EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

September 21, 2015

Via Electronic Mail

Oakland City Council
1 Frank Ogawa Plaza, 3rd Floor
Oakland, CA 94612
(510) 238-2386
cityclerk@oaklandnet.com

Re: Proposed Oakland Coal Export Terminal

To the Oakland City Council:

I am writing on behalf of the Sierra Club, West Oakland Environmental Indicators Project ("WOEIP"), San Francisco Baykeeper, and Communities for a Better Environment, to provide a response to the September 8, 2015 letter sent by Stice & Block LLP and attachments on behalf of the Oakland Bulk and Oversized Terminal, LLC ("OBOT"). The Sierra Club, WOEIP and other groups are dedicated to protecting community health and promoting environmental justice, and have many members who live, work, and recreate in and around the former Oakland Army Base. Due to the numerous health and safety risks posed by the transportation and storage of coal in the West Oakland community, they strongly oppose the development of a coal terminal at the former base and urge Oakland City Council to act to prevent this dangerous commodity from being part of OBOT.

The Stice & Block letter raises various points which are not supported and which require further clarification to ensure that the City Council has accurate information on which it can base its decision regarding development of the proposed coal export terminal. It is notable that nowhere in the Stice & Block letter do they argue that coal was ever discussed in <u>any</u> environmental review or funding application for the Oakland Army Base Redevelopment project—the simple answer is that it was not.

This letter sets forth clarification on these key points:

1. **Jobs Development**

The Sierra Club, WOEIP and other groups support development of the former Army Base, including the development of a bulk terminal at the site, and the additional economic opportunities that such development will bring to the City. If anything, bringing coal into the equation will put this project at risk because the international coal markets are in a state of collapse and the broad consensus is that coal is a bad investment. That risk associated with coal will also put project jobs at risk. The Stice & Block letter suggests that quashing the proposed coal terminal will result in the loss of thousands of construction and waterfront jobs. (*See* p. 1.) This is inaccurate – a non-coal bulk terminal project will still result in the creation of numerous construction and waterfront jobs, and indeed could result in better quality and safer jobs than a coal terminal which will bring a small handful of low-quality and dangerous jobs to city residents.[1]

2. **Project Entitlements and California Environmental Quality Act**

The Stice & Block letter notes that environmental review for the Army Base development was conducted pursuant to the California Environmental Quality Act ("CEQA"). What the letter does not note is that neither the Environmental Impact Report ("EIR") completed in 2002, or the Initial Study/Addendum completed in 2012, mentions the possibility of shipping coal through the bulk terminal or analyzes the many hazardous effects of shipping, handling, transporting and burning coal. As set forth in the Sierra Club, WOEIP's and other groups' letter of September 1, 2015, as well in the expert testimony submitted to the City Council on September 21, 2015[2], shipping coal carries unique hazards and poses great risks to the surrounding community.

The complete absence of environmental review for the proposed coal terminal, coupled with new information concerning the developer's commitment to ship Utah coal, requires further CEQA review of the effects of the proposed coal terminal. (*See* Pub. Res. Section 21166; CEQA Guidelines section 15162.) As shown by the attachments to the Sierra Club, WOEIP and other groups' comment letter of September 14, 2015

[1] *See* September 1, 2015 Letter of Sierra Club, WOEIP, *et. al.* and the September 21, 2015 Expert Report of Tom Sanzillo for additional information on the poor job creation potential of a coal export terminal, **attached hereto as Exh. A.**

[2] *See e.g.*, September 21, 2015 Expert Reports of Dr. Phyllis Fox and Dr. Deb Niemaier, **attached hereto as Exhs. B** and **C**.

proposed coal terminals in the Pacific Northwest have undergone extensive environmental review. The same rigorous standards for environmental review should be applied here.

Prior to this year, there was no opportunity for the City or community members to request this additional environmental review. Indeed, until very recently, project developers stated that the Army Base development would not involve coal shipment – for example, in a 2013 newsletter, project developer Phil Tagami stated that: "CCIG is publicly on record as having no interest or involvement in the pursuit of coal-related operations at the former Oakland Army Base."[3]

The Stice & Block letter does not cite to any documents showing that the City and the developer actually discussed the prospect of shipping coal through Oakland prior to conducting environmental review. The standard for environmental review is not, as Stice & Block suggests, that the City or community should have guessed about the aim of a project. The Stice & Block letter cites only to a Freight Transportation Forecast and a Proposal by the Tioga Group, Inc. – none of which show that a dedicated coal terminal was actually part of pre-agreement discussions between the City and developer or the environmental review for the project. Here, new information regarding the developer's commitments to ship Utah coal requires further environmental review.

