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(List of Counsel continued on next page)

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant,

and

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 16-cv-7014-VC

**SIERRA CLUB AND SAN FRANCISCO  
BAYKEEPER'S NOTICE OF APPEAL  
AND REPRESENTATION STATEMENT**

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4 *Attorney for Defendant-Intervenor*  
*Sierra Club*  
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**NOTICE OF APPEAL**

Notice is hereby given that Sierra Club and San Francisco Baykeeper, Defendant-Intervenors in the above-captioned case, appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment dated May 23, 2018 (ECF No. 255, attached as Exhibit A) and the associated Findings of Fact and Conclusions of Law dated May 15, 2018 (ECF No. 249, attached as Exhibit B).

A Representation Statement is attached to this notice pursuant to Federal Rule of Appellate Procedure 12(b) and Circuit Rule 3-2.

This appeal is related to the appeal filed by Defendant City of Oakland in the same, above-captioned matter (*see* ECF No. 260), which was docketed by the United States Court of Appeals for the Ninth Circuit as Case No. 18-16105 and given the short title “*OBOT v. City of Oakland, et al.*”

Dated: June 19, 2018

Respectfully submitted,

*s/ Colin O'Brien*

COLIN O'BRIEN

*Attorney for Defendant-Intervenors  
Sierra Club and San Francisco Baykeeper*

**REPRESENTATION STATEMENT**

The undersigned represent Sierra Club and San Francisco Baykeeper, who were Defendant-Intervenors below and are Appellants in this matter. The following is a list of all parties to the action and their counsel, pursuant to Federal Rule of Appellate Procedure 12(b) and Circuit Rule 3-2(b):

**Plaintiff Oakland Bulk & Oversized Terminal, LLC is represented by:**

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Dated: June 19, 2018

Respectfully submitted,

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**CITY OF OAKLAND'S NOTICE  
OF APPEAL**

Trial Date: January 16, 2018  
Ct. No.: No. 2, 17<sup>th</sup> Floor  
Judge: Honorable Vince  
Chhabria

1 Defendant City of Oakland (City) hereby appeals to the Ninth Circuit Court  
 2 of Appeals from the Judgment entered on May 23, 2018, ECF Dkt. No. 255, a true  
 3 and correct copy of which is attached as Exhibit A to this Notice. The City's appeal  
 4 from the Judgment incorporates all prior orders and rulings, including the Findings  
 5 of Fact and Conclusions of Law dated May 15, 2108, ECF Dkt. No. 249, a copy of  
 6 which is attached as Exhibit B to this Notice. In compliance with Circuit Rule 3-  
 7 2(b), the Representation Statement identifying all parties and their counsel is  
 8 attached to this Notice as Exhibit C.

9 Dated: June 13, 2018

BURKE, WILLIAMS & SORENSEN LLP

11 By: /s/ Amy E. Hoyt  
 12 Amy E. Hoyt  
 13 Attorneys for Defendant  
 14 CITY OF OAKLAND

**PROOF OF SERVICE**

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 1901 Harrison Street, Suite 900, Oakland, CA 94612.

On **June 13, 2018**, I served the following document(s): **CITY OF OAKLAND'S NOTICE OF APPEAL** on the interested parties in this action by placing a true and correct copy of such document, enclosed in a sealed envelope, addressed as follows:

**SERVICE LIST**  
**(Update: 06-12-18)**  
**Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, et al.**  
**USDC Case No.: 3:16-cv-07014-VC**  
**(#05684-0033)**

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( X ) **BY COURT CASE MANAGEMENT/ ELECTRONIC CASE FILES (CM/ECF) SYSTEM**, By submitting the document listed above as a Portable Document Format (PDF), by uploading an electronic version via CM/ECF System case filing which automatically generates a Notice of Electronic Filing or NEF which allows recipients to retrieve the document(s) automatically, pursuant to the Court's Administrative Order Regarding Electronic Filing. I certify that said transmission was completed and that all pages contained therein were received. [CRC, Rule 2.250(5) and 2.253(a)]

Executed **June 13, 2018**, Oakland, California.

( X ) **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Lesley E. Neil

LESLEY E. NEIL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

[16-cv-07014-VC](#)

**JUDGMENT**

The Court, having ruled in favor of the plaintiff in its separate Findings of Fact and Conclusions of Law ruling, now enters judgment in favor of the plaintiff and against the defendant. The Clerk of Court is directed to close the case.

**IT IS SO ORDERED.**

Dated: May 23, 2018



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VINCE CHHABRIA  
United States District Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**JOINT OBJECTIONS TO EVIDENCE  
INTRODUCED AT TRIAL**

Trial Date: January 16, 2018  
Ctrm.: No. 2, 17<sup>th</sup> Floor  
Judge: Honorable Vince Chhabria

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Pursuant to the Court's Order Setting Post-Trial Briefing Schedule (Dkt. 232), Defendant City of Oakland and Defendant-Intervenors Sierra Club and San Francisco Baykeeper hereby submit their joint evidentiary objections to testimonial and documentary evidence introduced at trial as follows:

I. Objections to Trial Testimony: Defendants object to the trial testimony identified below on the basis that it is irrelevant and extra-record, to the extent that it is admitted merely to contradict the record evidence before the City Council, or is not helpful to assist the Court in understanding the evidence in record before the City Council or the significance of such evidence. This objection, along with citations to supporting authority,<sup>1</sup> was previously asserted in the City of Oakland's Objection to Extra-Record Evidence to Contradict Record Evidence (Dkt. 224), and in the City of Oakland's Trial Brief (Dkt. 200, pp. 3-6). Any further objections (other than irrelevance as extra-record) are set forth in the "Further Objections" column.

Witness	Trial Transcript Page and Lines	Further Objections
Patrick Cashman	27:16-40:19	
Darin Ranelletti	43:8-43:21 44:9-54:23	
Phillip Tagami	58:3-5 58:12-17 58:21-61:14 61:22-64:24 65:6-67:6 68:4-72:18	

<sup>1</sup> E.g., *W. States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 576, 578-579 (1995) ("extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision"); *Coachella Valley Unified School Dist. v. State*, 176 Cal.App.4th 93, 125 (2009) ("[E]xtra-record evidence amounting to nothing more than contradictory expert testimony designed to question the wisdom and accuracy of a public agency decision generally is not admissible."); *Fort Mojave Indian Tribe v. Department of Health Services*, 38 Cal.App.4th 1574, 1595 (1995) (To admit "conflicting scientific opinions created after an administrative decision would pose... a threat of repeated rounds of litigation, and uncertain, attenuated finality."); *Eureka Citizens for Responsible Gov't v. City of Eureka*, 147 Cal.App.4th 357, 366-367 (2007); see also *Outfitter Properties, LLC v. Wildlife Conservation Bd.*, 207 Cal.App.4th 237, 251 (2012) (extra-record evidence may not be admitted to "call into question the wisdom" of the agency's decision).

Witness	Trial Transcript Page and Lines	Further Objections
	89:21-90:16	
Crescentia Brown	91:20-101:21	
Victoria Evans	106:8-136:12 250:24-264:16	
Sabrina Landreth	This testimony was provided by excerpts of a videotaped deposition that was played in open court on January 17, 2018— Defendants object to the entirety of this testimony as extra-record evidence.	
Douglas Cole	This testimony was provided by excerpts of a videotaped deposition that was played in open court on January 17, 2018— Defendants object to the entirety of this testimony as irrelevant extra-record evidence	There is no foundation that Mr. Cole was either a Rule 30(b)(6) representative or a manager of the City (he was neither) and therefore the video is hearsay and inadmissible
James Wolff	This testimony was provided by excerpts of a videotaped deposition that was played in open court on January 17, 2018— Defendants object to the entirety of this testimony as irrelevant extra-record evidence  Defendants further object to OBOT's counter-designated deposition testimony played on January 19, 2018, specifically the following page/line excerpts from Mr. Wolff's deposition (these excerpts are attached as Exhibit A hereto): 178:4-7 239:5-9 239:11-12 239:14-18 154:14-15 154:18-22 154:25-155:1	Mr. Wolff offered testimony that constituted improper hearsay, lacked foundation, called for an expert opinion, and failed to adhere to the best evidence rule, among other such deficiencies. This testimony was on topics ranging from how well Bowie's coal travels, how cleanly the coal burns, to the average dust loss from rail cars carrying Bowie's coal to a mention of purported studies about Bowie's coal dust loss from rail cars that were never produced by Bowie or discussed at the deposition.
Mark McClure	275:3-282:21 282:24-284:7 284:20-285:10	
David Buccolo	288:9-304:25	Mr. Buccolo does not satisfy Rule 702. Specifically, there is a lack of reliability of the principles or methods in his underlying report and trial testimony, and he did not rely on sufficient facts and data. Nor did he have

Witness	Trial Transcript Page and Lines	Further Objections
		specialized knowledge on the particular coal dust or coal cover issues to which he testified.  In addition, Mr. Buccolo's testimony about a video and demonstrative picture purportedly depicting a covered rail car carrying coal lacked authentication, foundation, constituted improper hearsay, and was not the proper subject of expert testimony.
Lyle Chinkin	317:21-381:4	Defendants further object to the testimony at 360:3-361:11 regarding statements by Mr. Moleski as hearsay (FRE 801-803).
Andrew Maier	386:13-400:6	
Ali Rangwala	410:17-429:16	
Claudia Cappio	468:6-484:6	

II. Objections to Documentary Evidence. The following table lists each exhibit introduced at trial, and for each sets forth Defendants' objections or lack thereof ("N/A" if no objection).

Trial Ex. No.	Description	Objection and Explanation
4	Oakland City Council Ordinance No. 13385 C.M.S.	N/A
14	ESA Report on the Health and/or Safety Impacts Associated with the Transport, Storage and/or Handling of Coal and/or Coke in Oakland (B&W 154 pgs.)	N/A
19	Janna Scott email to Victoria Evans, Crescentia Brown, Tim Rimpo re Oakland: coal by rail-internal draft and attachment Health and Safety Report Outline 12/1/15	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.

Trial Ex. No.	Description	Objection and Explanation
24	Crescentia Brown Calendar Appointment to Brian Boxer, Jim O'Toole, Chuck Bennett, Victoria Evans, Tim Rimpo attaching draft Preliminary Scope of Work	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
25	Crescentia Brown email to Chuck Bennett, Tim Rimpo, Victoria Evans, Cory Barringhaus, Janna Scott, Jim O'Toole, Brian Boxer, Michael Manka, Jeff Caton attaching final Oakland Coal Effects Review Scope of Work	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
31	City of Oakland Agenda Report re Status Report on Coal from Claudia Cappio to Sabrina Landreth	N/A
32	Crescentia Brown email to Brian Boxer, Chuck Bennett, Victoria Evans, Cory Barringhaus, Jim O'Toole, Janna Scott, Shannon Stewart, Michael Manka, Jeff Caton re Oakland Coal Update, Oakland pulls resolution to hire ESA	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
34	Crescentia Brown Calendar Appointment to Brian Boxer, Chuck Bennett, Victoria Evans attaching draft Preliminary Scope of Work	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
42	Crescentia Brown to Victoria Evans, Cory Barringhaus, Chuck Bennett re OBOT Kick-off Prep #2	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
46	Heather Klein Calendar Appointment to Mark Wald, Esq., Kevin Siegel, Esq., Claudia Cappio, Darin Ranelletti, Crescentia Brown, Victoria Evans, Cory Barringhaus, Winnie Woo	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.

Trial Ex. No.	Description	Objection and Explanation
47	Victoria Evans email to Cory Barringhaus, Tim Rimpo, Crescentia Brown re OBOT - Health Impacts Conclusions example - INTERNAL ESA REVIEW ONLY	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
48	Steve Radis email to Cory Barringhaus, Victoria Evans re Privileged & Confidential: Combustion	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
53	Victoria Evans email to Barbara Toole O'Neil, Tim Rimpo, Cory Barringhaus re Privileged & Confidential AQ and use with BAAQMD	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
57	Victoria Evans email to Tim Rimpo, Cory Barringhaus re: covers & domes	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
58	Steve Radis email to Cory Barringhaus, Victoria Evans re Additional questions from Oakland	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
62	Professional or Specialized Service Agreement btw City of Oakland and Environmental Science Associates (ESA)	N/A
65	Army Base Gateway Redevelopment Project Lease Disposition and Development Agreement btw City of Oakland and The Oakland Redevelopment Successor Agency and Prologis CCIG Oakland Global, LLC (LDDA) (88 pgs.)	N/A
96	Army Base Gateway Redevelopment Project Ground Lease for West Gateway btw City of Oakland and OBOT (146 pages)	N/A

Trial Ex. No.	Description	Objection and Explanation
98	Doug Cole email to Zachary Wald, John Monetta, Claudia Cappio, Casey Farmer email re Train Route through Oakland	Objection, relevance; objection, lacks foundation (FRE 401-403, 602). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
103	Henry Hilken email to Doug Cole, Alison Kirk, David Vintze, Darin Ranelletti re Follow up on City's Sept. 21 Public Hearing on Coal's Public Health and/or Safety Impacts	N/A
108	Evaluation of Health and Safety Impacts of the Proposed Bulk Coal Terminal on the Former Oakland Army Base Adjacent to the Port of Oakland with various emails attached	N/A
128	City of Oakland Agenda Report re Supplemental Report re Army Base Rezoning & Development Agreement, attaching redline draft of same	N/A
131	Fully executed Army Base Gateway Redevelopment Project; Ground Lease for West Gateway, btw City of Oakland ("City") & Oakland Bulk & Oversized Terminal, LLC ("Developer") dated as of February 16, 2016	N/A
133	Mark Wald, Esq. email to Heather Klein. Crescentia Brown, Heather Lee, Esq., Claudia Cappio attaching handwritten edits to ESA City of Oakland Coal-by-Rail Effects Review Draft Approach and Preliminary Scope of Work January 8, 2016	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
135	City of Oakland Agenda Report re Public Hearing to Consider a Report and Recommendation for Options to Address Coal and Coke Issues, attaching final ESA Report on the Health and/or Safety Impacts Associated with the Transport, Storage and/or Handling of Coal and/or Coke in Oakland	N/A
136	Alison Kirk email to Darin Ranelletti, Heather Klein, David Vintze re proposed contract to study coal at OBOT	N/A
138	2012 Oakland Army Base (OARB) Project Standard Conditions of Approval and Mitigation Monitoring and Reporting Program	N/A

Trial Ex. No.	Description	Objection and Explanation
141	City of Oakland letter by Darin Ranelletti to Phil Tagami re Annual Compliance Review - Gateway Development / Oakland Global Project Development Agreement, July 16, 2016 to July 5, 2017	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
145	City of Oakland Agenda Report re Status Report on Coal and Authorization of a Professional Services Contract with Environmental Science Associates (ESA) attaching draft City of Oakland Review of Public Comments Received Regarding Potential Health and/or Safety Effects of Coal and Other Hazardous Fossil Fuel Materials Proposed at OBOT Draft Approach and Preliminary Scope of Work April 6, 2016	N/A
149	Phil Tagami and Jerry Bridges letter to Claudia Cappio re Responses and Information for City Follow-Up Questions to September 21 Informational Hearing	N/A
166	Phil Tagami letter to Claudia Cappio re Responses to Inquiries by ESA	N/A
213	City of Oakland Agenda Report re Coal's Public Health and/or Safety Impacts	N/A
214	City of Oakland Agenda Report re Coal's Public Health and/or Safety Impacts	N/A
216	City of Oakland Agenda Report re Informational status report on Coal's Public Health and/or Safety Impacts – No Action Required	N/A
217	City of Oakland Agenda Report re Status Report on Coal	N/A
221	Claudia Cappio email to Heather Klein, Mark Wald, Esq. re Ecofab response to Lora Jo Foo letter to council (and subsequent "No Coal in Oakland" article based on her letter) attaching Covers for rail transport of coal memorandum	N/A
264	Claudia Cappio to Phil Tagami, Mark McClure re 2 questions regarding OBOT plans on facility design and commodities	N/A
265	Heather Klein email to Victoria Evans, Cory Barringhaus. Mark Wald, Esq., Claudia Cappio, Crescentia Brown OBOT letter from Phil Tagami re responses to Inquiries by ESA	N/A
281	ESA Report on the Health and/or Safety Impacts Associated with the Transport, Storage and/or Handling of Coal and/or Coke in Oakland (Color 154 pgs.)	N/A
286	Claudia Cappio email to Sabrina Landreth, Christine Daniel attaching draft letter from Mayor Schaaf and Lynette Gibson McElhaney re ACTC funding for Oakland Army Base Wharf Improvements	Objection, relevance; objection, lacks foundation (FRE 401-403, 602).

<b>Trial Ex. No.</b>	<b>Description</b>	<b>Objection and Explanation</b>
371	City of Oakland Agenda Report re Report on the Request for Qualifications (RFQ) Process to Select a Master Developer for the Central Gateway Development Area of the Former Oakland Army Base	N/A
372	Redevelopment Agency of City of Oakland Agenda Report re Resolution Authorizing the Agency Administrator to Negotiate and Enter into Exclusive Negotiating Agreement for a Term of 360 Days from Agency Approval	N/A
388	Oakland Global News article from December 2013, Issue 4	N/A
431	Victoria Evans email to Tim Rimpo, Cory Barringhaus re AP-42 Recalc	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
432	Victoria Evans email to Cory Barringhaus re draft Emissions Quantification attaching Draft Emissions Calculation and Emissions Quantification Blurb	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
433	Emission Calculation Excel spreadsheet	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
435	Miscellaneous Sources section 13.2.5 Industrial Wind Erosion	N/A
440	Earthjustice letter to Oakland City Council re Proposed Oakland Coal Export Terminal	N/A
448	South Coast Air Quality Management District Rule 1158 – Storage, Handling, and Transport of Coke, Coal and Sulfur	N/A
453	Rule 1158. Storage, Handling, and Transport of Coke, Coal and Sulfur	N/A
454	Victoria Evans C.V.	N/A
463	Dr. Nadia Moore working files with Federal Register, Vol., 78, No. 10, Part II Environmental Protection Agency, 40 CFR Parts 50, 51, 52, et al. (995 pgs.)	N/A

<b>Trial Ex. No.</b>	<b>Description</b>	<b>Objection and Explanation</b>
466	Federal Register, Vol., 78, No. 10, Part II Environmental Protection Agency, 40 CFR Parts 50, 51, 52, et al. (203 pgs.)	N/A
478	Millennium Bulk Terminals - Longview SEPA Environmental Impact Statement, SEPA Coal Technical Report Coal Dust Emissions, Coal Spills Analysis, and Sulfur Dioxide and Mercury Emissions Analysis by ICF	Objection, relevance; objection, lacks foundation; objection, hearsay (FRE 401-403, 602, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
479	Connell Hatch – Queensland Rail Limited, Goonyella, Blackwater and Moura Coal Rail Systems, Final Report Environmental Evaluation of Fugitive Coal Dust Emissions from Coal Trains Executive Summary	Objection, relevance; objection, lacks foundation; objection, hearsay (FRE 401-403, 602, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
515	PowerPoint presentation entitled BNSF Railway - Coal Dust Mitigation Update, Surface Transportation Board - RETAC September 10, 2009	N/A
516	Summary of BNSF/UP Super Trial 2010	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
522	HDR Excel spreadsheet - OBOT Switching Time Diagram - Parallel Commodity Unloading Pit Layouts	N/A
571	Opening Expert Report of Andrew Maier	Objection, relevance; objection, hearsay. Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S. Moreover, this exhibit constitutes inadmissible hearsay. FRE 803(18).

<b>Trial Ex. No.</b>	<b>Description</b>	<b>Objection and Explanation</b>
584	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"	N/A
593	City of Oakland Agenda Report re Status Report on Coal and Authorization of a Professional Services Contract with Environmental Science Associates (ESA)	N/A
594	City of Oakland Agenda Report re Status Report on Coal	N/A
596	ESA Report (B&W 163 pgs.)	N/A
604	2012 Oakland Army Base (OARB) Project Standard Conditions of Approval and Mitigation Monitoring and Reporting Program	N/A
608	City of Oakland Agenda Report on Status Report on Coal	N/A
612	OAB / OHIT Rail System Area Calculations schematic; drawing number X-1944 drawn by V. Bribiesca	N/A
630	City of Oakland Agenda Report re Oakland Army Base Development	N/A
635	OAB Milestones timeline; C1 Project Milestone timeline	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
639	Index of Legislative Record (see Trial Ex. 640)	N/A
640	Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S. (contained on USB flash drive)	N/A
657	Response to Follow-Up Questions from Residents and Non-Residents (compilation)	N/A
660	Letter from Alameda County Health Care Services Agency Public Health Department to City Council President Lynette Gibson McElhaney, subject: "Coal's Public Health and Safety Impacts"	N/A
661	Memorandum from Lora Jo Foo, No Coal in Oakland, to Claudia Cappio, the Oakland City Council, and City Attorney Barbara Parker, subject: "Covers for rail transport of coal"	N/A
736	Dr. Andrew Maier C.V.	Objection, hearsay (FRE 801-803).
738	Oakland Global, CCIG, Port of Oakland PowerPoint presentation to Mayor Libby Schaaf, Project Briefing, December 15, 2014	N/A
814	Agenda Report from Fred Blackwell to Deanna Santana, Subject Oakland Army Base Development	N/A

Trial Ex. No.	Description	Objection and Explanation
815	Agenda Report from Fred Blackwell to Deanna Santana, Subject Oakland Army Base Development Supplemental Report	N/A
842	Project Aerial photograph	N/A
844	Photograph of Levin Terminal in Richmond, CA	Objection, relevance; objection, hearsay; objection, lacks foundation. (FRE 401-403, 602, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
845	Photograph of Port of Stockton in Stockton, CA	Objection, relevance; objection, hearsay; objection, lacks foundation. (FRE 401-403, 602, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
848	Rail Commodity Movement Through Oakland photograph (1 of 4)	Objection, relevance; objection, hearsay; objection, lacks foundation. (FRE 401-403, 602, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
900	NFPA 68, Standard on explosion protection by deflagration venting.	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
915	Carnahan, R., Reza, A., Dracup, B., Ross, B., and Christiansen, E., A case study of two shiploader fires in a coal and pet coke facility. Fire and Materials Conference, 2007.	N/A

Trial Ex. No.	Description	Objection and Explanation
930	Dungan, K.W., Storage and handling of solid fuels, fire protection handbook, ed. A.E. Cote. Vol. 1. 2003: National Fire Protection Assoc.	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
960	Letter from Public Health Advisory Panel on Coal in Oakland and attachment, An Assessment of the Health and Safety Implications of Coal Transport through Oakland	N/A
961	Chafe Z. (2016) Analysis of health impacts and safety risks and other issues/concerns related to the transport, handling, transloading, and storage of coal and/or petroleum coke (petcoke) in Oakland and at the proposed Oakland Bulk & Oversized Terminal. Report prepared for Councilmember Dan Kalb of the Oakland City Council, Oakland, CA, June 22. Available at <a href="http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak059408.pdf">http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak059408.pdf</a> .	N/A
968	Ferreira A. D., Viegas D. X., and Sousa A. C. M. (2003) Full-scale measurements for evaluation of coal dust release from train wagons with two different shelter covers. Journal of Wind Engineering and Industrial Aerodynamics, 91, 1271-1283, doi: 10.1016/S0167-6105(03)00077-1.	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
972	LSA Associates, Inc., (2012) 2012 Oakland Army Base project initial study / addendum. Report submitted to the City of Oakland, Oakland, CA, by LSA Associates, Inc., Berkeley, CA, May. Available at <a href="http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak035079.pdf">http://www2.oaklandnet.com/oakcal/groups/ceda/documents/report/oak035079.pdf</a> .	N/A
976	Cappio C. (2016) Public hearing to consider a report and recommendation for options to address coal and coke issues. Agenda report prepared for the Oakland City Council, Oakland, CA, June 23.	N/A
982	Axetell K. and Cowherd C. (1984) Improved emission factors for fugitive dust from western surface coal mining sources. Prepared for Industrial Environmental Research Lab, Cincinnati, OH, March.	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.

Trial Ex. No.	Description	Objection and Explanation
991	Minutes and Steve Bobb Presentation, Rail Energy Transportation Advisory Committee, September 10, 2009. <a href="https://stb.dot.gov/stb/docs/RETAC/2009/September2009/Minutes%209-10-09.pdf">https://stb.dot.gov/stb/docs/RETAC/2009/September2009/Minutes%209-10-09.pdf</a> .	N/A
1069	Crane C.M., English P., Heller J., Kirsch J., Kuiper H., Kyle A.D., Ostro B., Rudolph L., and Shonkoff S. (2016) An assessment of the health and safety implications of coal transport through Oakland. Report prepared for the Oakland City Council, Oakland, CA, by the Public Health Advisory Panel on Coal in Oakland, California, June 2016.	N/A
1083	Draft for internal discussion only.	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
1084	June 2016 "Chapter 5: Health Effects" OBOT Health and Safety Effects (Draft Report).	Objection, relevance (FRE 401-403). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
1085	Muleski G.E. (1985) Coal yard wind erosion measurement at the [redacted]. MRI Project No. 8162-L, March 22, 1985	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
1207	Phil Tagami email to Libby Schaaf CC: Tomiquia Moss and Mark McClure re: Stop all mention of coal now	N/A
1225	2012 Oakland Army Base Project Initial Study / Addendum	N/A
1229	Kinder Morgan PPT Presentation: Setting the Standard for Terminal Storage and Handling Services in North America: An Overview of our Network and Services	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.

Trial Ex. No.	Description	Objection and Explanation
1238-1261	Basis of Design Supporting documents – Potential Commodities NFPA 704 (color)	N/A
1267	Attachment 15 to Army Base Gateway Redevelopment Project Lease Disposition and Development Agreement btw City of Oakland and The Oakland Redevelopment Successor Agency and Prologis CCIG Oakland Global, LLC (LDDA) (241 pgs.)	N/A
1272	Printout of City of Oakland Website, File # 15-0977 (stipulated)	N/A
1273	Transmittal sheets dated May 4, 2016, May 9, 2016, and September 8, 2015 from CCIG and TLS to Doug Cole, Heather Klein, Mayor Libby Schaaf, and "Mayor and City Council members" (stipulated)	N/A
1274	Dr. Fernandez-Pello C.V.	N/A
1277	Wayback Machine (archive.org) printout	Objection, relevance; objection, hearsay (FRE 401-403, 801-803).
1278	Video played by Plaintiff on January 18, 2018	This exhibit contains the video deposition excerpts for the depositions of Wolff, Landreth and Cole played by Plaintiff. Defendants object to this exhibit to the same extent they object to the testimony of these deponents as described in the table above setting forth their objections to trial testimony.
Dkt. 213-2	Plaintiff Oakland Bulk & Oversized Terminal, LLC's First Set of Interrogatories to Defendant-Intervenor Sierra Club	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.
Dkt. 213-3	Defendant-Intervenor Sierra Club's Objections and Responses to Plaintiff Oakland Bulk & Oversized Terminal, LLC's First Set of Interrogatories	Objection, relevance; objection, hearsay (FRE 401-403, 801-803). This exhibit constitutes evidence outside of the City's Legislative Record related to Ordinance No. 13385 C.M.S. and Resolution 86234 C.M.S.

1  
2 Dated: February 9, 2018

BURKE, WILLIAMS & SORENSEN, LLP

3  
4 By: /s/ Kevin D. Siegel

5 Kevin D. Siegel  
6 Gregory R. Aker  
7 Timothy A. Colvig  
8 Christopher M. Long  
9 Attorneys for Defendant  
10 CITY OF OAKLAND

11 Dated: February 9, 2018

EARTHJUSTICE

12 By: /s/ Colin O'Brien

13 Colin O'Brien  
14 Attorneys for Defendant-Intervenors  
15 SIERRA CLUB and SAN FRANCISCO  
16 BAYKEEPER

17  
18 **ATTESTATION**

19 I, Kevin D. Siegel, am the ECF user whose ID and password are being used to file this  
20 "Joint Objections to Evidence Introduced at Trial." Pursuant to Civil Local Rule 5-1(i)(3), I  
21 hereby attest that Colin O'Brien has concurred in the filing of this document.

22 DATED: February 9, 2018

23 /s/ Kevin D. Siegel  
24 Kevin D. Siegel

Volume 3

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

OAKLAND BULK & OVERSIZED TERMINAL, )	
LLC, )	
)	
Plaintiff, )	
vs. )	No. C 16-7014 VC
)	
CITY OF OAKLAND )	
)	San Francisco, California
Defendant. )	Friday
)	January 19, 2018
)	10:00 a.m.

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**TRANSCRIPT OF PROCEEDINGS**

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**ER 0071**

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— — —

1 of confidence they have in these factors. So they are not by  
2 any means definitive.

3 **Q.** Okay. And there was some testimony here yesterday when  
4 you were here that the City used the wrong AP-42 section,  
5 namely 13.2.5. Did you agree with that or disagree?

6 **A.** I disagreed with that strongly, because that was in -- as  
7 I said earlier, AP- -- this section of AP-42 -- and there  
8 really is no other section of AP-42 for estimating storage pile  
9 emissions, is the one that is used by agencies, by permitting  
10 authorities, by consultants that do permitting, and essentially  
11 the air quality community that deals with storage pile  
12 emissions.

13 And the -- so I don't see any problem with -- with using  
14 AP-42 and that particular section to estimate storage pile  
15 emissions.

16 **Q.** If I get your testimony correctly, there is no other  
17 section that would be more applicable?

18 **MR. FELDMAN:** Excuse me, your Honor. I object.  
19 Leading.

20 **THE COURT:** Sustained.

21 **BY MR. AKER**

22 **Q.** Is there another section that would -- you could also  
23 choose from?

24 **A.** I think I mentioned in the previous answer that there was  
25 none that I -- that I know of.

1 Q. Okay. So you've discussed the two -- at least two of the  
2 three factors that might apply here: The uncrusted coal pile  
3 and the fine coal dust on a concrete pad.

4 Why did you not pick the uncrusted coal pile as -- as the  
5 applicable factor?

6 A. I didn't do it for a very simple reason. It is because --  
7 it is my opinion, and I think I've expressed that previously,  
8 that even the .54 that ESA had used was very conservative,  
9 meaning it would tend to underestimate emissions. And that in  
10 reality, because we're talking about PM2.5, that the threshold  
11 friction velocity would be much lower.

12 I'm well aware of AP-42 and the data that goes into a lot  
13 of the sections I use, including that one. And all the studies  
14 go back to the late '80s. And where they simply did not  
15 measure the threshold friction velocity for PM2.5. All of  
16 those numbers, whether it is the .54 or the 1.12, they both  
17 come from measurements of threshold friction velocity for  
18 larger particles, for the total suspended particles, which is  
19 PM30 or for particles that are around PM15, because they're all  
20 visual measurements. They use wind tunnel, portable wind  
21 tunnels in the field, as Mr. Chinkin even alluded to, and  
22 literally made of Plexiglas that was placed on the ground. And  
23 you increase the wind and you visually saw when particles would  
24 start to move and erode and identified threshold friction  
25 velocities.

1       You can't see PM2.5. And -- and it's well known that  
2       PM2.5 measurements of threshold friction velocity are simply  
3       not part of those compilations. With that knowledge, with that  
4       background, my -- my assumption was -- I was certainly not  
5       going to go above .54. If anything, it would be lower. So  
6       I -- I simply left it alone.

7       Logically it made no sense for me to go to the higher  
8       values, when you're talking about PM2.5. And we all know that  
9       the fine particles, the finer the size, the finer the particle,  
10      the easier it is to entrain, if you will, into the atmosphere.  
11      So because of all those reasons, I saw no reason to go to the  
12      1.12 value.

13      **Q.** And what about the uncrusted coal pile? We're talking  
14      here about the rail staging calculations, correct?

15      **A.** Yeah. The rail staging is where that really has been  
16      applied.

17      **Q.** Okay.

18      **A.** I mean, because the rail, we use the -- this emission  
19      factor of -- on a per car, per pound -- you know, per car, per  
20      mile basis.

21      But for staging, we used -- both parties have used the  
22      coal, this AP-42 13.2.5 --

23      (Court reporter clarification.)

24      **A.** Both parties have used the 13.2.5 section of AP-42, that's  
25      correct.

1 **Q.** You agreed with the ESA report?

2 **A.** Yes.

3 **MR. AKER:** Thank you, your Honor.

4 **THE COURT:** All right. You may step down. Thank  
5 you.

6 (Witness excused.)

7 **THE COURT:** Okay. So what's the plan from here on  
8 out? What's Oakland got?

9 **MR. SIEGEL:** So we have Dr. Zoe Chafe next.

10 **THE COURT:** Okay.

11 **MR. SIEGEL:** And that's about probably 12 to 15  
12 minutes of testimony. That will be brief.

13 And then we have, I believe, Dr. Carlos Fernandez-Pello,  
14 and then Mr. Sullivan is next.

15 Do you want time estimates for any of these, or just the  
16 list?

17 **THE COURT:** No, I was kind of curious who was left.

18 **MR. SIEGEL:** Yes. And then is it --

19 **MR. AKER:** The video.

20 **MR. SIEGEL:** -- the video of Mr. Wolff.

21 **THE COURT:** I mean, I'm -- here is what I propose we  
22 do. Why don't we take a ten-minute break, and then I'm  
23 comfortable going to 4:00 o'clock. So if that means the  
24 addition of a little bit of time to each of your clocks, that's  
25 fine. We can go until 4:00 o'clock today. Okay? I think that

1 would amount to an addition of some time to each of your  
2 clocks.

3 So why don't we resume at 2:30. Okay?

4 (Whereupon there was a recess in the proceedings  
5 from 2:18 p.m. until 2:30 p.m.)

6 **THE COURT:** All right. Shall we proceed?

7 **MR. SIEGEL:** Yes, your Honor. Defendants call  
8 Dr. Zoe Chafe.

9 **ZOE CHAFE,**

10 called as a witness for the defendant herein, having been duly  
11 sworn, testified as follows:

12 **THE WITNESS:** I do.

13 **THE CLERK:** Thank you. Please be seated.

14 And for the record, please state your first and last name  
15 and spell both of them.

16 **THE WITNESS:** Zoe Chafe. Z-O-E C-H-A-F-E.

17 **DIRECT EXAMINATION**

18 **BY MR. SIEGEL**

19 **Q.** Good afternoon, Dr. Chafe. Could you just briefly  
20 describe your educational experience?

21 **A.** Sure. So I hold a BA in Human Biology from Stanford  
22 University, and a Master's in Science in Energy and Resources  
23 from UC Berkeley. A Master's in Public Health from  
24 UC Berkeley, and a Ph.D. in Energy and Resources from  
25 UC Berkeley.

1 Q. So you have written a dissertation. Could you briefly  
2 explain what that is?

3 A. Sure. My dissertation focused on the public health  
4 effects of exposure to PM2.5, especially ambient air pollution  
5 coming from household burning of coal and wood and other solid  
6 fuels.

7 Q. And what would you describe as your profession?

8 A. I'm a public health professional also working in  
9 environmental studies and sciences.

10 Q. In what fields?

11 A. Interdisciplinary. So my training is epidemiology within  
12 public health mostly and environmental health sciences.

13 Q. And what are you currently doing professionally?

14 A. I'm a post-doctoral research associate at Cornell  
15 University.

16 Q. And working on what kind of projects?

17 A. I still work on the same issues that I worked on for my  
18 dissertation. They've changed a bit, but still focusing on the  
19 health effects of exposure to ambient PM2.5, and, in  
20 particular, air pollution.

21 Q. And if I could call up, please, Exhibit 961. And you'll  
22 have in your binder here a set of exhibits, and then they will  
23 be displayed on the screen.

24 (Document displayed.)

25 Q. Do you recognize this Exhibit 961, particularly if you

1 turn to Page 3 of the exhibit?

2 **A.** I do.

3 **Q.** And what is it?

4 **A.** This is a report that I prepared for the City of Oakland  
5 in my capacity as an employee with the City, and it's prefaced  
6 by a memo by Council member Dan Kalb.

7 **Q.** And what -- you'll see that at the bottom of the page  
8 there is a page reference that is different than what your  
9 report says. That's what I will be referring to when I go  
10 through the pages.

11 How did you access -- what did you do to prepare this  
12 report?

13 **A.** To prepare this report, I reviewed the very large body of  
14 evidence that was submitted to the City and became part of the  
15 City record related to the Army base project. It was a  
16 combination of online records that are available through the  
17 City website as well as some paper records that I was given  
18 during my employment with the City.

19 **Q.** And did you do anything else to prepare the report besides  
20 look at the City's records?

21 **A.** I did, yeah. So in the case where I had questions or  
22 needed additional information, I supplemented what I was given  
23 through the City's record with additional outside research.

24 **Q.** If I could call your attention to, please, Page 114 of  
25 this exhibit.

1 over-the-road operation. So in the case of a coal train coming  
2 into the OBOT facility, the -- the train -- the preferred route  
3 or the more preferential route would be the southern route,  
4 which would bring it through Alameda, West Oakland, down  
5 Embarcadero Street to a point just west of Embarcadero Street  
6 where it would enter the Union Pacific yard. It would have to  
7 traverse that yard to enter the support yard where the train  
8 then would be stopped and broken into smaller segments, and  
9 then taken back to the OBOT facility and switched through.

10 A lot of start-and-stop motion going on there.

11 The other factor is the distance traveled, because the  
12 longer the train is on the line of road, the more the coal has  
13 a chance to grind and grate together, compress, pulverize and  
14 the fine particulate matter moves to the bottom of the car  
15 where it then gets released.

16 Q. So some of that coal dust loss would occur in West Oakland  
17 outside the OBOT property?

18 A. Yes.

19 Q. In terms of your fugitive coal dust loss, you also made an  
20 opinion on covers in this case?

21 A. I did.

22 Q. And what was that opinion?

23 A. Well, they're not being used in the industry. There  
24 are -- there are proposals for ideas to cover cars. There has  
25 never been a proof of concept, a prototype design or any

1 studies that have been done to -- to show the effectiveness of  
2 covering coal cars.

3       Operationally, it doesn't make a lot of sense for a  
4 railroad to use them.

5 **Q.** You also gave an opinion on the distance traveled  
6 impacting coal dust. Is there more or less loss at the end of  
7 a trip from the bottom?

8 **A.** In this particular case, because we're traveling a  
9 thousand miles either over the northern or the southern route,  
10 and there is a lot of switching, stop-and-start motion that  
11 goes on at the back end, especially at the -- within the West  
12 Oakland and at the OBOT facility, the dust loss would be  
13 higher.

14               **MS. LOARIE:** Okay. Nothing further.

15               **THE COURT:** Thank you.

16                               **CROSS EXAMINATION**

17 **BY MS. SHAW**

18 **Q.** Good afternoon, Mr. Sullivan.

19 **A.** Good afternoon, Ms. Shaw. How are you?

20 **Q.** Fine, thank you.

21       Mr. Sullivan, the application of covers to rail cars  
22 carrying lignite coal is in use, correct?

23 **A.** The application of covers to lignite, I wouldn't  
24 necessarily call it coal. It's a totally different product  
25 that's in use, that is correct.

1 Q. You consider yourself an expert in rail operations?

2 A. Yes.

3 Q. And just so that we're clear, for purposes of your  
4 opinions in this case, you are assuming that the rail cars  
5 coming into the OBOT terminal will be covered, correct, sir?

6 A. Part of my opinion, yes, that's correct.

7 Q. Now, you do not consider yourself an expert in calculating  
8 the amount or rate of release of particulate matter from a  
9 moving train, correct?

10 A. I am not an expert on dust release, that is correct.

11 Q. And you do not consider yourself an expert in calculating  
12 the amount or rate at which coal dust is released from a moving  
13 coal train, correct?

14 A. Other than citing the recognized experts in the industry,  
15 BNSF, you're correct.

16 Q. All right. Now, there are several designs for rapid  
17 discharge rail cars, correct?

18 A. Yes, there are.

19 Q. And you're not aware of the particular design or model of  
20 rapid discharge cars that are planned to carry coal to the OBOT  
21 terminal, correct?

22 A. I am not aware, that is correct.

23 Q. And you also do not know which make or model of rail cars  
24 were used in BNSF's study of emissions from the bottom of rail  
25 cars, correct?

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, January 19, 2018

*Debra L. Pas, CSR, RPR, RMR, CRR  
Official Reporter - U.S. District Court - San Francisco  
(415) 431-1477*

Volume 2

Pages 225 - 456

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

OAKLAND BULK & OVERSIZED TERMINAL, )  
LLC, )  
 )  
Plaintiff, )  
 )  
vs. ) No. C 16-7014 VC  
 )  
CITY OF OAKLAND )  
 ) San Francisco, California  
Defendant. ) Wednesday  
 ) January 17, 2018  
 ) 10:00 a.m.

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**TRANSCRIPT OF PROCEEDINGS**

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*Official Reporter - US District Court*

*Computerized Transcription By Eclipse*

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**ER 0084**

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— — —

## PROCEEDINGS

1 WEDNESDAY - JANUARY 17, 2018

10:04 A.M.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Back on the record in Case No.  
5 16-CV-7014, Oakland Bulk & Oversized Terminal, LLC versus City  
6 of Oakland.

7 **THE COURT:** No need to state your appearances again.  
8 We all know each other at this point. Unless there is anybody  
9 new appearing who wants to introduce themselves? Please.

10 **MR. NESS:** Eliyahu Ness for OBOT.

11 **THE COURT:** Okay. Anything to discuss before  
12 Ms. Evans resumes her testimony?

13 **MR. MYRE:** One very brief note, your Honor. The  
14 parties have each put on the record a few standing objections  
15 at this point that apply to exhibits. Otherwise we have an  
16 agreement that the exhibits that are introduced will be  
17 admitted subject to those standing objections, unless  
18 specifically objected to. We've spoken to the deputy. We're  
19 going to work with her at the end of this trial to sort that  
20 all out and provide the Court with a full list that lays out  
21 the exhibits, checks off the ones that are admitted. But we  
22 just want to put on the record that that is the general  
23 agreement so it's known going forward that's what you're going  
24 to get.

