US Army Corps of Engineers®

Oakland Harbor Turning Basins Widening

Revised Draft Integrated Feasibility Report and Environmental Assessment

APPENDIX A10c:

Response to Public Comments
Comments #95 - 106

The U.S. Army Corps of Engineers (USACE) and the Port of Oakland thank the public for their comments on the Draft Integrated Feasibility Report and Environmental Impact Statement /

Environmental Impact Report (IFR) during the December 2021 – January 2022 comment period. This appendix provides responses to all comments received by mail or email during the public comment period. Repeated comments from both the public and other state and federal agencies, expressed concern over the potential for the proposed project to cause increased ship and landside traffic. These two concerns are framed as general comment themes and are displayed with responses in the first pages of each of the Public Review Comment appendices. All other comments and responses are included for each individual comment letter. The responses to each comment letter are summarized in a table followed by the specific comment letter.

The following tables are organized to display responses by USACE and the Port of Oakland as follows:

- First Column – numbers corresponding to comments highlighted in the comment letters, as shown in Attachment 2 of this appendix
- Second Column – USACE and Port of Oakland responses
- Third Column – Section of second draft integrated feasibility report where the revision(s)/updates(s) were included in response to each comment, as applicable.

General Comments and Responses		
Response Number	**General Theme**	**Response**
General Comment (GC) -1	Induced Growth & Cargo Throughput	The evaluation of the potential for induced growth is found in Section 5.7 of the Draft IFR/EA. This response is designed answer multiple comments regarding the potential for induced growth, increased capacity and impacts to Port operations from implementation of the project. The Recommended Plan is designed to improve both the efficiency and safety of vessel movements, thereby creating the savings that are the main driver of national economic development (NED) benefits. However, this design does not include any elements that can a) remove any barriers to growth, b) shift cargo from one port to another, or c) increase the Port's container handling capabilities. Accordingly, waterway improvements like the one proposed here would not increase cargo throughput or induce growth. For a container port, throughput is the amount of cargo that can pass through a port, measured in the amount of twenty-foot equivalent units (TEUs). A port's maximum practical throughput is called the terminal's container handling capacity, that is how many containers the terminal could handle given its size, configuration, and equipment. A terminal's capacity can be limited by 1) the number of vessels it can accept at a time (berth-constrained) or 2) by how much cargo its landside facilities (e.g., container yard, truck gate, pumps, pipelines, and storage tanks) can handle (yard-constrained). These barriers to growth or handling capacity are not modified by the Recommended Plan as it only increases the diameter of the two turning basins. It neither adds physical berthing space nor includes any landside facility elements, either of which would require its own project-specific environmental review. Without these two types of modifications, the Port's maximum capacity remains approximately 5.6 million TEUs (Appendix C). The San Francisco Bay Conservation and Development Commission (BCDC) developed the May 22, 2020, 2019-2050 Bay Area Seaport Forecast (2020 Tioga Report), incorporated by reference in the Draft IFR/EA, explains, analyzes, and forecasts container movements and capacity for Bay Area Ports, including the Port of Oakland. As explained in the 2020 Tioga Report, projected cargo volumes at the Port are determined by

		economic activity, specifically the volume of consumers served by the Port and the amount of goods that people buy and consume, both in the Bay Area itself and in the broader Central and Northern California market. It is the major economic factors such as recessions, trade conflicts, and global events like the novel Coronavirus, that impact trade and drives activity at Ports, rather than individual Port improvement projects like the Recommended Plan. The 2020 Tioga Report details how the turning basin's fail to impact growth by showing that should ships be limited to a 14,000 TEU capacity, the largest ship that can utilize the Inner Turning Basin, the Port could still accommodate moderate or high growth. The limitation simply shifts the forecasted vessel calls from 29 to 40-43 ships a week. The Port could still manage to accommodate this level of future growth albeit with restrictions, delays, and suboptimal navigational and environmental impacts. This scenario also illuminates how the Recommended Plan produces efficiency when compared to the future without project scenario. The Port's ability to continue to handle less than 30 larger vessels a week rather than attempt to accommodate 40-43 smaller ones, allows for improved planning of ship and cargo movements. Yet, the Port will never be limited to an entirely 14,000 TEU capacity ship future, because ULCVs with approximately 19,000 TEUs are able to call at the Port, though not easily since they are unable to use the turning basins. Therefore, the Port's ability to accommodate potential growth is not limited by its turning basins and the Recommended Plan cannot cause or allow growth. The Recommended Plan and its benefits are independent of growth.

General Comments and Responses		
Response Number	**General Theme**	**Response**
GC -2	Truck Management	The West Oakland Truck Management Plan is an action-based plan designed to reduce the effects of transport trucks on local streets in West Oakland. It was developed as a partnership between the City of Oakland, Port of Oakland, and the community members in which this plan applies and was approved by the City and Port in April 2019. On April 19, 2022, the City of Oakland adopted updates to the truck parking regulations in West Oakland (one of the ten strategies outlined in the Truck Management Plan). The City of Oakland and the Port are continuing to work on the approach to

		update the truck route network, another key strategy of the Truck Management Plan that includes a continued community driven process. Construction trucks will use the haul routes for the Recommended Plan as discussed in the revised EA under Navigation and Transportation. Additionally, the construction contractor would be required to prepare and implement a traffic control plan as part of the Recommended Plan construction. Construction trucks would be subject to and must comply with City of Oakland designated truck routes and parking regulations much like any other truck traveling within West Oakland. For a description of current truck operations at the Port, see Section 3.10.2.

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Earthjustice in collaboration with West Oakland Environmental Indicators Project, Sierra Club, Union of Concerned Scientists, and Center for Biological Diversity

7. Earthjustice in collaboration with West Oakland Environmental Indicators Project, Sierra Club, Union of Concerned Scientists, and Center for Biological Diversity		
Commenter: Marie Logan, Michelle Ghafar, & Sasan Saadat with Earthjustice, Ms. Margaret Gordon & Brian Beveridge with WOEIP, Igor Tregub with the Sierra Club, Miyoko Sakashita with the Center for Biological Diversity, and Sam Wilson with the Union of Concerned Scientists		
Comment Number	**Response**	**Location in IFR**
95	As explained in GC-1, USACE has not mischaracterized the Recommended Plan and the Recommended Plan does not facilitate major expansion at the Port or an increase in freight throughput. The Draft IFR/EA includes relevant analysis on the status of the environmental justice community and impacts attributable to the Recommended Plan, including air quality, climate change, greenhouse gas emissions, water quality, and ESA concerns. Please see the relevant sections of the Draft IFR/EA for more detail.	6.1, 6.4, 6.5, 6.6, 6.10, 6.11, 6.13, 6.14, 6.16
96	The Draft IFR/EA identifies the need for the Recommended Plan to improve the turning basins at the Port of Oakland to promote efficient and safe navigation. As the maritime industry moves toward more PPX Gen III/IV ships, the inefficiencies currently experienced at the Port will only worsen creating potential navigation safety issues such as an increased risk of grounding and collisions, with all the associated environmental life and safety risks.	1.2
97	In re-releasing the EA, USACE considered your comments and preference for combining the NEPA and CEQA documents. However, the release of the CEQA document is not expected until late 2023. Such a delay would jeopardize USACE's ability to timely request authorization for the proposed Project. While USACE is actively coordinating with the Port in order to ensure alignment between the NEPA and CEQA documents, the preparation of these documents is too far along to integrate them at this time. Such integration would be time consuming, require significant public resources from both USACE and the Port, and delay any request for authorization, as explained previously. Therefore, USACE and the Port are unable to integrate the NEPA and CEQA document. See Response 1.	N/A

98	The Draft IFR/EA includes a Clean Water Act analysis.	6.4, Appendix A-3
99	As explained in GC-1, the Recommended Plan does not drive growth in trade and an increase ULCVs does not automatically translate into additional cargo. Increases in throughput can occur even in a future without ULCV. The Recommended Plan does not allow the Port to "dramatically expand its cargo throughput capacity" because it does not include berth or other landside facility improvements. Such improvements would require independent environmental analysis pursuant to NEPA or CEQA as appropriate. Therefore, growth in cargo is not a foreseeable result and is independent of the Recommended Plan.	5.7
100	See Response 7.	
101	The Draft IFR/EA is appropriately scoped and provides a complete and accurate description of the proposed federal action because as explained in GC-1, the Recommended Plan does not expand Port cargo capacity. Throughput at the Port is driven by supply and demand, not by the Port's configuration. The proposed improvements are meant to handle throughput in a more efficient manner. Therefore, Draft IFR/EA does not make invalid assumptions. Dredging and construction will indeed be the primary source of emissions attributable to the Recommended Plan. The corresponding one-mile radius for environmental impacts from the center of the turning basins is appropriate. The Draft IFR/EA includes analysis on GHG reductions.	1.2, 5.7, 6.1, 6.14
102	The Draft IFR/EA meets NEPA's requirement to take a "hard look" at the potential environmental impacts of the Recommended Plan and its alternatives. It also includes analysis of all relevant direct, indirect, and cumulative impacts. Further, the Draft IFR/EA has been revised to comply with CEQ's newly issued NEPA Guidance on Consideration of Greenhouse Gas Emissions and Climate Change.	6.14, 6.16
103	Please refer to GC-1- Induced Growth. While the expansion of the turning basins may facilitate ULCVs calls at the Port, that does not in turn result in an increase in total vessel calls. As explained previously, the Port would be able to handle prospective moderate or high growth regardless of its ability to handle ULCVs. If no ULCVs were able to call, the same amount of growth could be accommodated but vessel calls would increase to 40-43 rather than approximately 29 in a ULCVs future. Therefore, a future without project would result in more vessel calls rather than less, contrary to what the comment suggests. The commentor also appears to assume that these vessels	1.2, 5.7, Appendix C

	would be fully loaded. The Port of Oakland is only maintained to 50 feet MLLW. ULCVs require approximately 52 feet draft to be fully loaded.	
104	"Debottlenecking" as defined by the EPA is not relevant to the Draft IFR/EA. Neither turning basin prevents the ULCVs from calling at the Port. Many have called in the last several years. Further, the turning basins are not a bottleneck for increased cargo. The same amount of increased cargo is able to come to the Port under the high growth scenario, it will just arrive on a greater number of smaller ships than if ULCVs are able to use the turning basins. Refer to GC-1 – Induced Growth.	1.2, 5.7, Appendix C
105	105a. Please refer to GC-1 explaining that the Recommended Plan will not induce growth. It is unclear what the commenter is citing to in the 2020 Emissions Inventory Report, because the full quote appears to be: "The overall trend towards longer berthing times is consistent with the trend towards fewer calls by larger vessels and gradual increase in annual TEU throughput." This does not state that visitation by larger ships correlates with or causes an increase in TEU throughput. It states that there is a trend of longer berthing times and that there are fewer calls by larger ships, not an increase of them. 105b. Commenter suggest that the chosen excerpt from the 2014 Port of Long Beach report states that there is a direct link between larger vessels and increases in cargo throughput. Instead, the article focuses on landside infrastructure improvements ports undergo to accommodate the industry's transition to larger ships. Any landside improvements at the Port of Oakland require their own independent environmental review. Further, the article does not contain any economic analysis to support commenter's induced growth assumptions. It is important to note that ULCVs already call at the Port. Therefore, the Port of Oakland already feels the landside pressure of having to accommodate ULCVs without the Recommended Plan. In fact, the Draft IFR/EA considered the Port of Oakland's infrastructure improvements and plans in its analysis of appropriate alternatives. Further, the article is not a specific analysis of the Port of Oakland. It only mentions the Port once in a table as part of the Pacific Southwest region. Please see GC-1 for a discussion of the specific economic realities of the Port of Oakland and how the Recommended Plan and its alternatives do not induce growth. 105c. ULCVs already call at the Port and those landside infrastructure pressures exist with or without the Recommended Plan. The Oakland International Container Terminal already has ten Super Post-Panamax cranes (the largest modern container cranes) and Ben E. Nutter	1.2, 2.1.2, 4.1, 4.6, 5.7, Chapter 6

	Terminal's four cranes have an outreach of 203 feet. See Section 2.1.2. Further the Section 4.1 of the Jungen Article also states that, due to ULCVs, "the environmental impact per TEU is decreasing. This effect could be described as 'ecologies of scale'." Further, the article discusses dredging as the primary environmental concern. Please see Chapter 6 of the Draft IFR/EA for a discussion on dredging impacts by resource. In the case of the Recommended Plan, benefits are expected from dredging because it includes significant beneficial use of dredged material, improving local wetlands. Nothing in the article suggested that port infrastructure improvements such as the Recommended Plan would induce growth or result in new pressures on landside infrastructure. Finally, any improvements to the Port of Oakland's infrastructure would require its own environmental review. 105d. ULCVs already call at the Port and those landside infrastructure pressures exist with or without the Recommended Plan. See Response 105a-c. Commenter has not provided any data to show that ULCVs arrivals cause increased traffic flow for the Port of Oakland. USACE does not dispute that additional cargo may require additional truck activity. However, the Recommended Plan will not induce growth. See GC-1- Induced Growth. The articles quoted by commenter contain generalized statements that suggest large call sizes may increase traffic due to trucks coming to pick up cargo from the ships. This analysis is not specific to the Port of Oakland or the Recommended Plan. The article continues to say that terminals alleviate the issue through truck appointment systems, such as the one the Port of Oakland already has. The pressures of larger ships, whether PPX Gen III or UCLVs, exist independent of the Recommended Plan. The Port of Oakland recognizes the traffic issues and utilizes the Maritime Comprehensive Truck Management Program. The Recommended Plan will not modify this program and it will continue to function to assist in truck management to address air quality. As the Recommended Plan does not induce growth and traffic congestion is already managed to reduce air quality impacts, CARB's paper is not relevant to this study. CARB's paper also does not suggest that widening the turning basins will increase cargo or traffic congestion.	
106	The commentor is correct that the Draft IFR/EA assumes a 2.1% growth rate for TEU volumes. For a detailed economic analysis, see Appendix C. The "MAQIP" report provides a high and low estimate for years 2020 and 2030, while the Draft IFR/EA's estimate is an average through 2050. These are not equivalent analyses and cannot be compared directly as commenter is doing. The 2020 Tioga Report also provides detailed breakdown of how the average was calculated. Finally, projections for economic growth are variable, but the Draft	4.4, Appendix C

