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VIA ELECTRONIC MAIL

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United State Army Corps of Engineers
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OaklandHarborTurningBasinsStudy@usace.army.mil

RE: Oakland Harbor Turning Basins—Draft Integrated Feasibility Report and Draft Environmental Assessment

Dear Mr. Jollifee:

The California Attorney General's Bureau of Environmental Justice has reviewed the United States Army Corps of Engineers' ("Army Corps") Draft Integrated Feasibility Report, Environmental Assessment ("EA"), and Finding of No Significant Impact ("FONSI") for the Oakland Harbor Turning Basins Widening Navigations Study ("the Project") at the Port of Oakland. We respectfully submit these comments to express several concerns with the environmental analysis provided in the EA and the Army Corps' decision to issue a FONSI.¹ First, the Army Corps was required to prepare an Environmental Impact Statement ("EIS") because the EA demonstrates that the Project may cause significant adverse environmental impacts. Second, the EA fails to adequately assess the Project's operational, cumulative, and reasonably foreseeable impacts. Third, the EA fails to analyze or disclose the Project's inconsistency with state and local laws and plans. As a result of these issues with the EA, we are concerned that the Army Corps has not adequately disclosed, analyzed, or meaningfully considered mitigation of the adverse environmental consequences associated with widening the turning basins in the Oakland Harbor, as required by the National Environmental Policy Act ("NEPA").² We also urge the Army Corps to coordinate its environmental review with the Port of Oakland's ("the Port") environmental review under the California Environmental Quality Act ("CEQA"). Finally, the Army Corps should adopt all measures necessary to protect the already

¹ The Attorney General submits these comments pursuant to his independent power and duty. See Cal. Const., art. V, § 13; *D'Amico v. Bd. of Medical Examiners*, 520 P.2d 10, 20-21 (Cal. 1947).

² Our comments are not intended to object to the Project as a whole, but rather to express concerns regarding the adequacy of the Army Corps' environmental analysis required under NEPA.

severely overburdened neighborhoods in West Oakland, which will bear the brunt of the impacts of the Project.

I. THE PROJECT WILL INCREASE POLLUTION IN ONE OF THE MOST POLLUTION-BURDENED COMMUNITIES IN CALIFORNIA.

This Project proposes to widen the width of the turning basins in the Inner and Outer Harbors, to better facilitate the visitation of larger shipping vessels at the Port of Oakland (“the Port”). The existing turning basins were designed for ships that are 1,139 long, 140 feet wide, and have a carrying capacity of 6,500 twenty-foot equivalent units (TEUs).³ The Project will widen the turning basins by dredging land around the existing turning basins to allow ships that are 1,310 feet long, 193 feet wide, and have a carrying capacity of 19,000 TEUs to more easily make 360 degree turns in the harbor without causing a backlog at the Port. These proposed alterations to the turning basins could lead to a 200% increase in TEU shipping capacity and processing at the Port,⁴ which will inevitably impose additional environmental burdens on West Oakland.

The Project Study Area includes West Oakland, a community of color where 42% of its residents identify as African American, 18% identify as Hispanic, and 11% identify as Asian. It is also a relatively low-income community with approximately 52% of the population living two times below the poverty level, compared to 23% in the broader Bay Area.⁵ West Oakland already experiences high levels of air pollution from the Port, four highways, industrial facilities, and truck-related businesses.⁶ According to California’s statewide pollution burden screening tool, CalEnviroScreen 4.0, West Oakland residents endure greater pollution exposure than 85-90% of all other Californians.⁷ CalEnviroScreen identifies the census tracts surrounding the Port as falling within the top 90% of all census tracts statewide for exposure to traffic pollution from diesel particulate matter (DPM) emissions, with the Prescott neighborhood scoring within the top

³ “TEUs” or “twenty-foot equivalent units” refers to “the total number of available container slots” on a vessel. (EA at 20.)

⁴ This figure reflects the percentage change in TEU capacity based on the original design vessel for the existing turning basins and the new design vessel that the Project will accommodate. (See EA at ii, iii.) The turning basins are currently designed for vessels with 6,500 TEU carrying capacity, and the Project will expand the turning basins to accommodate vessels with 19,000 TEU carrying capacity—a 192.3% increase in TEU carrying capacity. (*Id.*)

⁵ Bay Area Air Quality Management District and West Oakland Environmental Indicators Project, *Owning Our Air: The West Oakland Community Action Plan* (October 2019) at 2-6, <https://www.baaqmd.gov/~media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en> (hereafter, “WOCAP”) (citing American Community Survey (ACS) 2013-2017 DP05 [census tracts 4014, 4015, 4016, 4017, 4018, 4022, 4024, 4025, 4026, 4027, 4105, 9819, and 9820].)

⁶ *Id.*

⁷ CalEnviroScreen is a tool created by the Office of Environmental Health Hazard Assessment that considers environmental, health, and socioeconomic information to produce scores and rank every census tract in the state. A census tract with a high score is one that experiences a much higher pollution burden than a census tract with a low score.

98%, and falling within the top 100th percentile statewide for exposure to contaminants from cleanup site and groundwater threats.