25 **THE COURT:** Appreciate it.

*Debra L. Pas, CSR, RPR, RMR, CRR*  
*Official Reporter - U.S. District Court - San Francisco*  
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## McCLURE - CROSS EXAMINATION / AKER

1     **A.**    I am.  It's quite a thick document.

2     **Q.**    Sure.  It's pretty big.

3     **A.**    Yeah.

4     **Q.**    And is it your recollection that at the time of this, that  
5    this ordinance was passed in 2016, the City has that Basis of  
6    Design?

7     **A.**    It's my understanding that they did.  They definitely had  
8    the Basis of Design before they passed the ordinance, yes.

9     **Q.**    Okay.  And as Mr. Tagami testified, at that point in time,  
10   the Basis of Design was very preliminary, correct?

11   **A.**    Yeah, I think we refer to it as about 10 percent of what  
12   100 -- you know, compared to 100 percent.

13   **Q.**    I think you said "8 to 10 percent."  But basically 10.  So  
14   there was a lot left to do on the design, correct?

15   **A.**    Yeah.

16           **MR. AKER:**  No further questions, your Honor.

17           **THE COURT:**  All right.

18           **MR. FELDMAN:**  Nothing further, your Honor.  Thank  
19   you.

20           **THE COURT:**  Thank you very much.

21           (Witness excused.)

22           **THE COURT:**  All right.  Who's next?

23           **MR. SWEDLOW:**  Plaintiff would like to call David  
24   Buccolo.

25

DAVID BUCCOLO,

called as a witness for the Plaintiff herein, having been duly sworn, testified as follows:

**THE WITNESS:** Yes, I do.

**THE CLERK:** Thank you. Please be seated.

And for the record, please state your first and last name and spell both of them.

**THE WITNESS:** David Buccolo, and that's D-A-V-I-D, B-U-C-C-O-L-O.

**THE CLERK:** Thank you.

**MS. LOARIE:** Your Honor, I believe they are going to tender Mr. Buccolo as an expert, and I would like to register an objection to that. I don't know when you would view that as timely or proper.

**THE COURT:** Objection based on qualifications?

**MS. LOARIE:** A Rule 702 objection. They are going to offer him as an expert on a few different areas. So our objection would be about the reliability of his principles or methods in his report, and that it did not rely on sufficient facts and data, nor did he have specialized knowledge on the particular coal dust or coal covers issues that we understand him to be offered for.

**THE COURT:** Okay. Well, I think we can treat all that pursuant to the weight of his testimony rather than its admissibility, since the main purpose of *Daubert* is for the

1 judge to be a gatekeeper for the jury.

2 **MS. LOARIE:** Thank you. Just wanted to make that on  
3 the record.

4 **THE COURT:** Thank you.

5 **DIRECT EXAMINATION**

6 **BY MR. SWEDLOW**

7 **Q.** Good morning, Mr. Buccolo -- or good afternoon.

8 **A.** Yeah, afternoon.

9 **Q.** Where do you currently work?

10 **A.** Rusty Spike Rail Service.

11 **Q.** And what does Rusty Spike Rail Service do?

12 **A.** Rusty Spike provides railroad operations, safety and  
13 hazardous materials consulting.

14 **Q.** When did you first start working in the railroad and/or  
15 coal industry?

16 **A.** Railroad industry in 1968.

17 **Q.** When did you start -- first start working with coal?

18 **A.** Probably in that first year, the railroad I was on, we  
19 handled coal.

20 **Q.** Okay. Can you -- without taking up too much time --  
21 describe generally what your jobs have been from 1968 until,  
22 let's say, last year?

23 **A.** I started in the track department as a track man, and then  
24 became a switchman, conductor, brakeman, engineer, and then  
25 moved into management on the railroads. And retired in October

1 of 2016 as the general manager of the Central California  
2 Traction Company at Stockton for the railroad serving the port  
3 of Stockton and the Lodi area.

4 **Q.** How long did you work at the port of Stockton?

5 **A.** Twelve and a half years.

6 **Q.** Did the -- as the general manager of the port of Stockton,  
7 did you oversee coal transport and export?

8 **A.** Yes. We coordinated the movement of coal in and out of  
9 the port with Union Pacific Railroad and Metro Stevedore, the  
10 terminal operator.

11 **Q.** How many yards have you worked at over your 48-year career  
12 that handled coal?

13 **A.** Probably 17.

14 **Q.** Can you identify generally where -- not each of the 17,  
15 but where have you worked throughout the country in yards that  
16 handled coal?

17 **A.** Back on the East Coast, and then Indiana, Trona,  
18 California. T-R-O-N-A.

19 (Court reporter clarification.)

20 **Q.** I told you nobody knows where Trona, California is.

21 **A.** Trona is one valley west of Death Valley in Southern  
22 California. I'm not even sure that helps, but it's out in the  
23 middle of nowhere.

24 Green River Basin in Wyoming, and then in Stockton,  
25 California, and Columbus, Nebraska, and all along the railroad.

1 Q. What kind of coal have you been handling and transporting  
2 in your 48-year railroad and coal car career?

3 A. Well, it went from anthracite coal on the East Coast to  
4 bituminous, Midwest bituminous coal, and they called it "hard  
5 coal." Powder River Basin coal and Western bituminous coal.

6 Q. So you've handled Powder River Basin coal before in your  
7 job responsibilities with the railroad?

8 A. The trains came through my area, and I have been to the  
9 Powder River Basin.

10 Q. So from an operational standpoint, what's the difference  
11 between Powder River Basin coal and bituminous Utah coal?

12 A. We always called Powder River "dirt that burned," but it's  
13 a very powdery coal. It's a lot finer than the Western  
14 bituminous.

15 Q. Do you have decades of experience with respect to the  
16 transport of coal over rails?

17 A. Yes.

18 Q. Do you have experience with the loading and unloading of  
19 coal trains at facilities?

20 A. I didn't do the actual unloading, but, yes. It was  
21 coordinated for the loading and unloading.

22 Q. So this is a little bit out of order, but are you  
23 responding to any other expert's testimony or do you anticipate  
24 responding here today?

25 A. Yes. To Mr. Stephen Sullivan's testimony.

1 Q. Do you know Mr. Sullivan?

2 A. I do.

3 Q. And I want to briefly identify the topics upon which  
4 you'll be testifying. So this may be -- we'll do a spoiler  
5 alert for this one.

6 Do covered cars for rail train cars exist?

7 A. Yes, they do.

8 Q. How long does it take or will it take to unload the rail  
9 cars at the anticipated OBOT facility?

10 A. Approximately nine hours.

11 Q. Will fugitive dust escape from the bottom of these rapid  
12 discharge cars at the anticipated OBOT facility?

13 A. As long as the proper maintenance is performed on the  
14 doors on the bottom of the cars, there will be no fugitive  
15 dust.

16 Q. Okay. So let's go back to the -- one of those opinions,  
17 the time estimates.

18 Do you know what Mr. Sullivan's time estimate was with  
19 respect to the staging and unloading of the rail cars?

20 A. Mr. Sullivan's total estimate was 23.4 hours, but that  
21 also included handling the empty cars, doing an air test and  
22 some other things beyond just unloading the train.

23 Q. And how long will it actually take to -- from first  
24 arrival at the yard to being empty cars at the anticipated OBOT  
25 facility?

1 A. Nine hours.

2 Q. How long will it take to actually discharge the cargo from  
3 the cars at the dumping pits?

4 A. About 5.2 hours.

5 Q. Can you help the judge -- how did you calculate that  
6 number?

7 A. Well, I estimated, and it's from experience in seeing how  
8 rapid discharge cars discharge and the takeaway belts that are  
9 proposed, that it will take about three minutes per car to  
10 unload a car.

11 Q. Times --

12 A. So 104 cars at three minutes is going to be about  
13 5.2 hours.

14 Q. And how long did Mr. Sullivan estimate that it would take?

15 A. 6.9.

16 Q. And what was his math?

17 A. About four minutes a car.

18 Q. There is also a six-and-a-half-hour discrepancy between  
19 your two measurements for how long this process will take, or  
20 390 minutes. Can you explain what that discrepancy is?

21 A. It looks like Mr. Sullivan took some information from the  
22 preliminary 10 percent HDR design or preliminary 10 percent  
23 design, where it shows that there will be dwell time after the  
24 train arrives, waiting for a crew to come to the terminal to  
25 operate the equipment to dump the train. And so we had that

1 built in where, in my discussions with OGRE and OBOT, they are  
2 going to have sufficient employees and sufficient shifts to  
3 work 24/7.

4 Q. So if I understand correctly, Mr. Sullivan's opinion is  
5 that the trains would just have to sit for six and a half hours  
6 after arriving before they could be unloaded?

7 A. Approximately that, yes.

8 Q. And it's your opinion that the trains wouldn't have to sit  
9 for six and a half hours doing nothing before they are  
10 unloaded, is that correct?

11 A. No. That's not good business to have the trains sit.

12 Q. Okay. Do you agree or disagree with Mr. Sullivan's  
13 opinion that the train would have to be put into two tracks in  
14 this courtyard?

15 A. No, I do not.

16 Q. So we already have up here X-1944. Do you recognize that  
17 as a map of the anticipated OBOT rail and yard?

18 A. Yes.

19 Q. Can you just explain for the Court how, keeping in mind  
20 we've heard other testimony -- but explain for the Court how  
21 are trains going to get to the yard and how are they going to  
22 be unloaded so that we can understand the difference between  
23 9 hours and 24 hours?

24 THE WITNESS: Your Honor, is it okay to use a  
25 pointer?

1           **THE COURT:** You can use a pointer. You can go down  
2 there and point with your finger. Whatever you're most  
3 comfortable doing.

4           **THE WITNESS:** Probably go down and point with a  
5 pointer.

6           **THE COURT:** Sure.  
7 (Witness steps down.)

8           **THE WITNESS:** So, currently, it's anticipated that  
9 the route of the trains will bring it into the south end of the  
10 Union Pacific's intermodal facility onto a new track that's  
11 currently not there til this project comes along, a running  
12 track which will bring it into the -- into the yard, into the  
13 support yard here (indicating). That train will pull into one  
14 of the support yard tracks until the rear of the train is what  
15 we call "in the clear," so it clears all the other tracks.

16           When it reaches this point (indicating), it will stop with  
17 52 cars and possibly the rear locomotives, if there is  
18 distributive power on it, and those are the engines they put on  
19 the back end sometimes that you see.

20           Stop here. A trainman will secure these cars with hand  
21 brakes on them, and then the train will pull back around and on  
22 up to the terminal with the other 52 cars, leaving 26 cars on  
23 each of the unload tracks.

24           At some point in this process, the Union Pacific crew will  
25 get off the train and the OGRE crew will get on the train and

1 make those moves. So normal practice in the railroad industry  
2 and with their short lines and their partners is to make  
3 agreements to use Union Pacific locomotives to make certain  
4 moves. Possibly that's what they will do, is make those moves.

5 You know, it's -- the most efficient way to make that move  
6 would be to have the Union Pacific power stay on the train and  
7 then pull those cars up in there, leave them at the terminal,  
8 go back on one of the tracks and come back, and either the  
9 power will be put away at that point or they will use the power  
10 to pull the next cut up onto the outside track at the terminal,  
11 where it's waiting to be dumped.

12 **Q.** So Mr. Sullivan added up sequentially a bunch of switching  
13 activities that he believes can't be done simultaneously.

14 (Witness resumes stand.)

15 **Q.** Can those activities, the switching activities you just  
16 described, be done at the same time for purposes of adding up  
17 how long this takes?

18 **A.** Yes. And by bringing the train directly into the  
19 terminal, the first cut, you eliminate about five of those  
20 moves.

21 **MR. SWEDLOW:** Can we call up 522, which is the HDR  
22 spreadsheet?

23 (Document displayed.)

24 **BY MR. SWEDLOW**

25 **Q.** Did you utilize this HDR spreadsheet in calculating the

1 time it would take to receive and unload the trains to empty?

2 **A.** No, I did not.

3 **Q.** Is there any reason why you didn't rely upon the  
4 information and time estimates in this?

5 **A.** Well, for one, it was a working draft. They noted it was  
6 worst-case scenario. And so this was something they put  
7 together probably to help cost and to come up with at least an  
8 idea of the plans for how they were going to do their trains.  
9 And I didn't use it because there is better ways to do it than  
10 how HDR came up with it.

11 **Q.** I'd like to switch to ask you about the actual cars  
12 themselves. Are you familiar with rapid discharge bottom  
13 outlet cars?

14 **A.** Yes. That's the cars that Bowie currently uses, and  
15 I've -- they have been in the business about 20 years.

16 **Q.** Do you have personal experience with these cars?

17 **A.** Yes.

18 **Q.** Also, I wanted to ask you about covered cars. I think you  
19 testified earlier that there are covered cars used with coal  
20 transport as of today, is that correct?

21 **A.** Yes, there are.

22 **Q.** And how do you know that?

23 (Photograph displayed.)

24 **A.** Well, in reading industry papers and being on the  
25 short-line -- on some committees with the short-line

1 association, I knew that the DMVW Railroad in North Dakota was  
2 handling a coal train between a mine handling lignite coal and  
3 into a power plant.

4 So I Googled it -- now we have the internet -- and found  
5 their train and then gave Randy Aden, their general manager, a  
6 call and asked them was this video that I found one of their  
7 coal trains, and he said it sure was. And so --

8 **Q.** Who is Randy Aden?

9 **A.** Randy Aden is the general manager of the DMVW Railroad.

10 **Q.** And is this -- we're looking at slide 3 here. Is this the  
11 photo that -- of the Google video or the video that you found  
12 on the internet of these coal --

13 **A.** Yes.

14 **Q.** -- covered rail trains?

15 **A.** Yes, it is.

16 **MS. LOARIE:** Your Honor, we would object to the use  
17 of that video -- the use of the picture since there is no  
18 foundation for it.

19 **THE COURT:** I think you're probably right, but you  
20 can go ahead and proceed with the testimony, and I'll decide  
21 whether it's valuable or not later.

22 **MR. SWEDLOW:** Okay.

23 **BY MR. SWEDLOW**

24 **Q.** You see that the top of this photo is the cover on the  
25 rail cars, is that right?

1 A. Yes, the cars are covered.

2 Q. And the bottom of this photo is what? What is it at the  
3 bottom of the --

4 A. Well, the bottom -- that's a rapid discharge car, so the  
5 bottom of the photo, those triangular-looking things, are the  
6 slope sheet and gate on the car that allow the coal to flow out  
7 of the car.

8 Q. Do you know how many of those -- or these covers for coal  
9 train cars are in operation at the DMVW train facility?

10 A. They have 160 cars in their fleet.

11 Q. Do you know why they have 160?

12 A. They run approximately a 75-car train, two sets. So they  
13 have 70 -- you know, 150 cars. And then they have some spares  
14 in case some need to be repaired or -- for whatever reason.

15 Q. Are you aware of any another companies that also sell  
16 covers for train cars?

17 A. Well, the DMVW folks have a -- someone that made their  
18 covers, and they would not tell me who it is because they are  
19 getting a patent on them. But they are willing to sell those  
20 covers to anybody that is willing to buy them.

21 And then there is a company I know called Ecofab that  
22 builds covers for rail cars and some specifically for coal  
23 operations.

24 Q. Based on your 48 years' experience with coal and rail  
25 operations, is it your opinion that if this OBOT facility

1 required the use of covered rail cars for coal transport, that  
2 it would be possible?

3 A. Yes.

4 Q. In fact, does Mr. Sullivan, the City's operations expert,  
5 also assume that these cars would be covered when he does his  
6 time estimates?

7 A. I think he does. And then he actually said something  
8 about the covers being -- have to be taken off at the mine.  
9 I'm not sure if that's the case, but he does, I think, assume  
10 there is covers on the cars.

11 Q. And if the cars are covered as depicted in this picture,  
12 will there be a fugitive dust problem off the top?

13 A. No. It's got a cover on it. It seals it in.

14 Q. So can you explain what the basis of your opinion that  
15 dust will not come out of a covered car is?

16 A. Well, I asked Mr. Aden, too: Do you have a problem with  
17 dust with those cars? Why did you put the covers on?

18 He said: Well, we don't -- it's lignite, which, again, is  
19 a different kind of coal. If Powder River is a dirt that  
20 burns, lignite is kind of like mud that burns, except that they  
21 dry it. He gets no dust from it. It also keeps any rain,  
22 water out and prevents freezing on the cars.

23 Q. Do you know if the coal transport operations at the OBOT  
24 facility plan to use these covered rail cars?

25 A. That is my understanding from OBOT, that they are going to

1 use covers on the cars, and I think from Mr. Wolff and  
2 Mr. Bridges' testimony, they agreed if they needed to, they  
3 would use the covers on the rail cars. And I think the OBOT  
4 terminal is going to require that.

5 **Q.** I want to switch to ask you about the stop-and-start  
6 motions in that staging process and unloading process that you  
7 testified about earlier.

8 Will those stop-and-start motions during the switching  
9 activities cause dust to escape from the train cars?

10 **A.** It should not, as long as the bottom outlet doors are  
11 properly maintained.

12 **Q.** What do you mean by that, that "the bottom outlet doors  
13 are properly maintained"?

14 **A.** The bottom gates have to be properly maintained so they  
15 close fully and so -- that's one of the things thermal  
16 operators, railroads, everybody keeps an eye on, is to make  
17 sure those bottom gates are properly maintained.

18 **Q.** Is there any other reason why the stop-and-start motions  
19 at this facility will not cause dust release?

20 **A.** Well, we're going to use air brakes, the train air brakes  
21 to handle the train, which reduces the slack action in the  
22 train, or "jostling," if you want to call it that. There is  
23 always slack action. And we'll use air brakes.

24 Plus, at the terminal itself rather than one car at a time  
25 over the pit, the anticipated design is going to be a pit big

1 enough for a continuous movement, as that rapid discharge car  
2 opens, for the coal to fall into the pit based on the belt  
3 takeaway rates where they can keep moving at a constant speed.  
4 We don't know what that is yet because we don't know belt  
5 takeaway. And they will keep right on moving.

6 **Q.** Are you familiar with the 2009 BNSF report that has been  
7 the subject of earlier testimony in this trial?

8 (Document displayed.)

9 **A.** The RETAC report?

10 **Q.** Yes. Are you familiar with it?

11 **A.** Yes.

12 **Q.** Do you know generally what was being studied in that  
13 report?

14 **A.** Prior to BNSF presenting at RETAC, there was a series of  
15 derailments in the Powder River Basin caused by the track  
16 structure being compromised. Nobody was sure what was causing  
17 those compromises, so BNSF and UP, the joint owners of the  
18 line, went out there and did some studies and determined that  
19 coal falling off cars, top of the cars especially, were fouling  
20 the ballast of that first couple hundred miles of the train  
21 trip. And that fouled ballast, then, was causing the track  
22 structure not to be as strong, and this, in turn, caused some  
23 derailments.

24 **Q.** So when the study was talking about the loss of product  
25 and measuring how much was lost off the top and bottom, was it

1 talking about dust or was it talking about coal product?

2 **A.** It was both.

3 **Q.** Can you go to slide -- or Page 12 of this Exhibit 515.

4 (Photograph displayed.)

5 **Q.** So these are -- this is a couple photos from this BNSF  
6 PowerPoint study here. Do you see what I'm looking at?

7 **A.** Yes. I sure do.

8 **Q.** Can you describe what is being shown on the left side and  
9 what is being shown on the right side?

10 **A.** Well, on the left side is a car that's been loaded to full  
11 visible capacity. And, in fact, it's overloaded to full -- not  
12 by weight, but by commodity. And there is coal on what we call  
13 the "top rails" or side rails of the car. I can't tell if  
14 there -- it looks like there is some even on the end rails.

15 And that pile isn't really shaped in any way. It's just  
16 flood-loaded in there, and the coal is up over the side of the  
17 car.

18 **Q.** So does the -- the transport of coal on the -- when the  
19 car on the left side versus the transport of coal in the car on  
20 the right side, would you expect, based on your 40 years -- 48  
21 years of coal transporting experience, that you would lose  
22 product and dust from the one on the left?

23 **A.** You're going to lose stuff on the one on the left as soon  
24 as you start leaving the mine because it's going to start  
25 falling off.

1 Q. Is the product loss going to be consistent from mile 1,  
2 when you leave the mine, to mile 700, when you would get to the  
3 OBOT terminal?

4 A. No. There is not going to be as much coming off the cars,  
5 especially if it's contoured, like the picture on the right  
6 side. You're going to have minimum product loss with that  
7 being contoured.

8 Q. So is this BNSF study applicable to the coal transport  
9 operations that will be associated with the OBOT facility?

10 A. No, because OBOT is going to require covers.

11 Two, it's Powder River coal, which is finer and lighter,  
12 kind of a dust.

13 And, three, OBOT intends to have covered cars which will  
14 eliminate coal coming from the top of the cars. And they are  
15 going to require, just like BNSF did in this study, that the  
16 shippers of these cars maintain the bottom outlet gates. That  
17 was another thing they found.

18 Back when these studies were done in '09 and '08, coal was  
19 a very big part of the power generation story. And so those  
20 coal trains were turning very fast, and they weren't getting  
21 maintained.

22 BNSF and UP then required their customers to start having  
23 them better maintained to stop the loss that was occurring out  
24 of the bottom of the cars.

25 Q. Can we show slide 4, please?

(Photo displayed.)

**Q.** So this is a photo -- well, what is this is photo of?

**A.** That is a photo of a Trinity rapid discharge hopper car. The reason I know it's a Trinity is its markings are TILX, which is Trinity Leasing. So it's a Trinity rapid discharge car that can also be used in rotary dump service.

If you see the green striping on the end, we call that "the stripe." That tells us that we've got a rotary coupler. And the nonstriped end is a non-rotary coupler. You don't want to have two non-striped ends together in a rotary dump system because you can turn all the cars over.

**Q.** Does this have the bottle load --

**A.** This also has bottom outlet gates.

**Q.** And so what is it about the bottom outlet gates that actually prevent the dust from just escaping while it's on the tracks?

**A.** As you can see, there is a slope on the car, and that's -- that's called the "slope sheet." And then that door that closes, they are operated with an air and hydraulic cylinder. When that door closes, there is a little bit of a lip as the door closes onto that slope sheet, and that lip locks into the slope sheet, preventing anything from coming out.

**Q.** So if these rail cars are maintained properly, will there be coal and coal dust leaking out the bottom?

**A.** No, there will not.

1                   **MR. SWEDLOW:** Thank you.

2                                   **CROSS EXAMINATION**

3                   **BY MS. LOARIE**

4                   **Q.** Good afternoon, Mr. Buccolo.

5                   **A.** Good afternoon.

6                   **Q.** I have a couple questions for you. Is it true that you  
7 consulted for OGRE apart from being an expert in this case?

8                   **A.** Yes.

9                   **Q.** And you've done work for OGRE dating back to 2012, right?

10                  **A.** Yes.

11                  **Q.** You were even listed as an employee at an OGRE  
12 presentation at one point, were you?

13                  **A.** You showed me something that said that in the deposition.  
14 I had never seen that information before.

15                  **Q.** Okay. But it's true that you're still a current  
16 consultant to OGRE, is that right?

17                  **A.** Yes.

18                  **Q.** But you didn't disclose that ongoing relationship with  
19 OGRE in your expert report, did you?

20                  **A.** I did not.

21                  **Q.** Okay. And you also consulted for Bowie Resource Partners,  
22 the coal company involved in this case, isn't that right?

23                  **A.** We talked about coal fleet sizing for the port of  
24 Stockton, yes.

25                  **Q.** And you consulted for Bowie for free, didn't you?

1 A. Yes.

2 Q. But you also didn't disclose your prior work for Bowie in  
3 your expert report either, is that right?

4 A. I did not, no.

5 Q. Okay. Your opinion that you just talked about right now  
6 is that there is no coal dust lost from the bottom of coal  
7 cars, is that right?

8 A. That's correct, as long as they are properly maintained.

9 Q. But you never published a study on coal dust?

10 A. No.

11 Q. And you are not a scientist who specializes in coal dust?

12 A. I'm a railroader.

13 Q. You're not an expert on air pollution, like particulate  
14 matter 2.5?

15 A. No, ma'am.

16 Q. Or on PM10?

17 A. Excuse me? I didn't hear.

18 Q. On particulate matter 10 as well?

19 A. No.

20 Q. You're not an expert.

21 And you've never really reviewed the body of literature on  
22 coal dust, is that right?

23 A. Other than industry papers and industry publications on  
24 what was going on in the coal dust, no.

25 Q. Other than a BNSF website talking about a study, isn't

1 that right?

2 **A.** No. Industry publications. Also railway age, progressive  
3 railroad. There were articles in those.

4 **Q.** So two magazine articles and a BNSF website?

5 **A.** I wouldn't characterize it as two. It's been an issue for  
6 a while, and there have been different articles.

7 **Q.** So the first time you've given an opinion on coal dust was  
8 for this case, right?

9 **A.** Yes.

10 **Q.** So you're not really an expert on coal dust?

11 **A.** I can see dust if that's what you say, but, no, I'm not an  
12 expert.

13 **Q.** Okay. And you cite no evidence to support your conclusion  
14 that trains' start-stop motions and coal dust are correlated,  
15 is that right?

16 **A.** Other than 48 years of railroad experience and being able  
17 to see dust if it was coming off the cars, that's -- that's all  
18 I can cite.

19 **Q.** But you don't cite any studies in your report for that,  
20 that conclusion?

21 **A.** Other than I looked at a study from -- I forgot. It was a  
22 Navajo generating station, and they were looking at problems  
23 with their coal movement. And in their study, they determined  
24 maintenance again on those bottom outlet gates. As long as  
25 they were maintained properly, there wouldn't be any coal

1 coming out.

2 **Q.** You recall giving an deposition in this case. I'm going  
3 to pull up the deposition transcript at 186, Lines 7 through  
4 13.

5 (Document displayed.)

6 **MS. LOARIE:** Apologies if you don't have that in  
7 front of you.

8 **BY MS. LOARIE**

9 **Q.** I think you can see it on the screen.

10 **A.** Yes.

11 Looks like it says at Line 7:

12 **"QUESTION:** Do you cite any evidence for your opinion  
13 about coal dust loss?

14 **"ANSWER:** Again, I'm not sure of your question.

15 **"QUESTION:** On Page 5 we're looking at your opinion  
16 about coal dust loss from the bottom of rail cars. Do  
17 you cite any evidence to support your conclusion about  
18 the start/stop motions?"

19 Omitting the objection. The answer is:

20 **"ANSWER:** No, I don't cite any evidence."

21 Do you recall that testimony?

22 **A.** Yes.

23 **Q.** You also disregarded coal dust top and bottom loss studies  
24 from that RETAC panel that you just discussed, is that right?

25 **A.** Yes.

1 Q. Okay. So you base your opinion about there being no coal  
2 dust loss from rail cars mainly on testimony given by the COO,  
3 Mr. Wolff of Bowie Resource Partners, is that right?

4 A. No.

5 Q. Could we go to Line 221 of your deposition -- I'm sorry.  
6 Page 221, Line 16 through 22. The question is:

7 "QUESTION: It looks like your other basis for there  
8 being no -- asserting that there is no coal dust loss,  
9 is testimony from a deposition, is that right?

10 "ANSWER: Yes.

11 "QUESTION: From testimony by James Wolff at Bowie, is  
12 that right?

13 "ANSWER: Yes."

14 Do you recall that testimony?

15 A. Yes.

16 Q. You also testified that you personally have not  
17 experienced any problems with coal dust in your work at port of  
18 Stockton, is that right?

19 A. That's correct.

20 Q. But didn't you also testify that you've done ballasts  
21 repair at Stockton due to coal dust falling?

22 A. Well, you are mischaracterizing what I said in the  
23 deposition.

24 Q. Let's look at it. Let's go to Page 216, Lines 19 through  
25 23:

1       **"QUESTION:** Have you repaired ballasts fouled with  
2 coal dust?

3       **"ANSWER:** Yes.

4       **"QUESTION:** Where have you done that?

5       **"ANSWER:** Port of Stockton."

6 Do you recall that testimony?

7       **A.** I sure do.

8       **Q.** Okay.

9       **A.** But that was not within the yard tracks. That was at the  
10 outside of the dumper, because coal was coming out of the  
11 dumper. And it was in the first 20 feet on either side of the  
12 dumper. It wasn't coal falling from the bottom of the cars.  
13 We dug the track out. We made the repairs in the dumper, and  
14 we didn't have a problem after that.

15       **Q.** Let's talk a little bit about your experience. You said  
16 you have been in the rail industry for about 40 years, is that  
17 right?

18       **A.** Forty-eight.

19       **Q.** Okay. And you have had some experience with coal trains,  
20 fair enough to say?

21       **A.** Yes.

22       **Q.** So after this experience in the rail industry of 40 years,  
23 the only time you have seen a coal train is from Googling it on  
24 the internet?

25       **A.** I'm sorry. I couldn't hear you.

1 Q. The only time you have seen a covered coal car is from  
2 Googling it on the internet?

3 A. Yes, ma'am.

4 Q. And in that picture that we were talking about, was there  
5 any way to verify there was coal in that car?

6 A. No, there wasn't other than Mr. Aden told me that that was  
7 one of their coal trains.

8 Q. But you weren't even sure that you and Mr. Aden viewed the  
9 same picture or YouTube video, were you?

10 A. Well, I think we were when we discussed it.

11 Q. Can we go to Page 247, Lines 8 through 14 of your  
12 deposition.

13 (Document displayed.)

14 BY MS. LOARIE

15 Q. (As read)

16 "QUESTION: How do you know you and Mr. Aden were  
17 looking at the same video?

18 "ANSWER: I don't know.

19 "QUESTION: So you're not 100 percent certain those  
20 cars were hauling coal?

21 "ANSWER: The springs were down, and he said they only  
22 haul coal in those cars."

23 Is that right?

24 A. That's correct. The springs were compressed.

25 Q. But you --

1           **THE COURT:** I'll tell you, I mean, you're free to  
2 pursue this line of questioning if you want, but I don't know  
3 how calling a guy to talk to him about his trains is the proper  
4 subject of expert testimony. So I'll just tell you that now.

5           **MS. LOARIE:** Okay.

6           **THE COURT:** In case it affects how you want to use  
7 your time.

8           **MS. LOARIE:** Thank you. I appreciate that.

9           We would also make a hearsay objection to that for obvious  
10 reasons.

11 **BY MS. LOARIE**

12 **Q.** So in your 40 years of working in the rail industry,  
13 you've never actually witnessed in the flesh a unit coal car  
14 train using covers, is that right?

15 **A.** Personally, no.

16 **Q.** Okay. And so the generally accepted manner in which coal  
17 is shipped in the U.S. is in uncovered cars, is that right?

18 **A.** That's correct.

19 **Q.** And you also say that there is no sort of requirement for  
20 coal cars to be covered, is that right?

21 **A.** There is no requirement for coal cars to be covered.

22 **Q.** And are you aware that -- I think you referenced earlier  
23 that the BNSF was supposed to commence a study on covered coal  
24 cars, is that right?

25 **A.** They were going to do a study. I don't know if they ever

1 did complete it or not.

2 **Q.** Okay. So I don't know if you're aware that BNSF has not  
3 yet been able to commence its study because it claims it has  
4 found no coal car cover prototypes that are ready to go?

5 **A.** I'm not aware that they said that.

6 **Q.** Okay. The only basis for your opinion, then, that Bowie  
7 will cover its coal cars in Oakland is just the deposition  
8 transcripts from this case?

9 **A.** And I spoke with Mr. Tagami and Mr. McClure, and they said  
10 they are going to require whoever ships coal into the Port of  
11 Oakland to have covered cars.

12 **Q.** So you're just relying on -- on what someone told you,  
13 nothing else?

14 **A.** Well, they are the folks that are going to run the  
15 operation, so yes.

16 **Q.** But you're also aware that -- I presume, that Bowie does  
17 not use covered cars anywhere in its current operations,  
18 anywhere in the U.S.?

19 **A.** That's correct.

20 **Q.** Okay. You also based your coal dust opinion on the  
21 assumption that no Powder River Basin coal would be handled at  
22 the OBOT terminal, is that right?

23 **THE COURT:** Can you try to slow down just a little  
24 bit?

25 **MS. LOARIE:** I'm sorry.

1 BY MS. LOARIE

2 Q. You based your coal dust opinion on an assumption that no  
3 PRB coal, or Powder River Basin coal, would be handled at the  
4 OBOT terminal?

5 A. That's correct.

6 Q. But you're not aware of any limitations that we placed on  
7 the origins of coal moving through the OBOT terminal?

8 A. The only limitation is going to be that it isn't  
9 economically practical to move Powder River coal in this  
10 direction, no.

11 Q. You're not an economist, are you?

12 A. No, but I know rail rates.

13 Q. But you base that opinion on the economics of coal  
14 movement?

15 A. On the economics on the rail rate to move coal that way.  
16 I don't think the coal will move that way.

17 Q. Okay. But you're not an economist?

18 A. I am not.

19 Q. Okay. In terms of you talked about there being some  
20 train-timing issues, you say that there would be three minutes  
21 per car for the type of cars allegedly used, is that right?

22 A. That's correct.

23 Q. As opposed to, I believe, Mr. Sullivan, the other expert  
24 going on this afternoon, says four?

25 A. Yes.

1 Q. What was your basis for the three-minute assumption?

2 A. I've, in different locations, timed the unloading of rapid  
3 discharge in rotary cars and used that as a number that I felt  
4 was fair; that it would take three minutes per car based on my  
5 understanding of the belt system they are going to use to take  
6 away the coal from the pit.

7 Q. So it's just kind of a guess at time; is that fair to say?

8 A. I wouldn't call it a guess. Again, I timed other cars.  
9 Some cars take a minute and a half. Some cars take, as  
10 Mr. Sullivan said, four minutes.

11 It depends more on the takeaway belt system and the pits  
12 than it does on the actual car. Those cars will unload in a  
13 minute and a half.

14 Q. I believe you said you based your assumption on using a  
15 stopwatch, maybe, to time two coal cars at some point at  
16 Stockton, is that right?

17 A. I timed some at Stockton and Richmond, yes, ma'am, with a  
18 stopwatch.

19 Q. You did it twice a couple years ago?

20 A. With the stopwatch. I've observed it many more times.  
21 So, I mean, that just verified what I saw.

22 Q. But you never wrote down the times anywhere, did you?

23 A. No.

24 Q. Okay. And you also said that you disregarded, I believe,  
25 it's OBOT's HDR report in this case, is that right?

1     **A.**    Yes.

2     **Q.**    And you did that because you felt the HDR report was  
3     flawed?

4     **A.**    I did.

5             **MS. LOARIE:**  Okay.  Thanks.  Nothing further.

6             **THE COURT:**  Anything further?

7             **MR. SWEDLOW:**  No, nothing further.

8             **THE COURT:**  Great.  Thank you very much.

9             (Witness excused.)

10            **THE COURT:**  You-all want to break for lunch now or --  
11     probably makes sense to break for lunch now.

12            Okay.  So we'll do that.  And why don't we plan on  
13     returning at 25 after the hour.

14            **THE CLERK:**  Court is in recess.

15            **THE COURT:**  30 after the hour.  Let's just make it 30  
16     after the hour.  Feeling generous today.

17            **MR. FELDMAN:**  I was going to say...

18            (Whereupon at 12:34 p.m. proceedings were adjourned  
19     for noon recess.)

P R O C E E D I N G S

JANUARY 17, 2018

1:34 P.M.

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**THE COURT:** Okay. What's next?

**MR. FELDMAN:** Thank you for the extra few minutes.  
It helped.

Lyle Chinkin, your Honor. This witness will take a few  
minutes -- I mean, more than a few minutes.

**THE COURT:** Okay.

LYLE CHINKIN,  
called as a witness for the Plaintiff herein, having been duly  
sworn, testified as follows:

**THE WITNESS:** Yes, I do.

**THE CLERK:** Thank you. Please be seated.

And for the record, please state your first and last name  
and spell both of them.

**THE WITNESS:** Lyle Chinkin. L-Y-L-E, C-H-I-N-K-I-N.

**THE CLERK:** Thank you.

DIRECT EXAMINATION

**BY MR. FELDMAN**

**Q.** May I ask what your area of expertise is that may be  
relevant to this case?

**A.** I'm an air quality scientist. I do emissions inventories,  
air quality data analysis, air quality measurements and air  
quality modeling.

1 Q. And could you tell the Court, please, your educational  
2 background?

3 A. I have a BS and an MS in Atmospheric Science from the  
4 University of California at Davis.

5 Q. Where do you currently work?

6 A. Currently work at a consulting firm called Sonoma  
7 Technology, Incorporated in Petaluma, California.

8 Q. What is your current position there?

9 A. I'm currently chief scientist and president emeritus.

10 Q. This may be obvious, but does that mean that you were once  
11 the president?

12 A. Yes, I was president for the last 11 years.

13 Q. And how long have you been at STI?

14 A. Approaching 25 years this year.

15 Q. Prior to joining STI, did you have professional experience  
16 in the public sector?

17 A. Yes, I did.

18 Q. Please.

19 A. I started my career out of college working for the  
20 California Air Resources Board. I worked there for about five  
21 years.

22 Q. What types of clients do you typically or generally  
23 consult for at STI?

24 A. Some of our major clients at STI are the U.S.  
25 Environmental Protection Agency. Other federal agencies, such

1 as NASA, NOLA, U.S. Forest Service. And I also do work for  
2 some private sector clients and local and state governments.

3 Q. And have you consulted for the U.S. EPA?

4 A. Yes, I have.

5 Q. In what capacity?

6 A. The principal thing that Sonoma Technology does for the  
7 U.S. EPA is to help them run a program called AirNow,  
8 A-I-R-N-O-W. It allows anybody to log on the internet and see  
9 what the air quality is where they live right now. That's  
10 where it's called AirNow.

11 Q. Have you written any guidance documents on behalf of the  
12 EPA?

13 A. Yes, I have.

14 Q. Please.

15 A. I wrote the seminal document on how to prepare emission  
16 inventories for air quality modeling for the U.S. EPA several  
17 decades ago.

18 Q. Have you peer-reviewed EPA reports on behalf of EPA?

19 A. Yes, I have.

20 Q. Please.

21 A. So I was appointed to a number of peer-review panels for  
22 the U.S. EPA. Relevant to this case, I was appointed to review  
23 what is called the "PM air quality criteria document." That's  
24 what U.S. EPA uses to determine air quality standards.

25 I was also appointed to review emissions from rail yard

1 operations in the Midwest for a particular study.

2 Q. Have you been appointed to any relevant organizations in  
3 connection with your work on air quality?

4 A. Yes, I have.

5 Q. Please.

6 A. I was appointed to the National Academy of Sciences'  
7 special committee looking at air pollution from stationary  
8 sources like power plants and oil refineries, et cetera.

9 Q. Have you presented at any conferences or public meetings?

10 A. I routinely present and publish. I have probably been to  
11 hundreds of conferences where I have presented over my career.

12 Q. And have you ever been accepted as an expert in federal  
13 court with respect to air quality?

14 A. Yes, I have. Many times.

15 Q. I'm going to ask you a series of questions, and I don't  
16 mean to be facetious, about the OBOT terminal and whether it is  
17 a big deal from an air quality perspective. Okay?

18 A. Okay.

19 Q. Based on your nearly 40 years in the air quality field,  
20 how would you determine generically whether -- one second.

21 THE COURT: You're fine.

22 BY MR. FELDMAN

23 Q. Sure. Based on your 40 years in the air quality field in  
24 the most general terms, how would you determine whether a new  
25 source of pollution is, in fact, a big deal? We'll get more

1 specific in a moment.

2 **A.** Okay. So, basically, I'm asked this question a lot. You  
3 know, someone wants to build a new source, and how do you  
4 decide if it's a big deal and how do you handle it.

5 So there is a very scientific method we follow, and it has  
6 various steps. And the first step is you calculate its  
7 emissions.

8 The second step would be you do air quality modeling to  
9 see where those emissions go and who is affected by it. And  
10 then you compare the emissions and the air quality to establish  
11 regulatory thresholds to see if they exceed any established  
12 thresholds of concern.

13 **Q.** If I asked you to use a car exhaust to describe for His  
14 Honor what "emissions" means in your last answer -- and I'm not  
15 sure if you said this -- but air quality is in your last  
16 answer, could you do that, please?

17 **A.** Sure. So if you think about a car and it has an exhaust  
18 pipe, if you put your mouth -- and I don't recommend anybody do  
19 this. But if you put your mouth on the tail pipe and you just  
20 breathe all that air in, that's the emissions coming out of the  
21 tail pipe. But if you move 10 feet away or 100 feet away or a  
22 mile away, you're breathing air quality concentrations, and the  
23 only way to know how much you're breathing would be to model  
24 how much of those emissions got to where you were and breathe  
25 that air.

1 Q. You mentioned something about thresholds or standards?

2 A. Yes.

3 Q. Are there CEQA thresholds for particulate matter?

4 A. Yes, there are.

5 Q. And what are they?

6 A. So in the state of California, there is established  
7 thresholds for emissions, and there are two that are relevant  
8 here. One for PM10. That's the size of particles less than  
9 10 microns. And one for PM2.5, particles less than two and a  
10 half microns, and those are 15 tons per year or 10 tons per  
11 year, respectfully, for PM10 and PM2.5.

12 Q. So the record is clear, 15 tons for PM10 and 10 tons for  
13 PM2.5?

14 A. That's correct.

15 Q. I may have given the Court the impression the other day  
16 that those numbers are BAAQMD numbers. Are they?

17 A. They are also used by BAAQMD, as well as other districts  
18 in the state of California.

19 Q. Why is modeling -- after emissions, why is modeling the  
20 next step in determining if a proposed source is a big deal?

21 A. Well, you need to understand where the emissions go. And  
22 so I'll give an example. You might have a facility that's as  
23 big as a football field. And all the emissions are occurring  
24 right at the 50-yard line.