	IFR/EA is internally consistent and consistent with the 2020 Tioga Report.	
107	See Section 6.16 of the Draft IFR/EA, which includes discussion of the future plans for the Oakland Waterfront Ballpark District at Howard Terminal. The Recommended Plan has been revised to include only 3.9 acres of fast land at Howard Terminal. Further the USACE accepted the planning restraint that all alternative expansions for the Inner Harbor remain within the land reserved for such expansion. Howard Terminal is not being used as a marine terminal. For ancillary uses, there are other acres at the Port that can be used in lieu of Howard Terminal. The 2020 Tioga Report discusses this on page 84.	ES, 2.2.1, 5.1
108	108a. Section 3.1 and 6.1 of the Draft IFR/EA discuss and analyze environmental justice concerns and impacts. The Recommended Plan is expected to reduce air quality impacts by allowing for more efficient marine vessel transit and wetland sequestration. Section 6.14. 108b. See GC-1 – Induced Growth. 108c. The Draft IFR/EA Section 6.16.1 analyses environmental justice cumulative impacts. The Recommended Plan is expected to benefit the environmental justice community due to reduced GHG emissions over the long term. 108d. See Response 108a. As explained in GC-1, the Recommended Plan will not induce growth and therefore increased freight activity is not appropriate for analysis in this Draft IFR/EA. The initial 1-mile radius was intended to conservatively cover the geographic extent of identified landside project impacts. This radius accounted for potential construction traffic impacts in the areas closest to the construction sites. None of the resource area impacts exceeded the significance thresholds or documented impacts at greater distances so it did not suggest a need to identify environmental justice communities at a greater distance. This 1-mile radius did in fact capture part of the West Oakland community. Nine census tracts containing environmental justice communities were identified. The revised report more clearly discusses the overall West Oakland community, and it is included as an environmental justice community. 108e. The draft HRA is now included as Appendix A-4b. See Section 6.16 for analyses on Cumulative Impacts. See GC-1 – Induced Growth. 108f. See Response 87. Construction truck trips are analyzed at Section 6.13. See GC-1 – Induced Growth.	1.2, 5.7, 3.1, 6.1, 6.13, 6.14, 6.16.1, Appendix A-4b,

109	109a. See Responses 92-94. 109b. See Response 109a. See GC-1 – Induced Growth. The Recommended Plan will not impact operational truck traffic. 109c. See GC-2 – Truck Management Plan. See GC-1 – Induced Growth. The Recommended Plan will not interfere with the Truck Management Plan.	3.13.2, 6.1, 6.13
110	110a. Title VI applies to recipients of federal financial assistance recipients but not USACE itself. However, USACE fully complies with Executive Order 12898. See Response 15 and 81. USACE does not know what DOD regulations commenter is referring to because the citations provided, 40 C.F.R. §§ 195.1, 195.3, do not appear to be relevant. 110b. The Draft IFR/EA discusses its compliance with EO 14008 in Sections 3.1, 5.4, and 5.5. USACE is not a party to the Title VI informal resolution agreement and EPA agrees that it does not apply to this Project, but USACE has committed with the Port to public engagement with WOEIP and other community groups regarding this Project. See Comment and Response 15. The Recommended Plan is a water infrastructure investment project that will lead to better environmental outcomes from more efficient marine vessel transport and wetland creation. See Section 6.14. USACE will share commenter's concerns regarding operations with the Port of Oakland.	3.1, 5.4, 5.5, 6.14
111	See GC-1 – Induced Growth for an explanation for how the Recommended Plan will not induce growth, therefore Port operations are outside the scope of the Draft IFR/EA. The Draft IFR/EA's air quality analysis is appropriately scoped. As shown in the 2020 Tiago Report, a decrease in vessel trips is expected when compared to a future without project. Further, the commenter's referenced Jungen Article, explained that ULCVs result in ecologies of scale. See Section 6.14 for an analysis of the long-term marine emissions by alternative, showing that we expect less GHG emissions from the Recommended Plan. Commenter is correct that larger vessels spend more time docked on average, however, docked ships are on shore power, therefore they do not contribute to GHGs while docked. Again, the Recommended Plan will not induce growth.	1.2, 5.7, 6.13, 6.14
112	What the commenter describes as "at anchor" emissions are referred to as idle times and is analyzed in the Draft IFR/EA. The issue of increased idle times and its associated emissions is one of the problems the Recommended Plan will address by allowing for more efficient vessel transit. For instance, smaller vessels will no longer	2.1.1, 5.7, 6.14

	have to wait for larger vessels to maneuver in and out of the harbor to berth and larger vessels will no longer have to wait for the right tide to berth. See Section 6.14 for an analysis of expected GHG emission reductions from the Project.	
113	See GC-1 – Induced Growth. Operational impacts are outside the scope of this project. See 6.13 and 6.14 for air quality analysis.	5.7, 6.13, 6.14
114	For an analysis of cumulative air quality impacts see Section 6.16. Section 3.1 acknowledges the fact that the West Oakland community is impacted by cumulative air pollution. The Draft IFR/EA provides accurate air emissions estimates in compliance with the Clean Air Act.	6.13, 6.14, 6.16
115	115a. The Recommended Plan will not result in induced throughput as explained in GC-1. 115b. The Recommended Plan will not modify the Truck Management Plan and the Recommended Plan will not cause an increase in truck transports, see GC-1, GC-2. Therefore, a detailed discussion of the Truck Management Plan and truck operations is outside the scope of the Draft IFR/EA.	1.2, 5.7
116	The Draft IFR/EA appropriately analyzes air quality impacts resulting from the Recommended Plan and its alternatives. At this time, USACE has made an initial determination that, with implementation of the recommended avoidance and minimization measures, the impacts of the Recommended Plan would be less than significant and thus an EA is appropriate in this situation. The Draft IFR/EA utilizes BAAQMD reports and models. USACE has coordinated with BAAQMD through the Resource Agency Working Group meetings and will continue to coordinate with them as appropriate.	6.13, 6.14
117	The Draft IFR/EA analyzes GHG and climate change impacts in Section 6.14. Indirect Long-term impacts are expected to lower GHG levels. This is because the project will lessen vessel idle times and the PPX Gen III and IV vessels are newer and more efficient than the older vessels they are replacing. GHG will also be reduced by sequestration from wetland creation from beneficial use of dredged material from the Recommended Plan. Therefore, commenter is incorrect in claiming that the Recommended Plan will cause an increase in GHG. The Recommended Plan will assist the Port to meet their climate goals. In fact, as explained in Section 3.13.2 of Draft IFR/EA, the Port reduced DPM emissions by 86% despite seeing an 8% higher cargo throughput. Reductions are from regulatory changes, fleet turnover, infrastructure upgrades, and other programs implemented by the Port. Further, on March 9, 2023, the Port approved an environmental ordinance requiring tenants that operate	3.13.2, 6.14

	cargo-handling equipment to create a plan for converting to zero-emissions. Therefore, USACE's determination that climate change impacts will be insignificant is justified.	
118	118a. Water Quality impacts are discussed in Section 6.4 of the Draft IFR/EA. Dredging activities are common within the Port of Oakland and specifically the turning basins as USACE dredges this footprint annually. USACE has extensive experience in dredging and sediments throughout the SF Bay. Waters in the turning basins are naturally turbid because of resuspension of sediments from wind, waves, tides, and frequent ship transit. Generally, plumes created from dredging are short-lived. These impacts are appropriately considered in the Draft IFR/EA. Environmental work windows are established by NMFS and USFWS for the entire SF Bay for special status species. These windows set for when those species are unlikely to be present and are effective in avoiding impacts to them. 118b. USACE disagrees with commenter's contention that the Draft IFR/EA inappropriately minimizes significance. Waters in the turning basins are naturally turbid because of resuspension of sediments from wind, waves, tides, and frequent ship transit. In addition, dredging activities are common within the Port of Oakland and specifically the turning basins as USACE dredges this footprint annually. Finally, as an active Port and turning basin, it is routinely subject to disturbance. For areas with suspected contaminants, silt curtains would be deployed to minimize aquatic resuspension and aquatic work would be conducted within established work windows for the project location to avoid or minimize any potential effects to species during sensitive life stages. Most contaminants are tightly bound to sediments and are not easily released during short-term resuspension (e.g., metals) or are generally not very soluble in water (e.g., pesticides, PCBs, and polyaromatic hydrocarbons). Generally, plumes created from dredging are short-lived. These impacts from dredging on wildlife are appropriately considered in the Draft IFR/EA. See Section 6.5. The Recommended Plan does not include aquatic disposal. 118c. Longfin smelt are not expected to be in the project area. There are established work windows for salmonids and neither salmonids nor Green Sturgeon spawn in the study area. These factors limit the potential impacts of dredging on these species of concern. The types of impacts listed by the commenter are not expected in an aquatic environment that is already subjected to significant disturbance and dredging already. See Section 6.6.	6.4.1, 6.4.2, 6.5.1, 6.6, 6.6.1, 6.6.2, 6.16, Appendices A-1, A-1b, A-7

	118d. The Recommended Plan's footprint is an active Port and turning basin. Many of the largest ships utilizing the turning basin do so by taking up almost the entire diameter. Therefore, when they turn, they disturb the entire footprint of the turning basin. This means that this area is already highly disturbed in terms of both noise and turbidity. The additional noise and turbidity from dredging activities is equivalent to that of the ambient ship activity. The Draft IFR/EA has also been revised to include pile driving and its associated impacts. See section 6.6.1, 6.6.2. 118e. Should the Recommended Plan be approved for construction, USACE and the Port will consult with NMFS, USFWS, and CDFW. As required by law, USACE and the Port will comply with those specific mitigation measures provided during consultation. The Appendix provides a list of measures that USACE believes will be required but recognizes that NMFS, USFWS, and CDFW are the authority on ESA species. See Appendices A-1, A-1b, A-7. 118f. The Draft IFR/EA covers how maintenance dredging will change with the widening of the turning basins. Additional sediment and emissions are expected to result from the Recommended Plan. However, with the expectation of beneficial use and vessel efficiencies, net GHG will be less than a future without project. In addition, the new footprint would be analyzed pursuant to NEPA in future USACE San Francisco Bay operation and maintenance dredging environmental documents. Section 6.16.	
119	Potential impacts associated with possible contaminants in dredge or fill material is covered in Section 6.12. Dredge material characteristics specific to the Recommended Plan footprint is covered in 3.12. Based on existing sampling and analysis, the aquatic material is not expected to contain elevated COCs. The Draft IFR/EA explains that studies show that there is no significant transfer of metal concentrations into dissolved phase during dredging and that organic contaminants are not very soluble in water. Silt curtains will be utilized to further minimize potential suspension. Therefore, cetacean populations should not be significantly impacted by any contaminants that may be found in these sediments.	3.12, 6.12
120	The Draft IFR/EA Section 6.6 explains that dredging activities will be limited to the established work windows when fish such as the Chinhook Salmon are less likely to be present. Doing so will avoid impacts these species. Therefore, regardless of climate change impacts to species sensitivities, the salmonid should not be present in the project location.	6.6

121	The report identifies where contaminated material is expected and lays out mitigation measures to prevent suspended contaminants from causing significant adverse impacts to aquatic species. Sediment testing will be conducted prior to requesting a water quality certification and before the project seeks permission from the DMMO. Both provide opportunities for public engagement. Appropriate location and use of mitigation measures will be detailed at that time. Suspected contaminated material will be removed via landside excavation to minimize impacts to the aquatic environment and disposed of appropriately, such as at a Class I or Class II landfill.	6.12
123	The LTMS has established work windows that were developed in coordination with multiple resource agencies in the San Francisco Bay, for dredging activities based on the presence or absence of the special status species. When USACE believes that the species are not present, despite being outside the work window, USACE will consult with NMFS or USFWS as appropriate, to extend the work window. Additional mitigation measures can be required under those circumstances. For historical information on LTMS work windows please see the 2015-2024 Operations and Maintenance Dredging EA/EIR and the LTMS Policy EIS/EIR 1998. Finally, the project will coordinate with the USFWS on impacts to California Least Tern. We currently do not expect adverse effects to Least Tern from the Recommended Plan since it is located away from the Alameda colony and is not in preferred feeding areas.	6.6
124	See GC-1 – Induced Growth. This comment also illustrates how market demand is the driving factor for growth and cargo throughput. It is indeed independent from the Recommended Plan and the Recommended Plan can neither prevent nor enable it.	1.2, 5.7
125	125a. Commenter suggest without evidence that larger vessels are more likely to cause accidents. PPX Gen III and IV vessels are projected to arrive at the Port of Oakland in greater numbers in both a future with and without project. Widening the Inner and Outer Harbor turning basins would reduce the number of navigation hazards for ULCVs to navigate while transiting the harbor and would therefore decrease the risk of oil spills. 125b. See Response 125a. USACE does not have authority over the EPA's 2013 Vessel General Permit program. Commenter has not explained how lack of compliance with this program is common or how general compliance would be impacted by the Recommended Plan.	1.2, 4.1, 5.7
126	There is an established speed limit when transitioning into the Bay and it applies to all vessels no matter the size. However, larger vessels are	1.2, 5.7

	more difficult to control, thus speeds are expected to be slower. The Recommended Plan would result in a reduction in the number of vessel calls in comparison to a future without project. Blue and humpback whales are not expected in the immediate project area and would not be impacted. The commenter has also not provided any evidence that larger ships are more likely to strike marine mammals than smaller ships.	
127	Larger vessels are not expected to generate more noise. The Recommended Plan will result in fewer vessels calls in comparison to a future without project and a reduction in frequency of noise disturbance. In a future without project, under a moderate growth scenario, the Port is expected to see approximately 40 vessel calls a week, compared to a future with project vessel call amount of 29. Under commenter's logic, this would likely reduce the amount of noise, not increase it. Further, increased visitation by PPX Gen III/IV vessels are expected independent of the Recommended Plan. Therefore, the Recommended Plan would not increase noise impacts.	6.15, 6.16
128	See Response 118c and 127. The longfin smelt is subjected to vessel traffic noise regardless of the Recommended Plan's future.	6.6.1, 6.16
129	Please see Section 6.6 for a discussion of MMPA applicability. USACE will be coordinating with NMFS over in-water pile-driving work required by the re-alignment of the Inner Harbor Turning Basin to ensure proper protections are in place. USACE will pursue an incidental harassment authorization through coordination with NMFS, if necessary. Marine mammal monitors would be deployed during construction. See Response 68f regarding noise. Dredging noise should not be above ambient ship noises in an active Port and turning basin. See GC-1 – Induced Growth.	5.7, 6.6, 6.6.1, 6.6.2, 6.15
130	See Section 1.2 of the Draft IFR/EA for the purpose and need statement. As explained there, PPX Gen III vessels are only able to utilize the turning basins under very specific circumstances, otherwise it is unsafe. Hundreds of PPX Gen III vessels call each year. PPX Gen IV (ULCVs) vessels are unable to use the turning basins at all, but can call at the Port by submitting to even more restrictions than the PPX Gen III. The Recommended Plan would widen the basins enough for both types of ships to utilize them to turn safely. By alleviating the restrictions on these vessels, it would reduce the amount of vessel idling times and other associated complications. This would lead to overall GHG reductions. See GC-1 and Response 104 for responses to induced growth and "debottlenecking". Therefore, the purpose and need is appropriately characterized.	1.2, 5.7
131	The Port of Long Beach finalized its NEPA document and signed its	1.2, 4.6, 5.7

