which are considered fossil fuels and have similar characteristics as crude oil. However, crude oil was not specifically noted in the BOD.

ESA Revised Scope of Work

On February 16, 2016, staff presented an outline of a draft approach and preliminary scope of work from ESA to City Council which included a review of the health and/or safety effects of coal as well as fuel oil and gasoline. In response to concerns from the Council and members of the public, the draft scope of work was revised and the revised scope was circulated for public comment on March 25, 2016. Several comment letters were received which noted, in part, concerns regarding the lack of a public hearing on fuel oils and gasoline (***Attachment 3-5***). The scope was further revised. On May 3, 2016, the City Council will consider whether to authorize the City Administrator to execute a professional services agreement with ESA to review the health and/or safety effects of coal as well as fuel oil, gasoline, crude oil and petcoke.

Outcome

The information, testimony and other evidence obtained from the public hearing process on fuel oils and gasoline will be integrated with ESA's review of the potential health and/or safety effect of coal if the City Council authorizes the contract at the public hearing current scheduled for May 3, 2016.

FISCAL IMPACT

The solicitation of public comments regarding the public health and/or safety impacts of transportation, transloading, handling and/or export of fuel oil and gasoline products through the OBOT will not result in fiscal impacts to the City. ESA's proposed budget includes an evaluation of these commodities.

ACTION REQUESTED OF THE CITY COUNCIL

Other than receiving public comments, no action is requested to be taken by the City Council.

Staff recommends the public hearing remain open for receipt of written comments no later than 4:00pm on Thursday, May 12, 2016. Comments received after that date will be part of the administrative record; however the City may choose not to consider them.

For questions regarding this report, please contact Claudia Cappio, Assistant City Administrator, at 238-6654.

Respectfully submitted,

Claudia Cappio, Assistant City Administrator

Attachments (5):

1) Resolution No. 85054 C.M.S., A Resolution Opposing the Transportation of Hazardous Fossil Fuel Materials, Including Crude Oil, Coal, and Petroleum Coke, Through the City of Oakland
2) List of Commodities from the OBOT Basis Of Design, - 7/21/15
3) Letter from No on Coal in Oakland – 4/1/16
4) Letter from Stice-Block – 4/1/16
5) Letter from Environmental Coalition (CBE, Sierra Club, SF Baykeeper, W. Oakland Environmental Indicators Project, Asian Pacific Environmental Network) – 4/1/16

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14 MAY 29 PM 4:52

Approved as to Form and Legality

City Attorney's Office

OAKLAND CITY COUNCIL

RESOLUTION NO. 85054 C.M.S.

INTRODUCED BY COUNCILMEMBERS Kalb, Gibson McElhaney and Kaplan

RESOLUTION TO OPPOSE TRANSPORTATION OF HAZARDOUS FOSSIL FUEL MATERIALS, INCLUDING CRUDE OIL, COAL, AND PETROLEUM COKE, ALONG CALIFORNIA WATERWAYS, THROUGH DENSELY POPULATED AREAS, THROUGH THE CITY OF OAKLAND

WHEREAS, there is a new push by the fossil fuel industry to transport, export, and/or refine coal, crude oil and petroleum coke ("petcoke")—a byproduct of oil refining—on the West Coast and in California; and

WHEREAS, California refineries are in the process of securing permits to build rail terminals to import Canadian tar sands and Bakken crude oils from North Dakota, and existing rail terminals are securing permits to import tar sands and crude oil without public notice or CEQA review; and

WHEREAS, other refineries have similar projects planned to transport hazardous crude by rail through Oakland and other East Bay cities; and

WHEREAS, California public and private Ports are in the process of securing permits to build or expand export facilities for coal and petcoke; and

WHEREAS, the California Assembly passed, and Governor Brown signed, Assembly Joint Resolution No. 35 in September 2012 urging the President and Congress to enact legislation to restrict the export of coal for electricity generation to any nation that fails to adopt regulations on greenhouse gas emissions or hazardous air emissions that are at least as restrictive as those adopted by the U.S.; and

WHEREAS, New York Governor Andrew Cuomo also recognized the risk of transporting volatile crude by rail by passing Executive Order #125 directing New York state agencies to conduct a comprehensive review of crude rail transport safety procedures and emergency response preparedness and Albany County, NY, issued a moratorium on crude increases at the Port of Albany pending a public health investigation. In California, the cities of Berkeley and Richmond have passed resolutions concerning the safety of transporting crude by rail; and