3. **Health Impacts of Coal Terminal**

The Stice & Block letter sets forth various inaccurate and/or misleading statements in asserting that the proposed coal terminal will not have adverse health impacts on the community. (*See* pp. 4-5.) As set forth in the Sierra Club, WOEIP's and other groups' letters from September 1, 2015 and September 14, 2015, development of the coal terminal will create numerous health and safety risks, which add to the already serious health hazards present in the West Oakland neighborhood. Various other groups and commenters will provide the City with additional information about the health and safety risks associated with coal transportation at the September 21, 2015 hearing. As set forth in these sources, given the unique hazards of coal, constructing and operating a coal terminal will add to the existing pollution burdens in the community, rather than diminishing the pollution burdens placed on the community.

[3] *See Oakland Mayor, Port Developer in Dispute over Plan to Ship Coal,* KQED July 22, 2015 quoting CCIG's December 2013 newsletter. http://ww2.kqed.org/news/2015/07/06/oakland-mayor-port-developer-in-dispute-over-plan-to-ship-coal

The tentative terminal plans posted by the developer just last week in September 2015 do not provide adequate assurances that the public will be kept safe from risk. This last minute ad hoc disclosure of terminal design plans underscores how the public has been kept in the dark about the proposed coal terminal and the design for such terminal. As set forth in the expert reports of Phyllis Fox and Deb Niemaier, submitted on September 21, 2015, **attached hereto as Exh. B** and **C,** there are still significant risks associated with the proposed terminal design. In addition, as acknowledged by the developer, these plans are still subject to change and therefore do not provide information about the final design or mitigations that will be used at the terminal.

The Stice & Block letter also suggests that the project is in "full compliance to date with the City-imposed mitigation obligations of the project that have led to enhanced air monitoring." (p. 4.) However, given that the City and the community only learned about the developer's commitment to ship coal this year, there are no enforceable mitigations in place that account for the particular and unique public health and safety risks of coal transportation and storage. Thus, "full compliance" with the current mitigation measures contained in the development agreements provides no actual protection from coal risks. None of the serious problems raised in Dr. Phyllis Fox's report are addressed by any of these existing mitigation conditions. Further, Stice & Block cannot point to any specific measures among the supposed "myriad federal, state, regional, and local laws and regulations" which apply to the terminal and would provide protection from coal risks.

4. **Coal Trains and Dust**

As the attached report of Dr. Fox extensively details, coal trains lose dust in massive amounts – 500 pounds to a ton of coal can escape from a single loaded coal car, which amounts to 68.300 tons of coal dust (136,600,000 lbs) that could be emitted from the three trains/day serving the proposed coal terminal at OBOT. As set forth in this group's prior letters and in the testimony from the September 21, 2015 public hearing, this dust poses a significant health and safety risk to Oakland in terms of air and water pollution, potential for train derailments, and a myriad of other impacts.

While Exhibit B to the Stice & Block letter shows pictures of an uncovered coal train on one day in Oakland and claims that since there have been no complaints to date and that such trains must have no negative impact, this argument has no support. To set the record straight, coal trains do not regularly move through Oakland. The Port of

Oakland itself neither imports nor exports any coal.[4] Coal trains heading to the private Levin-Richmond terminal in Richmond do not regularly move through Oakland because the shorter rail route is one that enters from the North. The Union Pacific rail lines serving the Levin-Richmond terminal move coal from Utah to Richmond via a Northern route through towns like Reno, Auburn, Roseville, Sacramento, and then Davis, Fairfield, San Pablo, the community of Parchester Village, and Richmond.[5] There is a southern route via Las Vegas and the Central Valley cities of Fresno and Stockton that could theoretically be used that would pass through Oakland en route to Richmond, but given that the mileage is longer and more expensive for coal shippers, it is not the preferred route. It is our understanding that occasional overflow rail traffic may necessitate the rare coal train sitting in Oakland.