	ROD in July of 2022 and responded to commenter's letter in Appendix O of that NEPA document. The Draft IFR/EA Section 4.6 discusses how vessels generally travel to the West Coast Ports under a rotation, arriving first at the Port of Long Beach, before traveling north to the Port of Oakland, Seattle, or British Columbia. Generally, the Port of Oakland is a vessel's last stop before returning to Asia. The reasons for this are based upon fixed factors like geography. Port improvement projects such as the one at Long Beach or the one proposed here, have no impact on those factors. Therefore, the Port of Long Beach's improvement plans will not reduce the need for expanding the turning basins at the Port of Oakland.	
131	131a. The Draft IFR/EA includes appropriate mitigation measures. A full list can be found in Appendix A-7. See GC-1 for a response to induced growth. Since the project will not induce growth, mitigation measures for growth inducement are not appropriate. 131b. USACE is aware of many efforts in the State to move toward zero-emission construction equipment. However, it is not apparent that this type of equipment is widely available currently. USACE has committed to EPA Tier 4 Off-road construction equipment among other measures, see Appendix A-7. The Recommended Plan will ultimately reduce GHG over time. See GC-1 and Response 104 for induced growth and "debottlenecking" response. 131c. USACE will take the commenter's recommendation for placing air monitors, with input from local residents, into consideration. Monitors were not initially considered because it would be difficult to determine what impacts could be directly attributed to the Recommended Plan. However, USACE is open to continuing to discuss with the public feasible ways to implement better air quality monitoring. 131d. USACE and the Port will continue to coordinate with the EPA on the reduction of air quality impacts, especially with respect to the adjacent community. 131e. Section 6.14 of the Draft IFR/EA discusses emissions impacts from the project and explains that the Recommended Plan will result in a reduction of emissions from reduced idling, greater efficiency from newer, larger vessels, electric dredging of the Recommended Plan, and sequestration from wetland creation from beneficial use. Commenter's provided mitigation measures are not required. Further, the Recommended Plan does not interfere with any current programs	3.13.2, 5.7, 6.13, 6.14, Appendix A-7

	to achieve next-zero Port emissions. It is unclear how independent NEPA and CEQA documents prevent discussion of mitigation measures. The documents are not required to be integrated and are appropriately separated for the reasons stated in Response 1. 131f. The Draft IFR/EA does not ignore BAAQMD, CARB, or WOEIP plans. See Response 94. The reduction strategies contained in the Owning Our Air: The West Oakland Community Action Plan are generally out of the scope the Recommended Plan. However, USACE will have restrictions on equipment idling times, vegetative ground cover where applicable, PM and NOx reduction requirements, and Tier 4 engines on off-road construction equipment. Construction trucks will abide by the Truck Management Plan in place. See GC-2. For responses to induced growth comments see GC-1. 131g. As explained in 131e, the Recommended Plan would result in emissions reductions from a future without project. The ULCVs are larger but also significantly more efficient. The suggestions commenter has made here are outside the scope of this project. 131h. Noise from ship traffic is not expected to increase as a result of the Recommended Plan and no mitigation is required. 131i.Vessels are already limited to a maximum of 15 knots in the San Francisco Bay. 131j. The Draft IFR/EA did not find any significant and unavoidable impacts to sea level rise resulting from the project. Mitigation is not required. However, the Recommended Plan will beneficially reuse all suitable material at San Francisco Bay wetland sites that will mitigate sea level rise, generally.	
132	USACE developed a reasonable range of alternatives to address to address the purpose and need as described in Draft IFR/EA 1.2. The turning basins need to be widened to allow PPX Gen III and IV vessels to turn safely. Zero-emission construction equipment is not widely available, the alternatives and Recommended Plan are consistent with all applicable federal and state laws, vessel speeds are already limited in the San Francisco Bay, and dredged material will be placed in a local wetland restoration site to assist in sea level rise mitigation.	1.2, 7.1
133	While there are benefits to combining NEPA and CEQA documents, the competing timelines for authorization of the project required separation of the Draft IFR/EA from the Port's EIR. USACE and the	NA

	Port have committed to fully coordinating to ensure consistency. The public and agency partners will be provided the opportunity to engage with the project under both NEPA and CEQA. Agency partners have had significant engagement and are very familiar with this Project, which will assist in their reviews. Both USACE and the Port have committed to engaging with the public, including the commenter, to ensure they are able to track both the federal and state processes. The Port is actively engaged in USACE's NEPA process, therefore, allowing commenters to suggest mitigation measures under either entity's authority so long as they are within the scope of the project. Should the CEQA review process result in any changes to the Recommended Plan, USACE would determine what additional NEPA analysis would be necessary as appropriate.	
134	USACE has re-released the Draft IFR/EA and is providing this additional opportunity to comment. USACE has also scheduled additional public meetings. Commenter is encouraged to comment again and participate. If more time is required, please request an extension.	
135	135a. The Section 6.4 analyzes water quality impacts and a 404(b)(1) analysis is found in Appendix A-3. USACE will seek a Clean Water Act section 401 certification if the Recommended Plan is authorized for construction. 135b.See Responses GC-1, 95, and 96. Commenter does not name a specific type of fill that USACE has failed to analyze. 135c. Generally, the California Regional Water Boards find that they are unable to provide a 401 Water Quality Certification at this stage of the process because more detailed plans are needed. Such plans are only available during the pre-construction design phase. However, USACE has actively engaged with the SF Regional Water Quality Control Board so as to obtain a Certification during the appropriate planning phase. The public will have another opportunity to engage specifically on Water Quality during the 401 Certification process. See Response 135a. 135d.See responses GC-1, 95, 96, and 135a-c. Further, commenter should recognize that all suitable dredged material will be placed at a beneficial use wetland restoration site. Only if the material is unsuitable, will it be taken to a landfill. 135e. See responses GC-1, 95, 99, 135a-c.	1.2, 5.7, 6.4, Appendix A-3

136	See above Responses GC-1 with regard to induced growth, “debottlenecking”, alternatives, and mitigation. The project team has not identified any significant and unavoidable impacts that would trigger the preparation of an EIS at this stage. An EA remains the appropriate document. All impacts have been mitigated to less than significant with respect to NEPA. The Draft IFR/EA will be recirculated due to some project modifications to the alignment of the Turning Basins based on public comment. USACE encourages commenter to engage again and provide timely comment.	Throughout

EARTHJUSTICE

West Oakland Environmental Indicators Project

SIERRA CLUB
SAN FRANCISCO BAY

Union of Concerned Scientists

CENTER for BIOLOGICAL DIVERSITY

VIA ELECTRONIC SUBMISSION

February 14, 2022

Mr. Eric Jolliffe, Environmental Planner
U.S. Army Corps of Engineers
450 Golden Gate Ave, 4th Floor
San Francisco, CA 94102
OaklandHarborTurningBasinsStudy@usace.army.mil

RE: Comments on Oakland Harbor Turning Basins Widening Navigation Study; Draft Integrated Feasibility Report and Environmental Assessment

Mr. Jolliffe:

West Oakland Environmental Indicators Project ("WOEIP"), Earthjustice, Sierra Club, Union of Concerned Scientists, and Center for Biological Diversity submit this letter to comment on the U.S. Army Corps of Engineers' issuance on December 17, 2021 of a Draft Integrated Feasibility Report and Environmental Assessment ("Draft Report") for the widening of the Oakland Harbor Turning Basins (the "Project"). The Port of Oakland (the "Port") is the non-federal sponsor of the project and will be a 50% cost-share partner together with the Army Corps for the Project.

The undersigned organizations have serious concerns about the Army Corps' failure to comply with the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA") in issuing the Draft Report. The Army Corps has mischaracterized activities that could facilitate a major expansion at the Port as a mere construction project, which creates errors and omissions of analysis that pervade the entire Report.

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CALIFORNIA OFFICE 50 CALIFORNIA STREET, SUITE 500 SAN FRANCISCO, CA 94111

T: 415.217.2000 F: 415.217.2040 CAOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

By exploring only the hyper-local impacts of construction, the Draft Report fails to adequately analyze the potential environmental justice impacts that expanded freight throughput could have on the local community, which is already disproportionately impacted by pollution and heavy industrial activity. The Draft Report also fails to analyze the operational impacts that an expansion of the Turning Basins could have on air quality, climate change and greenhouse gas emissions, water quality, and impacts to local species and marine mammals—instead dismissing all of these impacts as insignificant in an unsupported Finding of No Significant Impact ("FONSI"). 95

Furthermore, the Draft Report fails to clearly identify the need for the Project at this time and fails to propose meaningful mitigation measures or reasonable alternatives to the Project. It also inexplicably segments out NEPA compliance from a forthcoming CEQA process that the Port will lead, thereby depriving members of the public of the opportunity to provide meaningful and informed comments. The Draft Report also fails to comply with the Clean Water Act. We request that the Army Corps address the significant flaws and omissions within the Draft Report, as described in detail below. 96 97 98

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TABLE OF CONTENTS

The Draft Report Fails to Comply with the National Environmental Policy Act

The Draft Report contains significant flaws and omissions, and fails to comply with NEPA. The central flaw in the Draft Report is the Corps' unsubstantiated conclusion that the environmental impacts of the Project will be exclusively generated by construction activity.

This Project is much larger than a mere construction project: it will remove nearly 2 million cubic yards of dredged and excavated material over 2.5 years, enable dramatically larger vessels to call on the Port of Oakland with greater frequency, and could fuel a major growth in cargo volume, which would produce concomitant increases in truck traffic, marine vessel traffic, and other significant impacts on the environment and the local community.

99

The last time the Port and the Army Corps seriously evaluated the environmental impacts of expanding the Oakland Harbor Turning Basins ("Turning Basins") was in 1998.[1] At that time, the Port and the Corps anticipated that the largest deep draft vessel expected to be using the Basins—called a "design vessel"—was a container ship 1,138 feet in length, with a capacity to carry 6,500 shipping containers known as twenty-foot equivalent units ("TEUs").[2]

Today, the Corps anticipates a design vessel "with nearly triple the capacity of the original design vessel," with a length of 1,310 feet and capacity to carry 19,000 TEUs.[3] If vessels of this new size are to be calling on the Port more frequently, as the Draft Report predicts,[4] then the Port will have the ability to dramatically expand its cargo throughput capacity.

But the Corps never analyzed in the Draft Report whether that reasonably foreseeable outcome—namely, expanding cargo throughput capacity—would occur at all.[5] Instead, the Corps categorized the expansion of the Turning Basins in this Report as a mere construction project with only local impacts, and it improperly elected to produce an Environmental Assessment ("EA") and a FONSI instead of a full Environmental Impact Statement ("EIS"). The Corps' Draft Report fails to adequately analyze the potential for significant impacts that this Project may produce.

100

Furthermore, the Corps' FONSI is arbitrary and capricious for relying on an inadequate EA.

[1] Port of Oakland & U.S. Army Corps of Engineers, "Oakland Harbor Navigation Improvement (-50 Foot) Project, Final Feasibility Study" (May 1998).

[2] *Id.* at 5-4 to 5-15.

[3] See Draft Report, pp. ii-iii.

[4] See Draft Report, p. 100.

[5] See Draft Report, p. 130 ("[O]perational effects associated with freight volumes . . . are not discussed further in this analysis.").

NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment."[6] In other words, "[a]n EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. To trigger this requirement, a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a project may have a significant effect is sufficient."[7]

100

When a court reviews an agency's decision to issue a FONSI, and thus not to prepare an EIS, "the arbitrary and capricious standard under the [Administrative Procedure Act] requires a court 'to determine whether the agency has taken a "hard look" at the consequences of its actions, 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.'"[8]

As described below, this Project will significantly affect the human environment in communities near the Port, and the Army Corps failed to take a hard look at the consequences of expanding the Turning Basins. The undersigned organizations urge the Corps to withdraw its deficient EA and unsupported FONSI, and instead prepare a full EIS that provides adequate opportunity for public comment.

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[6] 42 U.S.C. § 4332(C).

[7] *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1099 (D. Mont. 2017), *amended in part, adhered to in part*, 2017 WL 5047901 (D. Mont. 2017) (citing *Ocean Advocates v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 864–65 (9th Cir. 2005)).

[8] *Montana Envtl. Info. Ctr.*, 274 F. Supp. 3d at 1099 (citing *Barnes v. U.S. Dept. of Transp*., 655 F.3d 1124, 1132 (9th Cir. 2011)).

A. *The Scope of the Project Is Too Narrowly Defined*

The Draft Report is misleading because it defines the scope of the Project far too narrowly as a construction activity, rather than a project that has the potential to dramatically expand Port cargo capacity. NEPA requires that an agency must provide a complete and accurate description of a proposed federal action.[9] Here, the Corps and the Port have limited the scope of the Project to the dredging and construction activities themselves, ignoring the significant impacts that could be a predictable outgrowth from completion of the Project.

Rather than acknowledge that widening the Turning Basins could foreseeably induce increased cargo volume and fuel the ongoing expansion of the Port's import and export activity, the Draft Report makes two invalid assumptions: (1) that dredging and construction activity will be the primary sources of environmental impact, and (2) that the Project will not have any effect on expansion of cargo volume throughput at the Port. The Draft Report fails to substantiate or analyze either of these assumptions.[10] Based on these flawed assumptions, the Draft Report analyzes the physical boundaries of environmental impacts within no more than a one-mile radius extending from the center of each of the two circular Turning Basins.[11]

101

The Project's defined scope in the Draft Report is inappropriate because it ignores the reasonably foreseeable possibility that the widening of the Turning Basins could fuel an increase in vessel traffic by larger ships, resulting in increased cargo volume shipping activity to and from the Port, and therefore affecting an area well beyond the immediate radius of the Basins themselves. The Draft Report assumes that callings by larger ships would result in "operational efficiency gains" as well as "greenhouse gas emissions reductions,"[12] and also that bringing larger ships would "increase the efficiency of operations" and "would not change cargo throughput" at the Port.[13] But the Corps failed to adequately analyze or support any of those assumptions.

The Army Corps should redefine the scope of the Project and produce a full EIS that analyzes all of the potentially significant impacts that could flow from widening of the Turning Basins, including the possibility of an increase in cargo handling volume at the Port, as further described in Section I.B.1 below.

[9] *See, e.g., Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289, 322 (1975) ("In order to decide what kind of an environmental impact statement need be prepared, it is necessary first to describe accurately the 'federal action' being taken.").

[10] See, e.g., Draft Report, p. 130.

[11] See Draft Report, pp. 24-26; see also p. 130 ("The potential for *construction activities* to result in adverse environmental justice impacts depends on the geographic relationship of the construction impacts to the environmental justice communities of concern.") (emphasis added); see pp. 84-85 (analyzing air quality impacts only within 2,000 feet of the Turning Basin boundaries rather than throughout the West Oakland community).

[12] Draft Report, p. 125.

The Draft Report Fails to Adequately Analyze Numerous Significant and Cumulative Impacts of the Project

NEPA requires that agencies take a "hard look" at the environmental impacts of their actions before the actions occur.[14] "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."[15] The "'hard look' 'must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.'"[16]

102

The Draft Report fails to take a hard look at many direct, indirect, and cumulative impacts of the proposed action to widen the Turning Basins. Analysis of all the reasonably foreseeable impacts is a crucial aspect of an agency's compliance with NEPA before it may pursue any federal action. The Draft Report was prepared under the NEPA guidelines issued by the Council on Environmental Quality ("CEQ") by the Trump Administration in 2020.[17] Although the 2020 CEQ guidelines eliminated the express mandate to consider cumulative impacts, the Biden Administration's CEQ has proposed to restore the requirement for a cumulative impacts analysis as an essential component of NEPA review.[18] Furthermore, even the currently applicable 2020 regulations require agencies to take a hard look at all potential effects of a project that "are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."[19] The Corps has failed to examine reasonably foreseeable impacts here.