West Oakland residents suffer serious health impacts from this pollution exposure. CalEnviroScreen finds that neighborhoods in West Oakland are more likely to suffer from asthma than 99% of other California communities. The Alameda County Public Health Department reports that people living in West Oakland are 1.75 times more likely to be hospitalized for asthma-related illnesses than the general population of residents in Alameda County.⁸ The asthma rates in West Oakland are particularly alarming for children – almost 25 percent of the student body at the West Oakland Middle School has asthma or breathing problems.⁹ Further, air pollution-related diseases, including cancer, heart disease, stroke, and chronic lower respiratory disease, are some of the leading causes of death in West Oakland, where the average life expectancy of residents is 6.6 years lower than the average life expectancy of residents across Alameda County.¹⁰ Per CalEnviroScreen, infants born to families residing in West Oakland are born with birth weights lower than 93-96% of all other Californians. In short, West Oakland is undeniably an environmental justice community affected by multiple sources of pollution.¹¹

The pervasive harms facing West Oakland have been recognized by various government agencies. In 2019, per Assembly Bill 617¹² (“AB 617”), the California Air Resources Board (“CARB”) identified West Oakland as a community disproportionately burdened by environmental pollution, and with the participation of community stakeholders and the Bay Area Air Quality Management District (“BAAQMD”), adopted a community emissions reduction plan (“CERP”) for West Oakland—the West Oakland Community Action Plan (“WOCAP”). The WOCAP disclosed that Port-related emissions contribute 57% of the diesel PM emissions to West Oakland, 52% of the cancer risk, and 17% of the PM_{2.5} emissions, and that diesel PM emissions account for over 90% of the community’s total cancer risk.¹³ The WOCAP further found that West Oakland suffers from cancer risk exposure in excess of BAAQMD risk thresholds, and that the community was subjected to PM_{2.5} concentrations of around 1.70 µg/m³

⁸ Muntu Davis, Air Pollution Risks & Vulnerability to Health Impacts: A Look at West Oakland (March 2018) at Slide 4, https://ww2.arb.ca.gov/sites/default/files/2018-03/capp_consultation_group_march_2018_alameda_county_health_presentation.pdf.

⁹ Environmental Defense Fund, Traffic Pollution Causes 1 in 5 New Cases of Kids’ Asthma (April 2019), <http://blogs.edf.org/health/2019/04/29/traffic-pollution-causes-1-in-5-new-cases-of-kids-asthma-in-major-cities-how-data-can-help/>.

¹⁰ Davis, *supra* note 8, at Slides 8-10.

¹¹ West Oakland is also a historically redlined community. Beginning in the 1930s, federal housing policy directed investment away from “risky” communities of color in the East Bay, including West Oakland, Emeryville, and parts of Berkeley, Alameda, and Oakland. *Id.* at 2-2. The neighborhoods in West Oakland were coded red, signifying the least desirable areas where investment was to be avoided. *Id.* See also University of Richmond Digital Scholarship Lab, Mapping Inequality, Oakland, CA, <https://dsl.richmond.edu/panorama/redlining/#loc=14/37.804/-122.293&city=oakland-ca&adview=full>.

¹² Cal. Health & Safety Code, § 44391.2(c) (West 2018).

¹³ WOCAP, *supra* note 5, at 5-9 (Fig. 5-4), 4-5.

in 2017.¹⁴ To address these serious burdens faced by the West Oakland community, BAAQMD and CARB established emissions reductions goals and targets in the WOCAP to improve conditions in West Oakland, and identified 89 strategies that multiple agencies, including the Port, must implement to meet these goals.

Additionally, the Port and the City of Oakland are subject to an Informal Resolution Agreement with the U.S. Environmental Protection Agency that requires both agencies to implement a suite of public engagement, air quality, and other measures to rectify the history of Title VI civil rights violations exacted on the West Oakland communities by these agencies.¹⁵

II. THE ARMY CORPS SHOULD COORDINATE THE PROJECT'S ENVIRONMENTAL REVIEW PROCESSES UNDER STATE AND FEDERAL LAW.

We urge the Army Corps to coordinate its NEPA review of the Project with the environmental review the Port is required to undertake for the Project pursuant to the California Environmental Quality Act (CEQA). NEPA requires federal agencies to cooperate with State, Tribal, and local agencies “to the fullest extent practicable” to reduce duplication between NEPA and State, Tribal, and local requirements. 40 C.F.R. § 1506.2(b), (c). Indeed, “[w]here State or Tribal laws or local ordinances have environmental impact statement or similar requirements in addition to but not in conflict with those in NEPA, Federal agencies may cooperate in fulfilling these requirement . . . so that one document will comply with all applicable laws.” *Id.*, § 1506.2(c).

The Army Corps should make every effort to coordinate the NEPA and CEQA environmental review processes moving forward to avoid any potential discrepancies in the nature and extent of environmental impacts evaluated under each process. A coordinated review process serves the public information purposes of both NEPA and CEQA, and may resolve many of the substantive issues identified in the public comments addressing this Project. Coordination will also ensure a more robust public engagement process, and create efficiencies, for example by reducing the need for the Army Corps to revise findings in the EA when the Port publishes its CEQA analysis of the same Project. The Army Corps and the Port can avoid potential discrepancies in their separate environmental analyses of the Project by working together to produce a joint EIR/EIS. If the Army Corps does not coordinate its environmental review with the Port, it will need to address any inconsistencies between the separate state and federal environmental analyses of the Project. This approach will create additional work for the Army Corps and the Port and could generate public confusion if their separate analyses of the nature and scope of the Project's impacts are inconsistent with one another. As such, producing a supplemental EA after the Port completes its CEQA analysis is a poor alternative to producing a joint EIS/EIR with the Port.

¹⁴ *Id.* at 4-7 (Fig. 4-4).

¹⁵ Resolution Letter and Informal Resolution Agreement for Administrative Complaint Nos. 13R-17-R9 and 14R-17-R9 (July 26, 2019), available at <https://www.epa.gov/ogc/resolution-letter-and-informal-resolution-agreement-administrative-complaint-nos-13r-17-r9-and> (last accessed May 3, 2022).