25 So it's emissions because it went into the air, but it --

1 did it get beyond the end zone to where someone could breathe  
2 it in the stands?

3 So emissions are important, but air quality is outside the  
4 fence line of the property, and that's what you need to  
5 understand, what are people being exposed to. And the only way  
6 to do that is to model the emissions to get to the air quality.

7 **Q.** In general terms can you describe for the Court what a  
8 model in this context is or would be?

9 **A.** Sure. In simple terms a model is something you do on the  
10 computer. And it combines weather data, emissions information  
11 that you've calculated and facility-specific information, like  
12 how tall the buildings are, how tall the stack is. It combines  
13 all that information, and then produces mathematically what the  
14 air quality concentrations would be that someone might be  
15 exposed to.

16 **Q.** And I'm not going to ask you any questions about this,  
17 other than what I'm about to ask. You've prepared an expert  
18 report that has in it modeling for this facility, correct?

19 **A.** Yes, I did.

20 **Q.** So should the Court at any point in these proceedings -- I  
21 don't mean during the trial days -- have any interest in that?  
22 You're able to present that to him?

23 **A.** Yes, I am.

24 **Q.** Are you familiar -- well, withdraw.

25 Now let's get a little bit more technical about what a big

1 deal is or how it's -- what it's compared to. Can we do that?

2 **A.** Sure.

3 **Q.** Once you have the -- so you've determined the emissions  
4 and then you're determining the results of the model -- you've  
5 determined the results of the model.

6 **MR. FELDMAN:** Can I start again?

7 **THE COURT:** Sure.

8 **BY MR. FELDMAN**

9 **Q.** You've determined the emissions and you've determined the  
10 results of your model. What do you measure that against?

11 **A.** So the -- the emissions can be compared against the CEQA  
12 thresholds we just mentioned a moment ago. And the modeling  
13 outputs can be compared against air quality standards that have  
14 been established by the Bay Area District and the U.S. EPA.

15 **Q.** Are you familiar with the phrase or term -- excuse me.

16 Are air quality concentration thresholds monitored for  
17 individual sources or for some other type of source?

18 **A.** So regulatory agencies like the Bay Air District and the  
19 U.S. EPA and the State of California put out monitors spaced  
20 out to measure regional and community air quality. They are  
21 not really measuring any individual specific facility.

22 **Q.** What are NAAQS?

23 **A.** NAAQS?

24 **Q.** That's -- excuse me, that's N-A-A-Q-S.

25 Please.

1     **A.**    NAAQS is an acronym that stands for the National Ambient  
2     Air Quality Standards.

3     **Q.**    And who promulgates that?

4     **A.**    That is the U.S. EPA.

5     **Q.**    And may I ask you who enforces that in the -- I'll say the  
6     Bay Area?

7     **A.**    In the Bay Area that's enforced by the -- I pronounce it  
8     Bay Area Air Quality Management District, or BAAQMD. You have  
9     been referring to as BAAQMD or BAAQMD here today.

10    **Q.**    Yes. Without the Court's permission, I might add.

11           And what does -- what do the NAAQS do, or how -- how do  
12    they impose themselves on results of a model?

13    **A.**    So the -- the NAAQS are set to protect public health from  
14    air pollution. And so when you're looking at a source that  
15    wants to be built, you did the emissions, you ran the model,  
16    you compared those outputs to the NAAQS to see if it was going  
17    to cause any problem from a threshold standpoint against those  
18    air quality standards.

19    **Q.**    And are you able to describe for the Court whether those  
20    are -- the measurements that are required by the NAAQS are  
21    used -- to measure against the NAAQS, they were measurements  
22    over time or not?

23    **A.**    So the NAAQS have a time element to them that's important  
24    to understand. So, for example, for PM, for particulate  
25    matter, there are standards set for how much air pollution you

1 can experience in one 24-hour period. Also for an annual  
2 average, for a whole year.

3 **Q.** And are the concentrations --

4 **THE COURT:** Sorry to interrupt. Is it an average  
5 over a 24-hour period or total over a 24-hour period?

6 **THE WITNESS:** The way air quality is measured, your  
7 Honor, is you measure an amount of weight of material and then  
8 divide it by all the air that went through the filter. So it's  
9 an average over the 24-hour period. You take the total, divide  
10 it by 24 hours to get to that concentration.

11 **THE COURT:** Thank you.

12 **MR. FELDMAN:** You're welcome.

13 **BY MR. FELDMAN**

14 **Q.** Is it possible -- withdrawn.

15 Does BAAQMD post monitors throughout the Bay Area?

16 **A.** There's a number of monitors throughout the Bay Area.

17 **Q.** And does the results of the monitoring get compared to  
18 something by BAAQMD?

19 **A.** Yes, it does. The monitoring data is what is compared to  
20 NAAQS, that is correct.

21 **Q.** And what happens if a single monitor in the Bay Area is  
22 above the NAAQS threshold pursuant to their method of  
23 determining that?

24 **A.** So if one monitor, in any one monitor, single monitor in  
25 the entire nine Bay Area counties, violates the NAAQS quality,

1 the entire nine Bay Area counties is considered in violation  
2 and will be called "non-attainment."

3 Q. Is it possible for Oakland to be out of compliance while  
4 the rest of the Bay Area is in attainment?

5 A. That is not correct.

6 Q. Why not?

7 A. Because if one of the monitors in Oakland was in  
8 non-attainment, the entire Bay Area would be in non-attainment.

9 THE COURT: And non-attainment for a given day, a  
10 given year, a three-year period?

11 THE WITNESS: So the standards are complicated. The  
12 annual average quality is you take the three-year average that  
13 you're referring to, your Honor, and so you need three years'  
14 worth of data to determine whether or not you're in compliance  
15 or not. And then the daily standard is even more complicated  
16 than that.

17 You actually look at what's called the 98th percentile.  
18 And what they mean by that is the government has decided, you  
19 can have a few excursions. Consider 98 as 2 percent less than  
20 100. There is 365 days in a year. Two percent of that would  
21 be about seven days. So the government is basically saying,  
22 the U.S. EPA, you can violate the quality seven times a year on  
23 average for three years and not be in violation.

24 So you can have exceedances as long as you have less than  
25 seven.

1           **THE COURT:** Okay. Thank you.

2           **BY MR. FELDMAN**

3           **Q.** Do you have an understanding of why that might make sense?

4           **A.** Well, there are extreme events that happen, really unusual  
5 weather conditions or what we call "exceptional events," like  
6 the wild fires that happened in the North Bay last fall.

7           **Q.** Where you live?

8           **A.** And that's where I live.

9           So they have built into the system that there are some  
10 extreme events that can happen, so they tried to make it more  
11 robust and not count just the very highest for violation. But  
12 to give you a few opportunities to be in compliance.

13          **Q.** Would you look, please at -- in your notebook and perhaps  
14 on the screen at Exhibit 281, which is one of the versions of  
15 the ESA report?

16          **A.** Okay.

17          (Document displayed.)

18          **Q.** At Page 5-9? And do you see that ESA has stated on that  
19 page that --

20               **THE COURT:** Hold on. Give me a second.

21               **MR. FELDMAN:** Sorry.

22               **THE COURT:** I know it's on the screen, but...

23               **MR. FELDMAN:** That's okay.

24          (Brief pause.)

25               **THE COURT:** Okay. Go ahead.

1 BY MR. FELDMAN

2 Q. That ESA has stated that something is in not attainment  
3 for PM2.5. Do you see that?

4 A. I see that.

5 Q. Do you agree with that statement?

6 A. No, I do not.

7 Q. Well, what is it referring to? That is, what is it saying  
8 is not in attainment?

9 A. So the statement is making the point that California --  
10 well, the Bay Area Air Quality Management District region, the  
11 nine counties I referred to a moment ago, is designated as  
12 non-attainment for PM2.5 under California and federal  
13 standards.

14 Q. And do you agree with that?

15 A. I do not agree with that.

16 Q. Okay. There is a way in which it might be considered to  
17 be correct, and there's a way, I think you think, that it's  
18 completely incorrect.

19 A. That is a correct statement, yeah.

20 Q. Could you explain that to the Court?

21 A. So it's a little confusing in that, along with most  
22 government operations, they take time to happen. So,  
23 factually, the way you determine whether you're in attainment  
24 or not -- as we were mentioning a moment ago, your Honor -- is  
25 the three years of data calculated correctly below or above the

1 threshold, above the NAAQS.

2 In the case of the Bay Area District, they have been below  
3 that level since 2013. So almost, whatever that is, five years  
4 now. But in order to be redesignated as in attainment -- they  
5 were out of attainment prior to 2013. But to be redesignated  
6 as in attainment, there is an administrative process you have  
7 to go through. The district has to submit a redesignation  
8 request to the U.S. EPA. They have to write a plan that says  
9 how they -- they will maintain their status of good air  
10 quality. And then the U.S. federal government EPA has to  
11 approve that plan.

12 Well, that just happened in 2017, but, in fact, from an  
13 air quality standpoint --

14 **THE COURT:** What just happened in 2017?

15 **THE WITNESS:** The EPA just redesignated them as in  
16 attainment administratively.

17 **THE COURT:** Okay.

18 **BY MR. FELDMAN**

19 **Q.** So would it be fair to say this way: The levels of air  
20 quality were consistent with being in attainment, and it took  
21 the government some time to catch up?

22 **A.** That's correct.

23 **Q.** Would you look, please, at Page 4-11, another statement  
24 that ESA makes.

25 **MR. FELDMAN:** Shall I wait, your Honor?

1           **THE COURT:** Yes, please.

2           (Brief pause.)

3           **THE COURT:** Go ahead.

4           **BY MR. FELDMAN**

5           **Q.** This is on Page 4-11. The statement begins:

6                   "Oakland and West Oakland have both experienced  
7           exceedances, et cetera."

8           Do you see that?

9           **A.** Yes, I do.

10          **Q.** Do you agree with that statement?

11          **A.** Again, this is that -- that tricky -- you've got to be  
12          careful in terminology. So while the level of air quality  
13          could exceed that concentration threshold, that doesn't mean  
14          they are violating the NAAQS.

15          **Q.** And why is that?

16          **A.** Because, again, the violation of the NAAQS, as we  
17          mentioned a moment ago, you're allowed some daily exceedances.  
18          You can have up to seven on average over three years and not be  
19          in violation of the NAAQS.

20                So you can have some days, individual days that are over  
21          the standard levels but not still be in violation.

22          **Q.** So if there is a -- one or two exceedances per year, that  
23          would not mean that an area has exceeded the NAAQS?

24          **A.** That is correct.

25          **THE COURT:** Mr. Feldman, can I ask you a quick

1 question?

2 **MR. FELDMAN:** Of course, your Honor.

3 **THE COURT:** At the beginning of this testimony, you  
4 made reference -- or when you turned to this document, you made  
5 a reference to it as a version of the ESA report.

6 **MR. FELDMAN:** I didn't mean to suggest that they were  
7 different versions. I meant they were different exhibit  
8 numbers.

9 **THE COURT:** Okay. Thank you. I just wanted to make  
10 sure.

11 **MR. FELDMAN:** No worries. I've lost count of how  
12 many times it's been marked as an exhibit.

13 I will tell you I made an effort, and I think I succeeded  
14 at the depositions, to use the same deposition exhibit number  
15 every time. I wasn't joined in that effort.

16 **BY MR. FELDMAN**

17 **Q.** There are -- okay. How does BAAQMD ensure that the Bay  
18 Area remains in attainment of NAAQS?

19 **A.** So the Bay Area District is responsible for issuing air  
20 quality permits for sources in its jurisdiction, and those  
21 permit applications have to demonstrate to the district that  
22 they will not cause a violation of the NAAQS.

23 **Q.** What types of permits are required by BAAQMD? And just if  
24 you could -- if you don't mind, just say the names of the  
25 permits that are required.

1 A. So things like operating permits, you know, permission to  
2 construct before you even start operating, those kinds of  
3 things.

4 Q. Is the phrase "authority to construct" familiar to you?

5 A. Yes, it is.

6 Q. And is the phrase "permit to operate" familiar to you?

7 A. Yes.

8 Q. And of what types of facilities are those types of permits  
9 required, if you can say?

10 A. Well, typically, they are required of stationary sources,  
11 like the proposed terminal operation or refinery or power  
12 plant.

13 Q. Does BAAQMD regulate automobile traffic?

14 A. It does not.

15 Q. Who regulates automobile traffic with respect to air  
16 quality in California?

17 A. California is unique in that the California Air Resources  
18 Board regulates vehicles. Outside of California, it's the U.S.  
19 EPA.

20 Q. And did you say "California Air Resources Board"?

21 A. That's correct.

22 Q. CARB?

23 A. CARB, yes.

24 Q. What must -- in this case, for example -- the proposed  
25 terminal demonstrate to BAAQMD in order to -- in order for a

1 permit to construct -- an authority to construct, a permit to  
2 operate to be granted?

3 And I'd like you to give a detailed answer to this if you  
4 don't mind.

5 **A.** Okay. So it's usually an iterative process with the  
6 district, but you would start with a conceptual design of your  
7 facility, a rough estimate of your emission inventories and the  
8 processes. You talk to the district. And you would probably  
9 go back to the drawing board and make a few tweaks, and then  
10 you would compare your sort of final version to the CEQA  
11 thresholds.

12 **Q.** When you say "compare your final version to the CEQA  
13 thresholds," what do you mean?

14 **A.** You would compare your final emissions estimates. And if  
15 you're below CEQA, you're considered good to go, and you work  
16 on your permit process.

17 If you're above CEQA, they would probably say: Go back  
18 and figure out what controls or mitigation measures you can do  
19 and do some air quality modeling, and make sure you're not  
20 violating any NAAQS levels.

21 And then you would negotiate your permit conditions at  
22 that point.

23 **Q.** Okay. I'm going to, if I may, tear apart your answer a  
24 bit. Is that okay?

25 **A.** Sure.

1 Q. You said the first thing you do is present emissions  
2 estimates, is that right?

3 A. That's correct.

4 Q. And whether they did them right or wrong, that's what  
5 appears in the ESA and other materials that were submitted  
6 somehow or another to the City, right?

7 A. That's my understanding, yes.

8 Q. Okay. And am I correct in understanding that what you  
9 said is that that material would, in some fashion, be presented  
10 to BAAQMD, and that material would be compared to what?

11 A. Well, the first step would be to compare the emissions to  
12 the CEQA thresholds of 10 and 15 tons per year.

13 Q. And if you were below those thresholds, what happens?

14 A. Generally, you're greenlighted to go work on your permit  
15 to construct.

16 Q. And if you're above those thresholds?

17 A. Then you're generally asked to do air quality modeling to  
18 better understand the air quality implications.

19 Q. And what does that mean? I realize you've answered this  
20 question already, but I think it's worth it.

21 What does that mean -- what does that kind of modeling  
22 mean in the context of an application to BAAQMD?

23 A. So you would run an air quality simulation model that  
24 would calculate air quality concentrations from your emissions,  
25 and then that would be compared against the NAAQS to see if

1 you're causing the area to somehow bump up to the NAAQS and  
2 cause a problem.

3 Q. And by "the area," what do you mean?

4 A. In this case, the nine Bay Area counties.

5 Q. And if there is a problem, that is to say, if the modeling  
6 were to reveal that you would be bumping up against the NAAQS,  
7 what -- withdrawn.

8 Is there a two-part test that is used to determine  
9 compliance with NAAQS if air quality modeling is required?

10 A. Yes. So if you go into the air quality modeling step, if  
11 that's required, there is sort of two tests that you're faced  
12 with. One is --

13 Q. Excuse me. Could you tell the Court what the two tests  
14 are that you're faced with if you have to do the modeling?

15 A. So if you have to do the modeling, there are two tests.  
16 One is whether or not you're bumping up against the NAAQS and  
17 causing a non-attainment issue.

18 But there is actually a tighter test, which is you're  
19 allowed a certain amount of what's called an "increment." So  
20 let's say the number is 1 microgram and the standard is 12. So  
21 your facility might be -- let's say you live in the Bay Area  
22 and the average number is 10. So if you were contributing at  
23 3, obviously you would be violating it. You would be above 12.  
24 But if you're only contributing a 1, you would be a 9 and you  
25 would be good.

1 But their increment might say if you're 1 or above, you  
2 have to do additional control measures. So there's two tests:  
3 An increment test and an absolute NAAQS test.

4 Q. So if I may. You either -- you either do or don't exceed  
5 the NAAQS, but you're also obligated to not exceed a particular  
6 level of increment, irrespective of whether it goes above the  
7 NAAQS or not?

8 A. That's correct.

9 Q. Okay. Now, I'm not sure if you said this, but is BAAQMD  
10 authorized or permitted to put conditions on the issuance of a  
11 permit?

12 A. Absolutely.

13 Q. What -- can you name for the Court, please, the simplest  
14 kind of condition that BAAQMD could impose?

15 A. The simplest, most common restriction that was put on a  
16 permit is the amount of throughput. If your emissions are too  
17 high, you can cut them in half by cutting your throughput in  
18 half. That's the most common approach.

19 Q. And I'm going to ask you a question now that -- I'm going  
20 to be a little colloquial, if I may.

21 Would it be smart or stupid for somebody to build a  
22 facility and then apply for a permit to BAAQMD afterward? And  
23 have you ever seen it done? And if you haven't, explain it to  
24 the Court.

25 A. Well, I've never seen it done because it costs literally

1 millions of dollars to build a facility. And you would want to  
2 know you could operate the facility. So it always happens in  
3 the other order. You always go to the district first and talk  
4 about it before you consider --

5 **Q.** Well, I'm not sure it's clear for the record what you mean  
6 by "go to the district and talk about it."

7 **A.** Okay.

8 **Q.** What does that mean?

9 **A.** So most districts -- and the Bay Area District is  
10 typical -- want to have a dialogue with proponents or  
11 developers of projects. They are sort of a -- it's a  
12 relationship between the regulators and the regulated, and they  
13 try to keep the door open. And so they want you to come and  
14 talk with them before you put all the stuff on paper.

15 So we make sure we're on the same page and not waste each  
16 other's time in terms of money and effort.

17 **THE COURT:** Do you talk to them or do you get your  
18 permit?

19 **THE WITNESS:** Permit is way down the line. The first  
20 thing is talking.

21 **BY MR. FELDMAN**

22 **Q.** I want --

23 **THE COURT:** That is after you build?

24 **THE WITNESS:** No. You need a permit to build, and  
25 then you need a permit to operate. So there's several steps

1 along the way.

2 **BY MR. FELDMAN**

3 **Q.** I want to make this very clear.

4 Somebody wants to build a stationary source, right? Got  
5 it?

6 **A.** Yes.

7 **Q.** They get some idea about what they are going to do.

8 **A.** Yes.

9 **Q.** At some point, early or late in the process, do they go to  
10 BAAQMD?

11 **A.** As early as possible, they go to BAAQMD.

12 **Q.** And when you say "go to BAAQMD," does that mean that they  
13 write a letter, they write an application? Or what do they do?

14 **A.** Well, there is an -- there is an office within BAAQMD that  
15 deals with this very issue of issuing permits. So you would go  
16 to that permit office, schedule an appointment, and sit down  
17 with the permit reviewers and say: Hey, we're thinking about  
18 building a building that is going to be -- grows coffee.

19 Whatever you're going to do. "What are the issues you guys are  
20 concerned about? Which pollutants are you concerned about?  
21 What are your levels of concern? What thresholds do you want  
22 us to meet?"

23 Then you go back to your engineers, design your system.  
24 Then you come back. Show them the numbers, and then you get  
25 authority to construct. And then you build it, do the

1 emissions caps, as we talked about before, do the modeling.

2 So it's a very step-wise process. You don't want to waste  
3 anybody's time or money, so you work your way through the  
4 process.

5 **Q.** And is it, at least typically and hopefully, a cooperative  
6 process?

7 **A.** It's generally a cooperative process. The most  
8 contentious part is typically if some kind of control measure  
9 is needed, deciding which is the best or most cost-effective  
10 control measure.

11 **Q.** It's not a hearing and it's not -- I mean, it's -- people  
12 go in and talk?

13 **A.** Right. It's more of an administrative process.

14 **Q.** And have you ever seen BAAQMD just take some preliminary  
15 plans and tell somebody to kiss off?

16 **A.** I've never seen that.

17 **THE COURT:** Can I ask a question about the modeling  
18 that you were talking about? You say you do your model to see  
19 if you bump up against the NAAQS, the National Air Quality --  
20 what are they called?

21 **THE WITNESS:** Standard. National Ambient Air Quality  
22 Standard.

23 **THE COURT:** National Ambient Air Quality Standard.  
24 And they are looking to see if you bump up against those  
25 standards and, also, you need to show that you don't exceed a

1 certain increment.

2 This may be a stupid question, but -- and feel free to  
3 tell me if it is.

4 **MR. FELDMAN:** Please don't.

5 (Laughter.)

6 **THE COURT:** Okay. Let's say that the threshold is  
7 12. Okay?

8 **MR. FELDMAN:** The standard is 12.

9 **THE COURT:** The standard is 12. And we're now at  
10 11.9. Okay?

11 **THE WITNESS:** Okay.

12 **THE COURT:** Now I want to start a project of roasting  
13 coffee on the premises. And that would get us up -- that would  
14 get us up from 11.9 to 12.

15 **THE WITNESS:** Okay.

16 **THE COURT:** So then -- would they say: Sorry, you're  
17 getting us up to the threshold, so we -- to the standard, so  
18 you can't build your coffee roastery?

19 **THE WITNESS:** Well, the first meeting, as you just  
20 described, they would say: Hey, we have a problem. Let's work  
21 together as a team and figure out what can we do. Are there  
22 any control measures that you can add to your design that could  
23 get us down lower?

24 **THE COURT:** Okay. But if the answer is no, and I  
25 would get us up from 11.9 to 12, I cannot build my coffee

1 roastery?

2           **THE WITNESS:** There is one other exception, which  
3 would be they might offer to you: Well, there is somebody  
4 right next door to you who isn't controlled right now. If you  
5 pay for his controls, we can lower the region down and then  
6 when you model it again, the region will be below the standard,  
7 and you're good to go.

8           So that's called "offsets." You could be made to buy  
9 someone else's pollution and make it go away.

10           **THE COURT:** On some level, doesn't that seem a little  
11 unfair? I mean, just because I -- I came along later -- we  
12 have all these polluters who came along and they got us up to  
13 11.9, and I happen to be the one that gets us from 11.9 to 12.  
14 I -- if I can't -- if there is no mitigation measure or there  
15 are no controls I can implement either on my own property or on  
16 somebody else's site, I just can't build my roastery. I mean,  
17 does that sort of thing happen commonly?

18           **THE WITNESS:** Sure. I mean, that is a problem.  
19 People can't build in areas that are in non-attainment. That  
20 is why it is so important not to fall into non-attainment. It  
21 does cause businesses and society problems.

22           **THE COURT:** Okay. And I'm not saying that there is  
23 anything wrong with the standard. I'm just saying why should I  
24 bear the brunt of that when there are all these other bigger  
25 polluters who might be able to -- who the government might be

1 able to force them to reduce their emissions.

2 **THE WITNESS:** That's a very common argument I hear.

3 **THE COURT:** Okay. All right. Thank you.

4 **BY MR. FELDMAN**

5 **Q.** In other words, people get very irritated by the fact that  
6 they apply and they are told to either -- it's to control  
7 measures or buy offsets or something because they are not the  
8 ones -- they are not the only ones that cause the problem?

9 **A.** Right. Especially the smallest ones who are just bumping  
10 it up when there is a big guy next door. You're exactly right.

11 **THE COURT:** Okay.

12 **BY MR. FELDMAN**

13 **Q.** But that is the way it works, right?

14 **A.** That's correct.

15 **MR. FELDMAN:** Do you have any questions on that, your  
16 Honor?

17 **THE COURT:** No. Thank you.

18 **MR. FELDMAN:** You're welcome.

19 **BY MR. FELDMAN**

20 **Q.** Okay. So -- oh, yeah. And then if it turns out that at  
21 some point somebody gets authority to construct and a permit to  
22 operate, and they are -- they are not doing what they are  
23 supposed to do, roughly speaking, what happens?

24 **A.** Well, there is a whole enforcement division to the Bay  
25 Area District as well. So they would receive a violation.

1 They could be fined. They would be shut down, depending on how  
2 severe the violation is.

3 **Q.** Okay. So now I'd like to change --

4 **THE COURT:** Before you change, I think there may have  
5 been a question that he was in the middle of answering, and  
6 perhaps my interruption prevented him from fully answering it.  
7 And it was a question that you asked him about, you know, what  
8 sorts of conditions the Bay Area Air Quality Management  
9 District can impose on a permit applicant.

10 And you said the biggest one is the amount of -- a very  
11 common one is the amount of throughput. I thought you were  
12 getting ready to list some other ones, and I may have  
13 interrupted you.

14 **THE WITNESS:** Okay.

15 **THE COURT:** Were you --

16 **THE WITNESS:** Yeah. There's a couple that -- they  
17 fall into a category that you've probably heard the acronym:  
18 BACT, Best Available Control Technology. And new sources are  
19 required to assess whether or not there is a BACT that can help  
20 reduce emissions for that new source.

21 And so that would be the next thing. So you either cut  
22 throughput or you find a BACT that will help you reduce  
23 emissions at your kind of facility.

24 **MR. FELDMAN:** May I?

25 **THE COURT:** Yes.

1 BY MR. FELDMAN

2 Q. I'd like to move now to Table 5-7, which you're familiar  
3 with.

4 A. Okay.

5 Q. Are you familiar with it?

6 A. Yes.

7 (Document displayed.)

8 Q. Can I point you, please, to the -- let's see. The entries  
9 for BAAQMD, Oakland, South Emeryville and San Leandro. And may  
10 I refer to them as "Mainline Rail Transport"?

11 A. Okay.

12 Q. Is that okay with you?

13 A. Yes.

14 Q. In summary form, what are the biggest problems with the  
15 way Mainline Rail Transport was calculated on this table?

16 A. The principal flaw with the way those were calculated was  
17 they relied on an emissions approach which assumed that the  
18 emissions were the same, constant, for every mile for the  
19 700-mile trip. And that's -- go ahead.

20 Q. What's wrong with that?

21 A. That's clearly flawed, because we know emissions are a  
22 function of the train's speed and the relative wind speed  
23 blowing on the particles and if the train cars have coal in  
24 them. So you need to understand the train speed and the wind  
25 speed to properly calculate emissions from a train.

1 Q. Did ESA rely on a particular study to get their value for  
2 emissions from Mainline Rail Transport?

3 A. They were -- they used an old study from 40 years ago,  
4 30 years ago, yes.

5 Q. And was there -- we'll get to this in more detail. Was  
6 there a second problem with the way they calculated Mainline  
7 Rail Transport?

8 A. Well, so the emissions were constant, and they assumed no  
9 controls of any kind.

10 Q. I have reference, if I might, to how much dust would blow  
11 off and whether there was a finite amount.

12 A. Right. So there is an underlying principle with the  
13 philosophy that if emissions can remain constant for 700 miles,  
14 you're actually regenerating dust every mile along the way  
15 because otherwise you would deplete all the dust very quickly.  
16 And there is plenty of literature to show that that's not true.  
17 In fact, you don't regenerate dust all the way along a trip.

18 Q. And would you mind telling the Court whether you're  
19 familiar with any literature that is cited in the ESA report  
20 but not for the proposition that you just mentioned? And I  
21 have reference to the BNSF study.

22 A. Sure. There was a BNSF study back in around 2010 that  
23 specifically looked at this issue. And they found that after  
24 500 miles, they could not measure any emissions from trains  
25 going by.

1           **MR. FELDMAN:** And, your Honor, if I'm permitted to, I  
2 would note for the record that that is Exhibit 516. And if I'm  
3 permitted, I would say that it is cited at Footnote 40 of the  
4 ESA report at Page 2-10.

5           **BY MR. FELDMAN**

6           **Q.** Did you say the mileage at which the fall-off pretty much  
7 dropped off?

8           **A.** That was at about 500 miles. They could not measure any  
9 emissions.

10           **MR. COLVIG:** Your Honor, I object to that exhibit.  
11 It is hearsay.

12           **THE COURT:** Which exhibit?

13           **MR. COLVIG:** It's 519 -- 516.

14           **MR. FELDMAN:** It's 516.

15           **THE COURT:** Wait a minute. This is the BNSF report  
16 that the --

17           **MR. COLVIG:** It is the --

18           **THE COURT:** Excuse me.

19           **MR. COLVIG:** Sure.

20           **THE COURT:** This is the BNSF report that the ESA  
21 study invoked?

22           **MR. COLVIG:** Yes.

23           **THE COURT:** Overruled.

24           **BY MR. FELDMAN**

25           **Q.** So if I may --

1           **THE COURT:** Just -- I'm getting a lot of hearsay  
2 objections. The City Council is allowed to consider hearsay in  
3 making its decision, and so whatever hearsay the City Council  
4 may have considered, we certainly can examine it here.

5 **BY MR. FELDMAN**

6 **Q.** So the biggest problem is the assumption with respect to  
7 every mile being the same?

8 **A.** Correct.

9 **Q.** And the second problem, which is that some point, at least  
10 according to one study in your opinion, the fall-off stops  
11 entirely?

12 **A.** Correct.

13 **Q.** Did you, therefore, recalculate the rail emissions?

14 **A.** Yes, we did.

15 **Q.** And did your calculation take into knowledge wind speed  
16 and train speed?

17 **A.** Yes, it did.

18 **Q.** Is the formula that you used to calculate this cited at  
19 Page 50 of your report?

20 **A.** Yes, it is.

21 **Q.** And did you provide the formula, if that's what you call  
22 it -- not the formula --

23 **A.** The equation.

24 **Q.** -- the equation and data that you used to counsel in  
25 connection with the discovery process in this case?

1     **A.**    Yes, we did.

2     **Q.**    And did you rely on certain studies, which are  
3     Exhibits 479 and 968, to derive the formula that you used?

4     **A.**    That is correct.

5     **Q.**    And what speeds did you use for Oakland as opposed to, for  
6     example, BAAQMD in determining the wind speed for Oakland?

7     **A.**    So to be as precise as we could, we replied upon available  
8     information for wind speeds. And we got train speeds from the  
9     Union Pacific database, and we used average wind speeds for --  
10    train speeds for each of those sectors of rail length.

11    **Q.**    And did you apply your -- that data that you just  
12    described to the -- in the calculation of Mainline Rail  
13    emissions?

14    **A.**    Yes, we did.

15            **MR. FELDMAN:** And if we could see the first  
16    demonstrative?

17            (Document displayed.)

18    **BY MR. FELDMAN**

19    **Q.**    Does -- does this demonstrative contain the calculations  
20    that you did to determine the emissions in BAAQMD and also in,  
21    what I think you would agree, is West Oakland?

22    **A.**    Yes.

23    **Q.**    And what were their values, please?

24    **A.**    Approximately two and a half tons in the Bay Area segment,  
25    and 0.1 tons per year in just the West Oakland area.

1 Q. And what -- what throughput or volumes did you assume for  
2 this calculation, sir?

3 A. We were under the understanding that 5 million metric tons  
4 of coal would be moving through the area.

5 Q. Did you assume that the cars -- the rail cars would be  
6 covered or uncovered, surfacted or, I guess you could say,  
7 unsurfacted for this calculation?

8 A. For these calculations, we assume uncontrolled.  
9 Uncovered, unsurfacted.

10 Q. Have you ever said that before? Unsurfacted?

11 A. No, I haven't.

12 Q. There is another calculation on Table 5-7.

13 MR. FELDMAN: Your Honor, your Law Clerk can't see  
14 this table, but I believe it's on the screen.

15 THE COURT: 5-7?

16 MR. FELDMAN: If we could get 5-7 on the screen,  
17 please.

18 The board is available for the Court.

19 THE COURT: I'm pretty sure it's seared into her  
20 brain at this point.

21 MR. FELDMAN: If it were a longer trial, I would be  
22 more confident.

23 THE COURT: Don't get your hopes up.

24 MR. FELDMAN: I wasn't... That was just the  
25 beginning, your Honor.

(Document displayed.)

**BY MR. FELDMAN**

**Q.** 5-7, do you see there is an entry for staging?

**A.** Yes, I do.

**Q.** And do you have a criticism of -- well, one or more criticisms of the way that staging was -- excuse me -- rail transport for staging was considered in the ESA report?

**A.** Yes. There were a number of flaws in their approach.

**Q.** I would like you at the very highest level to say what they are, if you're able.

**A.** At the highest level, they replied -- they -- they -- I can't get my words. They relied upon -- thank you. They relied upon the wrong section of the U.S. EPA guidance document for how to calculate the emissions. And then the next is they used the wrong inputs to the wrong equation in that section. So it's very flawed.

**Q.** If I might ask: Did Dr. Sahu use the same wrong section of the EPA business?

**A.** Yes.

**Q.** And did he use, roughly speaking, the name inputs?

**A.** Yes. Roughly speaking, yeah.

**Q.** Now, you said that they used the wrong EPA what?

**A.** So there is a guidance document that the U.S. EPA makes available to all air quality practitioners.

**Q.** What's that called?

1     **A.**     Called the U.S. EPA AP-42.

2     **Q.**     Thank you.

3             And does it have various subsections?

4     **A.**     Right. This is like encyclopedia. It's a compendium,  
5     many volumes in length on how to calculate emissions for  
6     basically every source type in America.

7     **Q.**     And do you remember the name or number of the section that  
8     ESA used?

9     **A.**     Yes, I do.

10    **Q.**     Do you happen to remember if Earthjustice used the same  
11    section? If you don't remember, that's okay.

12    **A.**     I don't remember precisely. I couldn't say.

13    **Q.**     So ESA used a particular section. What section?

14    **A.**     That would be 13.2.5.

15    **Q.**     And tell the Court, please, why that was the wrong  
16    section.

17    **A.**     There is a couple of reasons it was the wrong section.  
18    One is how the emissions were calculated was wrong for the  
19    wrong kind of situation. And it was also that if you're going  
20    to follow the scientific method of calculating emissions and  
21    putting it in an air quality model, which is the right thing to  
22    do, that section explicitly says: Do not use this section if  
23    you're going to use it for air quality modeling.

24    **Q.**     Could you please explain the first part of your answer?

25    **A.**     Okay. So the first part was why were the emissions wrong.

1 And that was -- the section says explicitly: These emissions  
2 are for short-term emission events from a gust of wind, and the  
3 underlying principles are once that gust of wind has blown away  
4 the dust on the pile, there is no more dust to be blown away.

5 So you can't apply that hour after hour after hour. It's  
6 only for intermittent usage. And that's what it says in the  
7 guidance.

8 **MR. FELDMAN:** And could we, please, see Exhibit 435.  
9 Plaintiff's 435, please.

10 (Document displayed.)

11 **A.** That looks like the first page from that section, AP-42.

12 **MR. FELDMAN:** And may I ask to see the third page,  
13 0003?

14 (Document displayed)

15 **BY MR. FELDMAN**

16 **Q.** And if you would look, please, at the -- at what my son  
17 would call the penultimate paragraph, last sentence.

18 **A.** Yes, I see that.

19 **Q.** What does that say?

20 **A.** So I will read that last sentence aloud. It says:

21 "Calculated emissions represent intermittent  
22 events and should not be input directly into  
23 dispersion models that assume steady-state emission  
24 rates."

25 **Q.** Is that the sentence that you were referring to?

1 A. Yes, it is.

2 Q. And so you -- I'm not going to ask you to trouble the  
3 Court with the results, although they are available at a  
4 different phase of this proceeding if necessary. You've done  
5 some emissions estimates for this facility that are not based  
6 on 13.2.5, correct?

7 A. That's correct.

8 Q. But with respect to the emissions estimates of 13.2.5,  
9 have you also evaluated the inputs that were used?

10 A. Yes, I did.

11 Q. And do you have an opinion about whether the inputs were  
12 correct?

13 A. It turns out in this case, the inputs they chose were also  
14 incorrect.

15 Q. And you have criticisms of a number of the inputs, do you  
16 not?

17 A. Yes, I do.

18 Q. Could you -- I don't know if you can remember this, but do  
19 you remember some of them but not the one that we're going to  
20 talk about now?

21 A. Well, there's -- I'll give you a list of two or three that  
22 are pieces of the equation that you need to make decisions  
23 about. And so one of them is something called "friction  
24 velocity." One of them is called "surface roughness length."  
25 And --

1 Q. How about moisture?

2 A. I'm sorry?

3 Q. Moisture?

4 A. The moisture content of the coal. There are a number of  
5 parameters that need to be considered when calculating emission  
6 rates.

7 Q. And do you agree or disagree with, for example, the wind  
8 and/or moisture inputs that ESA used?

9 A. I disagree with all of them, frankly.

10 Q. Okay. But is there one that has a predominating -- and  
11 you lay them out in your report?

12 A. Yeah. These are all identified in the report.

13 Q. Do you have one criticism, if you will, or difference that  
14 makes an enormous difference to the way in which the numbers  
15 for staging were portrayed on Table 5-7?

16 A. Yes, I do.

17 Q. What is threshold friction velocity? And take however  
18 much time you need to explain it.

19 A. So it's a complicated concept, your Honor. But,  
20 basically, if you think about having a pile of dust in your  
21 hand and you blow on it, it's a measure of how hard you have to  
22 blow on it to make it start moving.

23 So that's called the "threshold friction velocity" because  
24 the particles have friction with each other, and you want to  
25 get over that threshold so they start moving. And that's the

1 minimum wind speed that it takes to start moving those  
2 particles.

3 **Q.** And if the threshold friction velocity is lower, what does  
4 that tell you about the wind speed that's required to blow the  
5 material away?

6 **A.** So a lower threshold friction velocity means lower wind  
7 speeds are needed to start moving the particles. A higher  
8 friction velocity means higher wind speeds are needed to move  
9 the particles.

10 **Q.** And if the threshold friction velocity is near zero, how  
11 big a wind do you need?

12 **A.** Basically, very little wind. It's just infinitely  
13 slippery. It starts blowing away quickly.

14 **MR. FELDMAN:** May I see, please, Exhibit 13.2.5-2,  
15 Page 5?

16 (Document displayed.)

17 **BY MR. FELDMAN**

18 **Q.** Are you familiar with this table?

19 **A.** Yes, I am.

20 **THE COURT:** For the record, exhibit -- you're talking  
21 about Exhibit 435?

22 **MR. FELDMAN:** Sorry.

23 **THE COURT:** Page 0005?

24 **MR. FELDMAN:** Yes.

25 **THE COURT:** Is that right?

1           **MR. FELDMAN:** Yes.

2           **THE COURT:** Okay.

3           **MR. FELDMAN:** Yes, your Honor.

4   **BY MR. FELDMAN**

5   **Q.** What is this table?

6   **A.** This is a table from the Section 13.2.5 that gives choices  
7 that an air practitioner can use to pick the most appropriate  
8 threshold friction velocities for the calculation they are  
9 trying to do. In this case you can see there was about a half  
10 a dozen choices you can make to determine these parameters.

11 **Q.** These are inputs into this formula that you don't think  
12 should have been used in the first place?

13 **A.** That's correct.

14 **Q.** And do you see there is a reference to an "uncrusted coal  
15 pile"?

16 **A.** Yes, I see that.

17 **Q.** What does the word "uncrusted" mean in this context?

18 **A.** So if you think about -- you know, visualize a pile of  
19 coal that's just sitting there not being touched. It's not  
20 being pushed by bulldozers, not being added to, over time it  
21 will develop a skin, a crust. And so that reduces emissions.

22 But in this case an uncrusted coal pile means it's an  
23 active pile. It's being vibrated, shaken, added to, subtracted  
24 from. So the material is moving, so it never has a chance to  
25 form that crust.

1 Q. So the uncrusted coal pile is more or less susceptible to  
2 wind than a crusted coal pile?

3 A. That's correct.

4 Q. More or less?

5 A. Oh, it is more.

6 Q. Which value on this table did ESA choose?

7 A. So -- well, ESA chose two --

8 Q. Which --

9 A. Yeah.

10 Q. Which value appears -- which value was used to come to the  
11 numbers that appear on Table 5-7?

12 A. So the final value they chose was the last row, the "fine  
13 coal dust on a concrete pad" row.

14 Q. Was it appropriate to use fine coal dust on a concrete  
15 pad?

16 A. It is not appropriate.

17 Q. Why not? Assuming that this formula was right in the  
18 first place, why not?

19 A. Assuming it's the correct formula, why was this the bad  
20 input is because coal piled in a train car is not fine coal  
21 dust on a concrete pad. And the way to think about it is this  
22 particular study, the Footnote C, was taken by looking at  
23 literally powdery coal that had fallen from a conveyor belt  
24 onto a concrete driveway that had been driven over by tractors  
25 and bulldozers and crushed.

1 Q. We'll get into that in a moment.

2 A. Okay.

3 Q. But it was the wrong -- that was the wrong value?

4 A. It was the wrong value.

5 Q. Is there a reference listed for the fine coal dust on a  
6 concrete pad?

7 A. Yes, there is.

8 Q. And who wrote the reference?

9 A. That was a Greg Moleski.

10 Q. And have you read that reference?

11 A. Yes, I have.

12 Q. Does it appear in the record as Trial Exhibit 1085? It  
13 will come up on the screen in a moment.

14 (Document displayed.)

15 Q. Do you see that?

16 A. Yes.

17 Q. Is that the Moleski study that's referred to in the table?

18 A. Yes.

19 Q. How did you get this report?

20 A. This required counsel to obtain it for me.

21 Q. Eli, who works for me?

22 A. Yes.

23 Q. Why was that?

24 A. It was considered a, I guess, proprietary or private study  
25 at the time. It was not released to the public.

1 Q. And you read the study?

2 A. Yes, I did.

3 Q. And did you, then, have -- make the effort to talk to  
4 Mr. Moleski about the study?

5 A. Yes, I did.

6 Q. And did reading the study and talking to Mr. Moleski  
7 inform your expert opinion about whether it was appropriate to  
8 use fine coal dust?