[13] Draft Report, p. 183.
[14] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[15] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).
[16] *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011).
[17] See Draft Report, p. 1.
[18] 86 Fed. Reg. 55,757 (Oct. 7, 2021).
[19] 40 C.F.R. § 1508.1(g); see 40 C.F.R. § 1501.2(b)(2); see *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

Failure to Disclose or Analyze the Potential for Expanded Freight Activity

The Draft Report fails to adequately analyze whether widening the Turning Basins could reasonably result in increased freight volumes flowing through the Port of Oakland and impacting nearby communities. The Corps is legally required under NEPA to disclose the reasonably foreseeable impacts that could result from accommodating larger ships, to allow for an honest and informed decision-making process.[20] Specifically, NEPA requires agencies to identify their methodologies, indicate when necessary information is incomplete or unavailable, and acknowledge scientific disagreement and data gaps.[21] The Corps' review must be thorough and the agency may not "sweep[] negative evidence under the rug."[22]

103

Here, the Corps does not deny that widening the Turning Basins will increase the number of ultra-large ships calling at the Port. "Widening the turning basins would allow for more efficient operation of the vessels within the Oakland Harbor and for the ULCVs [ultra-large container vessels] to call the Port of Oakland *more frequently*."[23]

But in spite of that admission, the Draft Report intentionally omits any analysis of the "operational effects associated with freight volumes" caused by widening the Turning Basins.[24] The Draft Report states without analysis that "the action alternatives would not change the projected overall volumes of freight that would come into the Port."[25] It also asserts that the Project "would not change cargo throughput."[26] The Draft Report also assumes without adequate analysis that (1) a transition to larger vessels will result in a reduced number of voyages over time,[27] (2) relying on larger vessels will reduce emissions due to reduced transit time, thereby resulting in environmental benefits,[28] (3) transitioning to larger vessels would produce operational efficiency gains and therefore reduce greenhouse gas emissions,[29] and (4) transitioning to larger vessels would reduce delays and vessel idling.[30] The Corps fails to base those assertions and conclusions on data or reasoned analysis.

The Draft Report lacks analysis about whether widening the Turning Basins might result in "debottlenecking" the Port's cargo throughput, or alternatively even inducing growth in cargo throughput over time. The U.S. Environmental Protection Agency ("EPA") defines "debottlenecking" as "[a] change in production equipment or processes that frees up additional production capacity up or down-stream of the equipment or process."[31] In the context of the Clean Air Act, "[a]ssessing debottlenecking impacts may be important when calculating emission increases"[32]

104

[20] See 40 C.F.R. § 1500.1 (describing purpose of NEPA to "provide for informed decisionmaking" by federal agencies); see also *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (agency violates NEPA by failing to provide "sufficiently detailed statement of environmental impacts and alternatives" for the public "so as to permit informed decisionmaking"); *City of Davis v. Coleman*, 521 F.2d 661, 674 (9th Cir. 1975) (rejecting agency's assertion in NEPA analysis that a freeway improvement project was merely an accessory to "inevitable industrial development").

[21] 40 C.F.R. §§ 1502.21, 1502.23.

[22] *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 194 (4th Cir. 2005).

[23] See Draft Report, p. 100, emphasis added. The Draft Report identifies ULCVs as Post- Panamax Generation III and IV vessels with a capacity between 9,901 and 23,000 TEUs. See Draft Report, p. 14. See also Draft Report, p. 102 (explaining that a decision to forego widening of the Basins would result in *fewer* ultra-large container vessels than would otherwise call at the Port "if the turning basins had been widened"); see also *id.*,
p. 94.

[24] Draft Report, p. 130.

So too here. Under NEPA, the Army Corps should have analyzed whether a bottleneck exists at the Port, such that expanding the Turning Basins would foreseeably free up additional flow-through capacity of cargo at the Port and cause emissions increases from the various emission sources at the Port—including, but not limited to, cargo handling equipment, truck and rail traffic, and the vessels themselves.

104

Furthermore, the Port failed to consider the alternative scenario that could also cause significant and foreseeable impacts: namely, that expanding the width of the Turning Basins could itself *induce* growth in cargo throughput over time. Failure to analyze a project's probable impact on growth violates NEPA.[33] The Port of Oakland has itself already observed in its 2020 "Emissions Inventory Report" that the trend of visitation by ever-larger ships correlates with a "gradual increase in annual TEU [cargo] throughput."[34]

105a

And existing economic data and emerging research suggest that ports that expand their capacity to receive ultra-large container ships may experience a variety of economic pressures to expand operations, many of which produce adverse environmental impacts. For example, a 2014 report by the Port of Long Beach's acting deputy executive director and chief operating officer concludes: "[T]he trend toward larger vessels will have significant implications for ports that compete to service them as well as for the land side warehouse, trucking and rail operations that must accommodate an increase in volumes."[35] More

105b

recently, a 2021 study by Jungen *et al.* discussing the rise of ultra-large container vessels concluded, based on practical observations and empirical studies, that ultra-large container vessels experience "significantly longer port stay times" compared to smaller vessels, which in turn puts "enormous pressure on terminal operators to increase handling efficiency."[36] One way operators may handle such pressure is by increasing reliance on cargo handling equipment, and in particular, by increasing "crane intensity": the number of cranes deployed per calling vessel.[37] That research has already borne out in Florida, where Port Miami reportedly "raced" to replace its crane equipment to be ready to handle an influx in ultra-large "post-Panamax" vessels alongside a planned dredging project that would deepen its shipping canal.[38] Thus, existing research shows it is reasonably foreseeable that callings by ultra-large container ships could increase pressures on local Port-side infrastructure.

105c

[25] Draft Report, p. 130.
[26] Draft Report, p. 183.
[27] See Draft Report, pp. 14, 101-02.
[28] Draft Report, p. 94.
[29] Draft Report, p. 125.
[30] Draft Report, p. 183.
[31] Clean Air Act Handbook Appendix B, Glossary (2021).
[32] *Id.*
[33] See, e.g., *City of Davis v. Coleman*, 521 F.2d 661, 680-681 (9th Cir. 1975).

Further, callings by ultra-large container ships also increase traffic flow to and through ports and nearby communities. The Port of Oakland found in its 2020 Emissions Inventory Report that even a "minimal (1.7%) increase in TEU throughput" between 2017 and 2020 produced a "roughly 30% increase in reported truck activity (i.e., trips)."[39] Complementing that finding, the Jungen *et al.* study described in the previous paragraph found a relationship between the number of containers handled per port call (also known as "call size") and coastal road traffic, apparently by trucks transporting the cargo flowing to and from the ultra-large vessels calling on local ports.[40] "Especially ports with a high modal share of road transportation show increased gate congestion in relation to arrivals of larger vessels."[41] In other words, as the number of containers per vessel goes up, so too does the local truck traffic. These data are further corroborated by a recent short paper issued by the California Air Resources Board on the emissions impacts of recent congestion at California ports, which noted the strong correlation between increases in cargo imports, traffic congestion at ports, and resulting regional air pollution.[42]

105d

Thus, it is reasonably foreseeable that widening the Turning Basins could expand cargo throughput and cause temporal spikes in cargo handling and traffic flow to and through the local community when such vessels call on the Port, with resulting environmental impacts. And if ultra-large vessels call on the Port more frequently as a result of the expansion of the Turning Basins, it also stands to reason that there could be a commensurate increase in cargo throughput flowing through the Port of Oakland.

After all, the expansion of the Turning Basins will enable container ships—up to *three times* larger in terms of capacity than the vessel size the Corps studied in 1998—to call at the Port more frequently, by the Corps' own assessment. The Corps failed to analyze the potential for expansion of Port operations at any length in the Draft Report, and in fact explicitly disavowed its responsibility to do so.[43] The Corps' omission of that analysis represents a failure to comply with NEPA.

The Corps' Draft Report also makes internally inconsistent assumptions regarding forecasted growth in cargo throughput at the Port. For example, the Draft Report concludes that a 2.1% average annual increase in TEU volumes is "expected to persist" through 2050,[44] even though data in the Draft Report from the last decade (2010 to 2020) shows almost no growth in imports and exports at the Port.[45] The Corps' conclusion that growth is inevitable conflicts with the data the Port provided.

106

Meanwhile, separate analysis conducted by the Port indicates that it anticipates a much larger rise in growth of between 2.4 to 3.0% in the coming years.[46] The Corps failed to reconcile these inconsistencies in growth projections and increases in cargo volume, and simultaneously ignored the reasonably foreseeable ways in which this Project could induce future growth at the Port, as described above.

Furthermore, the Army Corps failed to consider whether the potential changes to Howard Terminal might affect the Port's operations. The Draft Report notes that widening the Turning Basins would result in the loss of 10 acres of fast land from the 50-acre Howard Terminal site.[47] The Army Corps did not discuss whether the loss of 20% of that site's land (which the Port presently uses for truck parking and container vessel storage) could impact the Port's ability to handle bottlenecks or additional cargo from the ultra-large vessels that would be visiting more frequently after the widening of the Turning Basins. It also failed to contextualize potential changes to the Howard Terminal site in relation to potential plans to construct a ballpark on that site, and to discuss whether removing land from the Howard Terminal site to facilitate expansion of the Turning Basins would affect the ongoing CEQA process for the potential ballpark. The Army Corps' failure to analyze the Project in the context of present and future uses of Port property violates NEPA.

107

In sum, the Army Corps should have studied the degree to which the expansion of the Turning Basins will further expand the Port's capacity to bring in bigger ships and process more cargo, and it also should have performed a more thorough analysis of forecasted growth in cargo volume at the Port. At worst, the

Project could foreseeably result in an expansion of operational activity in a socioeconomically disadvantaged region that is already disproportionately burdened by pollution and traffic. Such an expansion could foreseeably facilitate more callings by larger ships that carry more cargo and will take longer to unload, spending more time at the Port, and require more cargo handling equipment, rail, and truck visits to handle larger cargo loads.[48] The Army Corps failed to analyze or disclose these reasonably foreseeable outcomes in the Draft Report. The Corps must commit to developing a full EIS that adequately analyzes the impacts of expanded operations, in place of the flawed Environmental Assessment and arbitrary FONSI it has offered here.

[34] "Port of Oakland 2020 Seaport Air Emissions Inventory Final Report" (Nov. 2021) at p. 24, https://www.portofoakland.com/files/PDF/Port%20Oakland%202020%20 Emissions%20Inventory%20Final%20Report.pdf.

[35] Dr. Noel Hacegaba, "Big Ships, Big Challenges: The Impact of Mega Container Vessels on U.S. Port Authorities" (June 30, 2014), https://www.supplychainbrain.com/ ext/resources/secure_download/KellysFiles/WhitePapersAndBenchMarkReports/Portof LongBeach/Hacegaba_PPM_PAPER_7_30_14.pdf.

[36] Hendrik Jungen, et al., "The Rise of Ultra Large Container Vessels: Implications for Seaport Systems and Environmental Considerations," *Dynamics in Logistics* 249-275 (2021) at pp. 258-59, https://link.springer.com/chapter/10.1007/978-3-030-88662-2_12.

[37] *Id.*

[38] "PortMiami Upgrades Cranes in Race for Giant Cargo Ships," *ColumbusCEO* (Oct. 7, 2013), https://www.columbusceo.com/story/business/2013/10/07/portmiami-upgrades- cranes-in-race/22907038007/.

[39] *Id.* at 64; see *id.* at p. 84.

[40] Hendrik Jungen, et al. (2021) at pp. 258-60.

[41] *Id.* at p. 261.

[42] See Cal. Air Resources Board ("CARB"), "Emissions Impacts of Recent Congestion at California Ports" (Sept. 13, 2021), https://ww2.arb.ca.gov/sites/default/files/2021- 09/port_congestion_anchorage_locomotives_truck_emissions_final_%28002%29.pdf.

[43] See Draft Report, p. 130.

[44] See Draft Report, pp. 95, 101.

[45] See Draft Report, Appendix C, pp. 50-51.

[46] See, e.g., Starcrest Consulting Group LLC, Technical Memorandum MAQIP Update – Emissions Forecast and Potential Additional Reduction Strategies (hereinafter "MAQIP Update") (July 2018) at p. 4, https://www.portofoakland.com/files/PDF/WV%20 FINAL%20POAK%20Task%20V%20Technical%20Memo%20(13%20July%2018)scg.pdf. [47] Draft Report, p. 18.

Failure to Analyze Environmental Justice Impacts to Communities Near the Port

Environmental justice communities that surround the Port of Oakland will be burdened by the Project. In particular, the adjacent community of West Oakland experiences disproportionate environmental and public health harms and risks due to proximity to the Port. Pollution from trucks, trains, and ships associated with the Port continuously bombards residents from all sides. In fact, residents have a higher exposure to diesel particulate matter than over 90% of Californians.[49] They are also 99% more likely to have asthma and 96% more likely to be born with low birth weight compared to other people in the state.[50] Despite acknowledging the presence of these environmental justice communities near the Project area, the Army Corps fails to adequately address potential impacts to these communities. The Draft Report's conclusion that the Project will have no significant environmental justice impacts is therefore arbitrary and capricious.

108a

According to the U.S. Environmental Protection Agency (EPA), environmental justice requires "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."[51] Executive Order 12898 directs each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. . . ."[52] The "identification of a disproportionately high and adverse human health or environmental effect on a low-income population [or] minority population should heighten agency attention to alternatives (including alternative sites), mitigation strategies, monitoring needs, and preferences expressed by the affected community or population."[53]

Therefore, under NEPA, agencies conducting environmental review for a proposed project "must not only disclose that certain communities and localities are at greater risk, but must also fully assess these risks."[54] The agency "cannot discount the localized impacts to people for whom the public health impacts are of clear significance."[55] To satisfy this "hard look" standard, the Army Corps must fully assess the public health and other impacts of the Project, including grappling with the substantial evidence suggesting that expanding the Port's Turning Basins could cause major increases in freight activity that will in turn severely affect nearby vulnerable and overburdened communities.

108b

West Oakland is one of the most significant environmental justice communities in California. Residents are surrounded by freeways and sprawling freight complexes that spill into the community from the Port, its railyards, and the Oakland Army Base. West Oakland is bounded by Interstate 880 to the south and west, Interstates 80 and 580 to the north, and Interstate 980 to the east. The Port of Oakland and its associated railyards lie to the south and west.[56] The community thus grapples with the presence of many different and dangerous pollution sources. The number and type of cleanup sites is higher than 99% of the census tracts in California, higher than 99% for groundwater threats, and higher than 93% for hazardous waste generators and sites.[57] Taking the requisite hard look at all significant environmental justice impacts inherently requires an analysis of these types of cumulative impacts. Communities such as West Oakland are designated as environmental justice communities precisely because of the cumulative nature of the impacts they endure. Cumulative impacts are a particular concern for West Oakland because residents are already overburdened by environmental pollution and other stressors and therefore are especially susceptible to adverse health consequences stemming from projects such as this one.