III. THE EA FAILS TO TAKE A HARD LOOK AT THE ENVIRONMENTAL IMPACTS OF THE PROPOSED PROJECT.

The Army Corps failed to take a “hard look at the environmental consequences” of this Project. Had it done so, the agency would have determined that construction and operation of the Project raises “substantial questions . . . as to whether [the] proposed project may cause significant degradation of some human environmental factor.” *Bark v. United States Forest Service*, 958 F.3d 865, 870 (9th Cir. 2020). When such questions exist, preparation of an EIS is required. *See* 42 U.S.C. § 4332(2)(C) (An EIS is required for federal action that “significantly affect[s] the quality of the human environment.”).

Here, the Army Corps published an EA and FONSI despite outstanding questions about the nature, extent, and intensity of the Project’s operational, cumulative, and growth-inducing impacts; its effect on environmental justice communities, water and air quality, and traffic; and its inconsistency with local laws and plans applicable to the Study Area. Moreover, the impacts that are discussed in the EA reveal that implementation of the Project will foreseeably cause significant adverse effects on the environment and local community. Thus, the Army Corps must prepare an EIS, rather than an EA, and provide a more detailed and thorough analysis of the Project’s impacts and mitigation of those harmful effects.¹⁶

A. The EA’s description of the Project’s purpose is inaccurate.

An EA must “discuss the purpose and need for the proposed action.” 40 C.F.R. § 1501.5. The scope of a proposed action’s environmental review “depends on the underlying ‘purpose and need’ specified by the agency for the proposed action.” *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 698 F.3d 1060, 1069 (9th Cir. 2012) (citations omitted). “An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.” *Id.* (internal quotations and citations omitted).

The Army Corps has not fully disclosed the purpose and need for the Project. The EA states that the purpose of the Project is: “to address navigation inefficiencies currently experienced by vessels in the Oakland Harbor.” (EA at 1.) But the EA also acknowledges that the Project will “realize economies of scale” that will significantly expand operations at the Port. (EA at 93, 20 [noting the positive correlations “between the economic condition of a port and its total nominal vessel capacity”].) The Army Corps glosses over this particular motivation for the Project by calling it a “navigation improvement project.” (EA at 1.) In doing so, the Army Corps skews the EA’s environmental analysis by intentionally excluding an important dimension of the Project—that the Project will increase the volume of cargo that is processed at the Port as larger

¹⁶ Even the Army Corps’ implementing regulations for NEPA express a clear preference for preparing an EIS for projects requiring a feasibility report. *See* 33 C.F.R. §230.6(a) (“Actions normally requiring an EIS are . . . [f]easibility reports for authorization and construction of major projects.”).

ships with significantly greater carrying capacity more efficiently maneuver the wider turning basins in the Inner and Outer Harbors. Based on this inaccurate project description, the EA does not discuss the environmental impacts of the Project's expanded Port operations. Because the Army Corps' EA does not accurately describe the Project's purpose, it precludes meaningful review of the Project's impacts in violation of NEPA.

B. The EA omits an analysis of the Project's operational impacts without explanation.

NEPA requires that the Army Corps "[i]dentify [the Project's] environmental effects and values in adequate detail so they can be compared to economic and technical analyses," 40 C.F.R. § 1501.2(b), "to ensure that relevant environmental information is identified and considered . . . to ensure informed decision making by Federal agencies," 40 C.F.R. § 1500.1(b). Here, the Army Corps failed to comply with this requirement because the EA does not examine the Project's operational impacts; the EA's analyses of every environmental category of impacts is limited to the Project's construction phase (i.e. activity associated with widening the turning basins in the Inner and Outer harbors).

The Army Corps failed to analyze operational impacts based on a faulty assumption. The EA states that: "Under [a] future without and future with project conditions, the same volume of cargo is assumed to move through Oakland Harbor." (EA at 19, 130.) Yet, the EA contains statements that conflict with the Army Corps' assumption and strongly suggest that widening the width of the turning basins will increase operations at the Port. For example:

- The existing turning basins were designed for a ship that is 1,139 feet long, 140 feet wide, and has a carrying capacity of 6,500 twenty-foot equivalent units (TEUs). (EA at ii.) The Project will widen the width of the turning basins to allow larger ships with three times the cargo carrying capacity of the turning basins' original design vessel to efficiently rotate in the turning basins. (See EA at iii [the Project will accommodate ships that are 1,310 feet long, 193 feet wide, and can carry 19,000 TEUs].)
- The cargo capacity for ships serving the Port has "grown at an average rate of 2.1% per year, and that rate of growth is expected to persist throughout the forecast period, which ends in 2050. This will roughly double the TEU volumes handled by the Port by the end of the forecast period. [. . .] *The Port will see an increase in vessel traffic to accommodate this increase in volume.*" (EA at 95, 101 [emphasis added].)
- "While smaller vessels are being replaced by larger ones to carry more cargo on a single voyage, the *overall number of vessels will have to increase* to match increasing [cargo capacity] volumes over time." (EA 101-102 [emphasis added].)
- "It is reasonable to assume that upwards of 40% of Oakland's [cargo capacity] volume would be shifted to these larger classes of vessels [referring to vessels with 15,000 to 23,000 TEUs] by the end of the forecast period." (EA at 102.) These ships "have called infrequently at the Port historically" due to the turning basins not being wide enough, but

the Army Corps anticipates that pattern will reverse and the Port can achieve “economies of scale” after widening the width of the turning basins (the Project). (*Id.*)

Conversely, the EA fails to provide any compelling evidence that supports its assumption that there will be no change in operations at the Port following construction of the Project. The Army Corps purports to rely on a “multiport analysis” and commodity and fleet forecasts, but there is no information in the EA that explains how the data supports the agency’s assumption that there will be no post-Project change in operations at the Port even though larger ships with significantly more carrying capacity are expected to service the Port more frequently once the turning basins are widened. The statements provided above strongly suggest that Project will lead to a direct increase in the number of large vessels servicing the Port and cargo volumes that are processed at the Port. The Army Corps was obligated to investigate the extent to which operations at the Port would change and it failed to do so. (*See* EA at 19-20; 102.)