WHEREAS, in Washington and Oregon, 27 communities have passed resolutions against coal transport and export, and hundreds of other public officials, including Governors Inslee and Kitzhaber, state and federal agencies, tribes, health entities, religious leaders and other community leaders, have recognized the harms of coal by making statements of concern

Attachment 1

about coal transport and export. The State of Washington Department of Ecology, through its SEPA process, is requiring a comprehensive cumulative impacts analysis of proposed coal export facilities and rail transport from mine to port to plant spanning the Powder River Basin to Asia for the proposed Longview and Bellingham coal export facilities; and

WHEREAS, in Illinois, the State Attorney General, Governor and Chicago mayor are pursuing new legislation to better regulate petcoke storage or to ban new facilities due to residents' concerns about dust and health impacts; and

WHEREAS, the last few years have seen a dramatic rise in transport of crude by rail nationwide – the volume of crude by rail shipments in Northern California increased by 50 percent last year alone—accompanied by a similar rise in accidents, nearly 100 in 2013. More crude oil was spilled in U.S. rail accidents in 2013 than in the preceding four decades, amounting to more than 1.15 million gallons in 2013. In July 2013, 72 tanker cars loaded with 2 million gallons of flammable crude oil derailed in Lac-Mégantic, Canada, causing explosions that destroyed dozens of buildings, killed 47 people, and caused over $1 billion in damages; and

WHEREAS, coal and petcoke are commonly transported via open-top rail cars and a large volume of those materials escape during transit. According to the BNSF Railway, each coal car in a 125-car coal train loses, on average, 500 pounds of coal per car in transit, for a total of up to 60,000 lbs lost per train on an average trip. Uncovered rail cars contaminate cities, towns, farmland, forestland, streams and rivers across California with coal dust, petcoke and chunks of coal; and

WHEREAS, a federal Surface Transportation Board proceeding regarding the transportation of coal by rail found that coal dust is a "pernicious ballast foulant" that can destabilize rail tracks and can contribute to train derailments, and between July 2012-2013, at least 40 coal trains in the U.S. derailed, causing four victims to lose their lives, large amounts of coal to spill, major delay to other rail users, and significant costs to repair the damage; and

WHEREAS, coal from the Powder River basin is explosive, and the transportation of coal in open rail cars and accumulation of coal on or near rail lines has been known to create public safety hazards, including train derailments, explosions and fires; and

WHEREAS, the National Transportation Safety Board and the Pipeline and Hazardous Materials Safety Administration recently acknowledged the failure to appropriately classify the contents of crude oil shipments to reflect the hazardous and highly flammable nature of the substances being transported by rail and the devastating consequences of a crude oil rail accident including loss of life, property and environmental damage, and thus made recommendations to avoid urban areas when transporting crude, and to improve rail safety regulations for crude oil transport, including worse-case scenario emergency response plans; and

WHEREAS, new coal and petcoke export terminals and crude by rail operations are expected to result in a massive increase in train traffic in California, causing concerns about blocked roads inhibiting the travel of emergency vehicles, pedestrians, access to waterways near the rail lines for fishing and other recreational use, and other vehicle traffic, and potentially catastrophic train derailments; and

WHEREAS, increased rail traffic in California from coal, petcoke and crude oil will lead to an increase in diesel emissions in communities along rail lines, and exposure to particulate

matter from diesel engines has been linked to impaired pulmonary development in adolescents; increased cardiopulmonary mortality; measurable pulmonary inflammation; increased severity and frequency of asthma attacks, emergency room visits, and hospital admissions in children; increased rates of heart attacks and strokes in adults; increased risk of cancer; and increased asthma and lung disease in children; and

WHEREAS, coal contains toxic heavy metals – including mercury, arsenic, and lead – and exposure to these toxic heavy metals in high concentrations is linked to cancer and birth defects; and

WHEREAS, petroleum coke contains Polycyclic Aromatic Hydrocarbons (PAHs) and heavy metals – including arsenic, copper, mercury, nickel, and zinc – at levels that that are harmful to fish and wildlife as well as humans; and