9 A. Yes, it did.

10 Q. And what did you conclude?

11 A. He and I both concluded that it was inappropriate. It  
12 was -- it was absolutely not the right choice.

13 Q. What did he tell you about the study that he conducted  
14 that supports the value on fine coal dust on a concrete pad on  
15 table -- on the table on TX-435-0005?

16 A. So he explained the physical conditions that I had  
17 mentioned a few moments ago.

18 Q. Please say them again.

19 A. So he described how this dust had been created and then  
20 also how it had been measured.

21 So this fine coal dust had fallen from a conveyor system,  
22 and then had been crushed under heavy equipment, bulldozers,  
23 et cetera. And he thought it would be a great opportunity to  
24 look at how fine coal powder might be blown around. So he did  
25 a special study just of this material.

1 Q. What is -- in the most general terms, what's the nature of  
2 that study?

3 A. They do what's called a "wind tunnel experiment," where  
4 you literally put a little cage, if you will, over the  
5 substance and blow wind across it and then measure the  
6 pollution that gets lofted. And so he did that kind of a  
7 study.

8 Q. And what did he tell you about what his results were  
9 compared to other results he had seen?

10 A. He said that this was the lowest friction velocity he had  
11 ever seen in his entire career.

12 Q. Would you look, please, again, to Table 13.2.5 that  
13 appears on 435-0005. And do you see there's a reference that  
14 relates to "uncrusted coal pile"?

15 A. Yes.

16 Q. And is that reference also something that you've read?

17 A. Yes, it is.

18 Q. And is that --

19 MR. FELDMAN: Trial Exhibit 982, please. Could we  
20 see on the screen so the witness can identify it.

21 (Document displayed.)

22 BY MR. FELDMAN

23 Q. Have you read this reference as well?

24 A. Yes, I have.

25 Q. And have -- in reading this reference, does that affect

1 your opinion about which value should have been used on  
2 13.2.5-2, assuming it -- this formula should have been used at  
3 all?

4 **A.** Yes, it does. And it points to the uncrusted coal pile as  
5 the right choice.

6 **Q.** Why is that?

7 **A.** If you read the details of the study, it talks about they  
8 were specifically trying to understand emissions from an active  
9 moving pile. Material being added to it, subtracted from it,  
10 actively being vibrated.

11 And that's the most representative of that table for train  
12 cars in Oakland.

13 **Q.** Is it a perfect match?

14 **A.** It's not a perfect match, but it is the best  
15 representative of one. For the wrong method, but it was the  
16 right choice to make.

17 **Q.** Would you look, please, at Exhibit 432, which is an email  
18 and attached spreadsheet.

19 (Document displayed.)

20 **A.** Okay.

21 **Q.** Have you had occasion to examine this email and attached  
22 spreadsheet?

23 **A.** Yes, I have.

24 **Q.** Would you look --

25 **MR. FELDMAN:** And may we see, please, exhibit -- this

1 exhibit, Page 0016.

2 (Document displayed.)

3 **MR. FELDMAN:** Thank you very much.

4 **BY MR. FELDMAN**

5 **Q.** You're seeing now yellow highlighted some material. And  
6 that material has next to it the name "threshold friction  
7 velocity, m/s."

8 And then at the bottom of the page, it has numbers -- very  
9 bottom of the page -- it has numbers for PM2.5 emissions of  
10 3.12, and I think it's 13.65.

11 Are we on the same page?

12 **A.** Yes.

13 **Q.** So to speak.

14 Can you explain how or what -- can you explain this  
15 spreadsheet page.

16 **A.** Sure. So it's very common for air quality practitioners  
17 to do calculations on a spreadsheet, your Honor. So this is  
18 probably Excel, if you're familiar with that.

19 So in these cells are numbers but also with underlying  
20 electronically are formulas. So it will combine the numbers,  
21 multiply them together, add them up to get other numbers you  
22 see in other cells. So it's sort of a shorthand way so you  
23 don't have to do it all manually on a calculator.

24 So that's what we're looking at, a visual image of an  
25 electronic spreadsheet.

1 And in this particular spreadsheet is how they calculated  
2 the staging emissions. And, again --

3 Q. Excuse me. The "staging emissions" meaning staging  
4 emissions on 5-7 (indicating)?

5 A. Correct.

6 Q. Go ahead.

7 A. So the important issue we have been talking about is the  
8 friction velocity, this threshold friction velocity. So if you  
9 go up near the top where it's in yellow and it says, "1.12,"  
10 they took it from AP-42, Chapter 13.2.5, uncrusted coal pile  
11 from a western surface coal mine. Just what we have been  
12 talking about.

13 So using that number, there is a number of parameters and  
14 calculations. We won't go into details. You result in an  
15 emissions calculation. You rely on that number.

16 And so you see at the very bottom, there is pounds per day  
17 of 3.12. Unfortunately, the number next to it is wrong, and I  
18 would be happy to explain it to you for 30 seconds about why --  
19 so you would know what's wrong.

20 Q. Sure.

21 A. The first column is pounds per day. The second column is  
22 just a conversion to tons per year. So it's about 3 pounds a  
23 day. So I'll round the number for you. Three times 365 days a  
24 year, yeah, it's roughly a thousand. If you take a thousand  
25 pounds divided by 2,000 pounds per ton, you get about a half a

1 ton, not 13 tons per year. So it's way off. Way too high of a  
2 number. It should be about a half.

3 And, in fact, if you do the calculation without rounding,  
4 it's .68. So it's a little bit more than a half a ton. So  
5 that number is absolutely incorrect.

6 So there is a number of typos in their report as well as  
7 miscalculations in their report.

8 **MR. FELDMAN:** May -- does your Honor have any  
9 questions about that?

10 **THE COURT:** No.

11 **BY MR. FELDMAN**

12 **Q.** So if we were looking at Table 5-7, is there -- on  
13 Page 0016 is there a corresponding row and column for the  
14 values that appear on 0016? That is to say, which box should  
15 we be in?

16 **A.** Well, in theory we would be in box PM2.5, and you drop  
17 down to the row that says "staging at port railyard." But it  
18 doesn't match because that's not the ultimate one they relied  
19 one.

20 **Q.** And based on correcting the mistake they made, the value,  
21 the number that would be in the box that my finger is on  
22 (indicating), that has -- on the chart says "18," what would  
23 the value be?

24 **A.** It would be -- I believe it was .68.

25 **Q.** And what would the value be where the number 67 is

1 (indicating)?

2 A. It would be 3.12.

3 Q. Can I ask you, please, to look at Exhibit 433.

4 (Document displayed.)

5 Q. And may we go to, please, Page 0006. Are you with me?

6 A. Yes.

7 Q. Is it on your screen?

8 A. Yes.

9 Q. Can I direct your attention, please, to the entry or the  
10 value for threshold friction velocity?

11 A. Yes, I see that.

12 Q. And what is the value that's entered there?

13 A. So on that row, it says "0.54."

14 Q. And what is entered next to it?

15 A. The note is saying this is from AP-42, Chapter 13.2.5, and  
16 it's for fine coal dust on a concrete pad from an Eastern power  
17 plant.

18 Q. And is it correct that based on -- well, you do things and  
19 other air quality people do things, but that indicates to you  
20 that to derive at the number 0.54, somebody used fine coal dust  
21 on a concrete pad?

22 A. Correct.

23 Q. And, then, could you please point the Court down to the  
24 emissions numbers for PM2.5, uncontrolled, that appear on 006?

25 A. So if you move down towards the bottom of the page, you

1 can see that the now calculated emissions from the spreadsheet  
2 with this new friction velocity are 66.69 pounds a day, or  
3 about 11.67, which they rounded to 12 tons per year. And  
4 that's what would have appeared if it wasn't a typo in  
5 Table 5-7.

6 **Q.** Thank you.

7 Have I failed to ask you any questions -- any questions  
8 that would elicit all of your opinions about threshold friction  
9 velocity as it relates to this table?

10 **A.** I think we're good.

11 **Q.** We're good? Thank you.

12 Okay. Then may I ask you to look at exhibit -- oh, right.

13 May I ask you to look, please, at Table 5-7 and ask you  
14 whether or not the OBOT operations emissions estimates in  
15 Table 5-7 take into account BACT?

16 **A.** So on this table we can see there are rail transport, and  
17 then the bottom half refers to OBOT operations. And they have  
18 broken them into several different kind of operations. And the  
19 underlying spreadsheets that support these tables show that  
20 these are uncontrolled emissions. They have not taken into  
21 account BACT controls.

22 **Q.** Would you look, please, at Trial Exhibit 18- -- 1084. And  
23 would you look, please, at Page 0015 of that exhibit.

24 (Document displayed.)

25 **THE COURT:** Give me one second.

1           **MR. FELDMAN:** Yes, your Honor.

2           (Brief pause.)

3           **THE COURT:** Go ahead.

4           **BY MR. FELDMAN**

5           **Q.** Is there an entry on 00 -- 0015 with a "TR10" next to it?

6           **A.** Yes, there is.

7           **Q.** What does it say, please?

8           **A.** In this section it describes that the Bay Area District,  
9           they conferred with -- ESA called them and spoke with them, and  
10          that they would be required as a new source to attain at least  
11          90 percent, if not greater, 99 percent, BACT controls at this  
12          facility.

13          **Q.** Does the final ESA report state that BACT would be  
14          required and that it would achieve 90 to 99 percent dust  
15          control, according to BAAQMD?

16          **A.** I'm sorry. Can you please rephrase that?

17          **Q.** Yeah. Does the final ESA report -- this is a draft of the  
18          ESA report we're looking at, right?

19          **A.** Right.

20          **Q.** Does the final draft -- there is a final -- there is --  
21          what do you call it? The report. Does the report say BAAQMD  
22          told us that using BACT would result in 90 to 99 percent  
23          control?

24          **A.** No. This section was omitted. That is not referred to in  
25          the, quote, final report.

1 Q. Do you agree, however, that the control efficiencies  
2 associated with BACT would be applied at the terminal in the  
3 range of 90 to 99 percent?

4 A. Yes, they would be.

5 Q. And would you look, please, at Exhibit 432, Page 0021.  
6 (Document displayed.)

7 Q. Do you have that?

8 A. They are magnifying it. There we go. Okay.

9 Q. What does the last sentence of the paragraph on that page  
10 mean to you -- withdraw.

11 This is an ESA spreadsheet, is it not?

12 A. No. This is a paragraph on my screen.

13 Q. I'm sorry. It's attached to it --

14 A. Oh, okay.

15 Q. It's attached to a spreadsheet, right?

16 What does the last sentence of that paragraph mean to you?

17 A. So this paragraph is describing calculations for  
18 emissions, and the last sentence says:

19 "Appropriate control efficiencies have been  
20 applied."

21 And so they should be calculated in that spreadsheet.

22 Q. In reviewing these spreadsheets, did you identify  
23 somewhere where that was done?

24 A. Yes.

25 MR. FELDMAN: Could we see, please, Page 0005 of the

1 same exhibit.

2 (Document displayed.)

3 **BY MR. FELDMAN**

4 **Q.** And could you describe what is on Page 0005?

5 **A.** So this is a spreadsheet, your Honor, that is divided into  
6 two parts. There's a top half and a bottom half. The red  
7 square is more of the top half. We'll get to that in a  
8 second -- that may not be in your copy.

9 So this is the top half, and it's labeled "Uncontrolled  
10 Emissions Summary, Tons Per Year." And the bottom half is  
11 labeled "Controlled Emissions Summary, Tons Per Year." And,  
12 again, there are typos. Don't be confused. The last row of  
13 the second section says "Total Uncontrolled," but it really  
14 should say "Total Controlled" because it's in a controlled  
15 section of the table.

16 But what you want to do is look at the PM2.5 column. And  
17 so if you look on the top, you'll see those are the estimated  
18 PM2.5 emissions for all the various operational components of  
19 the facility, uncontrolled. And then if you go down below,  
20 you'll see all of the numbers are reduced dramatically by about  
21 90 to 99 percent.

22 And so the bottom section are controlled levels, and the  
23 top section is uncontrolled levels for each of those  
24 activities.

25 **Q.** And were you able to identify individual separate

1 spreadsheets that related to the operations that are depicted  
2 on 0005?

3 A. Yes.

4 Q. And they are present in that same exhibit?

5 A. Yes, they were.

6 Q. And were you able to determine whether or not the entries  
7 that are reflected on 0005 relate in some fashion to Table 5-7?

8 A. I was able to do that.

9 Q. And what did you conclude?

10 A. I concluded that Table 5-7 in the ESA report used the  
11 numbers from the top half of this table, not the bottom half.

12 Q. And what does that mean for whether Table 5-7 reported  
13 controlled or uncontrolled numbers?

14 A. So that means Table 5-7 used uncontrolled numbers.

15 Q. And have you -- have you heard something about --  
16 withdrawn.

17 Do you have an opinion about whether -- how should I ask  
18 you this? There is an entry in one of these spreadsheets that  
19 talks about wind --

20 A. Yes.

21 Q. -- in connection with controls.

22 A. Yes. I'm familiar with that.

23 Q. So that -- how does that impact your opinion about whether  
24 Table 5-7 portrays controlled or uncontrolled numbers?

25 A. So the equation that one uses to calculate emissions often

1 considers wind speed as an important parameter, just like we  
2 talked about the train cars.

3 Well, they made an assumption to lower the wind speed for  
4 some of these equations, but that does not consider BACT  
5 controls. BACT controls are things like dry fogging. That's  
6 unrelated to wind speed.

7 So that tells me they didn't really consider controls in  
8 their calculation at all.

9 Q. Did you see any evidence that something like dry fogging  
10 was reflected in the Table 5-7?

11 A. I did not see that.

12 Q. And does Table 5-6 portray the values for OBOT operations  
13 as controlled or uncontrolled?

14 A. There was another table where they talked about controlled  
15 levels, but in the end they dropped that and did not include it  
16 in Table 5-7.

17 Q. Have you read the section of this report with respect to  
18 greenhouse gases?

19 A. Yes, I have.

20 Q. And do you have an opinion about whether the section on  
21 greenhouse gases -- do you have an opinion about that section?

22 A. I thought the section was very inadequate.

23 Q. In what respect?

24 A. It was very qualitative at best. It didn't do any  
25 calculations or any modeling to do the scientific method of

1 really determining any impact.

2 Q. And did you do a calculation that was portrayed in your  
3 expert report?

4 A. Yes, I did.

5 Q. And what did you calculate, and what were your results?

6 A. I calculated that if this 5 million tons of coal were  
7 shipped to Asia somewhere and was burned in a power plant, it  
8 would contribute 0.04 percent to global climate, or greenhouse  
9 gases.

10 Q. And did it have -- would that have any impact on Oakland?

11 A. That is a basically negligible small amount.

12 Q. If -- assuming that -- I'm trying to find an even number.

13 Assuming that -- assuming that the number for -- well, assuming  
14 that the value for unloading for PM2.5, which is portrayed on  
15 Table 5-7 was zero -- well, withdrawn.

16 Assume that the throughput for this terminal, instead of  
17 being 5 million tons was two and a half tons, two and a half  
18 million tons, what would that do to the value 0.9 for unloading  
19 for PM2.5?

20 A. So as we talked about quite a while ago, one way to  
21 control emissions at a facility simply is to cut the  
22 throughput. It's very proportionally linear. So if we cut our  
23 throughput from five to two and a half, you would cut that .9  
24 to 0.45.

25 Q. Thank you.

1 A. Cut it in half.

2 Q. Have you read the public health panel report with respect  
3 to emissions? The portion of it that relates to emissions?

4 A. Yes, I have.

5 Q. And do you have a view about whether those emissions  
6 calculations were correct?

7 A. No. They were incorrect.

8 Q. Can you explain to the Court why they were incorrect?

9 A. There were a number of --

10 Q. Excuse me. The critical -- I would say the most prominent  
11 flaws that are simple to explain.

12 A. Okay. So the most important flaws --

13 Q. I don't mean that it needs to be simple for the Court.  
14 For me.

15 A. So the most important flaws in the report are they relied  
16 upon the emissions and measurement studies done in the state of  
17 Washington with Powder River Basin coal, which we've already  
18 heard about, is much dryer, much powdery-er -- if that's good  
19 English -- and, therefore, has higher emission rates.

20 It was a very limited study. I've actually personally  
21 spoken with Professor Jaffe, who did the study. It was a crowd  
22 source-funded study, if people know what that means. That  
23 means people donated money to this professor to go do this  
24 measurement. He relied upon technology that was inexpensive,  
25 and in his own paper he said that it didn't compare well with

1 the more expensive federally required measurement devices that  
2 are used to determine attainment and emission inventories.

3 He also said that he only saw visible emissions when  
4 trains were overloaded or traveling at speeds greater than  
5 90 kilometers per hour, or approximately 45 miles per hour. So  
6 really high-speed, overloaded trains.

7 So it's not representative at all of what would happen in  
8 Oakland, where the speed limits are much lower, of course.

9 **Q.** I don't know if this question suggests a right or a wrong  
10 answer, so I suppose it's leading, but you can lead experts.

11 Is there a -- is there a problem with respect to mixing up  
12 diesel and -- diesel emissions and coal dust emissions in that  
13 article?

14 **A.** Right. That's another flaw. I was trying to hit what the  
15 most important one was.

16 **Q.** Sorry.

17 **A.** The second flaw was he didn't separate out how much of his  
18 measurement was from the locomotive engine versus dust coming  
19 off the train cars going by. So he just had a combined total  
20 for a train going by. And so that was a major flaw as well.

21 **Q.** Okay. Could we please see the first demonstrative, which  
22 is entitled "Corrected Emissions"?

23 **MR. FELDMAN:** I'm going to make a statement for the  
24 record, if I may, your Honor.

25 This is not an alternative emissions calculations that I

1 have referred to as being in his report but not present before  
2 the Court. This is the correction of the emissions that were  
3 done by ESA using what he said is a wrong formula.

4 **THE COURT:** Okay.

5 **BY MR. FELDMAN**

6 **Q.** What -- what values did you include for corrected  
7 emissions using what you've described as the wrong formula that  
8 ESA used but with corrected inputs?

9 **A.** So, for example, if you go to the second row, the staging  
10 with the corrected friction velocity calculation now becomes  
11 0.69.

12 **Q.** And what about for OBOT operations with 90 percent BACT?

13 **A.** And then with the BACT on the operations at the site, the  
14 emissions are 0.27 tons per year.

15 **Q.** And if you -- if you accept your calculation of emissions  
16 for mainline rail and what we think -- what we know is West  
17 Oakland, what would that number be?

18 **A.** That would be 0.1.

19 **Q.** And so for the Oakland staging and OBOT operations, what  
20 is the corrected amount of emissions?

21 **A.** About one ton per year.

22 **Q.** And if somebody wanted to, they could have done modeling  
23 on that, right?

24 **A.** Yes, they should have -- could have, yes.

25 **Q.** Given this level of emissions, would it have necessarily

1 made sense to do so?

2 **A.** At that small of a level, it would not be required to do  
3 so. It's so small.

4 **Q.** BAAQMD wouldn't have required it?

5 **A.** That's correct. It's below the CEQA thresholds.

6 **MR. FELDMAN:** Could we see the next demonstrative?

7 (Document displayed.)

8 **BY MR. FELDMAN**

9 **Q.** What does this demonstrative show?

10 **A.** So this is just demonstrating in a graphical form ESA's  
11 original data from Table 5-7 on the left, and it's broken into  
12 color bars showing where the various chunks, if you will,  
13 emissions come from. Rail transport in blue. Pink in the  
14 staging. And then the green was all other operations on site.  
15 That's the column to the left.

16 The dashed line is the CEQA threshold for PM2.5, which is  
17 10 tons per year. And then the column to the right is, if we  
18 calculated the emissions correctly about 1 ton per year, 1.06  
19 to be precise. You can see we are almost 10 times lower than  
20 the CEQA threshold.

21 **Q.** I have one more substantive question.

22 I'm asked to ask you: What is the point of the NAAQS?  
23 What is it intended to do?

24 **THE COURT:** The what?

25 **MR. FELDMAN:** NAAQS, N-A-A-Q-S.

1   **A.**    So the National Ambient Air Quality Standards are designed  
2   to protect the public from air pollution, and they are designed  
3   by doing a very extensive review of literature on all the  
4   studies available.  It's re-upped about every five years.  It's  
5   reevaluated.  And then the administrator sets a level, a  
6   threshold, with a margin of safety that is supposed to protect  
7   the public from air quality -- from air pollution.

8   **Q.**    I have one more question.  Do you have relatives that live  
9   in West Oakland?

10  **A.**    I actually do.

11           **MR. FELDMAN:**  Nothing further.

12           **THE COURT:**  I have a question.

13   I'm pulling up the AirNow website.

14           **THE WITNESS:**  Okay.

15           **THE COURT:**  This is not relevant to our case.

16           **MR. FELDMAN:**  This is off my clock?

17           **THE COURT:**  This is off your clock.

18   I'm just curious.  I couldn't figure it out.  I was on the  
19   website, you know, I guess it must have been around the time of  
20   the fires or something and I was just trying to figure out  
21   what -- so I'm on the AirNow website and I'm clicking on  
22   "green," which is good air quality.  And it says "zero to 50."  
23   I couldn't figure out, poking around the website, what "zero to  
24   50" is.

25           **THE WITNESS:**  That is an incredibly good question,

1 and I don't mean to be patronizing. There is a scale that the  
2 U.S. Government decided --

3 **THE COURT:** We'll reserve that for Mr. Feldman.

4 **MR. FELDMAN:** I'm annoying. I'm not patronizing.

5 **THE WITNESS:** The U.S. EPA decided that the public  
6 would have too much difficulty understanding different units.  
7 So for particles, it's micrograms per cubic meter. For ozone,  
8 for smog, it's parts per billion. So they came up with a  
9 normalized scale for all pollutants.

10 So it's hard for you to know because it doesn't tell you  
11 what it is. It's intended intentionally that way. You just  
12 need to know it's in the green. It doesn't directly relate to  
13 the number we've been talking about today.

14 **THE COURT:** Okay.

15 **THE WITNESS:** There's a formula to get there, but  
16 it's complicated.

17 **THE COURT:** But particles -- number of particles  
18 per -- number of -- what is it?

19 **THE WITNESS:** Amount of weight of particles in a  
20 cubic volume of air. Micrograms per cubic meter.

21 **THE COURT:** Micrograms per cubic meter is part of  
22 this.

23 **THE WITNESS:** Yes.

24 **THE COURT:** It's one of many things that goes into  
25 the formula --

1           **THE WITNESS:** Absolutely.

2           **THE COURT:** -- that causes this number to get spit  
3 out and causes the air to turn green.

4           **THE WITNESS:** Right. So we actually calculate that.  
5 We run that website at our computers in Petaluma. So we do  
6 that for the whole country based on observed data. We will do  
7 those calculations you just referred to and convert it to this  
8 scale for showing it to the public.

9           **THE COURT:** Okay. Great. Thank you.

10          **BY MR. FELDMAN**

11          **Q.** One more question. Back on my clock.

12               Are you familiar with a study that was done in 2017 now,  
13 Trial Exhibit 478, and did it have any impact on your review of  
14 the Jaffe material?

15          **A.** Yes. I did, yes.

16          **Q.** Is that a study that was done by BNSF -- or excuse me --  
17 by ICF?

18          **A.** That's the ICF study, that's correct.

19          **Q.** How did that impact your review of the Jaffe material?

20          **A.** ICF is another consulting firm that was doing a very  
21 thorough evaluation of a train car, coal train car emissions.  
22 They did modeling and measurements. And one of the things they  
23 did was also critique the Jaffe work. So I learned some  
24 information about Jaffe from their -- their critique as well  
25 because Jaffe was in Washington.

1 Q. Is there anything that you haven't said already that that  
2 study conveyed to you?

3 A. No. I think I've already said those, but it was based on  
4 the ICF report.

5 MR. FELDMAN: Thank you very much.

6 Nothing further, your Honor.

7 THE COURT: Is now a good time to take our afternoon  
8 break? Probably. Why don't we resume at 3:00 o'clock. And  
9 we'll go until around 4:30.

10 MR. FELDMAN: Very well.

11 THE COURT: Thank you.

12 THE CLERK: Court is in recess.

13 (Whereupon there was a recess in the proceedings  
14 from 2:51 p.m. until 3:03 p.m.)

15 THE COURT: All right. All set?

16 CROSS EXAMINATION

17 BY MR. COLVIG

18 Q. Good afternoon, Mr. Chinkin.

19 A. Good afternoon.

20 Q. You recall I'm Tim Colvig for the City?

21 A. Yes.

22 Q. At the time you were retained in this matter, you were  
23 told by those retaining you that there was sufficient  
24 information for you to calculate your estimated emissions from  
25 the Basis of Design and a Cardno report, correct?

1 A. I would rephrase that I was asked did I feel there was  
2 sufficient information to do that calculation. I wasn't told  
3 that.

4 Q. You told those retaining you that there was sufficient  
5 information for you to calculate estimated emissions from the  
6 Basis of Design with a Cardno report, right?

7 A. Yes.

8 Q. Does BAAQMD issue permits for mobile sources, like trains?

9 A. If the trains are within the perimeter of a stationary  
10 source, they can be given control requirements by BAAQMD as  
11 part that stationary source's emissions sources.

12 Just like mobile sources, like a bulldozer inside a  
13 construction site.

14 Q. Like inside the fence line of a facility?

15 A. Correct.

16 Q. Yeah. And the -- that South Coast rule, 1158, does that  
17 require covers on coal-carrying rail cars coming to the  
18 facility when they are outside of the fence line?

19 A. I've not read that part of the rule, so I can't address  
20 that.

21 Q. Okay. How many air permits have you assisted clients in  
22 obtaining?

23 A. That's not part of my regular practice, to negotiate  
24 permits for clients.

25 Q. So none?

1     **A.**    That's correct.

2     **Q.**    So referring to the ESA report, Table 5-7, when you look  
3     at the OBOT operations, unloading, transfer and storage. Do  
4     you see that?

5     **A.**    Yes.

6     **Q.**    Were you able to determine whether -- in making these  
7     calculations that ESA assumed that those operations were either  
8     covered or enclosed in some way?

9     **A.**    I'm sorry. Can you say that again?

10    **Q.**    Sure. So with regard to OBOT operations, unloading,  
11    storage and transfer, in ESA's Table 5-7 -- are you with me?

12    **A.**    Yes.

13    **Q.**    Okay. Were you able to determine whether ESA's  
14    calculations for those operations assumed that those operations  
15    were covered or enclosed in some manner?

16    **A.**    My assumption there was a reduction of wind speed that  
17    they attributed to what you're saying, but it wasn't explicitly  
18    stated as such.

19    **Q.**    If two facilities have the same emissions and  
20    concentrations of those same emissions, can the harm to human  
21    health for each depend on where each is located? For instance,  
22    proximity to neighborhoods or prevailing winds?

23    **A.**    I'm sorry. I'm not trying to be picky, but when you said  
24    "same concentrations," I'm not quite sure what you meant.

25    Maybe say that again.

1 Q. The same amount of emissions.

2 A. Okay. So two facilities have the same emissions.

3 Q. Yes.

4 A. And so, as I said earlier, you need a model to know what  
5 the concentrations from those emissions are to determine what  
6 someone might be exposed to. Given the same exact emissions in  
7 a different environment further away from the fence line, the  
8 people might be exposed to different concentrations.

9 Q. And the location involved, both the facility and proximity  
10 to a neighborhood, for instance, works into that, doesn't it?

11 A. Yes, it does.

12 Q. Okay. And prevailing winds work into that?

13 A. Yes, it does.

14 Q. Does all PM2.5 create the same harm to human health, for  
15 instance, sea salt, coal, petcoke, diesel particulate?

16 A. At this time there is a lot of research that's still  
17 ongoing trying to understand that. But the current standards  
18 consider just the weight of the material, not the chemistry of  
19 the material.

20 Q. Okay. And you did your own emissions calculations as you  
21 just testified, correct?

22 A. That is correct.

23 Q. Okay. And did you have an assumed moisture content of the  
24 coal in your emissions?

25 A. Yes, we did.

1 Q. Okay. And did you assume the moisture content of the coal  
2 stated in the Basis of Design?

3 A. I relied upon that as one of my points of checking it,  
4 yes.

5 Q. Does the moisture content from each of Bowie's coal mines  
6 have the same moisture content?

7 A. I don't have that information.

8 Q. That was not something you looked at?

9 A. I looked at general mines in the Western, you know, mining  
10 area. I did not look specifically at their mines.

11 MR. COLVIG: No further questions. Thank you.

12 MR. FELDMAN: No questions.

13 THE COURT: All right. You can step down. Thank  
14 you.

15 (Witness excused.)

16 MR. MYRE: Your Honor, Plaintiffs call Dr. Andrew  
17 Maier.

18 MR. FELDMAN: Can I have a moment? Please continue.  
19 May I be excused for a moment?

20 THE COURT: Of course.

21 (Brief pause.)

22 ANDREW MAIER,  
23 called as a witness for the Plaintiff herein, having been duly  
24 sworn, testified as follows:

25 THE WITNESS: I do.

1           **THE CLERK:** Thank you. Please be seated.

2           And for the record, please state your first and last name  
3 and spell both of them.

4           **THE WITNESS:** Michael Andrew Maier.

5           **THE CLERK:** Please spell both.

6           **THE WITNESS:** Michael is M-I-C-H-A-E-L. Andrew,  
7 A-N-D-R-E-W. Maier, M-A-I-E-R.

8           **THE CLERK:** Thank you. Go ahead and adjust the  
9 microphone so it's directly in front you.

10          Thank you.

11                           **DIRECT EXAMINATION**

12   **BY MR. MYRE**

13   **Q.** Good afternoon, Dr. Maier. Can you please describe your  
14 educational background for the Court.

15   **A.** Yes. I have a Bachelor's degree in Natural Resources from  
16 Ball State University, a Master's degree in Industrial Health  
17 from the University of Michigan, and a Ph.D. in Molecular  
18 Toxicology from the University of Cincinnati.

19   **Q.** What's your current professional occupation?

20   **A.** I'm an associate professor at the University of Cincinnati  
21 and also director of the Risk Science Center.

22   **Q.** What does the Risk Science Center do?

23   **A.** The Risk Science Center is a laboratory or a group that's  
24 dedicated to developing new methodologies and improving the  
25 science of developing risk assessments.

1 Q. How many years do you have in your professional field,  
2 would you say? Years of experience.

3 A. Over 20 years.

4 Q. And what fields in particular?

5 A. So I have expertise in industrial hygiene, and toxicology,  
6 and in risk assessment science.

7 Q. Do you have any professional certifications?

8 A. Yes. I'm certified in industrial hygiene and  
9 board-certified in toxicology.

10 Q. What is toxicology?

11 A. Toxicology is really looking at the way that stressors or  
12 chemicals or agents interact with health. The body, for  
13 example. So in looking at -- evaluating the nature of the  
14 effects of different toxic chemicals or chemicals or agents,  
15 what we're looking at is what are the nature of the types of  
16 effects a chemical could cause.

17 And we look at the nature of how that effect is actually  
18 caused, the mechanisms behind it. We look at the dose or the  
19 potency, how much dose is required to cause those types of  
20 effects. And we evaluate the degree to which a risk of those  
21 type of effects occurs as it relates to how much exposure there  
22 is.

23 Q. If you could just briefly turn to Exhibit 736 in your  
24 binder, please, sir?

25 **THE COURT:** And try to slow down a little bit when

1 you're testifying for the court reporter.

2 **BY MR. MYRE**

3 **Q.** Let me know, is this a recent version of your C.V. that  
4 accurately reflects your educational and professional work  
5 history?

6 **A.** Yes, it is.

7 **Q.** You were describing toxicology. Is there a standard  
8 approach used for evaluating the potential risk of exposure to  
9 a toxicant?

10 (Court reporter clarification.)

11 **A** He might be able to spell it for you better than I can.

12 Yes. So basically what we use is something called the  
13 "risk assessment paradigm." That's a very standardized  
14 approach used by the federal government --

15 **THE COURT:** I'm going to ask you to again to try to  
16 slow down a little bit just to make sure that the court  
17 reporter can get everything you're saying.

18 **A.** Yes. So this risk assessment paradigm is really a  
19 standardized approach that's used by the federal agencies.  
20 Many state affiliations use this basic overall process. So the  
21 risk assessment paradigm really has four metrics or key steps.  
22 So the first rule of force is a hazard characterization or  
23 identification step.

24 So the idea in that step is to evaluate what are the  
25 nature of the types of effects a chemical could cause or

1 stressor could cause. And that can be expended to a hazard  
2 characterization, which is sort of the more modern way of doing  
3 things, and that hazard characterization step is really looking  
4 at under the circumstances or scenarios that are relevant, what  
5 is the nature of the effects that could be caused. So that's  
6 sort of the first step.

7 **BY MR. MYRE**

8 **Q.** Just slow down a little bit, please, sir.

9 **A.** Okay.

10 **Q.** What's the second step?

11 **A.** Okay. So the second step really relates to dose response  
12 assessment. So dose response, so that's looking at what dose  
13 or concentration would you expect to see the effects.

14 A third step is the exposure assessment step. So the  
15 exposure assessment step is looking at, well, how much exposure  
16 is there, what are the temporal patterns of the exposure, and  
17 how would that exposure, you know, be received by the  
18 population that you're studying.

19 And then what we do is we -- the last step is a risk  
20 characterization. And that risk characterization step really  
21 integrates what we learned about the nature of the exposure,  
22 how much the exposure was, and what we do is compare it to the  
23 dose response or the safe dose, and evaluate whether our  
24 exposure is below or above the safe dose. And based on that,  
25 that actually helps us understand if there is a risk.

1 Q. What was the assignment that you undertook in this case,  
2 sir?

3 A. I was asked to look at the -- the Oakland ordinance and  
4 evaluate the reports they relied on to determine if there is a  
5 scientific basis for the conclusions that were drawn.

6 Q. And what particular reports did you look at?

7 A. I looked at three key reports: An ESA report, a report by  
8 a Dr. Chafe, and a report from the Public Health Advisory  
9 Panel.

10 Q. I'm going to have pulled up on the screen Exhibit 4, which  
11 is the ordinance that you reviewed and, in particular, Page 5.  
12 So 4.0005.

13 (Document displayed.)

14 Q. Section 8.60.020B1 has this conclusion:

15 "The storage and handling of coke would have many  
16 public health and safety impacts, including without  
17 limitations a creation of conditions that would be  
18 substantially dangerous to the health and/or safety of  
19 Oakland's constituents."

20 Now, did you form an opinion as to whether the information  
21 in the reports that you reviewed support this conclusion?

22 A. Yes, I did form an opinion. Those reports don't support  
23 this conclusion. And there is, really, to me, two major flaws  
24 in those reports as a whole.

25 Q. And what's the first flaw?

1   **A.**   So the first flaw really relates to the idea of these are  
2   pretty much hazard identification reports.  So they list out  
3   coal.  They list out coal constituents or trace elements.  And  
4   they note:  Well, these are the types of effects that could be  
5   caused by these types of chemicals under some conditions.

6           But they -- it's not really a hazard characterization,  
7   which I mentioned.  It really looks at what are the nature of  
8   the types of effects that could occur under the types of  
9   conditions or scenarios relevant to the question at hand, the  
10  OBOT facility.  That was the first major issue.

11  **Q.**   What was the second?

12  **A.**   The second major issue was really an important issue.  
13  These reports really didn't conduct a risk assessment.  And a  
14  risk assessment is what's needed to make judgments about the  
15  level of potential risk.

16           So that risk assessment, they didn't have key aspects of  
17  doing the risk assessment that I mentioned.  There wasn't a  
18  clear credible exposure assessment, air levels or emissions,  
19  that could be compared to a safe dose assessment, which in this  
20  case would be that National Ambient Air Quality Standard.  So  
21  that risk assessment piece wasn't embedded in these reports.

22  **Q.**   And when you said "air emissions" in that sentence,  
23  correct me if I'm wrong, but I think when you're talking about  
24  comparing it to the standards, is it emissions or is it  
25  concentration levels?

1   **A.**   Yes.  So what we need to do is compare apples to apples.  
2   So the National Ambient Air Quality Standards are our safe  
3   concentration measure, so that's an air concentration in  
4   micrograms per cubic meter.  So we need to have some estimate  
5   of air levels or concentrations in that same unit, micrograms  
6   per cubic meter.  So amount or mass released is not sufficient  
7   to do that type of estimation.

8   **Q.**   I'd like to direct you to another point on the ordinance,  
9   same page here.  This is Subsection E-1-A, and it's pulled up  
10  on your screen.

11       (Document displayed.)

12  **Q.**   Towards the middle of that paragraph, there is a sentence  
13  that reads as follows:

14               "Coal contains toxic heavy metals, including  
15               mercury, arsenic and lead.  And exposure as to these  
16               toxic heavy metals is linked to cancer and birth  
17               defects."

18       Assuming that an OBOT facility was built and that PM2.5  
19   coal emissions were put out into the air, how would the  
20   residents of West Oakland be exposed specifically to these  
21   toxic metals that they list here through the inhalation of that  
22   dust?

23  **A.**   Yeah.  And they wouldn't be.  And that's because these  
24   metals are -- they are kind of stuck into the coal matrix.  
25   They are part of the coal.

1       They are not just floating around as individual elements,  
2       so they are not biodegradable. That means if you breathe it  
3       in, they are not actually getting released as individual  
4       elements into the bloodstream.

5               **THE COURT:** Slow down.

6               **THE WITNESS:** Okay. I'm sorry, your Honor.

7               **MR. MYRE:** No problem. Don't worry.

8               **THE COURT:** Keep an eye on your lawyer's hand.

9               **MR. MYRE:** It would have worked okay one or twice,  
10       but not every time.

11       **BY MR. MYRE**

12       **Q.** Turning to Page 2 of the ordinance. And we'll pull that  
13       up on your page. There is a "Whereas" clause towards the  
14       bottom of that, and it reads in part:

15               "Whereas, the City has determined that  
16       preexisting local, state and/or federal laws are  
17       inapplicable and/or insufficient to promote -- protect  
18       and promote the public health."

19       In your opinion, does the information that you reviewed in  
20       the reports that you did for this case support this conclusion  
21       in the whereas clause?

22       **A.** No, I don't believe that this -- this point is supported.  
23       And that's because we do have appropriate standards. We have  
24       the National Ambient Air Quality Standard, for example, for  
25       covering issues related to particulate matter exposure. That

1 is an appropriate protective standard to use.

2 **Q.** Can you turn to Exhibit 466 in your binder, please, sir?

3 (Document displayed.)

4 **Q.** If you could, when you're there, can you briefly describe  
5 for the Court what this document is.

6 **A.** Yes. So this is the Federal Register notice, and it  
7 publishes the final rule for the National Ambient Air Quality  
8 Standard for particulate matter.

9 **Q.** And what level for protection requirements does the EPA  
10 adhere to in setting this NAAQS standard?

11 **A.** So the NAAQS standard is mandated for the administrator of  
12 EPA to make it or set a standard that is protective of the  
13 public health, including adding a margin of safety. And that  
14 is also protective of sensitive subpopulations. Sensitive  
15 subpopulations with populations such as elderly, children,  
16 people with underlying disease. So that is mandated as the  
17 level of protection that must be provided by the NAAQS  
18 standard.

19 **Q.** Can you describe for the Court the process that the EPA  
20 follows in setting the NAAQS standard?

21 **A.** Well, that's a very complicated and sophisticated process,  
22 very elaborate process.

23 So, really, there are three key technical inputs to this  
24 overarching process. One is an integrated science assessment  
25 document. So the idea in that document is to take all of the

1 relevant information -- the health effect studies, toxicology,  
2 chemistry, exposure studies -- all relevant information is as a  
3 starting point. And that's developed by a team that does an  
4 integrated science assessment, evaluating all that data.

5 There is also a risk exposure assessment. And so that  
6 document is looking at characterizing the levels of exposure  
7 and evaluating those levels of exposure relative to dose  
8 response. So how much exposure causes different levels of  
9 response. And that document is also developed.

10 And then there is a policy assessment. So the policy  
11 assessment lays out sort of the decision process for how are we  
12 going to weigh all this complex information together to arrive  
13 at a conclusion.

14 So those are technical pieces that are developed. So in  
15 addition to developing the technical pieces, there's multiple  
16 steps of review throughout this whole process.

17 **Q.** What are those steps of review, or what are some of the  
18 ones that are involved?

19 **A.** Yeah. So a key one is there is an external advisory  
20 board, called a CAPAC, that would be evaluating or providing  
21 input about the judgments and the processes being used  
22 throughout the process.

23 And then the EPA has an internal review processes and  
24 the -- and the outputs are also -- go through an external  
25 review, where stakeholders of all kinds can provide inputs.

1 Q. "External" you mean public? The public can participate in  
2 the process?

3 A. That's correct.

4 Q. Okay. And do you agree that the EPA's NAAQS standards  
5 yield standards that are protective of public health?

6 A. I do. The process is extremely robust. They have a  
7 specific mandate to provide a level that's protective of public  
8 health with a margin of safety, including for sensitive  
9 subgroups. And based on the rigorous process, the level of  
10 caliber of the process and scientists, there is no reason to  
11 doubt the protective levels that's embedded in that mandated  
12 standard.

13 Q. I'm going to bring up on the screen Exhibit 961, and this  
14 is a portion of the Zoe Chafe report that you used.

15 (Document displayed.)

16 Q. So, in particular, 961.0021.

17 There is a section at the top here, 3.2 "Health Effects of  
18 Exposure to PM2.5."

19 And Dr. Chafe wrote:

20 "There is no safe level of exposure to fine coal  
21 dust particulates PM2.5."

22 Now, do you agree with that statement?

23 A. I don't agree with that statement.

24 Q. Why not?

25 A. So this statement seems to allude to the idea that there

1 is no threshold for the -- this alludes to the idea that there  
2 is no threshold for the onset of effects for particulate  
3 matter.

4 And EPA takes very great care in discussing this in the  
5 final rule. And they say very specifically that there is no  
6 discernible threshold.