C. The EA’s analysis of Project-related impacts is deficient.

NEPA requires that a federal agency analyze the potential environmental impacts of any “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). When there are substantial questions about whether a project may cause significant degradation of the human environment, a federal agency must prepare an EIS. *See id.*; 40 CFR 1501.3(b) (listing factors for weighing the significance of an impact); *Bark v. United States Forest Service*, 958 F.3d 865, 868 (9th Cir. 2020) (internal citations omitted).

As a preliminary step, an agency may decide to prepare an EA to determine whether to prepare an EIS or a FONSI. *See* 40 C.F.R. 1501.5(c)(1). “In reviewing an agency’s finding that a project has no significant effects, courts must determine whether the agency has met NEPA’s hard look requirement, based [its decision] on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project’s impacts are insignificant.” *Bark*, 958 F.3d at 869 (internal citations and quotations omitted). “Standing together, the FONSI and EA must be ‘sufficient to establish the reasonableness of th[e] decision not to prepare an EIS.’” *Center for Biological Diversity v. Bureau of Land Management*, 937 F.Supp.2d 1140, 1154 (N.D. Cal. 2013) (citing *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1215 (9th Cir. 2008)).

The Army Corps issued a FONSI without taking the mandatory “hard look” at the Project’s environmental consequences. Accordingly, the EA’s evaluation of Project-related impacts is not sufficiently developed or supported by compelling evidence to justify a FONSI for the Project.

1. The EA does not adequately disclose the Project’s impacts to air quality.

The EA acknowledges that the Bay Area is a designated nonattainment area for the federal ozone and PM_{2.5} standard, (EA at 182), and that West Oakland has a “high cumulative air pollution exposure burden, particularly to DPM [diesel particulate matter].” (EA at 186.) The

Army Corps also found that the Project would exceed BAAQMD's local threshold of 54 pounds of NO_x [nitrogen oxide] per day. *Id.* Nevertheless, the EA concludes that its proposed construction mitigation measures (i.e., requiring electric dredge equipment and certified Tier 4 Final construction equipment, and implementing BAAQMD's recommended mitigation measures) will reduce emission-related health risks to sensitive receptors in the West Oakland community. (EA at 126, 182, 189). There is no support for this determination.

Moreover, the Army Corps' conclusion that there will be no significant impacts to air quality post-mitigation is wrong. The EA clearly states its air quality analysis focused only on construction emissions and did not address the air quality impacts from increased operations. (EA at 183.) The Army Corps' air quality analysis ostensibly relied on a Health Risk Assessment (HRA) prepared by the Port of Oakland that: (1) was not made available for public review as part of the appendix to the EA, in violation of NEPA;¹⁷ (2) may not have reported health risks associated with operation of the Project; and (3) was a draft assessment. Thus, as discussed above, the Army Corps did not take a hard look at the reasonably foreseeable degradation of ambient air quality resulting from increased Port traffic and cargo volumes that will follow after the turning basins are widened.

2. *The EA ignores potential impacts to groundwater.*

NEPA requires a reasonably complete discussion of possible mitigation measures to ensure that the environmental consequences of the Project have been fairly evaluated. *See* 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. § 1502.16; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Here, the EA describes multiple pathways for groundwater contamination, but fails to take a "hard look at possible mitigation measures." *See Okanogan Highlands All. v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (internal quotations omitted).

The dredging and construction activity needed to widen the turning basins will require excavating 17 feet below groundwater elevation, which can increase saltwater intrusion into groundwater. (EA at 140-142.) The EA identifies a serious concern that the construction activity that takes place on the Schnitzer Steel and Howard Terminal properties will leach "contaminants of concern (COCs) such as dioxin, hydrocarbons, PCBs, and heavy metals in[to] soils and/or groundwater." (EA at 140.) The EA acknowledges that dredging in the Project area "ha[s] the potential to adversely affect groundwater if improperly managed." (EA at 141.) Despite this, the EA concludes that the Project's effect on water quality will be less than significant, ostensibly relying on the fact that the groundwater underlying the Project is not currently a source of drinking water. (EA at 141, 144.)

NEPA requires the Army Corps take a hard look at the extent to which groundwater in the

¹⁷ *See Natural Resources Defense Council v. Duvall*, 777 F.Supp. 1533, 1539 (E.D. Cal. 1991) ("[B]ecause the purpose of an EA is to decide whether an EIS must be prepared, . . . the document itself (any attachments or appendices included with it) must facilitate or enable public comment concerning the agency's determination that the project does not significantly affect the environment.").

Project area may be contaminated by implementation of the Project and how that will affect environmental quality for West Oakland residents. CalEnviroScreen ranks West Oakland in the 100th percentile statewide for exposure to groundwater threats. NEPA also requires the Army Corps consider mitigation measures that may avoid any potential impacts to groundwater caused by the Project. *See South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (holding agency was required to “give some sense” of whether impacts to groundwater could be avoided). The Army Corps should identify feasible mitigation measures to avoid anticipated harms to groundwater.

