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,

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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.”

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’.” ESA’s role is not to establish thresholds —that is an evaluation for the City to make based on the record.

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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 forthcoming 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

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5 Id. at 8.
6 Id. at 7-8, fn. 7-9.
7 Id. at fn. 9.
9 See http://www.tonguerivereis.com/
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. Groups including the Sierra Club and Earthjustice submitted extensive comments on the Tongue River Draft EIS pointing out multiple flaws. 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. 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.

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. 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.” 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. 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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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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