In other words, coal trains moving through Oakland right now are a rare occurrence. If Oakland were to build a coal terminal, however, there would be a massive increase in regular coal train traffic--at least 3-4 unit coal trains/day or more (unit trains usually contain 100 rail cars or more). *The volume of coal that is proposed to be shipped through Oakland is* ***ten times*** *the amount currently moving through the private Levin-Richmond facility.* The community of Richmond currently complains about the dust it experiences from a regular, but lower volume of coal traffic for a terminal that ships around 1 million tons of coal/year.[6]

If the Oakland City Council acts to eliminate coal from the OBOT, it may not see any coal trains since it is not even clear that coal will continue to be exported from the Levin -Richmond terminal after the end of 2015.[7]

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[4] *See* Email to Commissioner Gordon from Port of Oakland, August 6, 2015 and Report of Tom Sanzillo.

[5] Or the route from the North could move from Sacramento to Stockton, Pittsburg/Antioch, Concord, Martinez, then San Pablo, Parchester Village and Richmond. *See e.g.,* Union Pacific Coal Rail Routes, https://www.up.com/customers/coal/mines/index.htm and https://www.up.com/customers/coal/ports-docks/index.htm.

[6] Coal Train Dust Worries Richmond Residents, KQED, June 22, 2015, http://ww2.kqed.org/science/2015/06/22/coal-train-dust-worries-richmond-residents/.

[7] According to a SEC filing made as part of an initial public offering by the Utah coal company that proposed to ship coal through Oakland, Bowie Resource Partners, their contract with Levin-Richmond is expiring at the end of 2015. *See* Bowie Resource Partners LLC S-1 at 39, *available at:* http://www.sec.gov/Archives/edgar/data/1631790/000104746915005595/a2225124zs-1.htm.

5. **Federal Preemption**

The Stice & Block letter, along with the attachment from Venable LLP, claim that any efforts by the city to regulate its own terminal and the associated rail traffic are preempted by federal law, which is wrong in two ways. First, the City's ability to regulate the terminal itself is clearly not preempted by federal rail law. *See CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114 (N.D. Cal. 2003). Second, the City does retain police powers to protect the community health and safety, even over rail operations. *See Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

The federal statute that regulates rail lines and rail traffic, the Interstate Commerce Commission Termination Act (ICCTA), does preempt many state and local laws with regards to rail traffic. However, as the Court noted in *CFNR Operating Co. v. City of American Canyon*, that preemption "does not reach local regulation of activities not integrally related to rail service." 282 F. Supp. 2d at 1118; *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F.Supp.2d 1186, 1189-90 (E.D.Wash.2000) (noting that "ancillary railroad operations" such as "truck transfer facilities" are not subject to federal preemption) (*citing Borough of Riverdale—Petition for Declaratory Order— The New York Susquehanna & Western Railway Corp.*, 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99). Further, the City still retains police powers over rail, such as the ability to enforce local building, fire, and electrical codes. *Borough of Riverdale, Petition for Declaratory Order The New York Susquehanna & Western Railway Corp.,* 1999 WL 715272, STB Finance Docket No. 33466 at 8-9 (9/9/99).

OBOT's counsel suggests that it would assert federal preemption as a defense to City efforts to regulate its operations. As noted above, the City has some limited regulatory powers in this arena. Further, to the extent that federal rail preemption does apply, this should serve as a major red flag for the City of Oakland about how dangerous this project truly is. Indeed, OBOT, CCIG and TLS's argument outlines the fact that there are currently no regulations—local, state, or federal—that force OBOT to use covered rail cars or do anything else to prevent fugitive dust escaping from coal cars, including using other dust control measures like surfactants or load profiling.[8]

[8] The only federal Surface Transportation Board rules on loading practices for coal like surfactants and load profiling pertain to loads originating in Montana and Wyoming, not Utah.

The best way for Oakland to ensure that it does not have the dangers associated with coal trains is to make sure that it utilizes its powers to prevent coal from being shipped from the proposed bulk terminal. Simply put, if other commodities are shipped from the bulk terminal—like corn, wind turbines, and the like--there is no reason for rail lines located in Oakland or within the Army Base to ship coal.

6. **Vested Rights and The Development Agreement**

Contrary to Stice & Block's assertions, there is nothing in the development agreements or associated documents that creates a vested right to export "coal." (see pp. 6-7.) The 2012 Development Agreement describes the bulk terminal development as "a ship-to-rail terminal designed for the export of non-containerized bulk goods and import of oversized or overweight cargo."[9] Similarly, in the Transportation Corridor Improvement Funds ("TCIF") application for the project, the bulk terminal is described as "for movement of commodities such as iron ore, corn and other products brought into the terminal by rail...[t]he terminal would also accommodate project cargo such as windmills, steel coils and oversized goods."[10] As discussed above, as recently as 2013, the developer for the project plainly stated that the Army Base development would not involve facilities for the shipment of coal. The prospect of shipping coal out of the Army Base development was not something contemplated by the parties at the time the development agreements were finalized, and is only a recent change on the developer's part. There can be no vested right arising out of the agreement if the purported right to ship coal was never agreed to by the parties. (*See,* Civ. Code section 1636, "a contract must be so interpreted as to give effect to the mutual intention of the parties as existed at the time of contracting"; *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27).