3. *The EA downplays the Project’s impacts to traffic.*

Similar to the EA’s treatment of ground water, the EA does not properly evaluate options to mitigate the traffic impacts associated with construction of the Project. It notes that there will be land-based traffic associated with construction activities, including “dump trucks hauling excavated soil and other materials to landfills,” (EA at 167), that will cause “localized effects along roadways closest to the construction site.” (EA at 176.) At the same time, the EA claims that construction-related traffic will not “inhibit the existing or planned public transit, bicycle, or pedestrian circulation routes.” (EA at 167-168.) However, the EA’s “perfunctory description” of measures to mitigate the Project’s effect on roadways is inadequate. *Neighbors of Cuddy Mountain v. U.S. Forest Service* 137 F.3d 1372, 1380 (9th Cir. 1998); *see also Okanogan Highlands Alliance*, 236 F.3d 468 at 473 (“A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by the NEPA.”). The Army Corps must provide more than a hasty list of possible mitigation strategies to include in a proposed traffic management plan. (EA at 176.) Critically, the EA also fails to examine the traffic impacts owing to the unanalyzed operational impacts of the Project. (*See* discussion in section IV.B.) For example, it utterly fails to consider the impacts of increased truck traffic that will result from the larger number of cargo containers entering the Port. The Army Corps should identify mitigation measures for traffic impacts.

4. *The EA fails to meaningfully analyze the Project’s cumulative and indirect effects.*

The EA does not contain a cumulative or indirect effects impacts analysis. Indeed, the EA fails to analyze the effects of the two most prominent projects potentially occurring at the Port of Oakland alongside the Project: the Eagle Rock aggregates terminal project and the Howard Terminal ballpark project. Both of these projects, when combined with the Army Corps’ Project, would significantly exacerbate the poor environmental and health conditions experienced by neighboring communities. However, the EA does not discuss the cumulative or indirect impacts of joint construction and operation of these projects. Because the Eagle Rock project and Howard Terminal project could generate substantial construction and operational emissions, traffic, and other impacts alongside the impacts predicted for the Army Corps’ turning basin Project, the potential impacts of all three projects combined should have been analyzed and disclosed in the EA.

Where several projects have a “cumulative environmental impact,” their consequences must be discussed in an EA and EIS. *Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep’t*

of the Interior, 927 F.Supp.2d 921, 942 (S.D. Cal. 2013) (citations omitted). A “cumulative impact” is the impact of a project ““when added to other past, present, and reasonably foreseeable future actions.”” *Id.* (citing 40 C.F.R. §§ 1508.7, 1508.8(b)). Similarly, “indirect effects” are defined as effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* at p. 945 (citing 40 C.F.R. § 1508.8(b)). Indirect effects “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Ibid.* Cumulative impacts analyses are particularly important in EAs “because so many more EAs than EISs are prepared, and thus there is a higher risk of cumulative impacts resulting from the many smaller decisions.” *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241, 1266 (E.D. Cal. 2006) (citations omitted).

The Eagle Rock project will construct a facility adjacent to the outer harbor turning circle for construction aggregate stockpiling and distribution. The facility will receive up to 2.5 million tons of construction aggregates annually, arriving on 48 ships. The aggregates will be conveyed into three 40-foot-high uncovered open air stockpiles, combined containing 350,000 tons of aggregate. The uncovered aggregates would then be loaded onto trucks or floating barges for transport to regional facilities and projects. The project anticipates generating up to 375 daily truck trips and 70,000 annual truck trips.¹⁸

The Howard Terminal is slated for redevelopment as a new ballpark for the Oakland A’s baseball team. The project envisions a 35,000-seat waterfront ballpark, 3,000 housing units, office and retail uses, a performance venue, hotels, and parking.¹⁹ Approximately 250,000 roundtrip vehicle trips will occur during the construction phase, and buildout and operation of the project will generate approximately 28,000 new daily vehicle trips.²⁰ The Oakland City Council certified the EIR for the baseball park project on February 17, 2022, but the Port is significantly involved in this project.²¹ The Port approved a term sheet with the A’s in May 2019 that gave the team four years to advance the stadium proposal and executed an MOU with the

¹⁸ See Port of Oakland, Eagle Rick Aggregates Oakland Terminal Project, Final Supplemental Environmental Impact Report, Vol. 1 (Nov. 2021), at 2-12, 2-27—2-28, 2-32—2-34, https://www.portofoakland.com/files/PDF/PortOak_ERA_FSEIR_Vol.1_SEIR_Nov2021_ADA.pdf (as of Feb. 18, 2022).

¹⁹ Ravani, *Oakland Council Certifies Environmental Review of A’s Waterfront Ballpark Plan*, San Francisco Chronicle (Feb. 18, 2022), available at 2022 WLNR 5117688.

²⁰ City of Oakland, Waterfront Ballpark District at Howard Terminal, Draft Environmental Impact Report at 4.2-62, 4.2-71, https://cao-94612.s3.amazonaws.com/documents/Chapter-4.2-Air-Quality_2021-02-26-012844.pdf (as of Feb. 18, 2022).

²¹ *Ibid.* See also Bay City News, *Oakland City Council Certifies EIR for A’s Howard Terminal Ballpark Proposal*, KTVU Fox 2 TV (Feb. 18, 2022), <https://www.ktvu.com/news/oakland-city-council-certifies-eir-for-as-howard-terminal-ballpark-proposal> (as of Feb. 18, 2022).

City of Oakland in February 2020 to cooperate on development of the ballpark project.²² Finally, after the City approved the EIR, the Port relinquished to the City its responsibilities for permitting and administering projects at the Howard Terminal site.²³ Per the Port, Howard Terminal was last used for container operations in 2013, and is currently used “for vessel berthing, truck and container parking and depot operations, training of longshore workers and other logistics services that support Port operations.”²⁴ Notably, the Port reserved the right to use approximately 10 acres of the Howard Terminal property to expand the inner harbor turning circle in order to accommodate larger cargo ships.²⁵

The Army Corps Project EA does not discuss either the cumulative or indirect impacts of combined construction and operation of the turning basins Project, the Eagle Rock project, or the Howard Terminal ballpark project. The EA’s sole, oblique reference to the Eagle Rock project notes only that “the Port intends to use the Berth 20-21 land for dry bulk over the next 15 years...” (EA at 18.) The EA is similarly scant when discussing the Howard Terminal ballpark project, referencing only the environmental investigations conducted for the ballpark project and its proposed bicycle infrastructure and affordable housing units. (*Id.* at 36, 70, 84-85.) In one instance, the EA perplexingly remarks that “there are no significant expansion options for Howard [Terminal]...” (*Id.* at 18.) There are no other discussions of the Eagle Rock project or the Howard Terminal ballpark project anywhere in the EA.