WHEREAS, crude oil, like that coming from the Bakken shale reservoir, is known to be volatile, highly flammable, and contain elevated concentrations of benzene, a potent carcinogen; and

WHEREAS, trains delivering crude oil, coal and petcoke traveling through the Bay Area will follow routes adjacent to the San Francisco Bay Estuary and Oakland water front its tributaries, and routes adjacent to the Sacramento River and Sacramento-San Joaquin Delta posing a serious threat to these ecosystems, and to California's agricultural irrigation and drinking water supplies; and

WHEREAS, hauling crude oil, coal and petcoke into California involves traversing some of the most challenging mountain passes in the nation, areas laced with earthquake faults and numerous unsafe old steel and timber bridges over major waterways, greatly increasing the probability of serious accidents; and

WHEREAS, trains delivering crude oil, coal, and petcoke would travel on Oakland's existing train lines, which pass through our most vulnerable communities of East and West Oakland, which, throughout Oakland's history, have been exposed to significant environmental harm from industrial and commercial uses; and

WHEREAS, given the record of crude-oil and coal rail accidents in recent years, an event such as Lac Mégantic or a coal train derailment could have catastrophic effects if it occurred in any populated area; and

WHEREAS, historically, when environmental accidents do occur, oil companies spend years in litigation over damages as strategy to undercut payments to affected communities or deflect blame; and

WHEREAS, the cumulative impacts of the combined crude oil, coal, and petcoke train traffic through Oakland and other parts of California, in addition to the cumulative upstream and downstream greenhouse gas impacts of these fossil fuels, must be analyzed prior to the transport of any of these hazardous materials through our communities; now, therefore, be it

RESOLVED: That the Oakland City Council opposes using existing rail lines to transport hazardous crude oil, coal and petcoke along California waterways, natural habitats, through densely populated areas, through the East Bay and Oakland, through special districts and the Port of Oakland; and be it

FURTHER RESOLVED: That the City Administrator or his/her designee shall:

- Consider submitting comments in opposition to CEQA documents and any draft permit approvals, such as air permits or zoning changes for transport of crude oil, coal and petcoke, including a statement that any CEQA analysis must include a region-wide cumulative impacts analysis by a lead agency to fully account for the direct, indirect and cumulative impacts associated with multiple proposals for coal, petcoke and crude oil transport and export, and crude refining, in California communities;

- Submit a copy of this Resolution to Governor Edmund G. Brown, Jr. whereby the City Council of Oakland requests that he take executive action similar to New York Governor Cuomo's executive order directing state agencies to conduct a comprehensive review of safety procedures and emergency response preparedness related to shipments of volatile crude oil and a cumulative impacts analysis similar to the Washington Department of Ecology for coal mining, transport and burning;
- Submit copy of this Resolution to the Bay Area Air Quality Management District (BAAQMD) whereby the City Council of Oakland urges that the BAAQMD require public notice and CEQA review for all air permitting decisions made in connection with fossil fuel rail terminals, or port facilities, including change of use decisions, such as the BAAQMD's issuance of a permit to operate a crude-by-rail project without any notice to the public or environmental and health review;

- Address impacts to public health, safety, property, air quality and surface and groundwater caused by the transport of coal, petroleum coke, and crude oil through Oakland by actively enforcing applicable local public health, safety, building, electrical, nuisance, and fire codes and by actively enforcing applicable federal environmental statutes delegated to Oakland;

- Submit a letter to rail carriers involved in transport of crude oil, coal, and petcoke in California requesting:

  o that the rail carriers make public any plans for new or expanded rail facilities or significant rail traffic volume increases;

  o that the rail carriers provide representatives to meet periodically with local citizen groups and local government officials from Oakland to seek mutually acceptable ways to address local concerns;

  o that the rail carriers update its emergency response plan with the City of Oakland to account for the transport of crude oil, coal, and petroleum coke and the potential emergencies that could occur with accidents including these hazardous materials;

  o that the rail carriers conduct environmental monitoring in Oakland, including but not limited to groundwater and air monitoring, and submit environmental monitoring or testing information to local government entities on a monthly basis for 10 years; and

  o that the rail carriers implement measures to reduce community impacts including, but not limited to, drafting road improvement plans for grading, widening, or otherwise providing crossings at intersections that would be impacted by rail traffic increases to

prevent rail accidents and offset congestion; and require the railroad to pay in full for these upgrades in Oakland; and