Further, pursuant to the explicit terms of the development agreements, the vested rights provided by the such agreements will always be subject to modification by City regulation, provided that such regulation is: "(a) otherwise permissible pursuant to Laws…, and (b) 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

[9] LDDA, Attachment 7 – Scope of Development for the Private Improvements, Section C.1.
[10] *See* Amended TCIF Baseline Agreement, August 22, 2012, at p. 31. *Available at*: http://www2.oaklandnet.com/Government/o/CityAdministration/d/NeighborhoodInvestment/OAK038485

Project, adjacent neighbors, or any portion thereof, or all them, in a condition substantially dangerous to their health or safety."[11]

Both prongs of this test are met here. First, as set forth in the Sierra Club, WOEIP, *et. al's* September 1, 2015 letter, City regulation in this instance is permissible under long-standing authority authorizing municipalities to use their zoning and police powers to prevent the occurrence of dangerous activities within municipal borders.[12] Further, as set forth above, there is no conflict with federal laws. Second, based on the undersigned parties' submissions of September 1, September 14, and at the September 21 hearing, as well as the submissions made by other parties at the September 21 hearing, the City has the substantial evidence it needs to make a finding as to the health and safety risks of the proposed coal terminal. Thus, the City's regulation to protect public health and safety is consistent with the terms of the governing agreements as well as applicable laws.

Finally, even if an operator is already operating a facility (which is not the case here—in fact, TLS only has an option agreement at this juncture), such activity does not create a "vested right" immunizing that facility from complying with regulations designed to ensure public health and safety. (*See e.g., Standard Oil Co. v. Feldstein* (1980) 105 Cal.App.3d 590; *Hardesty v. Sacramento Metropolitan Air Quality Management Dist.* (2011) 202 Cal.App.4th 404.)

* * *

[11] Development Agreement at Section 3.4.2; *available at https://oakland.legistar.com/LegislationDetail.aspx?ID=1427119&GUID=9122B74A-273F-4343-B954-F848BC668685*

[12] *See Marblehead Land Co. v. City of Los Angeles*, 47 F.2d 528, 531 (9th Cir. 1931)(upholding city authority to use zoning ordinance to protect residents from fire hazard and noxious gases resulting from oil drilling operations); *Friel v. Los Angeles County*, 172 Cal.App.2d 142, 157 (1959); *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal.App.4th 534, 555 (2001).

Thank you for your consideration of these comments. As you are aware, while community groups whole-heartedly support the economic revitalization of Oakland, they are greatly concerned about the serious health and safety consequences of allowing coal exports to pass through Oakland. The City of Oakland has the chance to act as a local and national leader in committing to protect its residents from a dangerous fossil fuel and should act now to prevent the development of the proposed coal export terminal.

Sincerely,

Irene Gutierrez, Earthjustice Attorney
On behalf of:
Sierra Club, West Oakland Environmental Indicators Project, Communities For A Better Environment, San Francisco Baykeeper

cc: Honorable Mayor Libby Schaaf
officeofthemayor@oaklandnet.com

Oakland City Administrator Sabrina Landreth
cityadministrator@oaklandnet.com

Port of Oakland:
jbetterton@portoakland.com

Council District 1 Dan Kalb:
dkalb@oaklandnet.com

Council District 2 Abel Guillén:
aguillen@oaklandnet.com

Council District 3/Council President Lynette Gibson McElhaney:
president@oaklandnet.com, lmcelhaney@oaklandnet.com

Council District 4 Annie Campbell Washington:
acampbellwashington@oaklandnet.com

Council District 5 Noel Gallo:
ngallo@oaklandnet.com

Council District 6 Desley Brooks:
dbrooks@oaklandnet.com

Council District 7 Larry Reid:
lreid@oaklandnet.com

Council Member At-Large Rebecca Kaplan:
atlarge@oaklandnet.com, rkaplan@oaklandnet.com