7 **Q.** And what does that mean to you?

8 **A.** So what that means to me is, they look at the data and the  
9 data that they have confidence in, they didn't see a threshold  
10 in that range. But -- so there is no discernible threshold.  
11 There is no threshold they could find.

12 They specifically note, though, that there could very well  
13 be a threshold, and they've actually set a level that's  
14 mandated to be safe and protective of the public's health. So,  
15 therefore, that's a margin of safety. So that embeds the idea  
16 that there is, indeed, according to EPA's definition, a dose  
17 that is protective of public health and, therefore, safe.

18 **Q.** I'd like to next turn you to the public health report,  
19 which is Exhibit 1069. And, in particular, Page .0029, so  
20 Trial Exhibit 1069.0029.

21 (Document displayed.)

22 **Q.** There is a sentence here. And you see that they cited  
23 U.S. EPA 2009 for this sentence. It reads:

24 "Studies from around the world and published in  
25 the scientific literature have clearly documented

1 significant adverse health effects," and then it goes  
2 on to say "at levels below these standards."

3 Referring to the NAAQS.

4 My question for you is: In your opinion is this statement  
5 supported by the analyses that have been performed by the EPA?

6 **A.** Well, I think is a mischaracterization of EPA's thoughts  
7 and opinion. EPA's thoughts and opinion are represented in  
8 their final rule or final decision. So although there might be  
9 studies around the world that study authors indicated showed  
10 effects below the level of 12, that doesn't mean that the EPA's  
11 opinion is that there are effects below 12. Or if that were  
12 the case, they would have set a lower standard.

13 In fact, they actually deliberated about setting a lower  
14 value, and they specifically chose not to pick a lower value,  
15 and they discussed their rationale for that.

16 **Q.** Now, turning to a different subject, the ordinance also  
17 mentions workers, people who might be exposed to coal dust at  
18 the terminal facility. Do the reports that you reviewed  
19 contain scientific data supporting any conclusions regarding  
20 the risk of harm or hazards to the workers at the facility?

21 **A.** No. Again, the reports have the -- one of those flaws is  
22 sort of the hazard statements, but they are not risk  
23 assessments. And there is -- federal OSHA and California OSHA  
24 do have standards in place to protect or place health and  
25 safety. There are standards in place that are protective of

1 worker health.

2 And to the degree there are exposures, there are standard  
3 industrial hygiene practices and control measures that are  
4 meant to protect workers. And those would be things like  
5 ventilation systems that, you know, draw the particulates away.  
6 Administrative types of controls.

7 And there will be things like limiting the amount of time  
8 you can spend in a dusty area or things like wearing protective  
9 equipment. So there are OSHA regulations and procedures to  
10 assure worker health and safety.

11 **Q.** All right. The ordinance also discusses potential  
12 detrimental impacts to the natural environment. Do you have an  
13 opinion as to whether the reports support that conclusion?

14 **A.** Again, that conclusion is also not supported from an  
15 ecological risk standpoint. Coal is not very toxic, and as  
16 we've already noted, the materials in coal are not really  
17 bioavailable.

18 **Q.** Now, the EPA last set the NAAQS in 2012 or around then, is  
19 that right?

20 **A.** That's my understanding. 2013.

21 **Q.** So how would the EPA account for new scientific data if it  
22 now became available indicating that maybe there is a risk of  
23 harm at a lower level? How would -- how would the EPA be  
24 protective of that?

25 **A.** Well, the EPA does have an updating process, and my

1 understanding is actually there is an update underway at this  
2 time. To the degree that the new science suggests something  
3 different, it may stay the same. It may go down or it may go  
4 up. Who knows. They will evaluate. If that becomes available  
5 and when, then those would be the standards that would be used  
6 to make decisions about risk.

7 **MR. MYRE:** Thank you very much, Dr. Maier.

8 **THE COURT:** Cross?

9 **MR. AKER:** Yes, your Honor.

10 **CROSS EXAMINATION**

11 **BY MR. AKER**

12 **Q.** Good afternoon. I want to ask you about a statement you  
13 make at the end of your report that's Exhibit 571, if we could  
14 get that up on the screen. And I'm looking for --

15 **MR. MYRE:** Just for the record, we object to this,  
16 his report coming into the record, as hearsay.

17 **THE COURT:** You can ask him about his opinions.

18 **MR. AKER:** Okay. Sure, your Honor.

19 **BY MR. AKER**

20 **Q.** Is it your opinion that only if the NAAQS standards are  
21 exceeded would there be a potential harm to public health?

22 **A.** The latest robust science we have to evaluate a safe level  
23 is the National Ambient Air Quality Standard. And that is a  
24 standard that is protective of public health with a margin of  
25 safety. So, yes, that is the marker to use to evaluate whether

1 that is a health or safety risk.

2 Q. Okay. And if the emissions concentrations in a certain  
3 area went over the 12, you would agree that there is a  
4 potential harm to public health, correct?

5 A. Well, that's a little bit of a nuanced answer here. So  
6 generally we would use that NAAQ standard as the -- as a  
7 benchmark to take action to make sure we maintain below it  
8 because it has a margin of safety built in. So if there is  
9 slight increases above it, it does not necessarily mean there  
10 is a harm to public health. But for protective purposes, it's  
11 appropriate to use that NAAQS level as the place where we want  
12 to make sure we stay below it.

13 Q. Okay. Your opinion, as I understand it, is that because  
14 of the emissions calculations that Mr. Chinkin did, which you  
15 used, correct, in forming your opinion?

16 MR. MYRE: Objection, your Honor. I think there is a  
17 nuance here between emissions and concentrations that I would  
18 like to point out for everybody.

19 THE COURT: Your objection is overruled.

20 Counsel can ask the question the way counsel wants to ask  
21 it, and the expert can answer the question the way the expert  
22 wants to answer it.

23 BY MR. AKER

24 Q. Go ahead.

25 A. Yes. So we looked at airborne concentration estimates

1 that Mr. Chinkin -- Mr. Chinkin developed as part of evaluating  
2 our opinion, related to whether or not there would be a concern  
3 related to exceedances with the NAAQS.

4 **Q.** Okay. And you concluded that because those airborne  
5 concentrations were below the NAAQS, that this would not  
6 present a substantial harm to public health, correct?

7 **A.** Well, that's not exactly correct. I mean, what we were  
8 basically indicating is that the appropriate approach to use is  
9 air model, air concentrations out of the background. We  
10 compare that to the NAAQS.

11 Now, whether that would -- that approach, though, needs to  
12 be done using the most relevant data for the time the actual  
13 facility would be run or operated. So we did that calculation  
14 to show how it would be done in the context of the latest data  
15 we had.

16 But, obviously, a decision whether there is an actual risk  
17 would be relevant -- related to the relevant data for the  
18 decision about actually citing the facility.

19 **Q.** Okay. And if Mr. Chinkin's numbers were wrong, okay, if  
20 he had miscalculated them, if he had underestimated them -- in  
21 fact, the numbers were considerably higher than what  
22 Mr. Chinkin had calculated -- that would change your opinion,  
23 would it not?

24 **A.** Well, it would indicate to me that -- that, obviously, the  
25 permitting facilities or regulatory bodies would evaluate them

1 and say, well, then we are not going to allow a citing of this  
2 facility.

3 **Q.** I'm not asking you about that. I'm asking you would it  
4 change your opinion as to whether this OBOT operation would be  
5 substantial -- presents a substantial danger to public health?

6 **A.** Umm, not necessarily because, again, we're using that as  
7 an example for the latest data we had. But the -- the actual  
8 decision of whether or not there would be a harm of health or  
9 not would be based on the appropriate -- that same process, but  
10 that appropriate process as done and applied to the facility as  
11 it would be operating.

12 So in other words, it's not appropriate to say whether or  
13 not there would be a risk based on those data. The appropriate  
14 question is: If you're above the NAAQS at the time and  
15 conditions of the operation, then that would be a potential  
16 risk and, therefore, you know, the facility would be permitted  
17 or not based on that appropriate risk assessment.

18 **Q.** Okay. Aside from the permits, I'm just asking you: You  
19 concluded, did you not, that this operation would not present a  
20 substantial danger to public health because you took  
21 Mr. Chinkin's emissions numbers or concentration numbers and  
22 believed that those were well below the NAAQS levels, correct?

23 **MR. MYRE:** Your Honor, there is outside the scope of  
24 what was offered on direct examination.

25 **MR. AKER:** I don't think it is.

1           **THE COURT:** It's an opinion on whether -- on -- well,  
2 what are you offering an opinion on is some of the conclusions  
3 that were reached in the studies about the toxicity of the coal  
4 and coal dust, but I don't think -- well, I'll let you -- I'll  
5 let you keep asking the questions.

6           **MR. AKER:** Sure.

7           **THE COURT:** It seems to me that you're going outside  
8 the scope of what he testified to on direct, but I'll give you  
9 a little leeway since this is a bench trial.

10          **MR. FELDMAN:** Can I make one quick comment?

11          So the record is clear, Mr. Chinkin did not author his own  
12 emissions estimates --

13          **THE COURT:** The record is clear about that.

14          **MR. FELDMAN:** Okay. Or anything about  
15 concentrations.

16          **THE COURT:** Yes. He offered a corrected version.

17          **MR. FELDMAN:** That's right.

18          **THE COURT:** Partly corrected version.

19          **MR. FELDMAN:** That is available to the Court should  
20 you ever wish it.

21          **THE COURT:** I understand.

22          **BY MR. AKER**

23          **Q.** Okay. Did you reapply on Mr. Chinkin's calculations in  
24 any way to form your opinion?

25          **THE COURT:** Well, he -- let me just -- I mean, here

1 is the way it works when you're cross-examining an expert  
2 witness at trial, as opposed to at a deposition. Right?

3 You seem to be -- I don't know. I haven't read his  
4 report, but it seems like you're cross-examining his deposition  
5 testimony or your cross-examining his report.

6 But he came up here and, like, the basic two opinions that  
7 he offered, as far as I could tell, were that there were a  
8 couple of basic flaws in the conclusions reached by the studies  
9 considered by the City Council about the toxicity of coal. And  
10 he said that the two -- the two major flaws were, number one,  
11 that the -- there was no consideration of the conditions.

12 It was just generic statements about the types of effects  
13 that could be caused by coal in the abstract or by coal dust in  
14 the abstract, and that there was no actual risk assessment  
15 conducted.

16 And then he talked a lot about the standards and whether  
17 the -- you know, whether the standards adequately protect the  
18 safety of the public. And he concluded that the standards do  
19 adequately protect the safety of the public.

20 So it seems to me that at trial when you're  
21 cross-examining the expert, you want to limit yourself to the  
22 opinions that he offered at trial.

23 **MR. AKER:** Sure. I understand.

24 **THE COURT:** Those are the only things that I've  
25 heard.

1           **MR. AKER:** Okay.

2           **THE COURT:** And those, therefore, will be the only  
3 things that go into my conclusion at the end of this bench  
4 trial.

5           **MR. AKER:** I understand.

6           **BY MR. AKER**

7           **Q.** I want to move on to another topic, which is, you -- as I  
8 understand your testimony, you believe that if the NAAQS  
9 standards are not exceeded, in other words if airborne  
10 concentrations are below the NAAQS standards, it does not  
11 present harm to public health?

12          **A.** That's correct.

13          **Q.** Okay.

14           **MR. AKER:** Could we, Mitch, have Exhibit 463 up on  
15 the screen?

16           (Document displayed.)

17           **MR. AKER:** And if we go to Page 31.

18          **BY MR. AKER**

19          **Q.** Actually, do you recognize this document that's up to the  
20 screen?

21          **A.** Yes.

22          **Q.** Can you tell the Court what it is?

23          **A.** Yes. This is that Federal Register notice that presents  
24 the National Ambient Air Quality Standards for particulate  
25 matter, the final rule.

1 Q. Okay. And you refer to the final rule on your direct  
2 testimony today, correct?

3 A. That's correct.

4 Q. Okay.

5 MR. AKER: And, Mitch, if you could go to Page 55 --

6 THE COURT: Are you in 466? Exhibit 466? Is that  
7 what you're referring to? You said "463."

8 MR. AKER: I've got 463.

9 THE COURT: You're talking about the National Ambient  
10 Air Quality Standards.

11 MR. AKER: It's the Federal Register.

12 THE COURT: Yeah. Well, I have it. In my binder,  
13 it's 466, but anyway...

14 MR. AKER: Okay.

15 BY MR. AKER

16 Q. So this is the final rule that you referred to in your  
17 direct testimony, correct?

18 A. That's correct.

19 Q. And this is the rule through which the -- the EPA  
20 established the current NAAQS standards, correct?

21 A. That's correct.

22 Q. And those are 12 micrograms per cubic meter annual average  
23 at 35, 98 percentile daily average. Did I get that correct?

24 A. Right.

25 Q. So I want to read then --

1           **MR. AKER:** Mitch, if you could blow up the  
2 highlighted portion?

3           (Document enlarged.)

4           **BY MR. AKER**

5           **Q**     It says here:

6                   "CASAC further noted that, quote, although there  
7 is increasing uncertainty at lower levels, there is no  
8 evidence of a threshold (i.e., a level below which  
9 there is no risk for adverse health effects)."

10          Do you see that?

11          **A.**     I do.

12          **Q.**     And so isn't the EPA saying there could be adverse health  
13 effects below 12, correct? We don't know.

14          **A.**     I wouldn't characterize it that way myself. First thing I  
15 would note this highlighted sentence is attributed to the  
16 CASAC, not to EPA. That's not the same as the EPA, right.

17          The second thing is that you'll note the language here.  
18 There is no evidence of a threshold. That doesn't say that  
19 there is no threshold. It says, "There is no evidence of a  
20 threshold." And that's the point I was making, is that EPA --  
21 when you look at the language attributable to EPA in this  
22 document, they consistently note that there is no discernible  
23 threshold. They could have said there is no threshold. They  
24 chose not to say that.

25          In fact, there is a footnote in this document that

1 specifically calls out that they highlight that there is the  
2 possibility of a threshold. The data are just too uncertain to  
3 identify where that is.

4 **Q.** Right. And that threshold could be below the current  
5 standard, correct?

6 **A.** It's -- it's possible based on additional information, but  
7 based on the current scientific evidence EPA has or has, when  
8 they did this evaluation, they obviously judged based on the  
9 certainty of the data that we see effects in this range. We're  
10 going to set a limit below where we see effects and set a  
11 margin or -- with a margin of safety, and that level now  
12 becomes a level that's protective of the public health with a  
13 margin of safety -- so below where we're seeing effects --  
14 including protection of the sensitive sub-populations.

15 In essence, the EPA is saying, "We think this is the safe  
16 level based on the current available response."

17 **Q.** You're saying that, according to the EPA, that  
18 concentrations below the 12 micrograms per cubic meter are  
19 safe?

20 **A.** Yeah, they are protective of public health with a margin  
21 of safety. That's EPA's language.

22 **MR. AKER:** Thank you, your Honor. I have no further  
23 questions.

24 **MR. MYRE:** No questions, your Honor.

25 **THE COURT:** Thank you.

(Witness excused.)

**THE COURT:** Talking fast, you get through the testimony faster.

**MR. SWEDLOW:** Plaintiffs will call Dr. Ali Rangwala.

**THE WITNESS:**

**ALI RANGWALA,**

called as a witness for the Plaintiff herein, having been duly sworn, testified as follows:

**THE WITNESS:** I do.

**THE CLERK:** Please be seated. And for the record, please state your first and last name and spell both of them.

**THE WITNESS:** The first name is Ali and last name is Rangwala. First name, A-L-I. And last name, R-A-N-G-W-A-L-A.

**THE CLERK:** Thank you.

**DIRECT EXAMINATION**

**BY MR. SWEDLOW**

**Q.** Good afternoon, Professor Rangwala.

Have you been retained by OBOT's counsel to be an expert witness in this case?

**A.** Yes, I have.

**Q.** And what is your relevant area of expertise?

**A.** It's industrial fire and explosion safety.

**Q.** Do you have expertise with respect to industrial fire and explosion safety relating to coal?

**A.** Yes, I do.

1           **MR. SWEDLOW:** If we could put up Exhibit 737? We  
2 actually -- we probably don't need to. You'll probably  
3 remember your own C.V.

4           **BY MR. SWEDLOW**

5           **Q.** Where do you currently work?

6           **A.** I teach at Worcester Polytech Institute, which is a  
7 university in Massachusetts.

8           **Q.** What courses do you teach at that university?

9           **A.** I teach explosion protection, industrial fire safety and  
10 combustion at the graduate level.

11           **Q.** Does WPI offer a degree in fire protection?

12           **A.** Yes, it does.

13           **Q.** How many schools in the United States offer engineering  
14 degrees in fire protection?

15           **A.** Two. Two schools predominantly offer a degree in fire  
16 protection engineering, WPI and University of Maryland, with  
17 WPI being an exception where we also offer a Ph.D. degree in  
18 fire protection engineering.

19           **Q.** Can you describe your own personal educational background,  
20 please?

21           **A.** I have a Bachelor's in Electrical Engineering from  
22 University of Pune in India.

23           I then have a Master's in Fire Protection Engineering from  
24 University of Maryland, College Park.

25           And I have -- I have a Ph.D. in Mechanical and Aerospace

1 Engineering from University of California San Diego.

2 Q. And what was the major for your Ph.D. in Mechanical and  
3 Aerospace Engineering?

4 A. Combustion and fire.

5 Q. Have you published any papers or presented any papers on  
6 combustible dust hazards?

7 A. I have.

8 Q. How many papers?

9 A. I have about 15 peer-reviewed publications in combustible  
10 dust, predominantly coal dust, and about 20, 25 conference  
11 papers.

12 Q. Have you served on any panels relating to fire and  
13 explosion safety?

14 A. I have. I have served on an OSHA, which is the  
15 Occupational Safety and Health Administration, specifically for  
16 combustible dust. And I've also served on panels with the  
17 National Science Foundation, NASA, and for general fire and  
18 explosion-related problems.

19 Q. So have you been here listening to the testimony for the  
20 past almost two days?

21 A. Yes, I have.

22 THE COURT: Why? Sorry.

23 (Laughter.)

24 MR. SWEDLOW: So one thing. If he asks you a  
25 question, it's more important than the question I asked you.

1 But don't answer that.

2 **BY MR. SWEDLOW**

3 **Q** I assume you're familiar with what we're calling the "ESA  
4 report"?

5 **A.** Yes, I am.

6 **Q.** You reviewed portions of the ESA report?

7 **A.** Yes, I have.

8 **Q.** What portions have you reviewed of the ESA report?

9 **A.** Predominantly the portions related to fire and -- the fire  
10 and explosion risk of coal dust.

11 **Q.** Have you reviewed portions of what we're calling the  
12 "Chafe Report"?

13 **A.** Yes, I have.

14 **Q.** What portions of that?

15 **A.** The same portions, the portions related to fire and  
16 explosion risk.

17 **Q.** And have you have reviewed portions of the PHAP-C report?

18 **A.** Yes, I have.

19 **Q.** What portions of that?

20 **A.** The same portions of related fire and explosion risk.

21 **Q.** Are you also here to respond to one of the City's experts?

22 **A.** Yes.

23 **Q.** Which expert?

24 **A.** So I have also reviewed the report of the City's expert,  
25 Professor Carlos Fernandez-Pello, and I have provided comments

1 related to that report as well.

2 **Q.** So based on all of the information that you've reviewed in  
3 this case, which we'll cover in medium detail, what is your  
4 opinion with respect to the observed probability for a fire or  
5 explosion relating to bituminous coal for the facility in  
6 question here?

7 **A** So the fire and explosion risk for this particular  
8 facility, which is handling bituminous coal chunks, about  
9 half inch to two-inch in size, is essentially negligible in my  
10 opinion.

11 **Q.** And is that the theoretical risk or the observed risk?

12 **A.** The observed risk is zero, because there has never been an  
13 incident related to a fire or explosion at the facility -- at a  
14 storage terminal that is storing bituminous coal.

15 So if you -- if you -- to quantify engineering risk as the  
16 probability times the consequence, and you calculate  
17 probability based on the number of times that event has  
18 occurred historically, that number is basically zero, the  
19 occurrence. So that is zero, but there is a -- there does  
20 exist a theoretical risk.

21 **Q.** You said "theoretical risk"?

22 **A.** Yes.

23 **Q.** Okay. Sorry. Go ahead.

24 **A.** There does exist a theoretical risk, and that is, I  
25 believe, efficiently managed by the Basis of Design, by

1 incorporating the relevant fire and explosion safety standards.

2 **Q.** Are you aware of whether coal, bituminous coal, has been  
3 safely transported, handled in the United States for the past  
4 40 years?

5 **A.** It has. There are several coal storage terminals that  
6 have transferred millions of tons of coal without any  
7 incidents.

8 **Q.** I want to discuss in a little more detail the concerns  
9 identified by the City's researchers or reporters with respect  
10 to coal dust.

11 **MR. SWEDLOW:** And if we could display slide 4, which  
12 is part of Trial Exhibit 900?

13 (Document displayed.)

14 **BY MR. SWEDLOW**

15 **Q.** Can you explain what is being shown here with respect to  
16 the hazard class for coal dust?

17 **A.** So this is a table from a NFPA 68. NFPA is the National  
18 Fire Protection Association. It's a non-profit organization  
19 that issues most of the fire safety codes that are being used  
20 in the U.S. and, in fact, in many places around the world as  
21 well.

22 So what the table is showing is the dust hazard class for  
23 bituminous coal dust. And I would like to point out that this  
24 is very fine dust. This is 24 microns in size. So it's very  
25 fine. And the dust hazard class is one. One is the lowest

1 dust hazard class. And then as you increase the -- the risk of  
2 dust explosions, the hazard class increases to two and three.

3 So what I'm showing here is that bituminous coal is having  
4 a dust hazard class of one. And cellulose starch, cornstarch,  
5 wood flour, fairly -- I mean, bulk commodity, which you would  
6 consider very benign is having a higher hazard class of two  
7 based on NFPA.

8 **Q.** And cellulose, that relates to paper, is that correct?

9 **A.** Yes. Cellulose is paper dust.

10 **MR. SWEDLOW:** So if we can go to the next slide?

11 (Document displayed)

12 **BY MR. SWEDLOW**

13 **Q.** There is a statement in one of the -- in the Chafe report  
14 that says:

15 "It does not take much coal dust to cause an  
16 explosion."

17 Do you see that?

18 **A.** Yes, I do.

19 **Q.** Is that a correct statement of the risk of an explosion  
20 from coal dust?

21 **A.** Not -- not really.

22 **Q.** Okay. Can you explain what is required in order for there  
23 to be a coal dust explosion? What are the elements necessary?

24 **A.** So for a coal dust explosion, the first thing is you need  
25 really fine dust. And as I showed earlier, that dust is

1 24 microns, very fine dust.

2 Second is that dust has to be a sufficient amount of  
3 vibration or mechanical shock to make the dust suspended. So  
4 that's two.

5 The dust has to be a sufficiently high concentration.  
6 Typically in most dust explosions related to coal -- coal dust,  
7 these concentrations are of the order of 200 to 250 grams per  
8 meter cube. So that's a significantly high amount of dust.

9 And then you need a very high energy source to ignite dust  
10 particles. It's not like a gas. For example, to ignite a gas  
11 methane cloud, you barely need, like, one mini joule. But with  
12 micro dust cloud, the quantity of the energy is needed on the  
13 order of five to ten joules.

14 When you do these tests, the those tests that I showed you  
15 earlier from the NFPA standard, the tests are done with a  
16 pyrotechnic igniter, so it's almost like a firecracker, which  
17 is having an energy of five to ten joules.

18 The likelihood of having such high energy sources in --  
19 in -- especially in industrial facilities is low. In areas  
20 where they are possible, they are very effectively managed by  
21 NFPA standards.

22 **Q.** They are effectively managed by NFPA standards?

23 **A.** Yes.

24 **MR. SWEDLOW:** Could we put up slide 12?

25 (Document displayed.)

1 BY MR. SWEDLOW

2 Q. Was there any information in your reliance material or any  
3 information you reviewed in this case that explained to you  
4 what fire protection standards this terminal contemplated being  
5 in compliance with?

6 A. Yes, there is. So, in general, they are relying on the  
7 three main components of fire protection design. They are  
8 relying on standards by NFPA, which is, as I said, a nonprofit  
9 organization which issues codes and regulations for almost all  
10 fire and explosion risk in the U.S. And it's used by  
11 regulatory agencies across to -- to make sure that facilities  
12 are -- are following fire protection protocol. That's one.

13 In addition, they also listed Factory Mutual requirements.  
14 Factory Mutual is an insurance company. It's a private  
15 insurance company. And they have their own loss prevention  
16 data sheets. So that's a completely independent subset other  
17 than NFPA, which also is very stringent and very reliable. And  
18 so they are going to be using the Factory Mutual data sheets as  
19 well.

20 And then they also included UL. UL is Underwriters  
21 Laboratories. So any kind of fire protection system relies on  
22 equipment like detection systems. Smoke detectors. These  
23 detectors are tested based on UL standards. So they are  
24 ensuring that the equipment that they will use for fire and  
25 explosion detection, protection, suppression will be UL tested

1 UL approved.

2 In my opinion they have a very thorough layer of safety  
3 approach by incorporating these three main bodies for fire  
4 safety.

5 Q. Also in the preliminary plan that was submitted by OBOT to  
6 the City, there are some other codes and standards and  
7 occupational safety standards that were agreed to be complied  
8 with. Do you see that?

9 A. Yes.

10 Q. Do these inform your opinion as to whether and to what  
11 extent the anticipated facility would be protected from any  
12 fire or explosion risk?

13 A. Yes. So they have included the NFPA codes, and they've  
14 also added the state codes and codes set by the Mining Safety  
15 and Hazard Administration, MSHA, as additional layers of  
16 protection.

17 Q. For purposes of your work in this case, have you  
18 identified any actual documented incidents in which a  
19 bituminous coal dust has had an explosion at a coal terminal?

20 A. I haven't.

21 Q. Did you look at all of the incidents cited by all of the  
22 reports that you reviewed for this case?

23 A. Yes, I have. And I also did my own independent search,  
24 and I was not able to find a single documented case of storage  
25 terminal storing bituminous coal having a fire or explosion

1 incident due to the storage commodity.

2 **Q.** Where did -- where else did you look when you say you  
3 looked for yourself?

4 **A.** I looked at -- I looked at this -- at a handbook, at  
5 journal publications related to fire and explosion safety,  
6 predominantly devoted to case studies. And I have also been  
7 teaching industrial fire and explosion safety for the last ten  
8 years.

9 So over the years I have gathered a lot of additional  
10 documents and just based on experience as well.

11 **Q.** I want to switch to the identified alleged risks  
12 associated with spontaneous combustion of coal. Are you  
13 familiar with the concept of spontaneous combustion?

14 **A.** Yes, I am.

15 **Q.** Can you explain in lawyer -- for lawyers what spontaneous  
16 combustion means?

17 **A.** So any -- so any bulk material, if it is chemically  
18 reactive, does have a tendency to self-heat. And so  
19 spontaneous combustion is this capability of material to  
20 generate heat at a certain threshold temperature. And that  
21 threshold temperature for the case -- for the case of coal is  
22 called a "spontaneous heating temperature," which was a word  
23 coined by the -- by the Mining Safety and Health  
24 Administration, MSHA, and so as soon as this material hits this  
25 threshold temperature, you have a rapid acceleration of

1 heating -- of self-heating, and that's called "spontaneous  
2 combustion."

3 **Q.** So what is the -- for bituminous coal, what is the  
4 self-heating temperature? What is the temperature that matters  
5 here?

6 **A.** So I look at an MSHA study, a NIOSH study, which had  
7 coal -- bituminous coals from -- especially from Utah. They  
8 have coals from all across the U.S., but the bituminous coal  
9 they have from Utah. They have from four different mines. And  
10 there the SSG range was 80 to 90 degrees centigrade, which is  
11 176 to 194 degrees Fahrenheit.

12 **Q.** So below 176 degrees Fahrenheit, the bituminous coal will  
13 not self-heat? Is that the point?

14 **A.** That is the temperature which the bituminous coal has to  
15 reach, give or take, plus minus ten degrees centigrade, because  
16 it's an engineering number to -- to now start self-accelerating  
17 reaction that will build temperature.

18 **Q.** Can you compare that self-heating temperature for  
19 bituminous coal to the self-heating temperature for other types  
20 of coal?

21 **A.** Yes. So the best type of coal is anthracite, which is  
22 having the highest spontaneous-heating temperature. So it will  
23 have the lowest propensity to self-heat. And that temperature  
24 is on the order of around 120 degrees centigrade. So it's very  
25 safe to store.

1 Bituminous coal is the second level of coal, also  
2 extremely good because of the fact that it has a high SHT. And  
3 then you move on to the sub-bituminous coals, which have a  
4 lower SHT. And then the lignites, which have an even lower  
5 SHT.

6 So we have been here for two days, as has been pointed  
7 out. So a lot of discussion has been around Powder River Basin  
8 coal. Powder River Basin is a sub-bituminous, which is a rank  
9 lower than bituminous, which is what OBOT is planning to store.

10 Q. And "rank lower" means that it has a lower self-heating  
11 temperature, is that correct?

12 A. Has a slower SHT, yes.

13 Q. How does the concept of compacting coal affect this  
14 self-heating and risk of spontaneous combustion?

15 A. So in order for spontaneous heating to occur, spontaneous  
16 heating is a chemical reaction, and in the case of coal, the  
17 chemical reaction requires oxygen or air. As soon as you start  
18 compacting a coal pile, you are limiting the access of air to  
19 the coal pile.

20 And so if you compact the coal in a specific range that  
21 has been provided by an NFPA guideline, which is 1100 to 1200kg  
22 per meter cube, you essentially block the air access to the  
23 coal pile. And then you can essentially store millions of tons  
24 of coal safely in industrial facilities.

25 Q. So as long as the NFPA guideline regarding compaction of

1 coal is followed for this anticipated facility, is there any  
2 risk of spontaneous combustion in these piles?

3 **A.** I believe there is none.

4 **Q.** Can you please explain what this -- what it is that we're  
5 displaying there and how it relates to your opinion?

6 **A.** So this is a National Fire Protection Association Handbook  
7 chapter on storage and handling of solid fuels. So they cover  
8 all kinds of bulk fumes.

9 This particular paragraph is related to coal pile storage,  
10 where they have taken -- they have given a basic guideline that  
11 when coal is compacted in that threshold range which I just  
12 mentioned, 1100 to 1200kg per meter cube, the coal can be  
13 stored safely.

14 **Q.** For the record, that's Trial Exhibit 930 at Page 2.

15 Have you reviewed any material from the U.S. Bureau of  
16 Mines on the same issue?

17 **A.** Yes, I have. And this is a paragraph from one of those --  
18 an article from the U.S. Bureau of Mines where they are  
19 reaching the same conclusion, that when you have a coal pile  
20 and you -- and you compact it or layer it or you prevent  
21 segregation of particles, you can store it for extended periods  
22 of time without -- without any self-heating.

23 And this is for any rank of coal. So that's another point  
24 I would just like to make.

25 **Q.** Can you say that last point again?

1   **A.**    So this holds true for any rank of coal.  So it doesn't  
2   matter if it's bituminous or sub-bituminous or lignite.  If you  
3   compact it, you can store it safely.

4   **Q.**    If you follow the NFPA guidelines for storage and  
5   compaction of coal, you can store and compact any kind of coal  
6   without the risk of self-combustion?

7   **A.**    Yes.

8   **Q.**    Are you have aware of any documented instances where  
9   bituminous coal has spontaneously combusted in a storage  
10  terminal?

11  **A.**    No, I have -- I'm not.

12  **Q.**    I would like to move to the risks or the alleged risks  
13  associated with covered rail cars, the fire and explosion risk.

14        Let's say start with an easy one.  What is your opinion as  
15  to whether there is a risk associated with fire and explosion  
16  for covered rail cars?

17  **A.**    There isn't any because all the same reasons that I listed  
18  earlier.  It's -- A, it's bituminous coal.  B, it's  
19  significantly large chunks.  As I identified, a half-inch to  
20  two inches chunks of coal.  Three, it is -- I mean, a rail car  
21  is a very small volume.  It's only 100 tons.  So it's a very  
22  small volume.

23        And, yeah, these are the three main reasons.

24        **MR. SWEDLOW:**  Go to the next slide?

25        (Document displayed.)

1 BY MR. SWEDLOW

2 Q. This is a statement from the ESA internal communications  
3 relating to risk or potential risk from covered rail cars. It  
4 says:

5 "I have not seen any documentation that would  
6 indicate that fire and combustion hazards would be any  
7 higher in a covered versus an open rail car."

8 Do you see that?

9 A. Yes, I do.

10 Q. Do you agree with the statement that there is no  
11 documentation that there is an increased risk from covering  
12 rail cars?

13 A. Yes, there is -- I was unable to find any documentation  
14 either.

15 Q. Say that one more time?

16 A. I was unable to find any documentation.

17 Q. Next, I want to talk about the identified potential risk  
18 for a methane fire or explosion related to coal.

19 Is there a realistic risk of fire or explosion with  
20 respect to methane during the transport and or storage of  
21 bituminous coal?

22 A. So methane -- so coal dust contain methane, but the key is  
23 that methane is mostly in the mine when the coal is under high  
24 pressure. So as soon as you extract the coal from the mine,  
25 most of the methane is released.

1 And -- and CDC has performed several tests in the early  
2 70's where they showed that around 50 percent of the methane is  
3 essentially released during the first 48 hours after the coal  
4 is mined. So the quantity of the methane we're talking about  
5 is low.

6 And, secondly, in -- they also -- they also perform  
7 studies -- CDC performed studies in, again, the 70's for coals  
8 that were the most gassy coals back then. So they were not  
9 just randomly selecting coal, but they were selecting most  
10 gassy coals. And these coals were stored in silos that were  
11 about 9,000 tons of storage, and even know those studies, they  
12 found there was not enough methane that was accumulated on the  
13 top of the silos.

14 So in a rail car where you only have 100 tons of coal  
15 that's being stored, the -- I don't see any foreseeable risk  
16 for methane accumulation on top, and that methane accumulation  
17 being a high enough concentration to cause an explosion hazard.

18 **Q.** Based upon your review of the preliminary operating plan  
19 documents -- I think it was 12.8 and 13.1 that we looked at --  
20 do you believe that the plan that has been submitted to date  
21 adequately addresses and incorporates risk mitigation  
22 associated with fire and explosion?

23 **A.** Yes.

24 **Q.** I want to talk for a moment about the fires and explosions  
25 that were identified by the ESA report, the Chafe report, the

1 PHAP-C report, and then by Doctor/Professor Fernandez-Pello.

2 And I think I would like to address them as a group, if I  
3 could.

4 Do any of those identified reports or any expert reports  
5 quantify how many or to what extent coal-related fires and  
6 explosions actually occurred as compared to the amount of coal  
7 transported?

8 **A.** Yeah. So there's no -- firstly, none of those reports  
9 have -- show bituminous coal fire or explosion. And,  
10 secondly -- so, yes, there is no quantification of occurrence  
11 or probability in any of those reports because none of them are  
12 talking about bituminous to begin with.

13 And then there are issues with -- there are references  
14 later to storage terminals and not storing bituminous coal  
15 per se. And there have been documented files in those  
16 terminals.

17 But there the issue has always been a compliance issue,  
18 where those terminals were not compliant. And there was some  
19 massive loophole in the safety compliance.

20 And some of the other references that were discussed about  
21 case histories associated with coal were simply irrelevant  
22 because they were talking about a different facility  
23 altogether. So they are not talking about storage terminals.  
24 They were talking about power plants, for example.

25 **Q.** So let's take a couple examples to explain to the Court

1 what you mean here.

2 So the L.A. -- the Los Angeles or LAXT fires that were  
3 referred to, do those inform whether there would be a fire risk  
4 at the anticipated facility, the OBOT facility?

5 **A.** Not really because -- so I went through the report or the  
6 paper that resulted from that fire at -- and it was because of  
7 an incorrect design of a conveyor that -- and so the conveyor  
8 essentially overheated, and it overheated to an extent where  
9 the bearing temperature was on the order of 1100 degrees  
10 Fahrenheit. And that's a significantly high temperature where  
11 pretty much anything will ignite. So it was a bearing failure  
12 to begin with.

13 And the second aspect of the fire was the conveyor belt  
14 that they were using was completely not according to standards  
15 because it was non-fire -- it was supposed to be non- -- it was  
16 supposed to be fire retardant, but the conveyor belt was  
17 actually not fire retardant. So the conveyor belt carrying --  
18 caught on fire.

19 **Q.** So the cause of that fire, the reason for that fire was a  
20 flawed design with the conveyor belt bearings and an  
21 out-of-compliance belt, is that correct?

22 **A.** That is correct.

23 **Q.** Does that have anything to do with whether the facility  
24 was a coal facility or an Amazon transporting package facility?

25 **A.** No. I mean, it would have been any conveyor belt at any

1 facility.

2 Q. And then there was also an identification of a fire in  
3 Dearborn, Michigan. Do you recall in the materials?

4 A. Yes, I do.

5 Q. Can you explain how and to what extent that fire would be  
6 relevant to assess whether there is a risk of fire or explosion  
7 at this anticipated OBOT facility?

8 A. So that was an explosion, and both the facility as well as  
9 the fuel that was chosen was wrong -- was incorrect. Because  
10 the facility was -- was a power plant, and the explosion was  
11 due to a natural gas explosion to begin with.

12 Q. So based upon your review of all of the anecdotal fire and  
13 explosion data that's in all of the reports, do any of them  
14 actually inform the level of fire or explosion risk that would  
15 be associated with the anticipated OBOT facility?

16 A. Based on the -- not really, no.

17 MR. SWEDLOW: Thank you.

18 THE COURT: Cross?

19 MR. COLVIG: Yes.

20 CROSS EXAMINATION

21 BY MR. COLVIG

22 Q. Good afternoon, Dr. Rangwala.

23 A. Good afternoon.

24 Q. Do you recall I'm Tim Colvig for the City?

25 A. Yes.

1 Q. Okay. You're not an expert in explosion detection and  
2 supression systems, are you?

3 A. Well, I do teach a course on explosion protection, and I  
4 do cover aspects of detection and supression.

5 Q. I would like you to look at the binder that says "Ali  
6 Rangwala, Deposition Transcript." And if you could turn to  
7 Page 48?

8 THE COURT: I have two binders that both say "Witness  
9 Binder."

10 MR. AKER: We gave you the wrong one.

11 (Whereupon binder was tendered to the Court.)

12 MR. SWEDLOW: Your Honor, I also don't have one that  
13 has the transcript in it of the...

14 (Brief pause.)

15 MR. SWEDLOW: Your Honor, if the witness has the  
16 deposition transcript, I'll just follow along on the screen.

17 THE COURT: Okay, okay.

18 THE WITNESS: I was given two as well.

19 MS. SPALDING: Do you want to use the screen?

20 THE WITNESS: I found it.

21 BY MR. COLVIG

22 Q. Thanks for indulging us here.

23 We were looking at Page 48, lines 21 through 23.

24 (Document displayed.)

25 THE COURT: Can you say that a little louder?

1 BY MR. COLVIG

2 Q. We are at Page 48, Lines 21 through 23.

3 "QUESTION: You mentioned 'explosion detection and  
4 supression systems.' Do you see where it says that?

5 "ANSWER: Yes.

6 "QUESTION: Are you an expert in explosion detection  
7 and supression symptoms?

8 "ANSWER: I'm not."

9 Was that your testimony in your deposition?

10 A. Yes, it was.

11 Q. Now, you testified about compacting coal, right?

12 A. Yes, I did.

13 Q. And I think you said something like that compaction should  
14 be to a certain level of compaction, is that right?

15 A. Yes.

16 Q. And the reason for compacting a pile of coal is because of  
17 the danger that a pile of coal may catch fire by spontaneous  
18 combustion, is that right?

19 A. That is correct.

20 Q. And in your expert report and in your deposition, we  
21 talked about a study done in the Netherlands involving about  
22 three piles of coal that are compacted at different levels of  
23 compaction, or density. The so-called Schmal report,  
24 S-C-H-M-A-L, for those reading along at home, in your expert  
25 report, right?

1     **A.**    Yes.

2     **Q.**    And one of the lessons from that Schmal study was that  
3     compacting the coal not enough or too much does not reduce the  
4     time for a coal pile to spontaneously combust as much as  
5     desired; is that right?

6     **A.**    Well -- so the Schmal study has three piles of coal.  
7     There was one pile was not compacted whatsoever. There was one  
8     pile that was compacted mightily. And there was one pile that  
9     was compacted with 1100 to 1200kgs per meter cube, which was  
10    the number that was in the NFPA guideline.

11       The third pile never reached self-heating, which was  
12    compactd very nicely. The first pile which was not compacted  
13    at all also never reached self-heating. It was only the pile  
14    that was compacted in between that essentially reached  
15    self-heating. And that self-heating temperature was -- was  
16    reached at after 300 days. So it was a very extended period of  
17    time.

18       And the reason for that is because of, as I said earlier,  
19    the rank of coal, bituminous coal is fundamentally a  
20    high-ranked coal, which is not prone to self-heating.

21    **Q.**    Compacting coal can release dust, right?

22    **A.**    Compacting -- so, again, it's a function of how you are  
23    compacting. And the -- the -- if you're doing the compacting  
24    correctly, then the basic idea would be that you spend all your  
25    energy, all your -- your energy in compacting it, and a very

1 small amount of that energy is wasted in releasing dust and so  
2 on.

3 **Q.** Let's go to your deposition, Page 75, Lines 8 through 16.  
4 (Document displayed.)

5 **"QUESTION:** Okay. Do you know if the process of  
6 compacting can generate dust?

7 **"ANSWER:** I mean, again, it depends on how you're  
8 compacting. But, yes, I mean, as soon as you have any  
9 kind of pile and you're adding -- in order to compact  
10 the pile, you are adding some form of mechanical  
11 energy in the pile. So that mechanical energy, some  
12 of it will be used to -- to lift dust. So, yes."