Because both the Eagle Rock project and Howard Terminal ballpark project could each generate substantial construction and operational emissions, traffic, and other impacts alongside the impacts predicted for the Army Corps’ turning basin Project, the cumulative and indirect impacts of all three projects combined should have been analyzed in the EA. The combined impacts from all three projects are foreseeable, are not geographically or temporally remote from each other, and are not the product of a lengthy causal chain. Moreover, both the Eagle Rock and Howard Terminal projects are capable of being analyzed. Both have final CEQA environmental documents, and both have been preliminarily approved. Their details and specifications, and their anticipated environmental impacts, have been documented in detailed analyses, and are not too speculative for the EA to analyze. The Army Corps must analyze the cumulative or indirect impacts analysis for the three projects combined.

5. *The EA obfuscates the Project’s impact on West Oakland, an environmental justice community.*

The EA’s inadequate discussion of the Project’s potential environmental impacts is even more consequential because of the Project’s potential harm to West Oakland, an environmental

²² City of Oakland, Frequently Asked Questions About the Waterfront Ballpark District at Howard Terminal (Updated Feb. 10, 2022), <https://www.oaklandca.gov/resources/waterfront-ballpark-district-at-howard-terminal-faqs> (as of Feb. 18, 2022).

²³ *Ibid.*

²⁴ Port of Oakland, Proposed Howard Terminal Project, Project Overview, <https://www.portofoakland.com/howard-terminal/overview/> (as of Feb. 18, 2022).

²⁵ *Ibid.*

justice community in the Project area. However, the EA’s analysis of the Project’s impacts to environmental justice communities does not fully analyze, disclose, and consider for mitigation harms to all the census tracts that make up West Oakland. By artificially limiting the geographic scope of its environmental justice analysis, the EA found the Project’s environmental justice impacts related to air quality, noise, traffic would be less than significant and result in negligible “lifetime health risks.” (EA at 134; *see also id.* at 131 - 135.)

Executive Order 12898 requires federal agencies to include an environmental justice analysis as part of their NEPA reviews. Agencies must “identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”²⁶ Here, however, the EA’s analysis failed to consider whether the Project will have a “disproportionately high and adverse” impact on all of West Oakland.

The EA initially identified 12 census tracts within a one-mile radius of the center of each turning basin that meet the threshold criteria for a federal environmental justice community. It then narrowed the scope of its impact analysis to just “three minority environmental justice communities [census tracts] of concern . . . within the project’s 0.5-mile study area.” (EA at 25.) The EA does not explain or justify the Army Corps’ selection of a one-mile radius as the starting point of its environmental justice analysis. Indeed, a one-mile radius compressed the geographic scope of the Army Corps’ environmental justice analysis to the point that it missed an obvious environmental justice community of concern—West Oakland. According to CalEnviroScreen, nine out of the ten census tracts that make up the West Oakland community rank in the top 25% of the most polluted geographic areas in the state. A CalEnviroScreen map depicting the Project Area and the affected census tracts in surrounding area is reproduced as Attachment A to this letter. The Army Corps’ decision to use a one-mile radius was arbitrary and guaranteed that the agency did not take a hard look at the Project’s impacts on environmental justice communities or consider the full range of effective measures to mitigate the Project’s adverse environmental consequences for those communities.

The EA also does not explain the Army Corps’ decision to further narrow its environmental justice analysis from 12 census tracts within a one-mile radius of the turning basins to just three census tracts (tracts 9820, 4017, and 4287) within a half-mile radius of the turning basins. Of the twelve census tracts within a one-mile radius of both turning basins, eight census tracts meet the definition of a federal environmental justice community. But only one of the three census tracts (census tract 4287) the Army Corps chose to make the focus of its environmental justice analysis meets this definition. Furthermore, four of the excluded census tracts have a larger “minority” population than all three of the selected census tracts. (EA at 25.)

The Army Corps’ missteps are compounded by the EA’s recognition that certain Project impacts will extend beyond the half-mile and one-mile radius it arbitrarily selected for is

²⁶ Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) 59 Fed. Reg. 7,629 (Feb. 16, 1994).

environmental justice analysis and into “the surrounding communities of the West Oakland and Alameda.” (EA at 130); *see also Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission* 6 F.4th 1321, 1330-31 (D.C. Cir. 2021) (rejecting the federal agency’s environmental justice analyses under NEPA because it limited the analysis to “within two miles of the project site” even though it had “determined that the environmental effects of the project would extend beyond the . . . two-mile radius”).

The Army Corp was statutorily obligated to fully examine the Project’s impacts on West Oakland. This community meets the threshold criteria for an environmental justice community and the community will be harmed by project construction and expanded operations at the Port, regardless of whether they fall within a half-mile or one-mile radius of the Project. Based on the foregoing information, it is clear the Army Corps unreasonably and arbitrarily narrowed the geographic scope of its environmental justice analysis, skewing the EA’s analysis and conclusion of the Project’s potential impact on West Oakland. The EA excludes a reasonable and adequate analysis of the Project’s consequences on all potentially affected environmental justice community.