108c

[48] See generally CARB, "Emissions Impacts of Recent Congestion at California Ports," *supra*.

[49] Cal. Environmental Protection Agency (CalEPA), Office of Environmental Health Hazard Assessment (OEHHA), *California Communities Environmental Health Screening Tool* (hereinafter "CalEnviroScreen 4.0"), https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40 (accessed Feb. 1, 2022).

[50] *Id.*

[51] U.S. Environmental Protection Agency (EPA), *Learn About Environmental Justice* (2021), https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (accessed Feb. 1, 2022).

[52] Exec. Order No. 12898, 59 C.F.R. § 32 (1994).

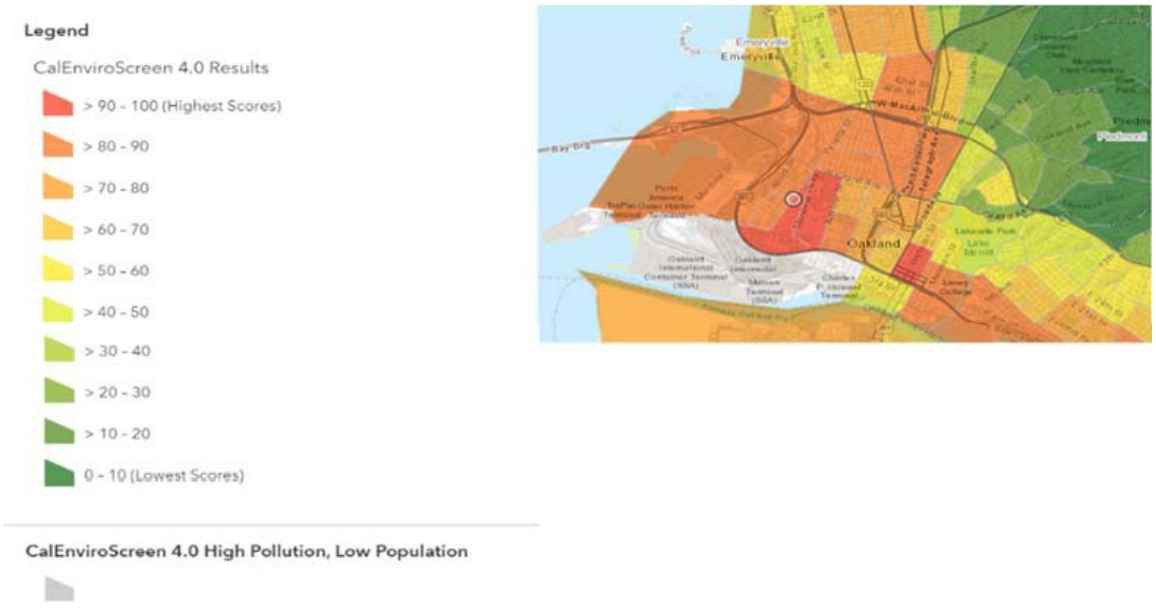
[53] Council on Environmental Quality, *Environmental Justice: Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at p. 10, https://ceq.doe.gov/docs/ceq- regulations-and-guidance/regs/ej/justice.pdf.

[54] *California v. Bernhardt*, 472 F. Supp. 3d 573, 620 (N.D. Cal. 2020).

[55] *Id.* at 622.

[56] Bay Area Air Quality Management District (BAAQMD) & WOEIP, *Owning Our Air: The West Oakland Community Action Plan*, Vol. 1 (Oct. 2019) at p. 2-1, https://www.baaqmd.gov/~/media/files/ab617-community-health/west-oakland/100219-files/final-plan-vol-1-100219-pdf.pdf?la=en.

[57] CalEnviroScreen 4.0, *supra*.



Indeed, West Oakland is one of the most pollution-burdened areas of the state, with elevated levels of diesel particulate matter (diesel PM), fine particulate matter ($PM_{2.5}$), and toxic air contaminants (TACs). The community is ranked in the 80–90th percentile for pollution burden in California.[58] EPA's EJSCREEN tool ranks West Oakland in the 57th percentile for $PM_{2.5}$ exposure in the state and in the 94th percentile nationally.[59] West Oakland is in the 97th percentile for diesel PM exposure in the state and in the 95th percentile nationally.[60] Residents also face some of the highest elevated cancer risks, with EJSCREEN ranking the community in the 56th percentile for cancer risk in the state and in the 78th percentile nationally.[61]

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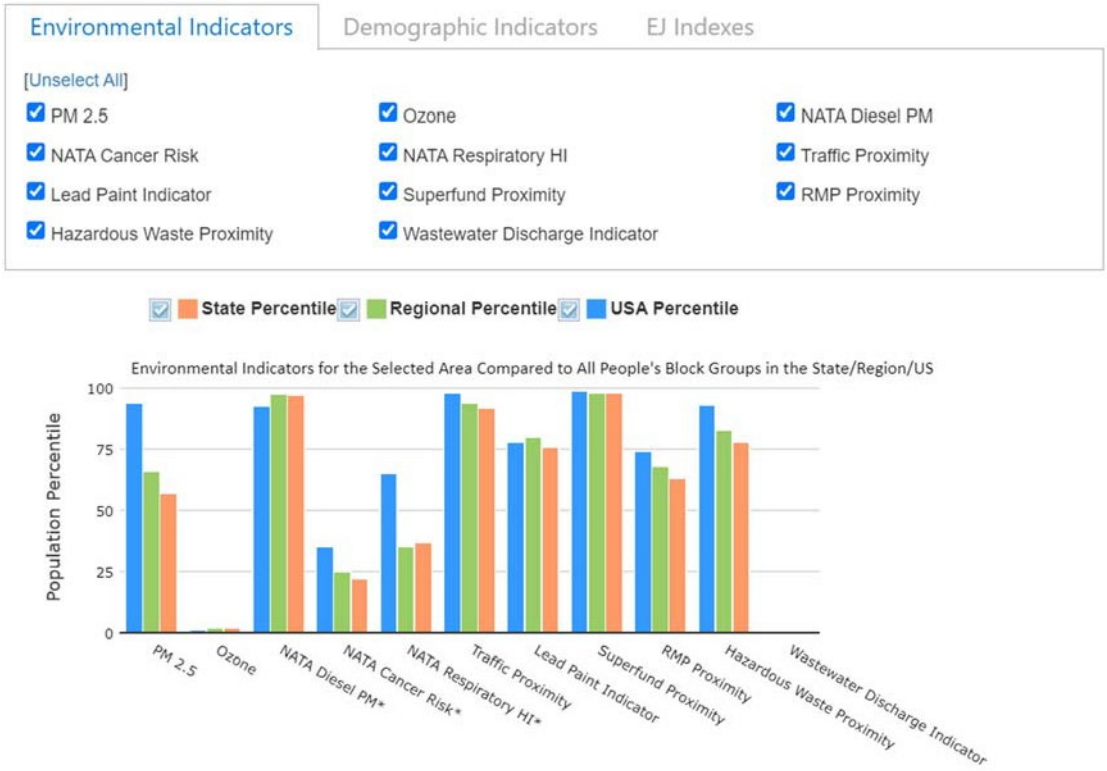
[58] *Id.*

[59] U.S. EPA, *EJSCREEN*, https://ejscreen.epa.gov/mapper/ (accessed Feb. 2, 2022).

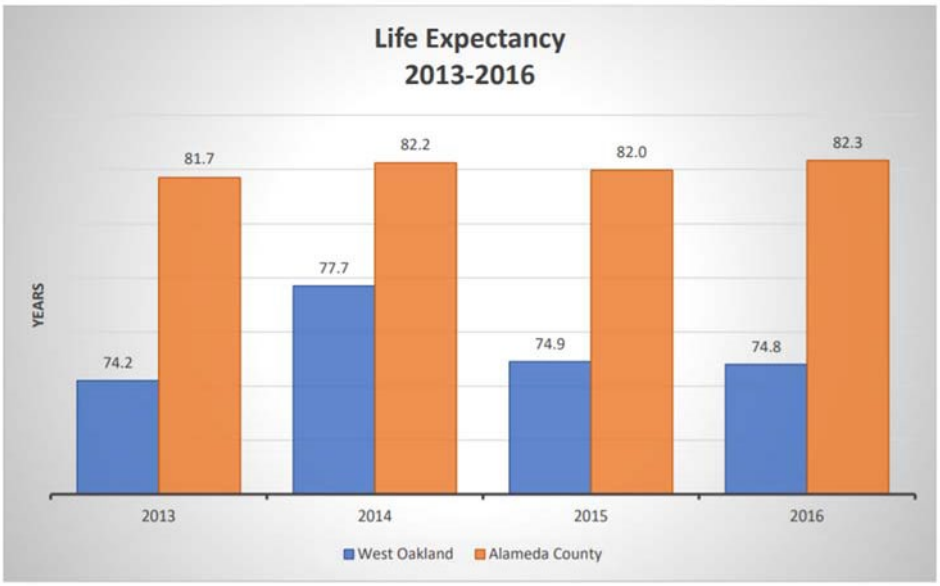
[60] *Id.*

[61] *Id.*



As a result, West Oakland residents experience higher rates of death from cancer as well as heart disease and strokes, and higher rates of asthma emergency visits and hospitalizations compared to the rest of Alameda County.[62] Asthma hospitalizations for West Oakland are about 88% higher than the County average and heart disease deaths are 33% higher.[63] Half of new childhood asthma cases in West Oakland are due to traffic-related air pollution, compared to about 20% of new childhood asthma cases in the nearby affluent and mostly white Oakland Hills neighborhood.[64] Residents also have the lowest life expectancies among the rest of their neighbors in Alameda County.[65] These injustices are compounded by the fact that West Oakland remains primarily a community of color. Approximately 42% of residents are Black (compared to 6% of all Bay Area residents), 18% identify as Latino, and 11% are Asian.[66] About half of the population lives below the Bay Area poverty level (two times the federal poverty level), compared to 25% in Alameda County and 23% in the Bay Area as a whole.[67]

[62] *Owning Our Air: The West Oakland Community Action Plan*, *supra*, at p. 2-9.
[63] *Id.*
[64] Environmental Defense Fund, *Air Pollution's Unequal Impacts in the Bay Area* (Mar. 31, 2021), https://www.edf.org/airqualitymaps/oakland/health-disparities.
[65] *Owning Our Air: The West Oakland Community Action Plan*, *supra*, at pp. 2-7 to 2-9.
[66] *Id.* at p. 2-6.



Source: ACPHD CAPE, with data from Alameda County vital statistics files, 2000-2017

Figure 2-9. Life Expectancy at Birth for West Oakland and Alameda County

Freight activity from the Port already accounts for the lion's share of diesel PM and $PM_{2.5}$ emissions and cancer risk posed by TACs in West Oakland. The Port is responsible for 57% of diesel PM emissions in tons per year (tpy), nearly 20% of $PM_{2.5}$ emissions tpy, and 52% of cancer risk-weighted toxics.[68] Ocean-going vessels and harbor craft are a significant source of emissions from the Port, producing 12 tpy of diesel PM and nearly 16 tpy of $PM_{2.5}$.[69] Cargo handling equipment produces another 2 tpy each of diesel PM and $PM_{2.5}$.[70] The top local contributors to both diesel PM and cancer risk are heavy-duty diesel trucks (about 40%), marine vessels (about 30%), and rail (about 20%).[71] Diesel PM is responsible for over 90% of the cancer risk from local air pollution in West Oakland.[72] Even without accounting for the expanded cargo throughput activity that could result from this Project, the volume of goods moved by the Port on all modes of transit is projected to increase over time, acutely compounding the pollution burden on West Oakland residents.[73]

[67] *Id.*

[68] *Id.* at p. 5-9.

[69] *Id.* at p. 5-7.

[70] *Id.*

[71] *Id.* at p. 5-12.

[72] *Id.* at p. 5-

West Oakland's community characteristics and existing environmental burdens therefore warrant careful consideration of potential "disproportionately high and adverse human health or environmental effects" associated with this Project and any increased freight activity it causes.[74] The Army Corps, however, fails to provide this careful consideration. The Draft Report instead improperly narrows its analysis to "the racial and income characteristics for census tract (CT) within or significantly intersecting both a 0.5-mile and 1-mile radius" of each of the Turning Basins.[75] This small analysis area—further limited to construction impacts alone—not only fails to capture how the Port's increased operations from the Project could foreseeably spill out into the region, but also, incredibly, leaves out most of the directly adjacent 6.5-square- mile neighborhood of West Oakland.

108d

Similarly, the Corps claims the Port conducted a health risk assessment (HRA) for the Project, but the Draft Report and appendices do not include clear references for the public to review and comment on it. The brief discussion in Appendix A-4 discussing criteria pollutant emissions during construction within the small geographic analysis areas is too limited to properly constitute an HRA.[76] There is no discussion of potential local risks and hazards from increases in diesel PM, $PM_{2.5}$, and TAC emissions from either the construction or operations impacts of the Project. The analysis fails entirely to analyze local risks and hazards in the context of nearby environmental justice communities like West Oakland and others in the region that may be impacted by the Project. Finally, the HRA fails to analyze the cumulative impacts from this Project in the context of the existing environmental pollution and threats that already overburden surrounding communities. The HRA therefore lacks the requisite level of information and is so narrow as to be meaningless in assessing health and safety risks. The Corps must complete a full EIS and an HRA that analyze the construction *and* operations impacts of the Project in the whole region.

108e

Local transportation emissions from Port-related sources represent by far the largest share of criteria air pollutant and greenhouse gas emissions in West Oakland and surrounding communities, primarily from drayage trucks, cargo handling equipment, ships and harbor craft, and trains traveling through the railyards located at the Port. The Army Corps must therefore take a hard look at whether the thousands of additional construction-related truck trips as well as dramatically larger ships and associated increase in cargo throughput will further contribute to the air pollution and climate crises and their attendant public health and safety impacts in the region.

108f

[73] See, e.g., MAQIP Update, *supra*, at p. 4 (indicating TEU growth rates between 2.4% to 3.0% in the coming years).

[74] Exec. Order No. 12898, 59 C.F.R. § 32 (1994).

[75] Draft Report, p. 24.

[76] Draft Report, pp. 126, 134.

In addition, the Corps must assess whether this Project conflicts with federal, statewide, and local policies and plans to reduce air pollution and greenhouse gas emissions and protect vulnerable communities in California. Under NEPA, an agency must include discussion of "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls."[77] The EIS must also "discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law."[78]

California has enacted several statutes to protect its disadvantaged communities from air and water pollution and this Project would have a significant adverse impact on the state's ability to meet these goals. For example, California State Assembly Bill (AB) 617 (2017) created a Community Air Protection Program that is focused on reducing exposure in communities most impacted by air pollution, including several near the Port that will be impacted by this Project, such as West Oakland and Richmond.[79] Indeed, West Oakland was selected as a first-year priority community under the program—one of the top ten in the state most impacted by pollution.