13 Was that your testimony?

14 **A.** Yes. But I think I further -- I think at some point, I  
15 also said what I just said right now as well.

16 So if you look on Page No. 76, I have mentioned that it's  
17 a function of how you're compacting and it -- that is a science  
18 of compacting, which I'm not an expert on. And if it is  
19 applied systematically, the basic idea would be that you want  
20 to optimize compaction such that you want to reduce all these  
21 aspects.

22 **Q.** Are you an expert in how to reduce the dust in a  
23 compacting process?

24 **A.** No, I'm not. But all I'm trying to say is that you  
25 pinpointed a certain section from my deposition. And I had --

1 and I guess your point was that I -- what I said right now was  
2 incorrect.

3 But I just said that I had -- I had further clarification  
4 to that question further down on Page No. 76, which you failed  
5 to show me.

6 Q. Thank you.

7 A. Yeah.

8 Q. And for the planned OBOT facility, any compacting would be  
9 within the closed environment of a dome, right?

10 A. Yes.

11 Q. Now, you discussed on the stand just a few minutes ago  
12 various coal fires at other facilities, right?

13 Yes?

14 A. Yes.

15 Q. And I think in your report, you identified 10 or 11 of  
16 them from the 1990's up through just a few years ago, right?

17 A. Yes.

18 Q. And one of them was the Los Angeles Export Terminal,  
19 correct?

20 A. That is correct.

21 Q. And you relied on a report from an author, at least one of  
22 the authors was Rob Carnahan, is that correct?

23 A. That is correct.

24 Q. And you felt that Carnahan was a reliable source for that  
25 information?

1 A. Well, yes. And I have personally also published papers on  
2 spontaneous combustion of coal, coal dust. I have -- I have  
3 coal dust piles in my lab where we have done tests.

4 So if I read a document and I -- I think I can also make a  
5 judgment on whether what they are saying is okay or not okay.

6 So it's not just the fact that it's done on paper or --  
7 it's also the fact that I -- I have used my own judgment based  
8 on my experience to make -- come to that conclusion.

9 Q. Fair enough, but you relied on that report as well, right?

10 A. Yes.

11 Q. You would not rely on it if you didn't think it was  
12 reliable?

13 A. Yes.

14 Q. And, in fact, there were two firewalls at the Los Angeles  
15 Export Terminal, correct?

16 A. That is correct.

17 Q. One was in September 2000, and the other was in  
18 February 2001.

19 A. Yes.

20 Q. And they were separate fires, right?

21 A. That is correct.

22 Q. And I think you've testified a little while ago that one  
23 of the issues with the fire that you were describing had to do  
24 with a problem with a belt -- conveyor belt that was not flame  
25 retardant, correct?

1     **A.**    Yes.

2     **Q.**    I would like you to open your binder and turn to the last  
3     document in there.  It's Trial Exhibit 915.

4           (Document displayed.)

5     **A.**    I don't have it.  I'm sorry.

6           **THE COURT:**  The tab says "549," and it's stamped  
7     Trial Exhibit 915.  Is that the document you're referring to?

8           **MR. COLVIG:**  It is 915.

9           **THE COURT:**  The tab is wrong, but the Trial Exhibit  
10    is 915.

11          **MR. COLVIG:**  That must be the case, your Honor.  It's  
12    not true on mine.

13          **THE COURT:**  This is called "A Case Study of Ship  
14    Loader Fires in a Coal and Coke Facility."

15          **MR. COLVIG:**  Yes, your Honor.

16          **THE COURT:**  Okay.

17          **MR. SWEDLOW:**  So he's got two binders with no tabs in  
18    either one.

19          **THE COURT:**  Oh, he's got two binders.  Both  
20    deposition?  Yeah, it looks like they are both deposition  
21    testimony.

22           It's getting a little crowded in there.  Do you want to  
23    pull off some of the old binders so he can look at the new  
24    binder?

25           (Brief pause.)

1 BY MR. COLVIG

2 Q. Are you familiar with this document, the Trial  
3 Exhibit 915?

4 A. Yes.

5 Q. It came from your files, didn't it?

6 A. Yes.

7 Q. And these are your annotations?

8 A. Yes, they are.

9 Q. And you've highlighted areas that you thought were  
10 important to remember?

11 A. Yes, I did.

12 Q. And as you just discussed, there were two fires, correct?

13 A. Yes.

14 Q. Did the second fire involve a flame retardant belt?

15 A. It did not. That's, again, what I was trying to say, that  
16 there was a compliance issue here where they -- even the second  
17 time, they failed to install a flame retardant belt.

18 Q. The first one did not have a flame retardant belt,  
19 correct?

20 A. Yes.

21 Q. And then they replaced it with the a flame-retardant belt,  
22 right?

23 A. No, they replaced it again with a non-flame-retardant belt  
24 again.

25 Q. If could you turn to Page TX-0915.0007?

1     **A.**    Yes.

2     **Q.**    And the last sentence in the second paragraph says:

3                 "Based on damage to the bearings and axles,  
4                 independent review of the belt stretch analysis burn  
5                 patterns on the idlers and ignition testing, exponent  
6                 concluded that the fire was caused by a failed bearing  
7                 that overheated and ignited coal and coke  
8                 accumulations in the center pocket of the v-channel  
9                 idler frame assembly and the spill pan."

10                Correct?

11     **A.**    That is correct.

12     **Q.**    Do you have any reason to disagree with that conclusion?

13     **A.**    Well, so there was -- there was a fire, and then there was  
14     a fire spread. The reason why this was in the news was because  
15     of the fire spread. So the fire took place at a localized  
16     event, which is what they are trying to explain here, which was  
17     due to the coal accumulating in this region, the bearing  
18     overheating and the bearing temperatures going up to  
19     1100 degrees Fahrenheit, which is a very high temperature, can  
20     ignite pretty much anything.

21                So there was coal that was trapped there, which shouldn't  
22     have been trapped there because of a faulty conveyor belt  
23     design, which is what they go into great depths explaining.

24                But after all this is done, the -- there was a localized  
25     fire where -- at that location. But the reason the -- the

1 reason it was a significant event was because the belt caught  
2 on fire, which it shouldn't have. And because it was not flame  
3 retardant, that belt burned. And if you have this long  
4 conveyor and the belt snaps and then keeps burning down, all  
5 the way down, you now have a very massive fire spread.

6 So that is why it is -- it's actually two things. It's  
7 the faulty conveyor belt design, which is because of the  
8 bearing. But if it would have only been that, then it would  
9 have been a small fire. But because it was coupled with the  
10 belt, I think it was an event.

11 **Q.** Do you have any reason to believe that the designers of  
12 the conveyor system for the Los Angeles Export Terminal did not  
13 intend to provide a good design for the conveyor belt?

14 **A.** Again, I mean, this was -- I'm not in a position to answer  
15 that question, I believe.

16 **Q.** Do you think they might not have intended to provide a  
17 good design?

18 **A.** Well, I believe they would have wanted to provide a good  
19 design, but clearly they -- they were not following the NFPA  
20 guidelines here. And, yeah, so...

21 **Q.** A number of the other fire events at coal facilities that  
22 you identified in your report, those also involved conveyor  
23 fires, is that right?

24 **A.** Some of them, yes. But I -- I would just like to clarify  
25 that many of them were actually at power plants, not at the

1 storage terminal.

2 Q. And none of these fires were caused by leaving a pile of  
3 coal sitting over time, right?

4 A. Yes.

5 Q. These were fires that resulted from coal igniting from an  
6 external source, friction in a conveyor system, is that right?

7 A. Well, which precise fire are you referring to, is my  
8 concern here.

9 Q. All of the conveyor system fires you identified.

10 A. So as I said, many of them were related to a power plant,  
11 where something else -- I mean, there could have been a  
12 different reason as well. Like the question was asked to me  
13 earlier, it was actually a natural gas explosion. So I can't  
14 be -- without getting a specific fire incident, I can't really  
15 answer that.

16 Q. How about Norfolk, Virginia? Was that caused by an  
17 overheated bearing igniting a fire on some rollers on a coal  
18 conveyor?

19 A. Yes. That's what the -- it was a very small snippet news,  
20 just one paragraph, and that's basically what it said.

21 Q. And that happened in 2009?

22 A. I believe that was the date.

23 Q. Okay. And there was one kind of recently in Scotland,  
24 2015 fire on a conveyor system, cause unknown?

25 A. I believe that was another one that was given by the

1 expert.

2 Q. And you said that -- that you couldn't find any of these  
3 fires that were bituminous coal, is that right?

4 A. That is correct.

5 Q. But for a number these fires, you don't know what kind of  
6 coal it was, right?

7 A. Yes. And that was my point; that the -- that in order for  
8 an occurrence, you need an event where you know all the  
9 information and none of these cases precisely had bituminous  
10 coal.

11 Q And would you agree that firefighters would need  
12 specialized equipment in order to fight a coal fire?

13 A. Yes. They -- I mean, there is a sudden -- there is a  
14 certain set of guidelines that have to be followed depending on  
15 the fire at the storage terminal.

16 So if you're relating to the -- a self-heating related  
17 fire, there is a certain guideline that has to be followed. If  
18 you're relating to a normal fire, there is a different  
19 guideline.

20 A conveyor belt fire is usually automatically suppressed  
21 because they have automatic protection and suppression systems  
22 in those modern conveyor belt designs.

23 So, yes, it depends what kind of fire that you're trying  
24 to...

25 Q. Would the firefighters also need special training in order

1 to fight a coal fire at the facility?

2 **A.** Well, again, based on -- so while I was being -- while I  
3 was researching this, I followed -- I did -- I followed three  
4 approaches.

5 The first is I used engineering codes and standards. I  
6 then used scientific papers that are out there.

7 And I also relied on industrial experts who -- for getting  
8 information on what exactly happens in these storage terminals,  
9 power plants and so on.

10 So based on discussions I have had, particularly in these  
11 storage terminals, the -- there is a very clear fire safety  
12 plan in place, and that fire safety plan is managed by the  
13 manager of the terminal and followed by other people who are --  
14 who are aware of this plan.

15 And if there is a fire that takes place, there are --  
16 there's a certain protocol that is followed, one after the  
17 other and --

18 **Q.** Is that your way of saying, yes, the firefighters would  
19 need specialized training?

20 **A.** Well, that's what I'm going to say. The specialized  
21 training, it depends on the -- on the -- on the facility design  
22 that is being designed. If you have automatic suppression and  
23 detection systems in place, then the -- the firefighters  
24 wouldn't have to come in and...

25 **Q.** Can you turn to Page 131 of your deposition transcript?

1 And let's look at Lines 19 through 25.

2 (Document displayed.)

3 **A.** Yes.

4 **Q.** Okay.

5 **"QUESTION:** And would the fire personnel need special  
6 training to address a coal fire at the facility?

7 **"ANSWER:** Usually, yes, they would -- they would  
8 obviously need to be aware of how to use the different  
9 detectors, what to gauge from the CO detector, from  
10 the thermal detectors, and how to extinguish the fire,  
11 how to reduce the temperature..."

12 I'm sorry. Go on to the next page, Page 132, Lines 1  
13 and 2.

14 **"ANSWER:** ... of the hot spots that are formed in a  
15 coal storage pile."

16 Was that your testimony?

17 **A.** Yes, which is the fire safety plan, that is.

18 **Q.** There would be a plan, and under that plan they would need  
19 to have that training, correct?

20 **A.** Yeah. This is the -- this is --

21 **Q.** Thank you.

22 **THE COURT:** How long do you have on redirect?

23 **MR. SWEDLOW:** Twenty-five seconds.

24 **THE COURT:** Okay.

**REDIRECT EXAMINATION**

**BY MR. SWEDLOW**

**Q.** There was some question about what and to what extent you're an expert in fire safety and fire protection.

How many people in the world have published as many peer-reviewed publications on the combustible dust hazard of coal as you have?

**A.** So I have -- I have a very large amount of papers and I would rank -- I would be like in the top, top three.

**Q.** Thank you. No further questions.

**THE COURT:** Nothing further, I take it?

**MR. COLVIG:** No.

**THE COURT:** Okay. Thank you very much. You may step down.

(Witness excused.)

**THE COURT:** That does it for today. Is there -- will the plaintiffs have any additional witnesses?

**MR. FELDMAN:** Ms. Cappio.

**THE COURT:** That's your witness.

**MR. FELDMAN:** That's my witness. My witness.

**THE COURT:** All right. So you'll have Ms. Cappio.

And then -- and then how many witnesses at this point does -- do the defendants have? And who are they?

**MR. AKER:** We have five and a video presentation.

**THE COURT:** Okay. Who are the five?

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Wednesday, January 18, 2018

*Debra L. Pas, CSR, RPR, RMR, CRR*  
*Official Reporter - U.S. District Court - San Francisco*  
*(415) 431-1477*

Volume 1

Pages 1 - 224

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

OAKLAND BULK & OVERSIZED TERMINAL, )	
LLC, )	
Plaintiff, )	
vs. )	No. C 16-7014 VC
CITY OF OAKLAND )	
Defendant. )	San Francisco, California
	Tuesday
	January 16, 2018
	8:30 a.m.

TRANSCRIPT OF PROCEEDINGS

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ER 0247

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— — —

**TUESDAY - JANUARY 16, 2018**

**8:34 a.m.**

**P R O C E E D I N G S**

**---000---**

**THE CLERK:** Calling Case No. 16-CV-07014 VC, Oakland Bulk & Oversized Terminal, LLC versus City of Oakland.

Counsel, please step forward and state your appearances for the record.

**MS. SHAW:** Good morning, your Honor. Meredith Shaw with Quinn Emanuel Urquhart & and Sullivan for plaintiff OBOT.

With me today is Mr. Robert Feldman, Mr. Stephen Swedlow and Mr. David Myre as well.

**MR. AKER:** Good morning, your Honor. Gregory Aker for defendant City of Oakland.

I'm here with Timothy Colvig, Christopher Long and Kevin Siegel.

**MR. SIEGEL:** Good morning, your Honor.

**MR. O'BRIEN:** And good morning, your Honor. Colin O'Brien on behalf of defendant intervenors. I'm joined by Adrienne Bloch, Jessica Yarnell Loarie and James Finberg.

**THE COURT:** Okay. Anything we should talk about before we begin?

**MR. COLVIG:** Yes. We've identified five things. One is the legislative record issue. Mr. Feldman and I reached a stipulation that was --

**THE COURT:** Hold on one second.

*Debra L. Pas, CSR, RPR, RMR, CRR*  
*Official Reporter - U.S. District Court - San Francisco*  
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1 not saying this happened, and there was certainly nothing in  
2 the materials that I reviewed over the weekend to remotely  
3 suggest that this happened. But if hypothetically the City  
4 said: Look, you just -- I understand you don't believe that,  
5 you know -- that this -- that these operations will send X tons  
6 of particulate matter into the air, but you need to put that in  
7 our report because we need it in our report to justify the  
8 ordinance.

9 If that happened and then it turns out, though, that there  
10 actually -- even though that person didn't believe that there  
11 is substantial evidence in the record to support the conclusion  
12 that X number of tons of particulate matter will be released  
13 into the air, then that statement doesn't matter. All that  
14 matters is whether there is substantial evidence.

15 So I do wonder how apt this sword-shield concept is going  
16 to be in this context. But obviously you're free to state your  
17 objections for the record and to be annoying.

18 **MR. FELDMAN:** Are there any limits on the latter?

19 **THE COURT:** We'll find out. Anything else?

20 **MR. COLVIG:** We registered our objection on  
21 contradictory extra record evidence, and the Court has said, as  
22 I thought you would, you know, it's hard to draw this contour  
23 right now. I will take in it. I'll make that decision when I  
24 look at it.

25 **THE COURT:** Yes.

1           **MR. COLVIG:** So we may register an objection, but  
2 we'll try to be careful and ask -- I mean, can you say right  
3 now I have a continuing objection on relevance?

4           **THE COURT:** That sounds very much like a continuing  
5 objection to me.

6           **MR. COLVIG:** But what we file is, and it will be  
7 deemed such.

8           **THE COURT:** Absolutely.

9           **MR. COLVIG:** Thank you.

10           And there is actually two scope issues. One is extra  
11 record evidence. The other is the scope the Court articulated  
12 for us last Wednesday. You want a trial to assist the Court in  
13 understanding the record and the significance of the evidence.

14           Is that a line, or are you saying: That's what you're  
15 asking for, put in whatever the heck you want. And then when I  
16 decide I am going to -- or are we going to stand up and go that  
17 doesn't go to this issue?

18           **THE COURT:** Look, if somebody submitted testimony to  
19 the City Council saying that the sky is green, and -- and then  
20 OBOT calls somebody to the stand and says, you know, there was  
21 this testimony that the sky is green and that's actually not  
22 true because I just went out and took a picture of the sky and  
23 it's blue and here is the picture, I don't see -- I mean, where  
24 would you put that on the line? Would you say that I'm not  
25 allowed to consider the testimony in this trial that the sky is

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

---

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Tuesday, January 16, 2018

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**CITY OF OAKLAND'S OBJECTION  
TO EXTRA-RECORD EVIDENCE  
TO CONTRADICT RECORD  
EVIDENCE**

Trial Date: January 16, 2018  
Time: 8:30 a.m.  
Ctmm.: No. 2, 17<sup>th</sup> Floor  
Judge: Honorable Vince Chhabria

1 The City objects to extra-record evidence Plaintiff OBOT may introduce to contradict  
2 record evidence.

### 3 I. INTRODUCTION

4 At the pretrial conference, the Court framed the trial for the parties:

5 And we will have a trial on the breach of contract question. And --  
6 you know, as I said, the purpose of the trial, from my standpoint, is  
7 to -- I think the idea is that I feel that I have not been given enough  
8 to understand the evidence that was in the record before the City  
9 Council. So that is what I view the trial as being about, is helping  
10 me better understand the evidence and the significance of the  
11 evidence that was before the City Council.

12 Transcript, 1/10/18, p. 129:7-14.

13 The Court also offered the following comments regarding testimony from witnesses who  
14 would discuss the record (specifically in connection with a statement by Mr. Aker about expert  
15 witness testimony):

16 THE COURT: I mean, it's extra record in the sense that the expert  
17 witness's testimony was not before the City Council.

18 MR. AKER: Correct.

19 THE COURT: As long as it is directed to helping me understand  
20 the evidence that was before the City Council . . . .

21 Transcript, 1/10/18, p. 140:17-22.

22 For the reasons discussed below, the City respectfully submits that the Court should  
23 exclude all extra-record evidence offered to contradict the record evidence.

### 24 II. DISCUSSION

25 In subsection A, we briefly reiterate the importance of limiting substantial evidence  
26 review to the record before the public agency. In subsection B, we discuss the contours this Court  
27 should place on offers of extra-record evidence.

#### 28 A. The Purpose of Limiting Review to the Record Before a City Is to Ensure that the Courts Respect Separation of Powers and Do Not Substitute their Judgment for the City's Decision Makers'.

Under California law, which applies to the breach of contract claim, where a party claims  
that a city's decision is not supported by substantial evidence, the challenger bears a heavy  
burden to show the absence of substantial evidence in the entire record. *Do v. Regents of the*

1 *Univ. of Cal.*, 216 Cal.App.4th 1474, 1490 (2013); accord *Benetatos v. City of Los Angeles*, 235  
2 Cal.App.4th 1270, 1280 (2015).

3 Thus, the California Supreme Court has emphasized that courts will not consider extra-  
4 record evidence (except for in very limited circumstances, discussed below). *W. States Petroleum*  
5 *Ass’n v. Superior Court*, 9 Cal.4th 559, 576, 578 (1995); see also *Foster v. Civil Serv. Comm’n*,  
6 142 Cal.App.3d 444, 453 (1983).

7 This rule reflects the separation of powers doctrine. “Agencies must weigh the evidence  
8 and determine which way the scales tip, while courts conducting substantial evidence ... review  
9 generally do not. If courts were to independently weigh conflicting evidence ..., this would []  
10 usurp the agency’s authority and violate the doctrine of separation of powers.” *W. States*  
11 *Petroleum Ass’n*, 9 Cal.4th at 576 (internal quotation marks omitted).<sup>1</sup>

## 12 **B. The Court Should Strictly Limit Extra-Record Evidence.**

13 At the pretrial conference, the Court indicated it would allow some extra-record evidence  
14 (e.g., testimony to facilitate the Court’s review of the record for substantial evidence). The City  
15 provides points and authorities to discuss limits the Court should place on extra-record evidence.

### 16 **1. The General Rule: Extra-Record Evidence Is Not Admissible.**

17 Where the plaintiff seeks to present new evidence that was “neither presented to, nor  
18 considered by, the city council in its deliberations,” the courts generally exclude it. *Eureka*  
19 *Citizens for Responsible Gov’t v. City of Eureka*, 147 Cal.App.4th 357, 366 (2007). But there are

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20  
21 <sup>1</sup> Thus, a court must defer to a city’s selection of which evidence to rely upon, even with  
22 respect to competing experts. *Oakland Heritage All. v. City of Oakland*, 195 Cal.App.4th 884,  
900 (2011); *Cal. Native Plant Soc. v. City of Rancho Cordova*, 172 Cal.App.4th 603, 626 (2009).

23 A court “must affirm ... if there is any substantial evidence, contradicted or  
24 uncontradicted, to support” the decision. *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal.4th  
25 1086, 1114 (2015); accord *Kutzke v. City of San Diego*, 11 Cal.App.5th 1034, 1042 (2017) (court  
26 must uphold decision unless “no reasonable municipality could have reached the same decision as  
27 the City”); *Ogundare v. Dep’t of Industrial Relations, Division of Labor Standards Enforcement*,  
28 214 Cal.App.4th 822, 829-30 (2013) (court “may not overturn [the decision] merely because a  
contrary finding would have been equally or more reasonable”); *Sequoyah Hills Homeowners*  
*Assn. v. City of Oakland*, 23 Cal.App.4th 704, 717 (1993) (court “may neither substitute [its] view  
for that of the city council, nor reweigh conflicting evidence”). Courts thus regularly defer to city  
decisions based on substantial evidence, despite contrary evidence.

1 limited exceptions, discussed next.

2 **2. Limited Extra-Record Evidence May Be Admitted Only to Shed Light and**  
 3 **Explain the Record Evidence, Not to Contradict It.**

4 “[E]xtra-record evidence amounting to nothing more than contradictory expert testimony  
 5 designed to question the wisdom and accuracy of a public agency decision generally is not  
 6 admissible.” *Coachella Valley Unified School Dist. v. State*, 176 Cal.App.4th 93, 125 (2009); *see*  
 7 *also W. States Petroleum Ass’n*, 9 Cal.4th at 579 (“extra-record evidence can never be admitted  
 8 merely to contradict the evidence the administrative agency relied on in making a quasi-  
 9 legislative decision or to raise a question regarding the wisdom of that decision”).

10 To admit “conflicting scientific opinions created after an administrative decision would  
 11 pose ... a threat of repeated rounds of litigation, and uncertain, attenuated finality.” *Fort Mojave*  
 12 *Indian Tribe v. Department of Health Services*, 38 Cal.App.4th 1574, 1595 (1995); *see also*  
 13 *Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251 (extra-  
 14 record evidence may not be admitted to “call into question the wisdom” of the agency’s decision);  
 15 *see also California Oak Found. v. Regents of Univ. of California*, 188 Cal.App.4th 227, 254-56  
 16 (2010) (in the absence of a public hearing and sufficient record for review, proper to admit  
 17 limited expert witness testimony to explain the basis for UC’s decision).<sup>2</sup>

18  
 19  
 20  
 21 <sup>2</sup> The California Supreme Court has looked to “federal courts for persuasive authority”  
 22 regarding extra-record evidence. The Court noted that the Ninth Circuit has also allowed extra-  
 23 record evidence ““only for background information ... or for the limited purposes of ascertaining  
 24 whether the agency considered all the relevant factors or fully explicated its course of conduct or  
 grounds of decision.”” *W. States Petroleum Ass’n*, 9 Cal.4th at 579 (quoting *Asarco, Inc. v. U.S.*  
*Env’tl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)).

25 As under California law, the limitations on the use of extra-record evidence in federal  
 26 administrative law cases “ensure[] that the reviewing court affords sufficient deference to the  
 27 agency’s action” and do not “substitute its judgment for that of the agency.” *San Luis & Delta-*  
 28 *Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014); *see also ForestKeeper v. La*  
*Price*, No. 1:16-CV-0759 AWI JLT, 2017 WL 4127871 at \*35 (E.D. Cal. Sept. 15, 2017) (“[T]he  
 focal point for judicial review should be the administrative record already in existence, not some  
 new record made initially in the reviewing court” [citations and quotation marks omitted]).

**3. OBOT Must Not Be Allowed to Submit New Evidence to Contradict the Record Evidence.**

OBOT had ample opportunity to submit evidence on the health and safety impacts of its plans to bring coal to the Terminal, including with respect to the public hearings on September 21, 2015 and June 27, 2016. Moreover, it could have submitted evidence prior to the City's adoption of the Ordinance on July 19, 2016.<sup>3</sup> But it declined to submit any health and safety reports with emissions or similar evidence to address the issues raised in the reports commissioned by the City and offered by third parties.

The City anticipates that OBOT will seek to offer evidence to directly contradict the record evidence before the City Council, not to assist the Court to “better understand the evidence and the significance of the evidence that was before the city council.” California law does not allow the admission of that evidence.

### III. CONCLUSION

The City respectfully requests the Court to refuse admission of any extra-record evidence OBOT may seek to introduce to contradict the record evidence. Otherwise, the Court would be in the untenable position of second-guessing the City's decisions, on the basis of evidence that was not before the City at the time it made its decisions. OBOT had the opportunity to provide evidence at the time, and allowing it to wait and do so now would violate the fundamental tenets of the separation of powers doctrine and long-settled principles of judicial review of agency decisions.

<sup>3</sup> While OBOT has complained about the publication of the City-commissioned reports shortly before the June 27, 2016 public hearing, it knew well in advance that the City had commissioned health and safety reports, *e.g.*, commenting before and shortly after the City retained ESA. And OBOT had no right to an advanced review or preview of either the ESA Report or the Chafe Report before they were published.

Despite being fully on notice of the health and safety issue addressed by the proposed ordinance, OBOT declined to submit any comparable health and safety analysis. Nor did OBOT ask for an opportunity to respond to the Reports or for a continuance of the June 27, 2016 public hearing. Likewise, OBOT submitted no materials prior to the July 19, 2016 meeting at which the Council adopted the Ordinance.

1 Dated: January 15, 2018

BURKE, WILLIAMS & SORENSEN, LLP

2  
3 By: /s/ Kevin D. Siegel

4 Kevin D. Siegel  
5 Gregory R. Aker  
6 Timothy A. Colvig  
7 Christopher M. Long  
8 Attorneys for Defendant  
9 CITY OF OAKLAND  
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 CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
 TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
 BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**STIPULATION AND [PROPOSED]  
 ORDER**

Date: January 16, 2018  
 Time: 8:30 a.m.  
 Ctrm.: No. 2, 17th Floor  
 Judge: Honorable Vince Chhabria

1 This Stipulation is entered into by and among Plaintiff Oakland Bulk & Oversized  
 2 Terminal, LLC ("OBOT"), Defendant City of Oakland ("City"), and Defendant-Intervenors  
 3 Sierra Club and San Francisco Baykeeper (hereinafter, the "Parties" or "Party"). The Parties  
 4 hereby stipulate by and through their respective counsel that:

5 1. The declarations of Sharon Hagle, Heather Klein, John Monetta, Christopher  
 6 Long, and Sean O'Brien, attached hereto as **Exhibits A through E**, respectively, represent the  
 7 testimony that each of these witnesses would have provided on behalf of Defendants if they had  
 8 been called to testify at trial.

9 2. Notwithstanding anything to the contrary in those declarations, the documents  
 10 listed in **Exhibit F** attached hereto were not uploaded to the Army Base Gateway Redevelopment  
 11 Project Website ([http://www2.oaklandnet.com/government/o/CityAdministration/d/project-](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485)  
 12 [implementation/OAK038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485)) until on or after June 30, 2016, with the exception of items 16 and  
 13 17 listed in Exhibit F, which may not have been uploaded at all.

14 3. None of the foregoing stipulations concede that any of the documents that are  
 15 contained in Joint Trial Exhibit 640 are being, or should be, admitted for any purpose other than  
 16 to show that they were submitted to the City.

17 4. No further stipulations, waivers of rights, or agreements are made by the parties  
 18 apart from an agreement to the statements set forth in paragraphs 1 through 3 above.

19 ///

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22 ///

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25 ///

26 ///

27 ///

28

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Dated: January 15, 2018

/s/ Robert P. Feldman

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*Attorneys for Plaintiff  
 Oakland Bulk & Oversized Terminal, LLC*

Dated: January 15, 2018

/s/ Kevin D. Siegel

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*Attorneys for Defendant  
 CITY OF OAKLAND Dated: July 12, 2017 /s/ Colin  
 O'Brien*

Dated: January 15, 2018

/s/ Colin O'Brien

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**ATTESTATION**

I, Kevin D. Siegel, am the ECF user whose ID and password are being used to file this "Stipulation and [Proposed] Order." Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that ECF users Robert P. Feldman and Colin O'Brien have concurred in the filing of this document.

DATED: January 15, 2018

/s/ Kevin D. Siegel  
Kevin D. Siegel

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: \_\_\_\_\_

Hon. Vince Chhabria  
United States District Court Judge

# **EXHIBIT A**

Barbara J. Parker (SBN 69722)  
City Attorney  
Otis McGee, Jr. (SBN 71885)  
Chief Assistant City Attorney  
Colin Troy Bowen (SBN 152489)  
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CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**DECLARATION OF HEATHER  
KLEIN**

Date: January 16, 2018  
Time: 8:30 a.m.  
Ctm.: No. 2, 17th Floor  
Judge: Honorable Vince Chhabria

1 I, Heather Klein, hereby declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if called as a  
3 witness, could and would testify competently to such facts under oath.

4 2. I have been continuously employed by the City of Oakland ("City") as a planner  
5 since April of 2003. My job title is Planner IV at the City's Bureau of Planning.

6 3. My job duties as a City planner have included assisting with managing the process  
7 associated with the City's consideration of the potential health and safety impacts related to the  
8 proposal by Plaintiff Oakland Bulk and Oversized Terminal, LLC ("OBOT") to develop a bulk  
9 goods terminal ("Terminal Project") at the West Gateway Development Area of the former  
10 Oakland Army Base.

11 4. As part of my job duties, I am familiar with how records related to the Terminal  
12 Project, Ordinance No. 13385 ("Ordinance"), and Resolution No. 86234 ("Resolution"),  
13 including public comments, agendas, meeting minutes, videos of public hearings, and staff  
14 reports of the Oakland City Council, are kept and maintained by the City as permanent records.

15 5. Beginning in December of 2015, when public comments, documents, and public  
16 hearing videos were submitted to or produced by the City relating to the Terminal Project and  
17 commodities that may be stored and handled there, I was responsible for ensuring that those  
18 public comments, videos and documents were made available to the City Council, City Staff and  
19 members of the public by personally uploading and posting them to, or linking to them within, the  
20 City's dedicated website for the Terminal Project located at  
21 [http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485)  
22 [038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485) (the "Army Base Gateway Redevelopment Project Website"), and it was my practice to  
23 do so.

24 6. In that regard, I collected all such information in both electronic and paper form,  
25 scanned the paper copies, and uploaded the information to the Army Base Gateway  
26 Redevelopment Project Website. I periodically reviewed the website to ensure that the  
27 information was, in fact, resident on the website, and confirmed that it was.

28 7. I am familiar with the Agenda Report for the June 27, 2016 City Council hearing,

pages 3-4 of which provide the following information related to the the Terminal Project, Ordinance and Resolution at issue in this matter:

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 coke (which includes petroleum coke (petcoke), to help inform potential future City Council actions. The written public hearing comment period ended on or about October 6, 2015, but comments submitted and received after that date are considered part of the administrative record and are posted on the City's website at the following location:

(<http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485>)

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. On May 9, 2016, the City Council held an informational public hearing to receive written and oral testimony and obtain more information regarding the health and/or safety effects of transporting and handling these materials as well as crude oil. The written public hearing comment period ended on May 16, 2016. Several comments received related to coal rather than fuel oil, gasoline and crude oil. All comments received are also part of the administrative record and posted on the City's website cited above.

Additional evidence was submitted before, during and after the above public hearings and is also part of the administrative record and posted on the City's website cited above.

The statements quoted above are consistent with my understanding, based upon my involvement in the process.

8. Specifically, I was responsible for ensuring that all public comments, documents, and public hearing videos submitted in and around the following proceedings and/or categories of documents were posted to, or links to access such information (such as videos) were embedded in, the Army Base Gateway Redevelopment Project Website (as they appear on the website), including, without limitation:

- a. Public Hearing on February 16, 2016 for a Professional Services Contract with Environmental Science Associates (ESA) for the Analysis of Potential Health and Safety Effects of Certain Commodities Proposed At the Oakland Bulk and Oversized Terminal;

- b. Environmental Science Associates' (ESA) Draft March 25, 2016 Scope of Work;
- c. Public Hearing on May 3, 2016 for a Professional Services Contract with Environmental Science Associates (ESA) for the Analysis of Potential Health and/or Safety Effects of Certain Commodities Proposed at the Oakland Bulk and Oversized Terminal;
- d. Public Hearing on Fuel Oil, Gasoline and Crude Oil in Oakland on May 9, 2016;
- e. Additional Public Comments or Records Received Regarding Coal;
- f. Special Meeting of the City Council on June 27, 2016; and
- g. City Council Meeting of July 19, 2016.

9. Other staff from the City's Public Works Department—specifically, City Employee John Monetta—effectuated this same process by working with the City's Information Technology staff so that all public comments, documents, and public hearing videos related to the Terminal Project were posted to or linked in the Army Base Gateway Redevelopment Project Website for the categories and proceedings prior to and including the September 21, 2015 Public Hearing on Coal in Oakland, and the follow-up submissions related thereto, including, without limitation:

- a. Public Hearing on Coal in Oakland on September 21, 2015, and responses by project proponents and members of the public to follow up on questions posed by the City;
- b. Environmental Review Documents;
- c. Development Agreement; and
- d. Lease Disposition and Development Agreement and Related Agreements.

10. To the best of my knowledge, the public comments, documents, and public hearing videos for these proceedings/categories that are posted on the Army Base Gateway Redevelopment Project Website comprise the record related to the Terminal Project, the

1 Ordinance and Resolution;<sup>1</sup> that these records were kept in the ordinary course of the City's  
 2 regularly conducted activities; and that the public comments, documents, and public hearing  
 3 videos available on the Army Base Gateway Redevelopment Project Website are true and correct  
 4 copies of the original records as they are kept in the records of the City of Oakland,

5 11. At some point between April 2017 and November 2017, the City relocated the Army  
 6 Base Gateway Redevelopment Project Website to a slightly different directory (from the  
 7 "NeighborhoodInvestment" to the "project-implementation" directory), and it is now located at  
 8 the following link: [http://www2.oaklandnet.com/government/o/CityAdministration/d/project-](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485)  
 9 [implementation/OAK038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485), however the content of the website is the same.

10 I declare under penalty of perjury under the laws of the United States of America that the  
 11 foregoing is true and correct.

12 Executed on the 15th day of January, 2018, at Oakland, California.

13   
 14 \_\_\_\_\_  
 15 Heather Klein

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24  
25 <sup>1</sup> With the exception of a binder submitted by the project proponents in advance of the May 9  
 26 hearing regarding fuel oil regulations and a Planning Commission Staff Report (and agenda)  
 27 dated May 1, 2013, which were available in hard copy in the City's offices, but were  
 28 inadvertently not posted on the Project Website. I am informed and believe that the City's  
 counsel produced these documents to Plaintiff OBOT in this litigation, Bates-stamped OAK  
 0247081—OAK 0250553.

# **EXHIBIT B**

1 Barbara J. Parker (SBN 69722)  
 City Attorney  
 2 Otis McGee, Jr. (SBN 71885)  
 Chief Assistant City Attorney  
 3 Colin Troy Bowen (SBN 152489)  
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 13 Attorneys for Defendant  
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15 UNITED STATES DISTRICT COURT  
 16 NORTHERN DISTRICT OF CALIFORNIA  
 17 SAN FRANCISCO DIVISION

18 OAKLAND BULK & OVERSIZED  
 19 TERMINAL, LLC,

20 Plaintiff,

21 v.

22 CITY OF OAKLAND,

23 Defendant.

24 SIERRA CLUB and SAN FRANCISCO  
 25 BAYKEEPER,

26 Defendant-Intervenors.  
 27  
 28

Case No. 3:16-cv-07014-VC

**DECLARATION OF JOHN  
 MONETTA**

Date: January 16, 2018  
 Time: 8:30 a.m.  
 Ctrm.: No. 2, 17th Floor  
 Judge: Honorable Vince Chhabria

1 I, John Monetta, hereby declare:

2 1. I have personal knowledge of the facts set forth in this declaration and, if called as a  
3 witness, could and would testify competently to such facts under oath.

4 2. I have been continuously employed by the City of Oakland ("City") as a project  
5 manager since 2013. My job title is Project Manager I within the City Administrator's Office.  
6 From 2000 to 2013 I was employed by the City as a Program Analyst and Real Estate Agent.

7 3. My job duties as a City project manager have included assisting with the City's  
8 project management efforts related to the City's Army Base Gateway Redevelopment Project,  
9 including with respect to the proposal by Plaintiff Oakland Bulk and Oversized Terminal, LLC  
10 ("OBOT") to develop a bulk goods terminal ("Terminal Project") at the West Gateway  
11 Development Area of the former Oakland Army Base.

12 4. As part of my job duties, I am familiar with how records related to the Terminal  
13 Project, Ordinance No. 133854 ("Ordinance"), and Resolution No. 86234 ("Resolution"),  
14 including public comments, agendas, meeting minutes, and staff reports to the Oakland City  
15 Council, have been and are kept and maintained by the City as permanent records.

16 5. Prior to December of 2015, when public comments, documents, and public hearing  
17 videos were submitted to or produced by the City relating to the Terminal Project and  
18 commodities that may be stored and handled there, I was responsible for ensuring that those  
19 public comments, videos and documents were made available to the City Council, City Staff, and  
20 members of the public by causing such information to be uploaded and posted to, or linking to  
21 them within, the City's dedicated webpage for the Terminal Project then located at  
22 <http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK>  
23 [038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK) (the "Army Base Gateway Redevelopment Project Website"), and it was my practice to  
24 do so.

25 6. In that regard, I collected all such information and provided it in electronic form to  
26 staff with instructions to upload it to the Army Base Gateway Redevelopment Project Website. I  
27 periodically reviewed the website to ensure that the information was, in fact, resident on the  
28

1 website, and confirmed that it was.

2 7. I am familiar with the Agenda Report for the June 27, 2016 City Council hearing,  
3 pages 3–4 of which provide the following information related to the Terminal Project, Ordinance  
4 and Resolution at issue in this matter:

5  
6 the City Council held an informational public hearing on September 21,  
7 2015 to receive written and oral testimony regarding the health and/or  
8 safety effects of coal and types of coal, including coke (which includes  
9 petroleum coke (petcoke), to help inform potential future City Council  
10 actions. The written public hearing comment period ended on or about  
11 October 6, 2015, but comments submitted and received after that date are  
12 considered part of the administrative record and are posted on the City's  
13 website at the following location:

14 (<http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485>)

15 In addition to coal, other potential fossil fuel commodities, which are  
16 listed in the BoD for the OBOT, include fuel oils and gasoline, which are  
17 fossil fuels and have characteristics similar to crude oil per the 2014  
18 Resolution. On May 9, 2016, the City Council held an informational  
19 public hearing to receive written and oral testimony and obtain more  
20 information regarding the health and/or safety effects of transporting and  
21 handling these materials as well as crude oil. The written public hearing  
22 comment period ended on May 16, 2016. Several comments received  
23 related to coal rather than fuel oil, gasoline and crude oil. All comments  
24 received are also part of the administrative record and posted on the City's  
25 website cited above.

26 Additional evidence was submitted before, during and after the above  
27 public hearings and is also part of the administrative record and posted on  
28 the City's website cited above.

29 The statements quoted above are consistent with my understanding, based upon my involvement  
30 in the process.

31 8. Specifically, I was responsible for ensuring that all public comments, documents,  
32 and public hearing videos submitted in and around the following proceedings and/or categories of  
33 documents were posted to, or links to access such information (such as videos) were embedded  
34 in, the Army Base Gateway Redevelopment Project Website (as they appear on the website),  
35 including, without limitation:

36 a. Public Hearing on Coal in Oakland on September 21, 2015, and responses by

project proponents and members of the public to follow up on questions posed by the City;

- b. Environmental Review Documents;
- c. Development Agreement; and
- d. Lease Disposition and Development Agreement and Related Agreements.

9. Other staff from the City's Bureau of Planning—specifically, City Employee Heather Klein—became responsible for ensuring that all public comments, documents, and public hearing videos related to the Project were posted to, or links to access such information (such as videos) were embedded in, the Army Base Gateway Redevelopment Project Website for the categories and proceedings from December 2015 up through and including the July 19, 2016 City Council meeting, including, without limitation:

- a. Public Hearing on February 16, 2016 for a Professional Services Contract with Environmental Science Associates (ESA) for the Analysis of Potential Health and Safety Effects of Certain Commodities Proposed At the Oakland Bulk and Oversized Terminal;
- b. Environmental Science Associates' (ESA) Draft March 25, 2016 Scope of Work;
- c. Public Hearing on May 3, 2016 for a Professional Services Contract with Environmental Science Associates (ESA) for the Analysis of Potential Health and/or Safety Effects of Certain Commodities Proposed at the Oakland Bulk and Oversized Terminal;
- d. Public Hearing on Fuel Oil, Gasoline and Crude Oil in Oakland on May 9, 2016;
- e. Additional Public Comments or Records Received Regarding Coal;
- f. Special Meeting of the City Council on June 27, 2016; and
- g. City Council Meeting of July 19, 2016.