IV. THE EA DOES NOT ANALYZE THE PROJECT’S INCONSISTENCIES WITH LOCAL PLANS DEVELOPED FOR THE PROTECTION OF WEST OAKLAND.

NEPA requires federal agencies to analyze inconsistencies with state or local laws and plans. “Where an inconsistency exists, the [environmental document] should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.” 40 C.F.R. § 1506.2(d); *see also Quechan Tribe*, 927 F.Supp.2d at 946. The EA fails to discuss the Project’s apparent inconsistencies with the goals and strategies of the WOCAP, the community emissions reduction plan that was adopted by BAAQMD and CARB to address the dangers of air pollution in the West Oakland community. The Army Corps must analyze and disclose the Project’s inconsistencies with the WOCAP.

A. The Project is Inconsistent with the WOCAP’s Primary Goals and Targets

The WOCAP establishes two overarching goals: (1) By 2025, all neighborhoods throughout West Oakland will experience the same air quality conditions as the *average* West Oakland residential neighborhood in 2017; (2) by 2030, all neighborhoods throughout West Oakland will experience the same air quality conditions as the *least impacted* neighborhood (i.e., the neighborhood with the cleanest air) in 2017. (WOCAP at 4-4.)

To achieve these goals, the WOCAP establishes emissions reductions targets for diesel PM, PM_{2.5}, and cancer risk.²⁷ (WOCAP at 4-4.) Per the WOCAP, local emission sources,

²⁷ Local emissions risks in West Oakland are attributable to goods movement, infrastructure, and industrial uses in the vicinity. (WOCAP at 4-1.) Port-related emissions contribute 57% of the diesel PM emissions, 52% of the cancer risk, and 17% of the PM_{2.5} emissions to West Oakland. (WOCAP at 5-9

including trucks and Port-related resources (*Id.* at 2-12), may emit no more than the following concentrations into West Oakland neighborhoods by 2025 and 2030:

POLLUTANT	2025 TARGET	2030 TARGET
Diesel PM	< 0.25 $\mu\text{g}/\text{m}^3$	< 0.13 $\mu\text{g}/\text{m}^3$
PM _{2.5}	< 1.7 $\mu\text{g}/\text{m}^3$	< 1.2 $\mu\text{g}/\text{m}^3$
Cancer Risk	< 200/1 million	< 110/1 million

The EA does not discuss the WOCAP's goals and targets at all. The EA briefly discusses AB 617, noting that West Oakland experiences high exposure to pollution from heavy-duty vehicles, trains, off-road equipment, stationary sources, and maritime vessels. (EA at 83.) The EA mentions that local community groups developed the WOCAP, but omits that the plan was adopted by BAAQMD and CARB. (EA at 84.) However, there is no analysis of the WOCAP's goals and reduction targets. Indeed, the EA fails to acknowledge that the Project will increase emissions in West Oakland in conflict with the WOCAP's express goal of decreasing emissions.

First, the WOCAP explains that West Oakland already suffers from cancer risk exposure at rates of 204-per-1 million in 2017, far in excess of the 10-per-1 million BAAQMD health risk thresholds. (WOCAP at 4-7 [Fig. 4-4], 5-23.) But the EA does not analyze cancer risk at all, even though the Project's emissions could add more cancer exposure risk to the community. Second, the EA finds the Project will generate approximately 2.1 tons (4,200 lbs.) of construction-related PM_{2.5} emissions. (EA at 190 [Table 52].) However, the WOCAP found that West Oakland *already* experienced PM_{2.5} concentrations of around 1.70 $\mu\text{g}/\text{m}^3$ in 2017, and the Project's 2.1-ton contribution would exacerbate this situation.²⁸ (WOCAP at 4-7 [Fig. 4-4].) Third, the Project's construction emissions, scheduled to begin in 2027, would exceed the WOCAP's 2025 PM_{2.5} targets. (EA at 190 [Table 52].)

The EA states that electric dredgers will result in fewer emissions than diesel dredgers, thereby complementing the WOCAP, but it does not discuss whether these reductions would help to achieve the WOCAP's targets, if at all. (EA at 126.) Finally, because the EA's analysis is confined solely to construction emissions, and does not include emissions from operational impacts, the Project's actual emissions impacts could be much higher, and that much more in conflict with the WOCAP's goals. The Project will increase emissions in West Oakland in direct conflict with the WOCAP's goals and targets. The EA was therefore required to analyze the inconsistencies between the Project and the WOCAP; however, it does not. NEPA requires the Army Corps to analyze the Project's inconsistency with the WOCAP's specific goals and targets and evaluate whether the Project would hinder their achievement.

[Fig. 5-4].) Moreover, diesel PM emissions account for over 90% of the community's total cancer risk. (*Id.* at p. 4-5.) Accordingly, the WOCAP explains, reductions in diesel PM and PM_{2.5} should be driven by reductions from Port-related sources. (*Id.* at 4-5 - 4-6.)

²⁸ Converting the Project's construction emissions into a $\mu\text{g}/\text{m}^3$ figure and a comparative point of analysis to the WOCAP is an essential part of an EA or EIS, but no such analysis occurred here.

B. The Project is Inconsistent with WOCAP Strategies.

The WOCAP identifies 89 strategies to achieve its goals. The WOCAP does not identify the Army Corps as responsible for any of the strategies, but it identifies the Port as responsible for 11 of the them, including planning for zero-emission trucks; measures to address noise, fee, and charging issues; creation of truck and chassis parking sites; development of electric barge and tug incentives and incentives for Tier 2 and 3 marine vessels; and transitioning to clean locomotives. (WOCAP at 6-21—6-32 [Table 6-4].) The EA touts the Project’s electric dredgers and their anticipated emissions reductions, and these measures do further some of the WOCAP’s electrification goals. (EA at 134.) However, the EA does not specifically discuss the WOCAP’s 89 strategies or the 11 strategies assigned to the Port, nor whether the Project is inconsistent with any of the strategies.