109a

WOEIP partnered with the Bay Area Air Quality Management District ("BAAQMD") and California Air Resources Board to develop the West Oakland Community Air Action Plan ("WOCAAP") under AB 617. The WOCAAP implements 89 different strategies to reduce impacts in the community from $PM_{2.5}$, diesel PM, and cancer risk from all toxic air contaminants.[80] The strategies are designed to minimize community exposure to freight activity and, importantly, to transition to a more sustainable and equitable freight system in the region. For example, many of the strategies will require state and local agencies to work together to reduce truck impacts on local streets in West Oakland, limit hours when trucks can operate in the community, and improve truck flow and congestion in the face of increasing visits from large container vessels.[81]

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[77] 40 C.F.R. § 1502.16(a)(5).

[78] 40 C.F.R. § 1506.2(d).

[79] Governor Gavin Newsom. (2020). *Executive Order N-79-20*, https://www.gov.ca. gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf (accessed July 20, 2021); Cal. Air Resources Board, *Community Air Protection Program Communities*, https://ww2.arb.ca.gov/capp-communities (accessed Feb. 2, 2022).

[80] See generally *Owning Our Air: The West Oakland Community Action Plan*, *supra.*

This Project, which will cause thousands of additional truck trips during construction, and could dramatically expand cargo throughput capacity and result in much greater freight activity in and around the Port, conflicts with these emissions reduction strategies and undermines the WOCAAP's goal to establish a sustainable model for freight activity in communities near the Port. The Corps must therefore assess whether this Project will infringe on the state's ability to meet its community protection and emissions reduction goals and discuss measures that will address any conflicts.

109b

Similarly, the Draft Report fails to consider the West Oakland Truck Management Plan ("TMP"), which the City and Port of Oakland adopted in 2019 to reduce the incidence and impacts of trucks driving through and parking in the community.[82] The City and Port are still in the midst of a five-year implementation plan for the TMP, yet the Corps did not analyze whether a huge expansion of truck trips during both the construction and operations phases of this Project could conflict with the goals and implementation of the TMP.

109c

At the federal level, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., prohibits entities receiving federal financial assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin. Pursuant to Title VI, the U.S. Department of Defense, which is the parent agency of the Army Corps, promulgated regulations prohibiting funding recipients from engaging in discrimination.[83] The Port of Oakland receives significant financial assistance from the Corps, as well as the U.S. Department of Transportation, EPA, and other federal agencies, and is a 50% cost share partner with the Army Corps on this Project.[84] The Department of Defense and the Corps thus have an affirmative obligation to ensure that the Port complies with Title VI and the Defense Department's implementing regulations.

110a

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[81] *Id.* at pp. 6-22, 6-26.

[82] City of Oakland & Port of Oakland, "West Oakland Truck Management Plan" (May 2019), https://cao-94612.s3.amazonaws.com/documents/West-Oakland-Truck- Management-Plan-FINAL-APPROVED.pdf.

[83] See 40 C.F.R. §§ 195.1, 195.3.

[84] See, e.g., *2021 Port Infrastructure Development Program Grant Awards*, U.S. Department of Transportation, Maritime Administration, https://bit.ly/3LuFuDQ.

The Port and the Corps fail to satisfy their Title VI obligations for this Project. The Draft Report fails to evaluate whether the Project will disproportionately subject the communities of color that surround the Port to additional air pollution and other serious health threats on the basis of their race. In fact, the Draft Report fails to provide *any* discussion of compliance with Title VI, instead referring to Title VI in one short sentence.[85] We find this especially troubling because the President and other federal agencies have made environmental justice a top priority for the new administration.

110a

The President's Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," issued in January 2021, states:

To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern. Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts. It is therefore the policy of my Administration to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care.[86]

110b

The Corps must therefore hold the Port accountable in its environmental review of this Project. Not only does the Draft Report fail to meaningfully address Title VI, however, it also fails to even mention WOEIP's 2017 Title VI complaint against the Port, which WOEIP filed after the Port continuously authorized freight expansion activities exactly like this Project. The complaint resulted in a Title VI settlement that ultimately imposed public engagement and substantive decision making requirements on the Port by the Department of Transportation and EPA to ensure Title VI-compliant processes at the Port going forward.[87]

The Port and Corps must ensure this Project complies with these requirements and properly analyze any disproportionate impacts on the surrounding community. The analysis must include appropriately tailored, updated mitigation measures that address the harmful externalities of expanded industrial and freight activities resulting from this Project. The Corps must also commit to a meaningful, continuous process for receiving and incorporating input from the West Oakland community—not one where the Corps and Port simply tell the community about its plans and decision making after the fact. If the Army Corps and Port cannot ensure compliance with Title VI or the mitigation measures cannot appropriately address all impacts on surrounding communities, the Corps cannot move forward with the Project.

[85] Draft Report, p. 22.
[86] Executive Order (EO) 14008 (Jan. 27, 2021), § 219.

Failure to Consider Operational Air Quality Impacts at the Port

The Draft Report fails to take the Port's daily operations into account in its analysis of air quality impacts, particularly considering that the proposed Project could not only facilitate ongoing commercial activity at the Port but actually fuel expansion.

In its air quality analysis, the Corps performs a cursory review of the impacts that dredging and construction activities will have on air pollution, based on the Draft Report's underlying assumption that the Project will have only local environmental impacts. Based on that flawed assumption, the Draft Report analyzes the proximity of sensitive receptors—meaning, people who are more sensitive to air pollutants, and the places where they congregate, such as daycares, parks, apartment buildings, and nursing homes—within a constrained 2,000-foot radius of each of the two Turning Basins.[88] The Report further constricts its analysis only to the period from 2027 to 2029, when the Corps estimates construction will take place.[89] But as throughout the entire Draft Report, the assumption that construction is the *only* source of air pollution dramatically underestimates the potential for impacts to air quality, and renders the entire analysis inadequate.

111

The Port is already a major contributor to air pollution in Alameda County. As a complex maritime facility with multiple incoming truck routes, interconnected rail yards and rail lines, the Port's daily operations have significant air quality impacts on the 26,000+ residents of the West Oakland community in particular.[90] Heavy-duty trucks, marine vessels, and rail all operate daily in, around, and through the community to enable the steady flow of cargo to and from the Port.[91]

While the Draft Report implies that a conversion to larger ships will decrease the overall number of vessel trips at the Port,[92] the Corps does not provide adequate support for that assumption. In improving operational efficiency, this Project could conceivably induce growth and even increase the cargo throughput *and* vessel visitation simultaneously at the Port.[93] Even if the Project does somehow decrease the overall number of vessel trips, the larger ships that will be accommodated by this Project carry more cargo and will take longer to unload, spending more time in the harbor.[94] The Port could also conceivably require more cargo handling equipment, rail, and truck visits at any given time to handle the influx of larger cargo loads, resulting in higher localized concentrations of pollution to the communities adjacent to the Port, as discussed in Section I.B.1, *supra*.[95] All of these impacts from cargo throughput will have an impact on regional air pollution and the West Oakland community in particular, which cannot afford any additional pollution. The Draft Report fails to analyze those significant impacts.

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[87] WOEIP's Complaint against the City and Port of Oakland Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Apr. 4, 2017), https://earthjustice.org/ sites/default/files/files/2017-04-04-TitleVI_Complaint.pdf; EPA's Resolution of Administrative Complaints (July 26, 2019), https://earthjustice.org/sites/ default/files/files/Resolution%20Letter%20and%20IRA%20-%20Paul%20Cort%20- 13R%20and%2014R-17-R9%202019-07-26.pdf.

[88] See Draft Report, pp. 84-85 (identifying only the sensitive receptors within 2,000 feet of the Turning Basins).

[89] See Draft Report, p. 183 (analyzing air emissions "based on construction schedule and phasing, proposed construction equipment lists, activity levels, and worker and construction truck trips by phase" from 2027 to 2029).

[90] See generally *Owning Our Air: The West Oakland Community Action Plan*, *supra*.

[91] *Id.* at p. 5-12.

[92] See Draft Report, p. 14.

[93] See Section I.B.1, *supra*.

[94] See "Port of Oakland 2020 Seaport Air Emissions Inventory Final Report," *supra*, at p. 24.

[95] See, e.g., CARB, "Emissions Impacts of Recent Congestion at California Ports," *supra*, at p. 1 (observing that "increased cargo imports are expected to increase the activity of trucks and locomotives moving these containers in/out of the ports").

To provide another specific example, the Draft Report entirely fails to mention or analyze the impact of at-anchor emissions by larger vessels on air emissions. The Port's "Emissions Inventory Report" confirms that ocean-going vessels accounted for more than half of the diesel particulate matter and more than three-quarters of the nitrogen oxide emissions at the Port in 2020.[96] That Report also indicates that the number of hours vessels spent at anchor (awaiting a berth assignment at the Port or their next port of call assignment) increased from 1,505 total hours in 2005 to 6,815 total hours in 2020; the average time at anchor per vessel also increased from 15.2 hours in 2005 to 27.4 hours in 2020.[97] The Corps should have analyzed whether, and to what degree, the increase in anchorage times correlates to the trend of increased callings by larger vessels, which the Port reported in its Emissions Inventory Report.[98] The Corps additionally should have analyzed in the Draft Report the degree to which anchorage times by larger ships (whose visitation will be facilitated by the widening of the Turning Basins) will contribute to the regional air pollution burden. For example, larger ships might foreseeably emit more pollutants per hour while waiting at anchor than smaller ships do—even if there are fewer total ships calling on the Port. The Corps' failure to analyze at-anchor emissions to any degree in the Draft Report violated NEPA.

112

Air pollution is already an urgent health concern in this region. Alameda County has been in marginal nonattainment for the national 8-hour ozone (both the 2008 and the 2015 standards) and moderate non-attainment for the 24-hour $PM_{2.5}$ 2006 standards for multiple years in a row.[99] The movement of goods to and from the Port is a significant source of criteria pollutant emissions (like particulate matter and ozone) that affects the region's nonattainment status, and this Project could reasonably lead to increased freight transportation. The Corps must consider the potential for significant operational impacts to air quality produced by the widening of the Turning Basins, and the Draft Report entirely fails to perform analysis of any operational impacts.[100]

113

[96] "Port of Oakland 2020 Seaport Air Emissions Inventory Final Report," *supra*, at p. 78.
[97] *Id.* at 25.
[98] See *id.* at 24.
[99] See generally EPA, "California Nonattainment / Maintenance Status for Each County by Year for All Criteria Pollutants," (current through Jan. 31, 2022), https://www3.epa.gov/airquality/greenbook/anayo_ca.html.
[100] See Draft Report, p. 130.

The Draft Report also errs by characterizing the increased exposure to ozone and particulate matter as "de minimis" exposure.[101] The Corps' "de minimis" characterization for those pollutants is misleading. As described above, the West Oakland community is already disproportionately exposed to pollution from freeways, rail, industrial activity, and heavy car and truck traffic. Even though federal regulations currently specify "de minimis" levels for ozone and $PM_{2.5}$ at 100 tons per year, any contribution of pollutants must be considered cumulatively alongside all of the other major sources of pollution in the region. The Corps has a responsibility to provide accurate air emissions estimates for this Project, supplement those estimates with details about the calculations and assumptions used to achieve those numbers, and to perform a conformity determination under the Clean Air Act for the aggregated effects of the Project. The Corps did not meet its responsibility to do those things in the Draft Report.

114

The Corps also failed to consider the possibility that callings by larger vessels could result in increased truck traffic to and through the West Oakland community. Even taking as true the Corps' assumption that larger vessels will equate to a lower number of vessel callings—which remains an unanalyzed assumption that the undersigned organizations strongly question—more truck or rail capacity will be necessary to load or offload the increased cargo capacity available on each larger ship that calls on the Port of Oakland.[102] Unless increases in regional truck traffic are limited exclusively to zero-emissions vehicles, then any increase in truck traffic will inevitably increase the air pollution burden on the West Oakland community. The Corps failed to analyze this possibility in any depth in the Draft Report.

115a

The Corps' decision to proceed without analyzing the possibility of an increase in transport truck traffic also ignores regional efforts to reduce the impacts generated by truck congestion. The Port of Oakland finalized a Truck Management Plan for West Oakland in 2019 after considering substantial public input from members of the residential and business communities.[103] Among the issues the Truck Management Plan aims to address are (1) safety for pedestrians and bikers whose routes are regularly criss-crossed by commercial trucks, (2) truck traffic flow and congestion in residential neighborhoods, and (3) idling and parking in illegal spaces not intended for commercial trucks. All of these issues have an indirect—but important—effect on air quality, because commercial trucks that pass regularly through residential areas expose residents to ongoing pollution caused by combustion of fossil fuels. The Army Corps cites the Truck Management Plan in its list of references but fails to discuss it in any depth whatsoever in the Draft Report. Similarly, the Corps did not consider the mitigation measures in West Oakland's AB 617 plan, which require reductions from truck impacts on local streets and improved truck flow and congestion in the face of increasing visits from large container vessels.[104] The Corps' failure to discuss the implications of truck traffic further contributes to a flawed Draft Report.

115b

In sum, the Draft Report utterly disregards the potential air quality impacts that could result from widening the Turning Basins. The Army Corps should perform a full Environmental Impact Statement rather than relying on the flawed EA and FONSI it has prepared here. In revisiting its analysis of air quality impacts, the Corps should ensure that it coordinates with BAAQMD to identify reasonable mitigation commitments that it could undertake, alone or jointly with the Port, to address the potential impacts to regional air quality. Some of those potential mitigation measures are outlined in more detail in Section I.D, *infra*.

116

[101] Draft Report, pp. 80-81.

[102] See discussion of Jungen *et al.* in Section I.B.1, *supra*.

[103] See generally "West Oakland Truck Management Plan," *supra*.

Failure to Analyze Climate Change and Greenhouse Gas Emissions Impacts

The FONSI issued with the Draft Report inexplicably concludes that climate change will be "unaffected by" the proposed Project.[105] That conclusion is faulty and unsupported by analysis. The Corps must revise its Draft Report to issue a full EIS that analyzes the potentially significant impacts to greenhouse gas emissions (and therefore, climate change) that will be fueled by expansion of the Turning Basins and the resultant potential for concomitant growth in freight volume flowing through the Port, either due to debottlenecking or induced growth, as discussed in Section I.B.1 above.

As a general rule, increased cargo throughput equates with an increase in greenhouse gas emissions. Emissions from the Port and port-related activities are determined by the emissions factor of the various pollution sources, multiplied by the level of activity of those pollution sources. As an emissions inventory completed for the Port of Oakland explains: "Simply stated, if the cargo throughput doubles, this analysis assumes the source category activity will also double."[106] Absent major changes to Port equipment and ocean-going vessel technology that would dramatically alter their emissions factors, any increases in cargo throughput capacity caused by the Project will result in substantial greenhouse gas emission increases. The emissions inventory highlights that even under a scenario assuming turnover to lower-emitting technologies, capacity "growth outpaces the emission reductions achieved by control strategies resulting in . . . increases in CO_2 emissions."[107]

117

This relationship between cargo throughput and greenhouse gas emissions is already apparent at West Coast ports amid the surge in cargo movement in 2021. As the California Air Resources Board ("CARB") notes in its 2022 Draft State Implementation Plan, "[i]ncreased cargo imports and congestion of ocean-going vessels at ports across California, together with the related increased activity of trucks and locomotives moving containers in and out of the ports, has recently led to significant emissions increases."[108] Unless there is a decisive, expansive effort by the Port to ensure that any increased freight activity relies on zero-emissions technologies, the Project will surely increase greenhouse gas emissions and contribute to worsening climate impacts. These impacts mean that the Project will impede progress toward achieving a net-zero emissions economy at the Port of Oakland and across the State—which state and local government agencies committed to in the Port of Oakland's Seaport 2020 and Beyond Plan,[109] the City of Oakland's Equitable Climate Action Plan,[110] and the State of California's goal of achieving carbon neutrality by 2045.[111] Under NEPA, the Corps must now assess whether the Project is consistent with, or instead will infringe upon, the ability of the state, the City of Oakland, and the Port to meet their climate goals.[112] The Corps erred in its Draft Report by failing to analyze these conflicts or the potential for significant impacts on greenhouse gases and climate change. And the Corps' FONSI that finds climate change will be "unaffected by" the Project is arbitrary and capricious due to its reliance on a flawed EA.