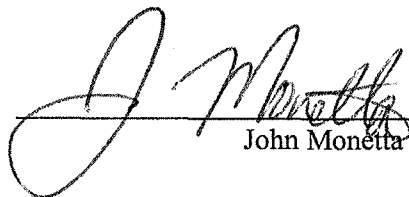
10. To the best of my knowledge, the public comments, documents, and public hearing

1 videos for these proceedings/categories that are posted on the Army Base Gateway  
 2 Redevelopment Project Website comprise the record related to the Terminal Project, Ordinance  
 3 and Resolution prior to and including December 2015; that these records were kept in the  
 4 ordinary course of the City's regularly conducted activities; and that the public comments,  
 5 documents, and public hearing videos available on the Army Base Gateway Redevelopment  
 6 Project Website are true and correct copies of the original records as they are kept in the records  
 7 of the City of Oakland

8 11. At some point between April 2017 and November 2017, because of a restructuring  
 9 of the responsible departments, the City relocated the Army Base Gateway Redevelopment  
 10 Project Website to a slightly different directory (from the "NeighborhoodInvestment" to the  
 11 "project-implementation" directory), and it is now located at the following link:  
 12 [http://www2.oaklandnet.com/government/o/CityAdministration/d/project-](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485)  
 13 [implementation/OAK038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485), however the content of the website is the same. I continue to make  
 14 use of the website in the course of my duties for the City.

15 I declare under penalty of perjury under the laws of the United States of America that the  
 16 foregoing is true and correct.

17 Executed on the 15th day of January, 2018, at Oakland, California.

18  
 19  
 20   
 21 John Monetta

# EXHIBIT C

Barbara J. Parker (SBN 69722)  
 City Attorney  
 Otis McGee, Jr. (SBN 71885)  
 Chief Assistant City Attorney  
 Colin Troy Bowen (SBN 152489)  
 Supervising Deputy City Attorney  
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 Christopher M. Long (SBN 305674)  
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Attorneys for Defendant  
 CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
 TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
 BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**DECLARATION OF SHARON I.  
 HAGLE**

Date: January 16, 2018  
 Time: 8:30 a.m.  
 Ctrm.: No. 2, 17th Floor  
 Judge: Honorable Vince Chhabria

1 I, Sharon I. Hagle, hereby declare:

2 1. I am a legal secretary with the firm Burke, Williams & Sorensen, LLP, attorneys of  
3 record for Defendant City of Oakland ("City") in the above-entitled action.

4 2. I have personal knowledge of the facts set forth in this declaration and, if called as a  
5 witness, could and would testify competently to such facts under oath.

6 3. At Christopher Long's instruction, I downloaded all documents that were available  
7 and posted to the City's Army Base Gateway Redevelopment Project Website,  
8 <http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK>  
9 [038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK) (the "Website"), including documents posted at further hyperlinks on the Website that  
10 related to the Army Base Gateway Redevelopment Project. For example, I downloaded the  
11 "Oakland Army Base Redevelopment Plan," "Aggregate Recycling and Fill Project," "2012  
12 Oakland Army Base Project," "Initial Study/Addendum Appendices," "Standard Conditions of  
13 Approval and Mitigation Monitoring and Reporting Program Report (SCA/MMRP)," and  
14 "Adaptive Reuse Feasibility Studies" documents collected under a hyperlink near the bottom of  
15 the Website that said, "click here to visit a page with Oakland Army Base Environmental Review  
16 documents," as well as copies of staff reports and other City Council meeting-related documents  
17 available at hyperlinks listed under each public hearing date on the Website (for example, the link  
18 for the September 21, 2015 public hearing listed on the Website is  
19 <https://oakland.legistar.com/LegislationDetail.aspx?ID=2386009&GUID=D136342F-CA09->  
20 [445D-8C24-AE4D3593C7CB](https://oakland.legistar.com/LegislationDetail.aspx?ID=2386009&GUID=D136342F-CA09-)).

21 4. Also at Mr. Long's instruction, I did not download copies of public hearing videos  
22 posted on the Website under the heading for each public hearing video.

23 5. I completed downloading all documents from the Website, saved them to a USB  
24 flash drive, and provided that flash drive to Mr. Long.

25 ///

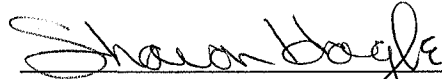
26 ///

27 ///

28 ///

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct.

3 Executed on the 12th day of January, 2018, at Oakland, California.

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5 Sharon I. Hagle  
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28

# **EXHIBIT D**

Barbara J. Parker (SBN 69722)  
City Attorney  
Otis McGee, Jr. (SBN 71885)  
Chief Assistant City Attorney  
Colin Troy Bowen (SBN 152489)  
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Attorneys for Defendant  
CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**DECLARATION OF CHRISTOPHER  
LONG**

Date: January 16, 2018  
Time: 8:30 a.m.  
Ctrm.: No. 2, 17th Floor  
Judge: Honorable Vince Chhabria

1 I, Christopher M. Long, hereby declare:

2 1. I am an attorney and an Associate with the firm Burke, Williams & Sorensen, LLP,  
3 attorneys of record for Defendant City of Oakland ("City") in the above-entitled action. I am a  
4 member in good standing of the State Bar of California and the bar of this Court.

5 2. I have personal knowledge of the facts set forth in this declaration and, if called as a  
6 witness, could and would testify competently to such facts under oath.

7 3. I was and remain informed and believed that when public comments, documents,  
8 and public hearing videos were submitted to or produced by the City relating to the proposal by  
9 Plaintiff Oakland Bulk and Oversized Terminal, LLC ("OBOT") to develop a bulk goods terminal  
10 ("Terminal Project") at the West Gateway Development Area of the former Oakland Army Base  
11 and commodities that may be stored and handled there, the City's regular practice was to upload  
12 those documents to the City's dedicated website for the Terminal Project located, at least through  
13 the end of March 2017 (see paragraph 6, below) at the following link:

14 <http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK>  
15 [038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK) (the "Army Base Gateway Redevelopment Project Website").<sup>1</sup>

16 4. The Army Base Gateway Redevelopment Project Website itself includes hyperlinks  
17 to other locations on the City's website where, for example, items related to City Council  
18 meetings are separately posted, including video, minutes, and agendas for the City Council  
19 meetings (see, e.g., [http://oakland.granicus.com/MediaPlayer.php?view\\_id=2&clip\\_id=2022](http://oakland.granicus.com/MediaPlayer.php?view_id=2&clip_id=2022),  
20 which includes these items for the June 27, 2016 public hearing).

21 5. The City listed the Army Base Gateway Redevelopment Project Website, among  
22 other City website hyperlinks, in its initial disclosure statement served on Plaintiff's counsel on  
23 February 28, 2017, a true and correct copy of which is attached hereto as **Exhibit A**.

24 6. I instructed Sharon Hagle, a legal secretary of my firm working under my  
25 supervision to download copies of all documents available on the Army Base Gateway

26  
27 <sup>1</sup> Note that a set of binders submitted by a project proponent, and a Planning Commission Staff Report (and agenda)  
28 dated May 1, 2013, were available in hard copy in the City's offices, but were inadvertently not posed on the Project  
Website. The City produced these documents to Plaintiff in this litigation as Bates numbers OAK 0247081–OAK  
0250553.

1 Redevelopment Project Website directly from that site. Ms. Hagle had completed this process by  
2 approximately March 29, 2017.

3 7. After Ms. Hagle finished downloading all documents from the Army Base Gateway  
4 Redevelopment Project Website and additional documents located at links available therein, she  
5 saved copies of those documents on a USB flash drive and provided that drive to me.

6 8. In late March and early April 2017, our firm directed Aiken Welch Court Reporters  
7 to prepare certified transcriptions of the relevant portions of the City Council meeting videos  
8 posted on the website, including Agenda Item 7.16 from the July 19, 2016 City Council meeting,  
9 Agenda Item 5 from the June 27, 2016 City Council meeting, Agenda Item 4 from the May 9,  
10 2016 City Council meeting, Agenda Item 13 from the May 3, 2016 City Council meeting, Agenda  
11 Item 11 from the February 16, 2016 City Council meeting, and Agenda Item 4 from the  
12 September 21, 2015 City Council meeting.

13 9. At my instruction, Sean O'Brien of my firm then forwarded these documents saved  
14 from the Army Base Gateway Redevelopment Project Website to our outside vendor, Harbor  
15 Litigation Solutions, which converted any color documents to grayscale and applied Bates  
16 numbers to the documents. The entire set of documents downloaded from the Army Base  
17 Gateway Redevelopment Project Website included documents bearing Bates numbers  
18 OAK0004000 through OAK0046834. I personally reviewed the documents that were returned  
19 with such Bates numbers and confirmed that they were copies of the documents found on the  
20 Army Base Gateway Redevelopment Project Website.

21 10. On June 20, 2017, the City produced all transcriptions of the relevant portions of the  
22 City Council meetings, together with a full and complete copy of the documents posted to the  
23 Army Base Gateway Redevelopment Project Website, to counsel for Plaintiff (the  
24 "Administrative Record"). A true and correct copy of the letter transmitting a copy of the  
25 Administrative Record on an electronic storage device is attached hereto as **Exhibit B**.

26 11. The Administrative Record includes more than 200 documents (e.g., the DA, LDDA  
27 (and related agreements), written documents and communications submitted to or by the City for  
28 consideration by the City Council, draft ordinances and resolutions, consultant reports, record

1 summaries, transcripts of the public hearings, video of the public hearings, proposals, agendas  
2 and agenda reports, public hearing notices, memoranda, and environmental review and other  
3 planning documents).

4 12. I am informed and believe that at some point between April 2017 and November  
5 2017, the City relocated the Army Base Gateway Redevelopment Project Website to a slightly  
6 different directory (from the "NeighborhoodInvestment" to the "project-implementation"  
7 directory), and it is now located at the following link:

8 <http://www2.oaklandnet.com/government/o/CityAdministration/d/project->

9 [implementation/OAK038485](http://www2.oaklandnet.com/government/o/CityAdministration/d/project-implementation/OAK038485). I am familiar with the Army Base Gateway Redevelopment  
10 Project Website as it existed in the initial directory and have reviewed the same website as it  
11 exists at the new directory, and confirmed that they are identical.

12 13. In November and December 2017, at my direction, Paralegal Sean O'Brien compiled  
13 an electronic copy of the Bates numbered Administrative Record set of documents and prepared a  
14 corresponding index of those documents with their Bates numbers, grouped by the following  
15 categories: (1) Resolutions and Ordinances; (2) Staff Reports, Agendas, Notices; (3) Transcripts  
16 and Minutes of All Hearings; (4) Public Comments; (5) Environmental Review Documents; (6)  
17 Notice of Determination and Notice of Exemption for the Ordinance and Resolution; (7)  
18 Agreements, and (8) Miscellaneous. Also at my direction, Mr. O'Brien renamed the electronic  
19 file names for the documents to match the corresponding "AR" number we assigned to each in  
20 our index (for ease of reference), but did not alter or otherwise modify the documents in any  
21 way—each document remains an accurate copy of the same document found on the Army Base  
22 Gateway Redevelopment Project Website.

23 14. On December 28, 2017, I emailed a copy of the Administrative Record index to  
24 Plaintiff's counsel, and explained the City's proposal to submit the entire Administrative Record  
25 as a single trial exhibit. A true and correct copy of this email is attached hereto as **Exhibit C**.

26 15. Plaintiff objected to the City's proposal by email of the same date. A true and  
27 correct copy of this email is attached hereto as **Exhibit D**.

28 16. The City subsequently produced the Administrative Record index and the

1 Administrative Record documents (organized and named to correspond to the index) as Joint  
2 Trial Exhibits 639 and 640, respectively. On January 4, 2018, I sent two copies of the entire  
3 Administrative Record on two USB drives to Plaintiff's counsel. A true and correct copy of my  
4 letter enclosing these USB drives is attached hereto as **Exhibit E**. Also on January 4, 2018,  
5 Kevin Siegel emailed a copy of the Administrative Record index to plaintiff's counsel and  
6 provided plaintiff's counsel with a link to download an electronic copy of the entire  
7 Administrative Record. A true and correct copy of this email is attached hereto as **Exhibit F**.

8 I declare under penalty of perjury under the laws of the United States of America that the  
9 foregoing is true and correct.

10 Executed on the 15th day of January, 2018, at Oakland, California.



Christopher M. Long

# **EXHIBIT A**

## **TO LONG DECLARATION**

Barbara J. Parker (SBN 69722)  
City Attorney  
Otis McGee, Jr. (SBN 71885)  
Chief Assistant City Attorney  
Colin Troy Bowen (SBN 152489)  
Supervising Deputy City Attorney  
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Attorneys for Defendant  
CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

Case No. 3:16-cv-07014-VC

**DEFENDANT CITY OF OAKLAND'S  
INITIAL DISCLOSURE STATEMENT**

**[F.R.C.P. 26 (a)(1)]**

Defendant City of Oakland (the "City") hereby provides its initial disclosures pursuant to Rule 26(a)(1).

The following disclosures are made based on the information reasonably available to the City as of the date below. By making these disclosures, the City does not represent that it is

1 identifying every document, tangible thing, or witness possibly relevant to this lawsuit. Rather,  
 2 these disclosures represent the City's good faith effort to identify information subject to the  
 3 disclosure requirements under Rule 26(a)(1).

4 Furthermore, the following disclosures are made without, in any way, waiving:

5 1. The right to object to production of any document or tangible thing on the grounds  
 6 of competency, relevancy, materiality, hearsay, undue burden, privilege, the work product  
 7 doctrine, or on any other proper ground to the use of any such information for any purposes, in  
 8 whole or in part, in any subsequent stage of proceeding in this action or in any other action;

9 2. The right to object on any and all grounds, at any time, to any other discovery  
 10 proceeding involving or relating to the subject matter of these disclosures; and

11 3. The right to supplement and/or amend this list during or at the close of discovery  
 12 in this action.

13 All of the disclosures set forth below are made subject to these comments and  
 14 qualifications.

15 **I. WITNESSES**

16 The City identifies any and all witnesses disclosed by Plaintiff Oakland Bulk &  
 17 Oversized Terminal, LLC ("Plaintiff"). In addition, the City Clerk maintains the City's  
 18 official records, which include the relevant documents presented to, considered by, adopted  
 19 and/or by the City Council at various public meetings, which documents are discussed in the  
 20 Plaintiff's Complaint, the City's pending Motion to Dismiss (set for hearing on April 20,  
 21 2017), and the Sierra Club's motions to intervene and to dismiss (also set for hearings on  
 22 April 20, 2017).

23 See the City Clerk's home page:

24 <http://www2.oaklandnet.com/government/o/CityClerk/index.htm>.

25 See also the City' Clerk's Legisar InSite webpage for document management:

26 <http://www2.oaklandnet.com/government/o/CityClerk/o/RecordsManagement/OAK022568>.

27 The City reserves the right to supplement this disclosure as permitted by Rule  
 28 26(e)(1).

1 **II. DOCUMENTS AND THINGS**

2 The City hereby identifies the following documents and things that it may use to  
3 support its claims and defenses in this action:

4 1. The Development Agreement by and between City of Oakland and Prologis CCIG  
5 Oakland Global, LLC Regarding the Property and Project Known as "Gateway  
6 Development/Oakland Global", dated July 16, 2013 and recorded in the official records of the  
7 County of Alameda, State of California on February 16, 2016 as Instrument No. 2016-038035, a  
8 true and correct copy of which was attached as Exhibit A to the City's Request for Judicial Notice  
9 in Support of Defendant City of Oakland's Rule 12(b)(6) Motion to Dismiss ("RJN") (Dkt. 20-1);

10 2. City of Oakland Ordinance No. 13385 C.M.S., an Ordinance (1) Amending the  
11 Oakland Municipal Code to Prohibit the Storage and Handling of Coal and Coke at Bulk Material  
12 Facilities or Terminals Throughout the City of Oakland and (2) Adopting California  
13 Environmental Quality Act Exemption Findings, adopted July 19, 2016, a true and correct copy  
14 of which was attached as Exhibit B to the City's RJN (Dkt. 20-2);

15 3. Oakland City Council Resolution No. 86234 C.M.S., a Resolution (A) Applying  
16 Ordinance No. [13385] C.M.S. [an Ordinance (1) Amending the Oakland Municipal Code to  
17 Prohibit the Storage and Handling of Coal and Coke at Bulk Material Facilities or Terminals  
18 Throughout the City of Oakland and (2) Adopting California Environmental Quality Act (CEQA)  
19 Exemption Findings] to the Proposed Oakland Bulk and Oversized Terminal Located in the West  
20 Gateway Development Area of the Former Oakland Army Base; and (B) Adopting CEQA  
21 Exemption Findings and Relying on the Previously Certified 2002 Army Base Redevelopment  
22 Plan EIR and 2012 Addendum, adopted June 27, 2016, a true and correct copy of which was  
23 attached as Exhibit C to the City's RJN (Dkt. 20-3);

24 4. The Memorandum of Army Base Gateway Redevelopment Project Ground Lease  
25 for West Gateway dated February 16, 2016 (with exhibits), recorded in the official records of the  
26 County of Alameda, State of California on February 16, 2016 as Instrument No. 2016-038036,  
27 and that certain Army Base Gateway Redevelopment Project Ground Lease for West Gateway  
28 between the City and Oakland Bulk and Oversized Terminal, LLC (without exhibits),

1 incorporated therein by reference, true and correct copies of which were attached as Exhibit D to  
2 the City's RJN (Dkt. 20-4);

3 5. Chapter 17.138 of the City of Oakland Planning Code (entitled Development  
4 Agreement Procedure), a true and correct copy of which was attached as Exhibit E to the City's  
5 RJN (Dkt. 20-5);

6 6. California Senate Bill No. 674 (Stats. 2005, Ch. 664), the "Oakland Army Base  
7 Public Trust Exchange Act", enacted October 7, 2005 a true and correct copy of which was  
8 attached as Exhibit F to the City's RJN (Dkt. 20-6);

9 7. State of California Patents regarding "Public Trust Parcels F, G, and H" and  
10 "Public Trust Parcel E", dated June 30, 2006 and recorded in the official records of the County of  
11 Alameda, State of California on August 7, 2016 as Instrument Nos. 2006-301849 and 2006-  
12 301850, respectively, true and correct copies of which were attached as Exhibit G to the City's  
13 RJN (Dkt. 20-7);

14 8. The Memorandum of Lease Disposition and Development Agreement dated  
15 October 23, 2012, recorded in the official records of the County of Alameda, State of California  
16 on December 4, 2012 as Instrument No. 2012-403243, and that certain Lease Disposition and  
17 Development Agreement between the City and The Oakland Redevelopment Successor Agency  
18 and Prologis CCIG Oakland Global, LLC, incorporated therein by reference, copies of which are  
19 produced concurrently herewith;

20 9. Oakland City Council Resolution No. 85054 C.M.S., a Resolution to Oppose  
21 Transportation of Hazardous Fossil Fuel Materials, including Crude Oil, Coal, and Petroleum  
22 Coke, Along California Waterways, Through Densely Populated Areas, Through the City of  
23 Oakland, adopted June 17, 2014, a copy of which is produced concurrently herewith;

24 10. The report entitled, "Analysis of Health Impacts and Safety Risks and Other  
25 Issues/Concerns Related to the Transport, Handling, Transloading, and Storage of Coal and/or  
26 Petroleum Coke (Petcoke) in Oakland and at the Proposed Oakland Bulk & Oversized Terminal"  
27 prepared by Zoe Chafe, Ph.D., MPH, for Councilmember Dan Kalb, dated June 22, 2016 (the  
28 "Kalb Report"), together with the documents cited in Volumes 1–3 thereof, copies of which are

1 produced concurrently herewith;

2 11. The Agenda Memorandum dated June 23, 2016 from Oakland City  
3 Councilmember Dan Kalb to Members of the Oakland City Council and City Administrator  
4 Sabrina Landreth regarding the Kalb Report and an Ordinance Amending the Oakland  
5 Municipal Code to Prohibit the Storage and Handling of Coal and Coke at Bulk Material  
6 Facilities or Terminals Throughout the City of Oakland, a copy of which is produced  
7 concurrently herewith;

8 12. The report entitled, "Report on the Health and/or Safety Impacts Associated  
9 with the Transport, Storage, and/or Handling of Coal and/or Coke in Oakland, Including at  
10 the Proposed Oakland Bulk and Oversized Terminal in the West Gateway Area of the Former  
11 Oakland Army Base" dated June 23, 2016, prepared by Environmental Science Associates for  
12 the City of Oakland, a copy of which is produced concurrently herewith;

13 13. The Oakland City Council Agenda Report dated June 23, 2016 from Assistant  
14 City Administrator Claudia Cappio to City Administrator Sabrina B. Landreth regarding  
15 Public Hearing to Consider a Report and Recommendation for Options to Address Coal and  
16 Coke Issues, a copy of which is produced concurrently herewith;

17 14. The Oakland City Council Meeting Agenda for the June 27, 2016 City Council  
18 meeting, a copy of which is produced concurrently herewith;

19 15. The Oakland City Council Meeting Minutes for the June 27, 2016 City Council  
20 meeting, a copy of which is produced concurrently herewith;

21 16. The letter dated June 28, 2016 from Assistant City Administrator Claudia  
22 Cappio to Prologis CCIG Oakland Global, LLC and Oakland Bulk and Oversized Terminal,  
23 LLC regarding A Resolution (A) Applying Ordinance No. \_\_\_\_ C.M.S. [An Ordinance  
24 (1) Amending The Oakland Municipal Code to Prohibit the Storage and Handling of Coal and  
25 Coke at Bulk Material Facilities or Terminals Throughout the City of Oakland and  
26 (2) Adopting California Environmental Quality Act (CEQA) Exemption Findings] to the  
27 Proposed Oakland Bulk and Oversized Terminal Located in the West Gateway Development  
28 Area of the Former Oakland Army Base; and (B) Adopting CEQA Exemption Findings and

1 Relying on the Previously Certified 2002 Army Base Redevelopment Plan EIR and 2012  
2 Addendum, a copy of which is produced concurrently herewith;

3 17. The letter dated July 21, 2016 from Assistant City Administrator Claudia  
4 Cappio to Prologis CCIG Oakland Global, LLC and Oakland Bulk and Oversized Terminal,  
5 LLC regarding An Ordinance (1) Amending the Oakland Municipal Code to Prohibit the  
6 Storage and Handling of Coal and Coke at Bulk Material Facilities or Terminals Throughout  
7 the City of Oakland and (2) Adopting California Environmental Quality Act (CEQA)  
8 Exemption Findings, a copy of which is produced concurrently herewith;

9 18. The letter dated August 2, 2016 from Assistant City Administrator Claudia  
10 Cappio to Prologis CCIG Oakland Global, LLC and Oakland Bulk and Oversized Terminal,  
11 LLC regarding An Ordinance (1) Amending the Oakland Municipal Code to Prohibit the  
12 Storage and Handling of Coal and Coke at Bulk Material Facilities or Terminals Throughout  
13 the City of Oakland and (2) Adopting California Environmental Quality Act (CEQA)  
14 Exemption Findings (Ordinance No. 13385 C.M.S.), a copy of which is produced  
15 concurrently herewith;

16 19. The Filed CEQA Combined Notice of Determination and Exemption for  
17 Resolution 86234 C.M.S., a copy of which is produced concurrently herewith;

18 20. The Filed CEQA Notice of Exemption for Ordinance No. 13385 C.M.S., a copy  
19 of which is produced concurrently herewith;

20 21. Legislation and related documents regarding the Lease Disposition and  
21 Development Agreement referenced in number 8, above, posted on the City's website and  
22 available at the following locations:

23 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1201501&GUID=C5079002-881C-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1201501&GUID=C5079002-881C-424E-9D43-10CB513565BB&Options=ID|Text|&Search,)  
24 [424E-9D43-10CB513565BB&Options=ID|Text|&Search,](https://oakland.legistar.com/LegislationDetail.aspx?ID=1201501&GUID=C5079002-881C-424E-9D43-10CB513565BB&Options=ID|Text|&Search,)

25 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1134209&GUID=DCF42791-D49A-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1134209&GUID=DCF42791-D49A-4D62-8C80-07BFD2942325&Options=ID|Text|&Search,)  
26 [4D62-8C80-07BFD2942325&Options=ID|Text|&Search,](https://oakland.legistar.com/LegislationDetail.aspx?ID=1134209&GUID=DCF42791-D49A-4D62-8C80-07BFD2942325&Options=ID|Text|&Search,)

27 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1524295&GUID=31DB84BE-B9DC-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1524295&GUID=31DB84BE-B9DC-4C41-8BC8-E07BCAB1C99C&Options=ID%7cText%7c&Search,)  
28 [4C41-8BC8-E07BCAB1C99C&Options=ID%7cText%7c&Search,](https://oakland.legistar.com/LegislationDetail.aspx?ID=1524295&GUID=31DB84BE-B9DC-4C41-8BC8-E07BCAB1C99C&Options=ID%7cText%7c&Search,) and

1 [https://oakland.legistar.com/LegislationDetail.aspx?ID=2071160&GUID=2D0D3782-B7A6-](https://oakland.legistar.com/LegislationDetail.aspx?ID=2071160&GUID=2D0D3782-B7A6-40BA-8BBC-B75E85BE394D&Options=ID|Text|&Search)  
 2 [40BA-8BBC-B75E85BE394D&Options=ID|Text|&Search](https://oakland.legistar.com/LegislationDetail.aspx?ID=2071160&GUID=2D0D3782-B7A6-40BA-8BBC-B75E85BE394D&Options=ID|Text|&Search)

3 22. Additional legislation and documents related to the Army Base Gateway  
 4 Redevelopment Project posted on the City's website and available at the following locations:  
 5 [http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485)  
 6 [038485,](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485)  
 7 [http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/o/Oa](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/o/OaklandArmyBase/DOWD008820)  
 8 [klandArmyBase/DOWD008820,](http://www2.oaklandnet.com/government/o/CityAdministration/d/NeighborhoodInvestment/o/OaklandArmyBase/DOWD008820)  
 9 [http://www2.oaklandnet.com/government/o/PBN/OurServices/Application/DOWD009157,](http://www2.oaklandnet.com/government/o/PBN/OurServices/Application/DOWD009157)  
 10 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1134198&GUID=18F3FB48-E8B2-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1134198&GUID=18F3FB48-E8B2-4DDA-885C-EC372215D015&Options=ID|Text|&Search)  
 11 [4DDA-885C-EC372215D015&Options=ID|Text|&Search,](https://oakland.legistar.com/LegislationDetail.aspx?ID=1134198&GUID=18F3FB48-E8B2-4DDA-885C-EC372215D015&Options=ID|Text|&Search)  
 12 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-4343-B954-F848BC668685&Options=ID|Text|&Search)  
 13 [4343-B954-F848BC668685&Options=ID|Text|&Search,](https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-4343-B954-F848BC668685&Options=ID|Text|&Search)  
 14 [https://oakland.legistar.com/LegislationDetail.aspx?ID=1427118&GUID=8DAD20F7-91E0-](https://oakland.legistar.com/LegislationDetail.aspx?ID=1427118&GUID=8DAD20F7-91E0-4E6E-8D78-B9CB3DD4AB0F&Options=ID|Text|&Search)  
 15 [4E6E-8D78-B9CB3DD4AB0F&Options=ID|Text|&Search, and](https://oakland.legistar.com/LegislationDetail.aspx?ID=1427118&GUID=8DAD20F7-91E0-4E6E-8D78-B9CB3DD4AB0F&Options=ID|Text|&Search)  
 16 [https://oakland.legistar.com/LegislationDetail.aspx?ID=848574&GUID=F558CB45-670C-4202-](https://oakland.legistar.com/LegislationDetail.aspx?ID=848574&GUID=F558CB45-670C-4202-8229-B45F25F29D23&Options=ID|Text|&Search)  
 17 [8229-B45F25F29D23&Options=ID|Text|&Search.](https://oakland.legistar.com/LegislationDetail.aspx?ID=848574&GUID=F558CB45-670C-4202-8229-B45F25F29D23&Options=ID|Text|&Search)

18 The City reserves the right to supplement this disclosure as permitted by Rule 26(e)(1).

### 19 **III. DAMAGES**

20 The City has not filed a claim for affirmative relief, but reserves its right to do so, an  
 21 also to seek its attorney's fees and costs in this matter, in an amount to be determined at a  
 22 future time pursuant to applicable law.

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1 **IV. INSURANCE**

2 Not applicable. The Complaint does not allege any claim or prayer for damages, and  
3 the City is not tendering the defending of this suit to any insurer.

4  
5 Dated: February 28, 2017

BURKE, WILLIAMS & SORENSEN, LLP

6  
7 By: 

8 Kevin D. Siegel  
9 Gregory R. Aker  
10 Christopher M. Long  
11 Attorneys for Defendant  
12 CITY OF OAKLAND  
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**PROOF OF SERVICE**

I, Sharon Hagle, declare:

I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On February 28, 2017, I served a copy of the within document(s):

**DEFENDANT CITY OF OAKLAND'S INITIAL DISCLOSURE STATEMENT**

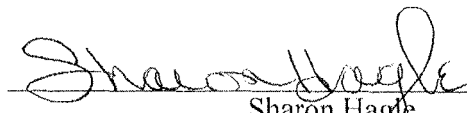
- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Oakland, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☐ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

**SEE SERVICE LIST ATTACHED**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on February 28, 2017, at Oakland, California.

  
Sharon Hagle

SERVICE LIST

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David Edward Myre, III  
Eliyahu Ness  
Robert P. Feldman  
Quinn Emanuel Urquhart Sullivan  
555 Twin Dolphin Dr., 5th Floor  
Redwood Shores, CA 94065  
  
Meredith McChesney Shaw  
Quinn Emanuel Urquhart Sullivan LLP  
50 California Street, 22nd Floor  
San Francisco, CA 94111  
  
Colin Casey O'Brien  
Adrienne L. Bloch  
Heather Mudford Lewis  
Earthjustice  
50 California Street Suite 500  
San Francisco, CA 94111  
  
Barbara J. Parker, City Attorney  
Otis McGee, Jr., Chief Assistant City Attorney  
Colin Troy Bowen, Supervising Deputy City Attorney  
OAKLAND CITY ATTORNEY  
One Frank Ogawa Plaza, 6th Floor  
Oakland, CA 94612

# **EXHIBIT B**

## **TO LONG DECLARATION**



1901 Harrison Street - Suite 900  
Oakland, California 94612-3501  
voice 510.273.8780 - fax 510.839.9104  
www.bwslaw.com

Direct No.: 510.903.8806  
ksiegel@bwslaw.com

June 20, 2017

**VIA OVERNIGHT COURIER**

Robert P. Feldman  
David Myre  
Quinn Emanuel Urquhart & Sullivan, LLP  
555 Twin Dolphin Drive, 5th Floor  
Redwood Shores, CA 94065-2139

Meredith M. Shaw  
Quinn Emanuel Urquhart & Sullivan, LLP  
50 California Street, 22nd Flr.  
San Francisco, CA 94111

Re: *Oakland Bulk & Oversized Terminal v. City of Oakland*  
U.S.D.C. - No. Dist. of California, Case No. 16-CV-7014

Dear Counsel:

Enclosed please find an electronic storage device with non-privileged documents responsive to Plaintiff Oakland Bulk & Oversized Terminal, LLC's ("OBOT") First Set of Requests for Production ("RFP"). The enclosed documents bear bates numbers OAK0001 through OAK3012 and OAK0004000 through OAK0046834, and are responsive to RFP numbers 1-16. Also included are non-privileged documents responsive to OBOT's subpoena to Dr. Zoe A. Chafe, Ph.D., dated April 28, 2017, which bear Bates numbers ZAC000001 through ZAC006538.

We are producing these documents with the parties' understanding and agreement that the documents are for attorneys eyes only since Judge Chhabria has yet to sign the proposed/stipulated protective order (which understanding and agreement was reached by email exchanges between Greg Aker and David Myre, bearing the subject line "draft PTO, Clawback").

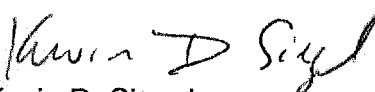
We are continuing to collect and review documents in response to your discovery demands, for anticipated subsequent production. In addition, we will provide a privilege log at a later date.



Robert P. Feldman  
Meredith M. Shaw  
June 20, 2017  
Page 2

Sincerely,

Burke, Williams & Sorensen, LLP

  
Kevin D. Siegel

KDS:cs

Enclosure

cc: Colin O'Brien, Earthjustice (with enclosure)  
Jessica Yarnall Loarie, Sierra Club (with enclosure)  
Colin T. Bowen, Oakland City Attorney's Office (with enclosure)

OAK #4828-0192-9546 v2

# **EXHIBIT C**

## **TO LONG DECLARATION**

**Long, Christopher M.**

---

**From:** Long, Christopher M.  
**Sent:** Thursday, December 28, 2017 11:05 AM  
**To:** Bob Feldman; Meredith Shaw; 'David Myre'; Eli Ness; CCIGQE  
**Cc:** 'Jessica Yarnall Loarie'; 'Colin O'Brien'; Joanne Spalding  
(joanne.spalding@SIERRACLUB.ORG); Adrienne Bloch; 'Heather Lewis'; Marie Logan;  
Siegel, Kevin D.; Aker, Gregory R.; Colvig, Timothy A.; Seals, Celestine O.; Hagle, Sharon;  
O'Brien, Sean; Deborah Ann Sivas; Helen Kang; 'Isaac Cheng'  
**Subject:** OBOT v. City of Oakland - Record of Council Proceedings  
**Attachments:** OBOT v. City of Oakland- Index of City Records.docx

Counsel:

In light of the voluminous amount of documents submitted to the City during the public hearing process related to the Ordinance and Resolution, which were prepared by OBOT (and its representatives), the City, and members of the public, we propose to seek permission from the Court to submit the entire record of the City Council's proceedings as a single trial exhibit on a flash drive (with a corresponding manual filing notification) to avoid the need to print out and submit more than 40,000 pages of material. We also plan to submit the attached index (which mirrors the folders and file names on the flash drive) for ease of reference. The index also lists the corresponding Bates numbers for each document from the City's production.

For example, this will allow the parties to quickly refer to all sections of the Basis of Design (AR0135-AR0148 on the index, which alone is voluminous) without the need to print out and file hard copies of these documents. This will also allow the parties to easily refer to the ordinance and resolution, meeting agendas, staff reports, transcripts of public hearings, meeting minutes, etc.

Of course, the parties are free to include different versions of the documents appearing in the record as separate trial exhibits on our joint trial exhibit list (which we are separately preparing and hope to have for you shortly) but this approach will hopefully reduce the amount of exhibits that we will need to file.

Please let us know if you agree.

Sincerely,

**Christopher M. Long | Associate**  
1901 Harrison Street, Suite 900 | Oakland, CA 94612-3501  
d - 510.903.8848 | t - 510.273.8780 | f - 510.839.9104  
clong@bwslaw.com | vCard | bwslaw.com



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# **EXHIBIT D**

## **TO LONG DECLARATION**

**Long, Christopher M.**

---

**From:** David Myre <davidmyre@quinnemanuel.com>  
**Sent:** Thursday, December 28, 2017 1:43 PM  
**To:** Colin O'Brien; Long, Christopher M.; Bob Feldman; Meredith Shaw; Eli Ness; CCIGQE  
**Cc:** Jessica Yarnall Loarie; Joanne Spalding (joanne.spalding@SIERRACLUB.ORG); Adrienne Bloch; Heather Lewis; Marie Logan; Siegel, Kevin D.; Aker, Gregory R.; Colvig, Timothy A.; Seals, Celestine O.; Hagle, Sharon; O'Brien, Sean; Deborah Ann Sivas; Helen Kang; Isaac Cheng  
**Subject:** RE: OBOT v. City of Oakland - Record of Council Proceedings

Christopher,

OBOT objects to the City's proposal. The City's proposed "exhibit" would consist of 228 separate, discrete documents that vary widely in terms of their authors, source, substance, and most importantly, admissibility at trial. Many are objectionable on multiple grounds, and absent testimony or other evidence supporting their admissibility, may not properly be admitted as evidence in this proceeding. The City may, of course, include the individual documents it intends to offer on the parties' joint exhibit list, and OBOT will provide specific objections as appropriate for each. However, we would oppose any request that the Court permit all 228 of these documents to be admitted as a single trial exhibit.

Regards,  
David

**David E. Myre**  
**Quinn Emanuel Urquhart & Sullivan LLP**  
Silicon Valley | Direct: (650) 801-5080

---

**From:** Colin O'Brien [mailto:cobrien@earthjustice.org]  
**Sent:** Thursday, December 28, 2017 12:04 PM  
**To:** Long, Christopher M. <CLong@bwsllaw.com>; Bob Feldman <bobfeldman@quinnemanuel.com>; Meredith Shaw <meredithshaw@quinnemanuel.com>; David Myre <davidmyre@quinnemanuel.com>; Eli Ness <eliness@quinnemanuel.com>; CCIGQE <ccigqe@quinnemanuel.com>  
**Cc:** Jessica Yarnall Loarie <jessica.yarnall@sierraclub.org>; Joanne Spalding (joanne.spalding@SIERRACLUB.ORG) <joanne.spalding@SIERRACLUB.ORG>; Adrienne Bloch <abloch@earthjustice.org>; Heather Lewis <hlewis@earthjustice.org>; Marie Logan <mlogan@earthjustice.org>; Siegel, Kevin D. <KSiegel@bwsllaw.com>; Aker, Gregory R. <GAker@bwsllaw.com>; Colvig, Timothy A. <TColvig@bwsllaw.com>; Seals, Celestine O. <CSeals@bwsllaw.com>; Hagle, Sharon <SHagle@bwsllaw.com>; O'Brien, Sean <sobrien@bwsllaw.com>; Deborah Ann Sivas <dsivas@stanford.edu>; Helen Kang <hkang@ggu.edu>; Isaac Cheng <isaac.cheng@stanford.edu>  
**Subject:** RE: OBOT v. City of Oakland - Record of Council Proceedings

Christopher –

The Intervenor has no objection to your proposed approach.

Best,  
Colin

**From:** Long, Christopher M. [mailto:CLong@bwslaw.com]

**Sent:** Thursday, December 28, 2017 11:06 AM

**To:** Bob Feldman <bobfeldman@quinnemanuel.com>; Meredith Shaw <meredithshaw@quinnemanuel.com>; David Myre <davidmyre@quinnemanuel.com>; Eli Ness <eliness@quinnemanuel.com>; CCIGQE <ccigqe@quinnemanuel.com>

**Cc:** Jessica Yarnall Loarie <jessica.yarnall@sierraclub.org>; Colin O'Brien <cobrien@earthjustice.org>; Joanne Spalding (joanne.spalding@SIERRACLUB.ORG) <joanne.spalding@SIERRACLUB.ORG>; Adrienne Bloch <abloch@earthjustice.org>; Heather Lewis <hlewis@earthjustice.org>; Marie Logan <mlogan@earthjustice.org>; Siegel, Kevin D.

<KSiegel@bwslaw.com>; Aker, Gregory R. <GAker@bwslaw.com>; Colvig, Timothy A. <TColvig@bwslaw.com>; Seals, Celestine O. <CSeals@bwslaw.com>; Hagle, Sharon <SHagle@bwslaw.com>; O'Brien, Sean <sobrien@bwslaw.com>; Deborah Ann Sivas <dsivas@stanford.edu>; Helen Kang <hkang@ggu.edu>; Isaac Cheng <isaac.cheng@stanford.edu>

**Subject:** OBOT v. City of Oakland - Record of Council Proceedings

Counsel:

In light of the voluminous amount of documents submitted to the City during the public hearing process related to the Ordinance and Resolution, which were prepared by OBOT (and its representatives), the City, and members of the public, we propose to seek permission from the Court to submit the entire record of the City Council's proceedings as a single trial exhibit on a flash drive (with a corresponding manual filing notification) to avoid the need to print out and submit more than 40,000 pages of material. We also plan to submit the attached index (which mirrors the folders and file names on the flash drive) for ease of reference. The index also lists the corresponding Bates numbers for each document from the City's production.

For example, this will allow the parties to quickly refer to all sections of the Basis of Design (AR0135-AR0148 on the index, which alone is voluminous) without the need to print out and file hard copies of these documents. This will also allow the parties to easily refer to the ordinance and resolution, meeting agendas, staff reports, transcripts of public hearings, meeting minutes, etc.

Of course, the parties are free to include different versions of the documents appearing in the record as separate trial exhibits on our joint trial exhibit list (which we are separately preparing and hope to have for you shortly) but this approach will hopefully reduce the amount of exhibits that we will need to file.

Please let us know if you agree.

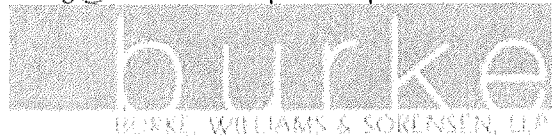
Sincerely,

**Christopher M. Long | Associate**

1901 Harrison Street, Suite 900 | Oakland, CA 94612-3501

d - 510.903.8848 | t - 510.273.8780 | f - 510.839.9104

clong@bwslaw.com | vCard | bwslaw.com



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**EXHIBIT E**

**TO LONG DECLARATION**



BURKE, WILLIAMS & SORENSEN, LLP

1901 Harrison Street - Suite 900  
Oakland, California 94612-3501  
voice 510.273.8780 - fax 510.839.9104  
www.bwslaw.com

Direct No.: 510.903.8848  
clong@bwslaw.com

January 4, 2018

**VIA E-MAIL AND OVERNIGHT MAIL**

Robert P. Feldman  
Meredith M. Shaw  
David E. Myre  
Eliyahu Ness  
Quinn Emanuel Urquhart & Sullivan, LLP  
555 Twin Dolphin Drive, 5th Floor  
Redwood Shores, CA 94065-2139

Re: *Oakland Bulk & Oversized Terminal v. City of Oakland*  
U.S.D.C. Northern Dist. of California, Case No. 3:16-cv-7014-VC

Dear Counsel:

Two USB drives with a copy of Joint Trial Exhibit 640 (the record of the City's proceedings) are enclosed, pursuant to Kevin Siegel's email dated January 4, 2018.