- Submit a copy of this Resolution to the California Public Utilities Commission (CPUC) whereby the City Council of Oakland seeks assurances that the CPUC railroad safety program is adequately implemented in Oakland and other areas that may receive crude by rail shipments, including investigation, inspection, infrastructure improvement, detection and mitigation of risks or any other procedures or mechanisms available to the CPUC;

- Send a copy of this Resolution to the U.S. Department of Transportation, which is developing regulations for federal rail safety of shipment of fossil fuels by rail in DOT-111 cars;

- Alert and communicate opposition to other cities along the transportation route, and support their efforts;

- Work through the League of California Cities, California State Association of Counties, and other relevant organizations to articulate opposition;

- Alert our State legislative representatives and our lobbyists in Sacramento and enlist their help; and

- Lobby federal Senators and Representatives to enlist their help to engage the appropriate regulatory authorities at the federal level.

IN COUNCIL, OAKLAND, CALIFORNIA, JUN 17 2014

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, GALLO, GIBSON MCELHANEY, KALB, KAPLAN, REID, SCHAAF, AND PRESIDENT KERNIGHAN - 8

NOES - 0

ABSENT - 0

ABSTENTION - 0

ATTEST: LaTonda Simmons

LATONDA SIMMONS
City Clerk and Clerk of the Council of the
City of Oakland, California

	Commodity	Health Rating	Fire Rating	Reactivity Rating	Special Hazard Rating
1	Animal Feed (BIOFOS Additive)	2	0	0	
2	Basic Chemicals (Melamine)	2	1	0	
3	Bauxite*	1	0	0	-
4	Bituminous Coal	1	1	0	-
5	Borax	1	0	0	-
6	Cereal Grains (Ground Corn)	1	1	0	-
7	Copper Concentrate	1	2	0	-
8	Dried Distillers Grain	1	1	0	-
9	Fertilizer (Mosaic MicroEssentials SZ)	2	0	0	-
10	Fuel Oils	2	2	0	-
11	Gasoline	1	3	0	-
12	Iron Ore	1	0	0	-
13	Logs (Douglas Fir)	1	0	0	-
14	Metallic Ores (Zinc Ore)	1	1	0	Water Reactive
15	Muriate of Potash	1	0	0	-
16	Portland Cement*	1	0	0	-
17	Soda Ash	2	0	0	-
18	Sodium Sulfate	2	0	0	-
19	Soybean (Meal)	0	0	0	-
20	Waste/Scrap (Aluminum)	1	0	0	-

**Information culled from different sources*

Source: OBOT Basis of Design 7/21/2015, Section 8

Attachment 2

No Coal
In Oakland

349 Mandela Parkway
Oakland, CA 94607
510-282-9454

April 1, 2016

Via Electronic Mail

Claudia Cappio
Assistant City Administrator
1 Frank Ogawa Plaza, 3rd Floor
Oakland 94612

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.

Attachment 3

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

David C. Smith
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April 1, 2016

TRANSMITTED VIA ELECTRONIC MAIL
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Planner III
CITY OF OAKLAND
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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 <u>and</u> 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:

Attachment 4

a) bituminous coal (washed coal, clean coal, or soft coal);
b) fuel oils (heating oil, off-road diesel fuel, high-sulfer 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."

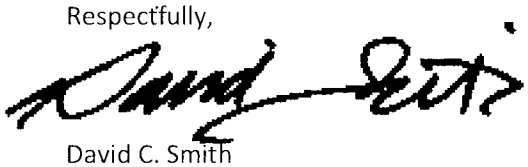
So what exactly is the City's intention in retaining ESA? If it is to review and report on the evidentiary record compiled to date, that report would related to coal and only coal. If it is to report to the City on "other hazardous fossil fuel materials," query what ESA would be reviewing in that there 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

April 1, 2016

Via Electronic Mail
Oakland City Council
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cityclerk@oaklandnet.com
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.

Attachment 5

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

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[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.

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[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

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[14] Id at 3-4.

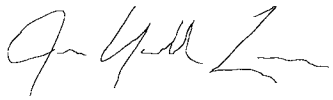
[15] Id. at 4 (emphasis added).

[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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[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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