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[104] *Owning Our Air: The West Oakland Community Action Plan*, *supra*, at pp. 6-22, 6-26.
[105] Draft Report, Appendix A-10, p. 2.
[106] MAQIP Update, *supra*, at p. 4.
[107] *Id.*
[108] CARB, 2022 Draft State Implementation Plan (Jan. 31, 2022) at p. 17, https://ww2.arb.ca.gov/sites/default/files/2022-01/Draft_2022_State_SIP_Strategy.pdf. [109] Port of Oakland, Seaport Air Quality 2020 and Beyond Plan – the Pathway to Zero Emissions (June 13, 2019), https://www.portofoakland.com/files/ PDF/2020%20and%20Beyond%20Plan%20Vol%20I.pdf.
[110] City of Oakland, Oakland 2030 – Equitable Climate Action Plan (July 2020), https://cao-94612.s3.amazonaws.com/documents/Oakland-ECAP-07-24.pdf.
[111] Governor Jerry Brown, Executive Order (EO) B-55-18 to Achieve Carbon Neutrality (Sept. 10, 2018), https://www.ca.gov/archive/gov39/wp-content/uploads/2018/09/9.10.18- Executive-Order.pdf.
[112] 40 C.F.R. § 1506.2(d).

Failure to Analyze Impacts of Dredging on Water Quality

The Draft Report inappropriately fails to analyze the potential for water quality impacts caused by the Project. Specifically, the Report fails to adequately consider the water quality impacts that will result from dredging (and the impacts on species that will result), as well as the risk of contaminant resuspension in the water column and its potential for exacerbation due to climate change. The Draft Report also fails to adequately justify its reliance on work windows to mitigate water quality impacts caused by dredging, as described below.

118a

Dredging

The Corps inappropriately minimizes the significance of sublethal harms to wildlife and fisheries species associated with dredging. The Draft Report describes an anticipated production of more than 1.9 million cubic yards of dredged material while widening the Turning Basins under its preferred alternative.[113] Dredging resuspends sediment and associated organic material, including any contamination within the sediments. This can lead to temporary increases in turbidity and nutrients, reductions in dissolved oxygen, and/or changes in temperature and pH. These water quality impacts can harm fish, benthic animals, and marine mammal foraging. The transit of dredged material can result in spills and the disposal can also resuspend dredged materials.
Additionally, resuspension of contaminated sediments accompanying the proposed dredging project poses a substantial risk to marine life in the project vicinity. The Army Corps failed to adequately analyze any of these potential impacts in the Draft Report, instead only characterizing these types of impacts as "insignificant" in its FONSI.[114]

118b

Longfin smelt, various salmonids, and green sturgeon are among the fish species the Corps identifies in the region. Dredging can cause fish species to suffer gill damage, body abrasion, reduced reproductive success, reduced visibility, decreased predator avoidance, modified territoriality, altered feeding and homing behavior, and flight/avoidance response.[115] The cumulative effects of these and other stressors may lead to a host of harms including reduced reproductive output, immunosuppression, and increased mortality. The Corps must discuss expected effects on regional and protected fish populations in more detail.

118c

Three types of marine mammals—the Pacific harbor seal, California sea lion, and harbor porpoise—are known to exist in the vicinity of the Turning Basins, and these species, too, may suffer adverse impacts from dredging.[116] Specifically, increased turbidity and dredging activity have the potential to disturb marine mammal foraging activities. The Corps declares such effects inconsequential because marine mammals "forage over large areas of San Francisco Bay and can avoid areas of temporarily increased turbidity and dredging disturbance."[117] But such relocation of effort is not without cost. The animals must expend energy to relocate, and distribution of prey is not uniform across time and space. Other threats to marine mammals may loom (*e.g.,* ship strikes, predators) in the areas to which they relocate. Marine mammals may also be impacted by the noise of dredging and those impacts may manifest as changes in feeding, breeding, and predator-avoidance behaviors; flight/avoidance behavior; and changes in dive times, migration routes, and swimming speeds. The Corps must conduct a more searching analysis of potential dredging-related impacts to marine mammals.

118d

[113] Draft Report, pp. iv-v.
[114] See Draft Report, Appendix A-10, p. 2.

The Corps refers vaguely in the Draft Report to techniques that may be used to limit the adverse effects of dredging, such as using silt curtains, "avoiding spillage," and "increasing cycle times."[118] But the Corps barely discusses these at any length in the Draft Report, and even the section of the Appendix dedicated to the development of avoidance and minimization measures couches these obligations in noncommittal language.[119] Further, the Corps fails to discuss the degree to which the various proposed mitigation techniques will be employed to minimize harms to local aquatic species. The Corps must revisit its analysis of the harms to local species associated with dredging, and provide more explicit instructions regarding any required mitigation for dredging-related impacts.

118e

Moreover, the Corps must consider the impacts from maintaining the depth of the Turning Basins. While maintenance dredging of these channels is already an ongoing activity, maintenance of the Basins will necessarily change as a result of the widening project envisioned here. The Draft Report fails to analyze the impacts from continuing to conduct maintenance dredging. Maintenance of the proposed depth is part of this Project and must be evaluated in a full EIS.

118f

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[115] Amelia S. Wenger et al., "A Critical Analysis of the Direct Effects of Dredging on Fish," 18 Fish & Fisheries 967 (Sept. 2017), https://onlinelibrary.wiley.com/ doi/full/10.1111/faf.12218 ; see also Michael E. Kjelland et al., "A review of the potential effects of suspended sediment on fishes: potential dredging-related physiological, behavioral, and transgenerational implications," 35 Enviro. Systems & Decisions 334 (2015), https://link.springer.com/article/10.1007/s10669-015-9557-2.

[116] Draft Report, p. 43.

[117] Draft Report, pp. 152-53.

[118] Draft Report, p. 139; see Draft Report, Appendix A-7, PDF p. 251.

[119] See Draft Report, Appendix A-7, PDF pp. 250-54.

Contaminant Resuspension, and its Exacerbation by Climate Change

The Army Corps also failed to adequately analyze the risks from resuspension of contaminants into the water column, and the possibility that such contamination could be exacerbated by climate change. The resuspension of contaminated sediments accompanying the proposed dredging project poses a substantial risk to marine life in the project vicinity. Such resuspension poses a threat in particular to marine mammals, which—due to high levels of body fat—tend to bioaccumulate lipophilic contaminants.[120]

Benthic sediments like those underlying the greater San Francisco Bay area act as a sink for anthropogenic contaminants including heavy metals (e.g., copper, lead, cadmium and zinc), polycyclic aromatic hydrocarbons ("PAHs"), phthalates, and persistent organic pollutants ("POPs") including polychlorinated biphenyls ("PCBs"), pesticides (e.g., DDT), and flame retardants ("PBDEs").[121] Dredging resuspends seafloor sediments, remobilizing a fraction of the contaminants and making them bioavailable to aquatic life.[122] This bioavailability and uptake can have devastating ecological consequences. For example, remobilized metals like copper and zinc pose a threat to salmon at very low concentrations. Many POPs, including PCBs, bioaccumulate in the fatty tissues of animals and biomagnify up the food chain.[123]

119

Studies of pinnipeds—like the California sea lions and harbor seals that are known to visit the Project area—have demonstrated that elevated POP concentrations lead to reproductive impairment, endocrine disruption, immunotoxicity, neurotoxicity, and skeletal abnormalities.[124] And a growing body of evidence on cetaceans suggests that organochlorine chemicals put certain cetacean species at risk for similar toxic responses.[125] Indeed, scientists studying other cetacean populations have found an association between high PCB-concentrations in females and low recruitment, which in turn leads to declining abundance.[126] The Corps did not consider whether such concerns may also apply to the myriad species that frequent the San Francisco Bay.

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[120] *Cf.* Ross, P.S. et al., "High PCB Concentrations in Free-Ranging Pacific Killer Whales, Orcinus orca: Effects of Age, Sex, and Dietary Preference," 40 Marine Pollution Bull. 504 (2000).
[121] Knott, N.A. et al., "Contemporary Ecological Threats from Historical Pollution Sources: Impacts of Large-Scale Resuspension of Contaminated Sediments on Sessile Invertebrate Recruitment," 46 J. Applied Ecology 770 (2009).
[122] Draft Report, p. 140; Knott et al. (2009), *supra*; Victor, O. et al., "Environmental Effect of Dredging and Geochemical Fractionation of Heavy Metals in Sediments Removed from River," 6 Modern Chem. 44 (2018).

The Corps also must consider how climate change may increase exposure to and bioaccumulation/ biomagnification of certain contaminants in marine organisms including the Chinook salmon. These increases in exposure or bioconcentration may occur (1) as climate change increases contaminant exposure or sensitivity, and/or (2) when contamination leads to an increase in susceptibility to other climate change effects.[127] Alava et al. (2018) estimate climate-induced contaminant amplification in Chinook salmon to be on the order of 10%. The Corps must consider how the proposed dredging and any associated contaminant resuspension would interplay with climate change effects and potentially harm resident fish and wildlife species.

120

Despite the threat posed by contaminant resuspension, the Corps downplays the risk of these contaminants in the Draft Report, making general assumptions that much of the material to be dredged will be "relatively 'clean' material."[128] Such a conclusion is at odds with the fact that contamination is already known to exist at various sites within the scope of the proposed Project.[129] The Corps should commit to conducting water quality sampling prior to approving this Project, and present the data to the public so that dredging project impacts, including contaminant impacts, can be properly analyzed. Should the Project move forward, the Corps should commit to a more frequent, scheduled sampling program of dredged materials over the anticipated course of construction to ensure water quality does not degrade over time or pose risks to local species in any location where dredged materials are to be deposited. If the Project should move forward, any dredging wastes that are found to be contaminated should be handled as hazardous waste and disposed of accordingly, with meaningful consultation to members of the affected community before embarking on such disposal.

121

[123] Ross et al. (2000), *supra*; Hall, A.J. et al., "Predicting the Effects of Polychlorinated Biphenyls on Cetacean Populations Through Impacts on Immunity and Calf Survival," 233 Envtl. Pollution 407 (2018).
[124] Ross et al. (2000), *supra*; Krahn, M.M. et al., "Effects of Age, Sex and Reproductive Status on Persistent Organic Pollutant Concentrations in 'Southern Resident' Killer Whales," 58 Marine Pollution Bull. 1522 (2009); Lundin, J.I. et al., "Persistent Organic Pollutant Determination in Killer Whale Scat Samples: Optimization of a Gas Chromatography/Mass Spectrometry Method and Application to Field Samples," 70 Archives Envtl. Contamination & Toxicology 9 (2016).
[125] Ross et al. (2000), *supra.*
[126] Hall et al. (2018), *supra*.
[127] Alava, J.J. et al., "Projected Amplification of Food Web Bioaccumulation of MeHg and PCBs Under Climate Change in the Northeastern Pacific," 8 Nature Scientific Reports, Art. No. 13460 (2018), https://www.nature.com/articles/s41598-018-31824-5.

Work Windows

The Corps' reliance on "work windows" as a dredging mitigation measure to avoid species harms is misplaced. The Corps notes throughout the Draft Report that most dredging will be conducted during a proposed window from June 1 through November 30 when certain fish species such as salmonids and herring are less likely to be present.[130] However, the Corps does not clearly state whether these work windows are mandatory or merely recommended, or in what instances it might elect to work outside the designated work windows.[131] The Corps also failed to explain how or whether its proposed dredging activities will be modified in the event that such species are still present during the work windows. For example, outmigrating Chinook salmon and green sturgeon may be affected by dredging activities that fall outside the proposed work window.[132] The Corps has failed to adequately support its conclusion that there will be no significant impact to local species caused by the proposed dredging and in- water construction activities. The Corps should discuss in more detail its historical record of complying with work windows in this particular navigation channel, as well as impacts that might result should work windows not be practicable.

123

Furthermore, the Draft Report contains inconsistencies regarding how it selected the proper work windows for the Project. Specifically, the Report notes that the preferred work window for the California least tern (a species listed as endangered both by the state and federal governments) would run from August 1 through March 15 of each year, but that time frame that does not align with the proposed work windows described above (June 1 through November 30). The Report acknowledges that "in- water construction is proposed to occur partially outside of [the work window most suitable for California least terns] under all action alternatives."[133] Given that the Corps' proposed work windows are going to pose potential resource conflicts and exposure for the California least tern, the Draft Report fails to adequately address how the Corps intends to mitigate for such exposure.[134] The Corps' decision to proceed without analyzing the potential for significant impacts to the California least tern represents a violation of NEPA as well as the state and federal Endangered Species Acts.

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[128] Draft Report, p. 77; see also p. 143-44.

[129] See generally Draft Report, pp. 77-78 (identifying various sources of historical contamination in sediment).

[130] See, e.g., Draft Report, pp. 45-46, 117, 144-45, 147, 150.

[131] See, e.g., Draft Report, Appendix A-5, p. A-1 (PDF p. 194) (noting that there may be circumstances when "in-water work must occur at times other than the approved work window").

[132] See, e.g., Draft Report, Appendix A-1, pp. 4-2, 4-4, 4-7 to 4-8.

Failure to Analyze Impacts of Larger Ships on Wildlife

In the Draft Report, the Corps implies that widening the Turning Basins will lead to reduced overall vessel traffic, because larger ships will carry cargo more efficiently and produce gains in operational efficiency.[135] That assumption is problematic for several reasons. First, it is an unstudied assumption that is not necessarily true, as discussed in Section I.B.1 above. Second, even if it were true, that assumption is not binding on any entity. A change in market demand could lead to an increase in the number of vessels beyond what is forecast and analyzed in the Draft Report, with a concomitant increase in vessel impacts on fish and wildlife species.

124

Furthermore, even if the Corps is correct that there will be an overall reduction in vessel traffic, the Draft Report nonetheless forecasts an increase in the number of ultra- large container vessels visiting the Port.[136] (In other words, the Draft Report predicts the percentage of ultra-large container vehicles calling on the Port will increase, thereby displacing at least some callings by smaller ships.) The increased presence of these larger vessels—in addition to a potential increase in the size or number of accompanying tending vessels such as tugboats—may increase the risk or severity of oil spills and other discharges, the likelihood of ship strikes on marine mammals, or generate excessive levels of underwater noise, as discussed below. The Corps failed to adequately analyze any of these possibilities in the Draft Report.