This omission is particularly notable for WOCAP strategy no. 43. WOCAP strategy no. 43 calls on the Port to study “the effects on truck flow and congestion *due to increasing visits from large container ships...*” (WOCAP at 6-26 [Table 6-4] [emphasis added].) The EA purports to analyze a Project designed specifically to cater to the large container ships referenced by this WOCAP strategy, but it does not mention the strategy. The EA analyzes truck traffic and congestion impacts from construction of the Project and concludes that impacts would be minimal (EA at 132, 133, 135, 167-79), but does not analyze the foreseeable operational impacts from additional vehicles servicing additional large container ships using the expanded turning basins, as the WOCAP strategy recommends. The EA’s failure to study these operational impacts is in conflict with the WOCAP strategy.

The WOCAP also identifies the Port as responsible for several truck and chassis parking actions. WOCAP strategy No. 5 urges the Port to relocate non-conforming truck yard, service, and refueling businesses currently located in West Oakland. (WOCAP, pp. 6-21 [Table 6-4].) WOCAP strategy No. 26 urges the Port and City of Oakland to establish permanent truck parking and chassis and cargo storage areas “not adjacent to West Oakland residents.” *Id.* at 6-23—6-24. WOCAP strategy no. 42 calls on the Port to arrange vendor leases and parking “to keep trucks off West Oakland’s streets.” *Id.* at 6-26. Finally, WOCAP strategy No. 21 recommends that agencies, including the Port, participate in stakeholder committees addressing truck, nuisance, charging infrastructure, and route enforcement issues. *Id.* at 6-23.

However, the EA does not address truck and container parking at all aside from *construction* vehicle parking and storage. If adequate permanent parking is not available for the additional trucks and containers required to service the additional large ships facilitated by the Project, it could force trucks and containers to be parked in West Oakland neighborhoods.²⁹

²⁹ The EA’s failure to discuss this strategy is particularly puzzling given that both the Eagle Rock project and the Howard Terminal stadium project appear to displace truck and chassis parking locations identified by the Port as surplus parking and storage areas. See Port of Oakland, Eagle Rock Aggregates Oakland Terminal Project, Final Supplemental Environmental Impact Report, Vol. 1, *supra*, at 3.11-19; Port of Oakland, Proposed Howard Terminal Project, Project Overview, *supra*, <https://www.portofoakland.com/howard-terminal/overview/>

Although the Project is designed to facilitate increasing numbers of large container ships, the EA omits analysis of the impacts from the trucks and equipment that will service these vessels, and makes no mention of any of the WOCAP strategies specifically identified to deal with truck and container issues. The Army Corps should analyze the inconsistencies between the WOCAP's truck parking strategies and the Project's potential to exacerbate existing truck and container parking issues.

Finally, the EA fails to analyze or adopt several electrification and clean-engine strategies recommended by the WOCAP. WOCAP strategy No. 19 urges the Port to develop an Electrical Infrastructure Plan to "remove barriers to the adoption of zero-emission trucks, such as cost, land, and ownership of charging equipment." (WOCAP at 6-23 [Table 6-4].) Similarly, WOCAP strategy No. 37 recommends that the Port support the transition to zero-emission drayage truck operations by setting interim phase-in targets, coordinating zero-emission truck commercialization, upgrading infrastructure, and studying time-of-day electric rates. *Id.* at 6-25. WOCAP strategy No. 50 urges the Port to work with BAAQMD to develop incentives for clean engine barges and tugs, (*Id.* at 6-27), while WOCAP strategies Nos. 63, 64, and 65 envision Port adoption of clean ship and locomotive programs and infrastructure. *Id.* at 6-28. The EA emphasizes that the Army Corps will utilize electric dredgers for construction of the Project, but the EA does not otherwise discuss the WOCAP strategies at all, nor does it contain any operational or other electrification measures that would further the recommended Electrical Infrastructure Plan, the zero-emission truck transitions, or the clean ship and locomotive efforts envisioned by the WOCAP.

In sum, although the Project will facilitate visitation of larger container ships and larger volumes of cargo to the Port, the EA fails to analyze whether the Project furthers the various strategies recommended by the WOCAP to ameliorate the impacts of Port operations on local residents. Indeed, the Project does not analyze or adopt any operational mitigation to address the impacts it will generate and fails to analyze numerous WOCAP strategies to reduce these potential impacts. Increasing vessel calls and container throughput without adopting operational mitigation is inherently inconsistent with the multiple WOCAP strategies specifically identified to address these activities. The Army Corps should analyze the applicable WOCAP strategies and disclose the Project's inconsistencies with those strategies.

V. CONCLUSION

NEPA provides the opportunity for transparent, thoughtful decision-making by requiring federal agencies to evaluate, disclose, and consider mitigation of a proposed project's environmental impacts prior to approval. The Army Corps must comply with NEPA by fully examining and disclosing the environmental impacts of the Project in an EIS before it can proceed with implementing the Project. Furthermore, the Army Corps should adopt all measures necessary to protect the local community and coordinate its NEPA review of the Project with the environmental analysis that the Port will undertake pursuant to CEQA.

Eric Jollifee, Environmental Planner
U.S. Army Corps of Engineers
May 9, 2022
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Sincerely,

A handwritten signature in blue ink, reading "Omonigbo Oiyemhonlan".

OMONIGHO OIYEMHONLAN
DAVIN WIDGEROW
Deputy Attorneys General

For ROB BONTA
Attorney General

Cc: Richard Sinkoff, Director of Environmental Programs and Planning—Port of Oakland
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ATTACHMENT A: CALENVIROSCREEN MAP OF THE PROJECT'S STUDY AREA AND AFFECTED CENSUS TRACTS