Please let us know if you have any questions.

Sincerely,

Burke, Williams & Sorensen, LLP

A handwritten signature in black ink, appearing to read "Chris Long", written over a horizontal line.

Christopher M. Long

CML:sh  
Enclosures

cc: Colin O'Brien (via e-mail)  
Jessica Yarnall Loarie (via e-mail)

OAK #4851-2906-1978 v1

# **EXHIBIT F**

## **TO LONG DECLARATION**

**Long, Christopher M.**

---

**From:** Siegel, Kevin D.  
**Sent:** Thursday, January 04, 2018 9:37 AM  
**To:** David Myre (davidmyre@quinnemanuel.com)  
**Cc:** O'Brien, Sean; Aker, Gregory R.; Colvig, Timothy A.; Long, Christopher M.; EJ-Colin O'Brien (cobrien@earthjustice.org); jessica.yarnall@sierraclub.org; Hagle, Sharon; Meredith Shaw (meredithshaw@quinnemanuel.com); Robin Ramirez (robinramirez@quinnemanuel.com)  
**Subject:** Submission of Exhibits, including Manual Filing of the Record of the City's Proceedings; Equipment Delivery to Courtroom - Logistics  
**Attachments:** Joint Trial Exhibit 639 - Index to City of Oakland Administrative Record - OBOT v City of Oakland.docx

Dear David (and Meredith and Robin):

This email concerns logistics re exhibits and courtroom equipment. (Christopher and Sean are separately working to get you exhibits you've requested.)

Exhibits

Please confirm that OBOT will deliver the hard copy set of the trial exhibits to Judge Chhabria's Clerk, Kristen Melen, on Thursday, January 11, at 1.00 pm. Ms. Melen so instructed our paralegal, Sean O'Brien regarding the time frame. Since OBOT is responsible for lodging the electronic copies of the trial exhibits on January 9, per the Standing Order, we are expecting that OBOT will also deliver the hard copy set on January 11.

As discussed Monday when we met and conferred, the City will equally share these costs with you.

With respect to joint trial exhibits 639 and 640 (the index and the record of the City's proceedings, respectively), below is a link to an electronic copy of the record (Exh. 640) We will send you two USB drives with the record, for delivery tomorrow. Please include the USB drive with the hardcopy exhibits (referenced above) for the delivery on January 11. (Defendants had listed the index and the record as exhibits 1 and 2, but OBOT has renumbered them to 639 and 640.) The other copy is for your files. A copy of the index (exhibit 639) is attached.

<https://bwsllaw.sharefile.com/d-sd8486af5a404bea8>

Equipment

Ms. Melen also instructed Sean that the Stipulation and Order regarding the list of the equipment to be brought to the courtroom needs to be filed by January 9<sup>th</sup>, though she would prefer January 8<sup>th</sup>. A signed copy of the Order will be needed for access to the courthouse in order to load in equipment for the trial. I understand that OBOT are preparing that (please advise if I'm mistaken).

Regards,  
Kevin

Kevin D. Siegel | Partner  
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# **EXHIBIT E**

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Attorneys for Defendant  
CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**DECLARATION OF SEAN P.  
O'BRIEN**

Date: January 16, 2018  
Time: 8:30 a.m.  
Ctmm.: No. 2, 17th Floor  
Judge: Honorable Vince Chhabria

1 I, Sean O'Brien, hereby declare:

2 1. I am a Litigation Support Paralegal with the firm Burke, Williams & Sorensen, LLP,  
3 attorneys of record for Defendant City of Oakland ("City") in the above-entitled action.

4 2. I have personal knowledge of the facts set forth in this declaration and, if called as a  
5 witness, could and would testify competently to such facts under oath.

6 3. In early April 2017, Christopher Long provided a USB flash drive to me which I  
7 understood to contain all documents downloaded by Sharon Hagle that were available from and  
8 posted on the City's Army Base Gateway Redevelopment Website.

9 4. In late March and early April 2017, I directed Aiken Welch Court Reporters to  
10 prepare certified transcriptions of the relevant portions of the City Council meeting videos posted  
11 on the website, including Agenda Item 7.16 from the July 19, 2016 City Council meeting, Agenda  
12 Item 5 from the June 27, 2016 City Council meeting, Agenda Item 4 from the May 9, 2016 City  
13 Council meeting, Agenda Item 13 from the May 3, 2016 City Council meeting, Agenda Item 11  
14 from the February 16, 2016 City Council meeting, and Agenda Item 4 from the September 21,  
15 2015 City Council meeting.

16 5. I uploaded and transferred the documents contained on the USB flash drive provided  
17 by Mr. Long, as well as the transcripts prepared by Aiken Welch Court Reporters, to our outside  
18 litigation support vendor, Harbor Litigation Solutions ("Harbor"). I instructed Harbor to convert  
19 any color documents to grayscale<sup>1</sup> and to apply Bates numbers to the documents and the hearing  
20 transcripts. The entire set of documents downloaded from the Army Base Gateway  
21 Redevelopment Project Website, plus the transcripts, resulted in a production set of documents  
22 bearing Bates numbers OAK 0004000 through OAK 0046834.

23 6. In November and December 2017, at Mr. Long's direction, I compiled an electronic  
24 copy of the Bates numbered Administrative Record set of documents and prepared a  
25 corresponding index of those documents with their Bates numbers, grouped by the following  
26 categories: (1) Resolutions and Ordinances; (2) Staff Reports, Agendas, Notices; (3) Transcripts

27 <sup>1</sup> Paragraph 1 of the parties' Electronically Stored Information ("ESI") Protocol stated that "[c]olor versions of any  
28 document produced in black and white shall be produced upon request." (emphasis added).

1 and Minutes of All Hearings; (4) Public Comments; (5) Environmental Review Documents; (6)  
 2 Notice of Determination and Notice of Exemption for the Ordinance and Resolution; (7)  
 3 Agreements, and (8) Miscellaneous. This index was modeled on an index for an Administrative  
 4 Record in a CEQA action I have previously drafted, as instructed by Kevin Siegel of my firm. I  
 5 also renamed the electronic file names to match a corresponding “AR” number assigned to each  
 6 document in the index (for ease of reference), but I did not alter or otherwise modify the  
 7 documents themselves in any way.

8 7. Errata:

9 a. On the index I prepared, I inadvertently did not assign an “AR” number for the  
 10 Army Base Gateway Redevelopment Project LDDA, or include the Bates  
 11 number range for that document. However, that document was downloaded  
 12 from the Army Base Gateway Redevelopment Project Website at the following  
 13 link:

14 <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak03843>  
 15 [5.pdf](#). This document appears under section 7 on the index (“Agreements”),  
 16 and bears Bates numbers OAK 0036691 through OAK 0036778. For ease of  
 17 reference, the City also included within its production of the Administrative  
 18 Record the recorded Memorandum of Lease Disposition and Development  
 19 Agreement, which bears Bates numbers OAK 0036620 through OAK  
 20 0036631.

21 b. Additionally, in section 7 of the Administrative Record produced to the Court  
 22 and to the parties, during the file transfer process, additional copies of records  
 23 that appear elsewhere in the Administrative Record and/or were system files  
 24 not actually a part of the Administrative Record were inadvertently copied to  
 25 the “Agreements” folder. Thus, for example, the file named “OAK 0036608”  
 26 under the Agreements folder is an unintended duplicate of the file that appears  
 27 as AR0022; the file named “OAK 0039392” and bearing Bates numbers OAK  
 28 0039392 through OAK 0039419 was a database system file that, through a

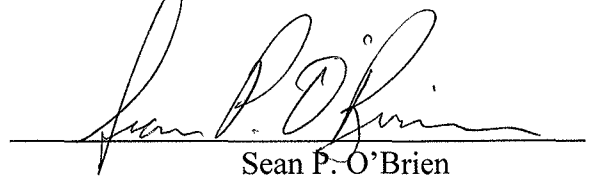
1 technical error in the document formatting conversion process by Harbor,  
2 should not have been included in the Administrative Record; the file named  
3 "OAK 0039420" is an unintended duplicate of the file that appears as AR  
4 0221; the file named OAK 0039436 is an unintended duplicate of the file that  
5 appears as AR0224, etc.

6 c. Accordingly, with the exception of the files named "OAK 0036620" and  
7 "OAK 0036691," any additional files that do not have an "AR" prefix within  
8 the "07 Agreements" folder produced to the Court and the parties should be  
9 disregarded, as they were copied to this folder in error.

10 8. I have confirmed that all other documents listed on the Administrative Record  
11 index produced as Joint Trial Exhibit 639 and the USB flash drive containing the Administrative  
12 Record set of documents produced as Joint Trial Exhibit 640 correspond with the USB flash  
13 drive provided to me by Mr. Long.

14 I declare under penalty of perjury under the laws of the United States of America that the  
15 foregoing is true and correct.

16 Executed on the 12th day of January, 2018, at Oakland, California.

17  
18   
19 Sean P. O'Brien

# EXHIBIT F

**EXHIBIT F**

<b>No.</b>	<b>BATES</b>	<b>Title</b>
1.	(AR 11) OAK 0035352-OAK 0036442	2016-06-22 - Report Prepared for Councilmember Kalb from Zoe Chafe Ph.D. Docs Cited Vol 1
2.	(AR 12) OAK 0034862-OAK 0035339	2016-06-22 - Report Prepared for Councilmember Kalb from Zoe Chafe Ph.D. Docs Cited Vol 2
3.	(AR 13) OAK 0034809-OAK 0034847	2016-06-22 - Report Prepared for Councilmember Kalb from Zoe Chafe Ph.D. Docs Cited Vol 3
4.	(AR 21) OAK 0008216-OAK 0008217	Public Comment Letter from TLS
5.	(AR 42) OAK 0008646-OAK 0008647	Public Comment Letter from the US Department of Transportation DOT DHS and EPA
6.	(AR 44) OAK 0008644-OAK 0008645	Public Comment Letter from the Port of Oakland
7.	(AR 45) OAK 0007878-OAK 0007894	Public Comment Letter from Stice Block
8.	(AR 40) OAK 0033194-OAK 0033199	Public Comment Letter from the Sierra Club
9.	(AR 46) OAK 0008218	Public Comment Letter from Ralph Kanz
10.	(AR 47) OAK 0007899-OAK 0008215	Public Comment Letter from Case for Natural Energy
11.	(AR 43) OAK 0008608-OAK 0008640	Public Comment Letter from the Sierra Club
12.	(AR 49) OAK 0008595-OAK 0008598	Public Comment Letter from Greg Stults
13.	(AR 50) OAK 0008648-OAK 0008650	Public Comment Letter from A. Brown
14.	(AR 51) OAK 0008221-OAK 0008436	Public Comment Letter from Earthjustice
15.	(AR 52) OAK 0008605-OAK 0008606	Public Comment Letter from Clean Water Action
16.	(AR 227) OAK 0039519-OAK 0039555	April 19, 2016 Letter from Stice-Block to State Senator Bob Wiekowski
17.	(AR 223) OAK 0039449	June 30, 2016 Email from Pat Cashman to Claudia Cappio
18.	(AR 66) OAK 0008603-OAK 0008604	Letter from Mayors of Berkeley, Emeryville, El Cerrito, Albany, Richmond etc.
19.	(AR 63) OAK 0007876	Comparison of ESA, Chafe Report, and Public Health Panel's Findings
20.	(AR 175) OAK 0045593-OAK 0045699	Northeast Gateway Air Quality Plan (8-30-16)

21.	(AR 175) OAK 0045769-OAK 0045935	City Admin Approval of NE Gateway AQP for Construction (Prologis) (10-4-16)
22.	(AR 64) OAK 0007843	June 2016 Public Health Panel's Frequently Asked Questions on Coal
23.	(AR 207) OAK 0007895-OAK 0007898	Councilmember Kaplan's Response to Deceptive Coal Matters
24.	(AR 224) OAK 0039436-OAK 0039446	June 28, 2016 Letter from Claudia Cappio to OBOT
25.	(AR 222) OAK 0039452-OAK 0039476	July 21, 2016 Letter from Claudia Cappio to OBOT
26.	(AR 221) OAK 0039420-OAK 0039435	August 2, 2016 Letter from Claudia Cappio to OBOT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE VINCE CHHABRIA

OAKLAND BULK & OVERSIZED TERMINAL, )	
LLC, )	
)	
)	
Plaintiff, )	
)	
vs. )	No. C 16-7014 VC
)	
CITY OF OAKLAND )	
)	San Francisco, California
Defendant. )	Wednesday
)	January 18, 2018
)	10:00 a.m.

---

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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**BY: STEPHEN A. SWEDLOW, ESQ.**

*Reported By: Debra L. Pas, CSR 11916, CRR, RMR, RPR*  
*Official Reporter - US District Court*  
*Computerized Transcription By Eclipse*

**APPEARANCES: (CONTINUED)**

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**BY: KEVIN DRAKE SIEGEL, ESQ.**  
**GREGORY AKER, ESQ.**  
**TIMOTHY ALAN COLVIG, ESQ.**

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**BY: JESSICA YARNELL LOARIE, ESQ.**  
**JOANNE SPALDING, ESQ.**

- - -

1 WEDNESDAY - JANUARY 10, 2018

10:05 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** We are going to call Civil Case 16-7014,  
5 Oakland Bulk & Oversized Terminal versus City of Oakland.

6 Counsel, please come forward and state your appearance.

7 **MR. FELDMAN:** May it please the Court. Good morning,  
8 your Honor. Robert Feldman for the plaintiff. With me are my  
9 colleagues Meredith Shaw and David Myre.

10 And I have the great pleasure to bring to your Honor's  
11 attention an unattended motion for the admission of Stephen  
12 Swedlow, pro hac vice. He is from our Chicago office. And if  
13 your Honor would grant that motion, I would introduce him to,  
14 your Honor.

15 **THE COURT:** Granted.

16 **MR. FELDMAN:** Stephen Swedlow.

17 **MR. SIEGEL:** Good morning, your Honor. Kevin Siegel  
18 from Burke Williams and Sorenson on behalf of the City of  
19 Oakland. I will be presenting on the summary judgment with  
20 respect to breach of contract.

21 Then I have some colleagues with me, who I'll let  
22 introduce themselves.

23 **MS. SPALDING:** Good morning, your Honor. Joanne  
24 Spalding with the Sierra Club representing defendant  
25 intervenors and I will be speaking on the dormant commerce

1 clause issues.

2 **THE COURT:** Great.

3 **MR. AKER:** Good morning, your Honor. Gregory Aker  
4 for the City. I will be handling the pretrial conference  
5 issues.

6 **THE COURT:** Okay. Such as they are.

7 **MS. LOARIE:** Jessica Loarie for defendant intervenor  
8 Sierra Club. I will handle part of the pretrial conference as  
9 well.

10 **MR. O'BRIEN:** Colin O'Brien, also here on behalf of  
11 the defendant intervenors.

12 **THE COURT:** Hello.

13 **MR. COLVIG:** Good morning, your Honor. Timothy  
14 Colvig also appearing on behalf of the City of Oakland.

15 **THE COURT:** All right. That's it?

16 All right. Why don't -- why don't we start with the  
17 commerce clause?

18 And Mr. Siegel, I want to start with just one quick  
19 question and then turn to the plaintiffs. I'm sorry, did I say  
20 commerce clause? I meant breach of contract. Sorry about  
21 that.

22 So the quick question I have for you, Mr. Siegel, is a  
23 question I asked you, I believe I asked you at the motion to  
24 dismiss hearing. And it was about Government Code Section  
25 65866 which governs Development Agreements, right? And that

1 section says:

2 "A Development Agreement shall not prevent a  
3 city, county or a city and county, in subsequent  
4 actions applicable to the property from applying new  
5 rules, regulations and policies which do not conflict  
6 with those rules, regulations and policies applicable  
7 to the property set forth herein, nor shall a  
8 Development Agreement prevent a city or county from  
9 denying or conditionally approving any subsequent  
10 development project," blah, blah, blah.

11 That language, at least read in isolation, seems to give  
12 the City broader authority to impose new regulations on a  
13 project than does the language of the agreement itself.

14 And so I was curious why -- you know, I have not dived  
15 into this and I have not read all the cases interpreting the  
16 language that I just read, but I was curious why you were not  
17 arguing that to the extent that this provision -- what is it  
18 3.4.2?

19 **MR. SIEGEL:** Correct.

20 **THE COURT:** To the extent that 3.4.2 of the  
21 Development Agreement narrows the City's authority to apply new  
22 regulations on the -- to the development compared to the  
23 authority that this statute protects, that the -- that this  
24 provision in the agreement might be invalid.

25 Is there something I'm missing? Is there a reason you

1 didn't argue that?

2           **MR. SIEGEL:** Your Honor, the Development Agreement  
3 has to be interpreted narrowly as to not have violated any of  
4 the City's contractual authority or, I should say, inherent  
5 police power authority and we don't believe it does.

6           And that was an argument we presented at the Motion to  
7 Dismiss hearing; that in order to narrowly construe the  
8 purposes of the Development Agreement itself, it doesn't  
9 encapsulate this scope of regulation, which governs the health  
10 and safety effects that are outside of the zoning regulations  
11 that the City was proposing.

12           **THE COURT:** But don't you agree that the language of  
13 3.4.2 gives the City less authority to apply new regulations to  
14 the development than this sentence in Section 65866 of the  
15 Government code?

16           I mean, the Government -- the Development Agreement says  
17 you can't apply new regulations to the development unless after  
18 a public hearing substantial evidence shows that the  
19 inadmissibility to apply the new regulation to the development  
20 would create a substantial danger to the health and safety of  
21 the people.

22           And this sentence says simply that:

23           "A Development Agreement shall not prevent a city  
24 in subsequent actions applicable to the property from  
25 applying new rules, regulations and policies which do

1 not conflict with the rules and regulations that  
2 existed at the time the agreement was entered into."

3 So I -- I might have imagined -- and maybe this is just  
4 reflective of my lack of understanding of this provision, but I  
5 might have imagined an argument that said, well, this -- you  
6 know, this coal ordinance is not in conflict with any of the  
7 regulations that existed at the time. The regulatory regime  
8 that existed at the time was silent on the issue of coal. And  
9 so the -- so the new coal ordinance is not in conflict with the  
10 regulatory regime that existed at the time. And to the extent  
11 that Section 3.4.2 purports to prevent us -- to prevent us from  
12 adopting -- from applying a new regulation to the development,  
13 except to the extent that it's necessary to prevent a  
14 substantial danger to the people, that provision is invalid  
15 under this Government Code section.

16 **MR. SIEGEL:** Well, I suppose that would be a  
17 secondary argument, but I think it would still -- our primary  
18 argument has been that there is no conflict because the D.A.  
19 doesn't address this type of ordinance and the existing  
20 regulations --

21 **THE COURT:** There is no -- that's what I'm suggesting  
22 to you, is perhaps there is no conflict between the coal  
23 ordinance and the existing -- the regulatory regime that  
24 existed at the time that the agreement was adopted.

25 **MR. SIEGEL:** Right, but --

1           **THE COURT:** But you didn't argue that. I mean,  
2 why -- under 3.4.2 you have to show more than the fact that  
3 there is no conflict between the coal ordinance and the  
4 regulatory regime that existed at the time.

5           You have to show that application of the ordinance to the  
6 development is -- serves to mitigate a substantial danger to  
7 the health and safety of the people.

8           **MR. SIEGEL:** Well, see, to me, your Honor, I see this  
9 really as basically the same argument. And perhaps you don't,  
10 but I see it really as the same argument that we were saying  
11 there was no vested right in the first instance to store and  
12 handle coal because there was no regulatory authority that  
13 provided such right.

14           And the D.A. did not lock in such regulatory authority  
15 because it didn't exist and the D.A. only provided a right to a  
16 multi bulk goods terminal. And so to me it is inherently the  
17 same argument.

18           **THE COURT:** But there was nothing in the existing  
19 regulatory regime that prevented shipping coal from the Port of  
20 Oakland at the time, right?

21           **MR. SIEGEL:** Correct. But nor was there anything in  
22 the existing regulatory regime that authorized it.

23           And so in order to have a vested right in the first  
24 instance, it needs to have been authorized by the existing  
25 regulations and have been locked in pursuant to the Development

1 Agreement, both because only those authorities would be  
2 applicable and, also, because the Development Agreement would  
3 have then expressly provided for any right to store or handle  
4 coal.

5 So to my mind, at least, it is really effectively the same  
6 argument and so we did not argue that the City violated its  
7 authority when it adopted the Development Agreement because we  
8 believe that the City was within its authority to adopt the  
9 Development Agreement and didn't contract away any police  
10 powers.

11 And so the only question is then what vested rights did  
12 the developer acquire, and it didn't extend this far.

13 **THE COURT:** Okay. I have to say that I don't -- I --  
14 so you know, I'm not sure I understand what you're saying, but  
15 you didn't make -- you didn't make the argument that I'm  
16 testing, so I'm not sure what else I can do with it.

17 Okay, Mr. Feldman.

18 **MR. FELDMAN:** Good morning, your Honor.

19 **THE COURT:** Good morning.

20 So I thought maybe we could start by going through the  
21 City's evidence and having you tell me what's wrong with it,  
22 starting maybe with the ESA report. Can we kind of go through  
23 the ESA report?

24 **MR. FELDMAN:** Sure.

25 I can do that in several ways, your Honor. Can I ask --

1 10 million tons in Oakland -- if 10 million tons of PM-2.5 are  
2 emitted into the air in Oakland every year and this project  
3 would add ten tons, so it would be 10,000,010 tons, that this  
4 project would pose a substantial danger to the people of  
5 Oakland?

6 **MR. SIEGEL:** I don't know. I don't know and my point  
7 is I don't think we need to know.

8 **THE COURT:** Why don't we need to know? That part I  
9 don't understand. I just don't understand that.

10 **MR. SIEGEL:** Because we can rely upon the evidence  
11 that was -- let me make a statement about "substantial," in  
12 that consider the fact that "substantial" really means not  
13 insubstantial. And that "substantial" is also used in the same  
14 sentence in which substantial evidence is shown.

15 And so I think you -- you are imputing more -- a  
16 heightened level of danger to the qualifier "substantial" than  
17 is in the plain text of the provisions of Section 3.4.2 itself.

18 **THE COURT:** So you think that -- so is that a long  
19 way of saying that the additional ten tons in my hypothetical  
20 would constitute a substantial danger and the City Council  
21 could conclude that?

22 **MR. SIEGEL:** If -- if City Council were presented  
23 with that record, they could make their conclusion. Most  
24 likely, that would not have been the conclusion.

25 But do I know that it would be the conclusion? I cannot

1 answer that because that is not the situation that is  
2 presented.

3 **THE COURT:** How do we know?

4 **MR. SIEGEL:** How do we --

5 **THE COURT:** How do we know it's not the situation  
6 that's presented? I don't know anything about how many tons of  
7 PM-2.5 go into the air in Oakland from other sources. I  
8 don't -- I don't think there is anything in the record on that.

9 And so if there is nothing in the record on that, how can  
10 I -- or how could -- more importantly, how could the City  
11 Council understand the relative contribution that the OBOT  
12 operation would be making to pollution?

13 Well, I think you see one of the questions that I'm going  
14 to be concerned with at trial. And I think that -- you know,  
15 I -- I think that there are problems with the record. I don't  
16 think there is any question that there are problems with the  
17 record.

18 I don't think -- I don't think I have developed enough of  
19 the -- of an understanding or a thorough enough or a  
20 comprehensive enough understanding of the record based on the  
21 work that I've put in so far and based on the materials that  
22 have been submitted to me to -- you know, to conclude that the  
23 record does not contain substantial evidence of a substantial  
24 danger, but I think we're going to have a trial on that  
25 question.

1           **MR. SIEGEL:** All right. Well, one point I want to  
2 make is I don't think that just only looking at this critique  
3 of the ESA report is enough because there's -- there is the  
4 fire risks and the other risks, and so counsel was entitled to  
5 rely upon those as well.

6           **THE COURT:** Well, I understand. And you can  
7 address -- you can address those at trial, if you want. But it  
8 seems to me that the -- probably the best case that you have is  
9 the air quality. I mean, that's my sense from what I've  
10 reviewed so far. You're entitled to put on what you want at  
11 trial on any of the health or safety issues.

12           Why don't we -- I would propose that we take a break and  
13 then have a little discussion -- I mean, I have sort of a much  
14 stronger tentative view on the commerce clause than I do on the  
15 breach of contract issue, but I think it's worth talking about  
16 a little bit and then talking about trial mechanics maybe after  
17 a lunch break.

18           **MR. SIEGEL:** Could Mr. O'Brien be heard from the  
19 intervenors on this air quality issue perhaps?

20           **MR. O'BRIEN:** Just very quickly?

21           **THE COURT:** Sure.

22           **MR. O'BRIEN:** I think it might be helpful for me to  
23 contribute just one or two thoughts about the questions that  
24 you asked about what really is the potential magnitude of  
25 pollution that this facility will contribute?

1 state lines -- or prohibiting transactions across state lines  
2 was not a violation of interstate commerce, I don't know what  
3 is.

4 If every state in the -- state and city in the nation can  
5 say: I don't want your grain shipped through my state. If,  
6 you know, Iowa can say: You may not ship your -- your beef  
7 through any state. Montana says: We're not going to permit  
8 transactions of gasoline across state lines.

9 The interstate commerce -- the United States interstate  
10 commerce system would be a complete mess. The most fundamental  
11 type of a dormant commerce clause violation is to stop the free  
12 flow of goods to stop the transportation.

13 That is exactly what this ordinance does. It does nothing  
14 else. The -- it's undisputed that's why we're here today. If  
15 we could be building a terminal that would be able to export  
16 coal from Utah to Asia, we would be doing it.

17 **THE COURT:** Okay. I understand those arguments.

18 **MS. SPALDING:** Your Honor, may I say one more thing  
19 that I forgot to hit on? I do think it's important. I'm  
20 sorry.

21 **THE COURT:** Very briefly.

22 **MS. SPALDING:** The idea that the dormant commerce  
23 clause applies to Oakland is true, but it doesn't mean that --  
24 it doesn't apply within the State of California to transactions  
25 within California.

1           So you don't look at just Oakland and can they ship coal  
2           through Oakland. You look at it -- the state as a whole and  
3           whether it causes an undue burden on the market.

4                   **THE COURT:** I'll go back and look at that.

5           All right. For now I think I'm going to take that -- I'm  
6           going to take the commerce clause question under submission.  
7           And we will have a trial on the breach of contract question.

8           And -- you know, as I said, the purpose of the trial, from  
9           my standpoint, is to -- I think the idea is that I feel that I  
10          have not been given enough to understand the evidence that was  
11          in the record before the City Council.

12          So that is what I view the trial as being about, is  
13          helping me better understand the evidence and the significance  
14          of the evidence that was before the City Council.

15          And I think that, you know, we can move whatever to the  
16          pretrial conference phase of this, of this proceeding and say  
17          that I -- I think, you know, in looking at the list of  
18          witnesses and the description of what the witnesses are going  
19          to testify about, I mean, there is a lot of stuff about, like,  
20          the background and formation of the contract and the -- you  
21          know, what, you know, the company wants to do and all that  
22          stuff. There is only so much we can hear about that.

23          And it's -- you know, I think everybody's focus needs to  
24          be narrowed a bit. And the way we're going to narrow the  
25          focus -- I am hopeful that people have a good understanding of

1 the questions that I'm, you know, concerned about. That's not  
2 to the exclusion of presenting something at trial on some other  
3 issue that you think is important, but hopefully I've given you  
4 an understanding of the issues that I'm concerned about.

5 And, you know, on the issue of substantial danger, I was  
6 having lunch with my law clerks and we were talking about this  
7 and, you know, we were looking in the -- at the dictionary  
8 definition of "substantial." And the example of -- in  
9 Websters, the use of -- you know, they give you an example of  
10 how you to use the word. And the example was: I have a  
11 substantial amount of cash.

12 Now think about that. In isolation what does that mean?  
13 I bet you if I asked you all to write down a guess of the  
14 substantial amount of cash that I have in my bank account, you  
15 would all come up with very different -- you would all make  
16 very different guesses.

17 Context matters. And that's -- you know, that to me --  
18 for me, that's the big question, is how do I -- how do I -- did  
19 the -- was the City Council given the ability to judge whether  
20 the amount of emissions from the facility would pose not merely  
21 a danger, but a substantial danger.

22 And that's what the trial is going to be about. And I  
23 don't think we need nearly as long as you have estimated to  
24 present evidence on the breach of contract question.

25 And so what I'm going to do is I'm going to limit each

1 side at trial to five hours of air time. Five hours of air  
2 time means time that you are -- you are spending examining your  
3 own witnesses and cross examining other -- the other side's  
4 witnesses. And there will be a clock and Kristen will keep  
5 track of the -- how much time each side has left.

6 What that means I think is we can probably get through --  
7 if we -- depending on the schedule we set for ourselves, we may  
8 be able to get through the evidence presentation and the  
9 testimony in three days doing, you know, about -- you know,  
10 three-and-a-half hours of air time per day. We could even  
11 potentially do it in two days.

12 I will say that if -- if, you know, as we're moving along  
13 if it seems like I have not given you enough time, I will -- I  
14 can extend it.

15 I mean, it's not -- you know, but you should -- as you  
16 plan your presentation, you should operate on the assumption  
17 that each side has five hours of air time. And so you can  
18 scratch some of the duplicative witnesses from that Witness  
19 List and really sort of get down to the heart of what we ought  
20 to be talking about.

21 Is there anything else to discuss with respect to the  
22 trial? Any questions or anything?

23 **MR. FELDMAN:** Yes.

24 **THE COURT:** I filed the ruling, the two rulings on  
25 the Motions in Limine, right?

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, January 12, 2018

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

Case No. [16-cv-07014-VC](#)

**ORDER DENYING CROSS-MOTIONS  
FOR SUMMARY JUDGMENT ON THE  
BREACH OF CONTRACT CLAIM**

Re: Dkt. Nos. 135, 145, 156

For the reasons stated at the hearing, the cross-motions for summary judgment on the breach of contract claim are denied. The cross-motions for summary judgment on the constitutional and federal preemption claims remain under submission and will be decided, if necessary, after the breach of contract claim is adjudicated.

**IT IS SO ORDERED.**

Dated: January 12, 2018



VINCE CHHABRIA  
United States District Judge

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CITY OF OAKLAND

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED  
TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO  
BAYKEEPER,

Defendant-Intervenors.

Case No. 3:16-cv-07014-VC

**DEFENDANT CITY OF OAKLAND'S  
TRIAL BRIEF**

Trial Date: January 16, 2018  
Time: 8:30 a.m.  
Ctrm.: No. 2, 17<sup>th</sup> Floor  
Judge: Honorable Vince Chhabria

## I. INTRODUCTION

This action will determine whether Plaintiff Oakland Bulk & Oversized Terminal, LLC (“OBOT”) may store and handle millions of tons of coal and coke adjacent to an already heavily pollution-impacted residential neighborhood, and just yards away from the Bay Bridge Toll Plaza and a bike path. After OBOT’s intentions to do so were disclosed, the City properly exercised its rights under the Development Agreement (“DA”), and in compliance with the federal law, to prohibit the storing and handling of coal and coke at the proposed bulk goods terminal (“Terminal”) based on substantial evidence that such a facility would be substantially dangerous to health and safety.

Regarding its breach claim, OBOT asks this Court to reject the substantial evidence considered by the City Council, and for the Court to substitute its judgment for that of the Council, even to hold a *de novo* trial. But OBOT cannot prove that the City breached the DA, no matter its theory. Notwithstanding the dirty, dusty, spontaneously combustible, and explosive nature of coal and coke, OBOT bases its claims upon wishful promises that five to ten million tons of coal and coke will be handled and stored at the terminal each year—in a perfectly designed terminal—that will somehow be hermetically sealed and will suffer no equipment malfunctions, compliance lapses, accidents, or any other problem or complication. The Council properly rejected OBOT’s attempt to force Oakland residents already disproportionately burdened by pollution to be canaries in OBOT’s coal mine.

Nor can OBOT prove that application of the Ordinance to OBOT violates the Commerce Clause or is preempted.

The City discusses in this Trial Brief certain issues for the Court to consider prior to and during the trial, the resolution of which will significantly impact the scope of the trial.<sup>1</sup>

## II. FACTS

The City sets forth below a truncated statement of facts to be proven at trial.

### A. Plaintiff OBOT and Third Parties.

OBOT is a limited liability company. Its sole member is California Capital & Investment

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<sup>1</sup> Defendant-Intervenors concur in the filing of this trial brief.

1 Group, Inc. (“CCIG”). CCIG is also the parent of Oakland Global Rail Enterprise, LLC  
 2 (“OGRE”). OBOT, CCIG, and OGRE are California entities.

3 Terminal Logistics Solutions (“TLS”) is a legal stranger to OBOT, CCIG, and OGRE.  
 4 TLS is a wholly-owned local subsidiary of Bowie Resources Partners (“Bowie”). Bowie is an  
 5 out-of-state coal producer and marketer. Bowie is TLS’s sole source of revenue.

6 **B. Brief Overview of Background Facts.**

7 After a long closure process, the City adopted plans for redeveloping the former Oakland  
 8 Army Base, including the West Gateway where OBOT proposes to build the Terminal. On July  
 9 16, 2013, the City and OBOT’s predecessor entered into the DA. The DA does not discuss coal  
 10 or any other commodity. In section 3.4.2, OBOT agreed that the City retained authority to apply  
 11 subsequently-adopted regulations to prevent substantially dangerous health and safety conditions.  
 12 In February 2016, the City conveyed to OBOT a ground lease for the site. OBOT is acting as a  
 13 landlord and developer and will not own or operate the Terminal.

14 OBOT confirmed the parties’ understanding that coal would not be stored and handled at  
 15 the Terminal. Later, the City learned that OBOT was pursuing plans to develop the Terminal to  
 16 handle five or more million tons of coal and coke annually.

17 The City commenced a nearly year-long process, including public hearings, to evaluate  
 18 whether OBOT’s coal and coke plans would create substantially dangerous health and safety  
 19 conditions and whether to apply post-DA legislation, pursuant to DA section 3.4.2. The City,  
 20 OBOT and its supporters, and members of the public submitted extensive evidence to the City  
 21 Council for its consideration. After the public hearing process, the City adopted the Ordinance,  
 22 banning the storage and handling of coal and coke at bulk material facilities, and the Resolution  
 23 applying the Ordinance to OBOT and the Terminal pursuant to DA section 3.4.2

24 **III. LEGAL AND TRIAL ISSUES**

25 **A. The Scope of Health and Safety Impact Evidence Regarding the Breach of Contract**  
 26 **Claim Is Contained Entirely Within the Record Before the City Council, which**  
 27 **Record Should Be Received into Evidence.**

28 OBOT claims that the City breached the DA by applying the Ordinance to it. First  
 Amended Complaint (Dkt. 74), ¶¶ 161-67 and Prayer, ¶¶ A(5) & B; *see also* OBOT’s MSJ

(Dkt. 135), p. 1:15-16; *see also* Pretrial Conference Statement filed contemporaneously, p. 2.

The DA states: “Notwithstanding any other provision of this Agreement to the contrary, City shall have the right” to apply post-DA laws if the “*City determines based on substantial evidence* and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof ... in a condition substantially dangerous to their health or safety.” DA § 3.4.2 (emphasis added). It also states that application of a post-DA law is an “exception to Developer’s vested rights.” *Id.*

The universe of relevant evidence regarding the breach claim is all within the public record before the City, as discussed in the summary judgment papers.<sup>2</sup> Where a public agency’s proceeding “adjudicates individual rights and interests, findings are required and the reviewing court looks to see whether the findings are supported by the evidence.” *Bright Dev. v. City of Tracy*, 20 Cal.App.4th 783, 794 (1993). The courts review the agency’s record for such evidence. *Foster v. Civil Serv. Comm’n*, 142 Cal.App.3d 444, 453 (1983); *see also W. States Petroleum Ass’n v. Superior Court*, 9 Cal.4th 559, 576, 578 (1995).

The courts will generally not consider extra-record evidence. *Foster*, 142 Cal.App.3d at 453; *W. States Petroleum Ass’n*, 9 Cal.4th at 578. Where the plaintiff seeks to present additional evidence, even “correspondence to or from various City officials,” that “were neither presented to, nor considered by, the city council in its deliberations,” the courts exclude it. *Eureka Citizens for Responsible Gov’t v. City of Eureka*, 147 Cal.App.4th 357, 366 (2007). The courts will only consider extra-record evidence if (1) the evidence in question existed before the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency before the decision was made so that it could be considered and included in the administrative record.” *W. States Petroleum Ass’n*, 9 Cal.4th at 587.<sup>3</sup>

<sup>2</sup> California law applies. DA, § 14.11; *Mason & Dixon Intermodal, Inc. v. Lapmaster Int’l LLC*, 632 F.3d 1056, 1060 (9th Cir. 2011).

<sup>3</sup> The record rules apply even if Cal. Code Civ. Proc. § 1094.5 does not. *Id.*; *McGill v. Regents of Univ. of Cal.*, 44 Cal.App.4th 1776, 1783, 1785-86 (1996); *Am. Bd. of Cosmetic Surgery, Inc. v. Med. Bd. of Cal.*, 162 Cal.App.4th 534, 547 (2008); *Apple Computer, Inc. v. Cty. of Santa Clara Assessment Appeals Bd.*, 105 Cal.App.4th 1355, 1366 (2003).

1           These rules reflect the separation of powers doctrine. “Agencies must weigh the evidence  
2 and determine which way the scales tip, while courts conducting substantial evidence ... review  
3 generally do not. If courts were to independently weigh conflicting evidence ..., this would []  
4 usurp the agency’s authority and violate the doctrine of separation of powers.” *W. States*  
5 *Petroleum Ass’n*, 9 Cal.4th at 576 (internal quotation marks omitted).

6           The rules of evidence do not apply to a city’s administrative proceedings, including public  
7 hearings at which evidence was taken so that a city decision-making body may decide the scope  
8 of a party’s rights under the law. *Mohilef v. Janovici*, 51 Cal.App.4th 267, 291 (1996). Rather,  
9 procedural informality is the norm. *Id.* Hearsay and unsworn testimony are permitted, for  
10 example, and a party has no right to cross-examination. *E.W.A.P., Inc. v. City of Los Angeles*, 56  
11 Cal.App.4th 310, 323-34 (1997). The city’s record from the proceedings provides the evidence to  
12 be reviewed by the court, whether the court is exercising substantial evidence review as it should  
13 here, *see, e.g., Do v. Regents of the Univ. of Cal.*, 216 Cal.App.4th 1474, 1490 (2013), or  
14 independent judgment review. *See, e.g., Cooper v. Kizer*, 230 Cal.App.3d 1291, 1300 (1991). A  
15 *de novo* court trial to review a city’s decision regarding a party’s rights is improper. *Id.*

16           Here, during the public hearing process, the City posted on its website all the materials  
17 presented by the City and its consultants, OBOT and its consultants and supporters, and members  
18 of the public related to this matter, as the Agenda Report for the June 27, 2016 public hearing  
19 discussed. The City produced all these record documents to OBOT during the litigation, along  
20 with certified transcripts of the relevant portion of the City Council meetings. The City will  
21 provide the Court with an index of these records, as a trial exhibit, along with a USB-drive with  
22 all the documents, as a manual filing (subject to OBOT’s objection).

23           The City is separately including on the Exhibit List each of the specific record documents  
24 upon which it intends to rely at trial. However, the City is providing the Court with the record of  
25 its proceedings because the Court should have the complete record of the City proceedings, and it  
26 is OBOT’s burden to prove that the entire record does not include substantial evidence.

27           OBOT seeks to offer extra-record evidence to prove that the City lacked substantial  
28 evidence to support its decision to apply the Ordinance to OBOT and the Terminal. However,

OBOT chose to disengage from the public hearing process rather than present its own expert analysis. Meanwhile, the City commissioned consultant reports from ESA and Dr. Chafe and received evidence from interested members of the public, including scientific and health experts, prior to adoption of the Ordinance and Resolution—all presented to the Council for its consideration. Thus, OBOT has no basis to claim it could not have produced its expert evidence in the exercise of due diligence prior to the City's adoption of the Ordinance and Resolution. Similarly, OBOT is seeking to introduce extra-record evidence such as internal ESA communications. But OBOT cannot show that these materials were considered by the Council.

Accordingly, prior to the introduction of evidence at trial, the City asks the Court to evaluate and rule upon these issues so that the trial, if any, may properly proceed.<sup>4</sup>

**B. The Court Should Allow Open Courtroom Access.**

A recurrent theme throughout this litigation has been OBOT's (or aligned entities, like TLS's) over-designation of documents as confidential. While OBOT has been prodded to reduce confidential designations, at considerable time and expense to Defendants (who have made no such designations), the parties' Exhibit List still contains documents designated as confidential either by OBOT or third parties. Rather than burdening the Court, parties, and public with a constant opening and closing of the courtroom, Defendants believe the courtroom should remain open for the full duration of trial. "The Supreme Court has repeatedly held that access to public proceedings and records is an indispensable predicate to free expression about the workings of government." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014). Moreover, the presumption in favor of public access is particularly strong in cases like this that involve matters of public concern, like a high-profile health and safety ordinance. *See, e.g., California ex rel. Lockyer v. Safeway, Inc.*, 355 F.Supp.2d 1111, 1124-26 (C.D. Cal. 2005).

**C. Defendants Will Prevail at Trial.**

OBOT alleges: (1) breach of the DA, (2) violation of the Commerce Clause (U.S. Const.

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<sup>4</sup> If the Court ultimately disagrees with the City's position on extra-record evidence, the City will be prepared to offer its own extra-record evidence, including expert testimony.