125a

[133] Draft Report, p. 141.

[134] See Draft Report, p. 151.

[135] See Draft Report, pp. 14, 125.

[136] Draft Report, p. 101-102.

Oil Spills and Other Discharges

The Corps entirely failed to analyze the potential for oil spills and other discharges from the ship traffic that will be visiting the Port. This is a remarkable omission given California's long and troubled history of oil spills that have soiled our shorelines over the years. Oil spills have caused great harm to the Bay Area historically: in 1971, a ship spilled 800,000 gallons of bunker fuel in San Francisco Bay, which the California Coastal Commission confirms had a "devastating impact on local species."[137] More recently, a container ship struck the Bay Bridge in 2007 and spilled 58,000 gallons of bunker fuel, which spread across the coastlines of the San Francisco Bay in a matter of hours.[138] Less publicized but frequent smaller oil spills in the region have contributed to "chronic" oil pollution throughout California.[139]

125a

Because the impact of widening the Turning Basins will be to facilitate callings by ever-larger container ships, it stands to reason that even larger oil spills of bunker fuel could result from those ships that will be able to visit the Port with greater frequency as a result of this Project. The Corps should have analyzed the possibility of an increase in the risk of oil spills, as well as the severity and magnitude of such spills in its Draft Report, instead of constraining its analysis merely to construction impacts.

The Draft Report also fails to discuss compliance with EPA's 2013 Vessel General Permit and the Vessel Incidental Discharge Act ("VIDA") passed in 2018. The 2013 Vessel General Permit applies to discharges incidental to the normal operation of commercial vessels greater than 79 feet in length, and remains applicable on an interim basis until EPA publishes standards for compliance with VIDA and the U.S. Coast Guard develops implementing regulations.[140] Because the Corps explicitly anticipates that larger vessels will be visiting the Port as a result of the Project, it is obligated under NEPA to discuss the rates of compliance of the larger-sized ships with the Vessel General Permit and to evaluate reasonably foreseeable impacts from their visitation at the Port.

125b

[137] Cal. Coastal Comm'n, "Oil Spills" (accessed Feb. 3, 2022), https://www.coastal.ca.gov/publiced/oilspills.html.
[138] *Id.*
[139] Steve Hampton, et al., "Tank Vessel Operations, Seabirds, and Chronic Oil Pollution in California," 31 Marine Ornithology 29 (2003), https://marineornithology.org/ PDF/31_1/31_1_4_hampton.pdf.
[140] See generally U.S. EPA, "Vessels – VGP" (n.d.), https://www.epa.gov/vessels- marinas-and-ports/vessels-vgp.

Ship Strikes

The Corps also entirely fails to analyze the threat that shipping traffic associated with this navigation channel poses to marine mammals. Ship strikes serve as a primary cause of mortality for large whales worldwide.[141] Large vessels (*i.e.,* those ≥ 80 m) are responsible for most of the collisions leading to whale death or severe injury.[142] For imperiled populations, "death from vessel collisions may be a significant impediment to population growth and recovery."[143]

Ports in the Bay Area host extensive shipping activity.[144] Incoming ship traffic transits several ecologically rich areas including Cordell Bank, Gulf of the Farallones, and Monterey Bay National Marine Sanctuaries.[145] These areas provide important habitat for blue whales (*Balaeonoptera musculus*), humpback whales (*Megaptera novaeangliae*), and gray whales (*Eschrichtius robustus*).[146] Blue whales and distinct population segments of humpback whales are listed as endangered under the U.S. Endangered Species Act.

126

In an analysis of ship strikes off the West Coast of the continental United States, scientists found that "the majority of strike mortality occurs in waters off California, from Bodega Bay south and tends to be concentrated in . . . designated shipping lanes leading to and from major ports."[147] Shipping lanes off San Francisco pose one of the highest ship strike risks.[148] Between 2005 and 2014, the National Oceanic and Atmospheric Administration documented 15 ship strikes of blue, humpback, and gray whales off the coast of San Francisco.[149] Given that ship strikes are rarely detected, the actual number is likely much higher.[150]

The Army Corps anticipates that the widening of the Turning Basins will facilitate an increased number of visits by ultra-large container vessels.[151] Larger vessels traveling at proportionately higher speeds as they transit to the navigation channel pose a greater risk of harm to marine mammals from ship strikes. Given the grave risk to whale species, including endangered populations of blue and humpback whales, the Corps must analyze how expansion of the Turning Basins may affect the risk of ship strikes.

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[141] Rockwood, R. Cotton et al., "High Mortality of Blue, Humpback and Fin Whales from Modeling of Vessel Collisions on the U.S. West Coast Suggests Population Impacts and Insufficient Protection," PLoS ONE 12(8): e0183052 (2017); Jensen, Caitlin M. et al., "Spatial and Temporal Variability in Shipping Traffic Off San Francisco, California," 43 Coastal Mgmt. 575 (2015).

[142] Jensen *et al.* (2015), *supra*.

[143] Rockwood *et al.* (2017), *supra*.

[144] Jensen *et al.* (2015), *supra*.

[145] *Id.*; Keiper, Carol et al., "Risk Assessment of Vessel Traffic on Endangered Blue and Humpback Whales in the Gulf of the Farallones and Cordell Bank National Marine Sanctuaries: Summary of Research Results," Oikonos (2012).

[146] Jensen *et al.* (2015), *supra*.

Noise

The Draft Report also fails to adequately analyze the impacts that increased vessel size may have on noise affecting local wildlife species. The presence of more and larger ships will increase the levels of low frequency noise, particularly close to major shipping lanes and ports.[152] Larger vessels may introduce significantly more noise into the marine environment, particularly if they have larger positioning thrusters and propulsion units.[153]

Kaplan and Solomon (2016) estimate that the growth of commercial ship noise could increase by up to a factor of 1.9 by 2030.[154] The study looked at three segments of the commercial shipping fleet: container ships, oil tankers, and bulk carriers. Continued growth in the number of ships, quantity of goods carried, and distances traveled all feed into the dramatic increase in the predicted ocean noise level.[155] Ocean sound is not distributed evenly across the ocean, but concentrated particularly in port areas like the San Francisco Bay. Because much of the increased noise pollution will be concentrated near the Oakland Harbor, it is particularly important that this Project address the issue of noise pollution from commercial shipping.

The Corps also must conduct a more searching analysis on the effects of project- associated noise on regional wildlife and fisheries species. Noise associated with the Project will be produced by a broad range of construction equipment including dredges, vibratory pile drivers, and tugboats, as well as land-side construction activities including pile driving, drilling, and compaction machinery.[156] Even if the noise produced from this machinery does not result in lethal harms to local species, smelt, salmonids, and green sturgeon might experience behavioral disturbances including reduced foraging, reduced ability to avoid predators, and increased flight/avoidance behavior, as well as neurological stress and hearing threshold shifts. The Corps must discuss in more detail the individual- and population-level implications of such sublethal harms, by themselves and in conjunction with other stressors, as discussed in Section I.B.5 above.

127

The Army Corps also fails to adequately analyze how shipping noise in the Turning Basins, produced by larger ships in conjunction with tugboats, could affect regional wildlife, including but not limited to marine mammals, local fish, and terrestrial wildlife like avian species. An agency's failure to analyze the noise impacts emanating from tugboats can result in an EA that fails NEPA's "hard look" requirement.[157] In *Cook Inletkeeper*, a federal agency dismissed noise impacts from tugboats in a semi-enclosed estuary of Alaska, contending that marine mammals "are likely habituated to the existing baseline of commercial ship traffic."[158] The district court concluded that the agency had failed to analyze the potential noise impacts from tugboats and their impacts on local marine mammal wildlife.[159] Here, too, ships that approach and use the Turning Basins will produce noise during their approach and while executing turns within the Basins, with assistance from tugboats. The Draft Report estimates that underwater noise associated with ships turning in the Basins can range from 141 to 175 decibels.[160] However, the Draft Report improperly dismisses those noise impacts as no different than existing vessel traffic.[161] The Draft Report fails to consider the noise impacts that emanate from the fact that that the largest vessels (which potentially make more noise) will call on the Port more frequently—a conclusion the Corps had in fact already reached elsewhere in the Draft Report, and which it failed to apply to its noise analysis.[162] The Corps must revisit its analysis regarding noise impacts on local species.

Any increase in shipping noise threatens marine mammal species that visit the San Francisco Bay area. Noise generated by commercial shipping reduces marine mammals' ability to communicate, locate

97c

prey, and navigate within their habitat, and induces behavioral changes. The Corps must disclose these impacts. The Corps also should consider developing and implementing a noise budget to protect vulnerable wildlife and fisheries species from noise pollution generated by construction and increases in vessel noise attributable to Port traffic, as more fully discussed in Section I.D below.[163]

127

Finally, the Corps must also discuss in more detail the behavioral implications of ship traffic and vessel noise on longfin smelt. Although the Draft Report outlines the life history of longfin smelt, it fails to discuss at any length the potential for impacts that disturbances from barges, dredging crews, and tugboats could have on the species. Given that longfin smelt are currently listed as threatened by the state of California and are a candidate species for listing under the federal ESA, the Corps must conduct a more searching analysis of the ways in which sublethal harms might affect the long- term population viability of threatened longfin smelt.

128

147 Rockwood *et al.* (2017), *supra*.

148 *Id.*

149 Jensen *et al.* (2015), *supra*.

150 *Id.*

151 Draft Report, p. 100.

152 Port of Vancouver, "2021 Haro Strait and Boundary Pass voluntary vessel slowdown" (n.d.), https://www.portvancouver.com/environmental-protection-at-the- port-of-vancouver/maintaining-healthy-ecosystems-throughout-our-jurisdiction/echo- program/projects/haro-slowdown/; Putland, R.L., et al., "Vessel noise cuts down communication space for vocalizing fish and marine mammals," 24 Global Change Biology 1708 (2018); Liu, M., et al, "Broadband ship noise and its potential impacts on Indo-Pacific humpback dolphins: Implications for conservation and management," 142 Journal of the Acoustical Society of America 2766 (2017).

153 *See* Kaplan, M.B. & Solomon, S., "A coming boom in commercial shipping? The potential for rapid growth of noise from commercial ships by 2030," 73 Marine Policy 119 (2016).

154 *Id.*

155 *Id.*

156 Draft Report, p. 194.

157 *Cook Inletkeeper v. Raimondo*, 533 F. Supp. 3d 739, 766 (D. Alaska 2021).

158 *Id.* at 745, 766.

159 *Id.* at 767-68.

160 Draft Report, p. 89.

161 See Draft Report, pp. 166 (concluding "transport barges carrying dredge material are not expected to generate underwater noise that is different than existing vessel traffic") and 191 ("[T]he noise produced by the turning activity would reasonably be expected to remain very similar to noise generated by existing ships turning.").

162 Draft Report, p. 100.

163 See, e.g., Merchant, N. D., et al., "Marine noise budgets in practice,"11 Conservation Letters 1 (2018); Haver, S.M. et al., "Monitoring long-term soundscape trends in US Waters: The NOAA/NPS Ocean Noise Reference Station Network," 90 Marine Policy 6 (2018); Redfern, J.V., et al., "Assessing the risk of chronic shipping noise to baleen whales off Southern California, USA," 32 Endangered Species Research 153-167 (2017); Viola, S. et al., "Continuous monitoring of noise levels in the Gulf of Catania (Ionian Sea), Study of correlation with ship traffic," 121 Marine Pollution Bull. 97 (2017).

Marine Mammals

The Corps failed to adequately explore whether it requires an authorization under the Marine

Mammal Protection Act ("MMPA") for the Project. The MMPA prohibits the taking of marine mammals, unless the take falls within certain statutory exceptions.[164] The statute defines "take" is as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect or kill, any marine mammal."[165] Here, the Project will have foreseeable impacts on a wide range of marine mammals including pinnipeds and cetacean species as discussed throughout these comments. All of those species are protected under the MMPA, and some are also protected under the state and federal ESA. The noise impacts from dredging and larger ships could cause take,[166] and any increase in shipping traffic or at-anchor times could also cause take. Because the Project (and any foreseeable future impacts from the project, such as an increase in growth of cargo throughput volume) may harass or harm marine mammals, the Corps should have explored whether MMPA authorization is required before it may proceed with the widening of the Turning Basins.

129

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[164] 16 U.S.C. § 1371(a)(3).
[165] 50 C.F.R. § 216.3; 16 U.S.C. § 1362(13).
[166] See, e.g., Jason Gedamke, Ocean Sound & Ocean Noise: Increasing Knowledge Through Research Partnerships, NOAA 2 (2014), available at http://cetsound.noaa.gov/Assets/cetsound/documents/MMC%20Annual%20Meeting%20Intro.pdf; International Maritime Organization, "Guidelines for the reduction of underwater noise from commercial shipping to address adverse impacts on marine life," (2014), https://cetsound.noaa.gov/Assets/cetsound/documents/MEPC.1-Circ%20883%20Noise%20Guidelines%20April%202014.pdf; L. S. Weilgart, "The Impacts of Anthropogenic Ocean Noise on Cetaceans and Implications for Management," 85 Canadian J. Zoology 1091-1116 (2007), https://cdnsciencepub.com/doi/10.1139/Z07-101;
D. Kastak et al., "Noise-Induced Permanent Threshold Shift in a Harbor Seal," 123 J. Acoustical Soc'y of Am. 2986 (2008), https://asa.scitation.org/doi/10.1121/1.2932514.

The Need for the Project Is Not Clearly Defined

The Draft Report fails to clearly define the need for the Project. The Corps acknowledges that the Port has already previously hosted the largest existing category of container ships, known as post-Panamax Generation IV vessels, with a TEU capacity of between 15,000 to 23,000 TEUs. Specifically, there were 3 such calls by Generation IV vessels on the Port in 2016, and 4 such calls by those vessels in 2020, the last year for which vessel calling records are available, according to the Corps.[167] Although such callings are extremely uncommon, the Port's own records indicate that it is feasible to use the Turning Basins at their present size for vessel callings by even the largest container ships that currently exist in the commercial shipping fleet.

Given that ultra-large container ships like Generation III and IV vessels are already capable of visiting the Port, it is not clear why the Army Corps is seeking to expand the Turning Basins at this time. Although the Draft Report identifies navigation inefficiencies and timing limitations associated with the largest ships performing maneuvers within the Turning Basins,[168] Generation IV vessel callings on the Port of Oakland to date represent only a tiny fraction of the number of total callings.

130

Specifically, for the six-year period from 2014 to 2019 (the most recent years for which complete ship calling data is available), Generation IV vessels represented only 0.03% of the 8,449 vessels that called on the Port of Oakland in those years.[169] Generation IV vessels presently visit the Port so infrequently that it strains logic to suggest that those very limited visits by large vessels have produced meaningful or lasting navigational inefficiencies. In short, the mere existence of temporary inconvenience in hosting the ultra-sized container vessels does not adequately support the Corps' stated need for widening of the Turning Basins.

Based on the exceedingly low number of callings by ultra-large container vessels to the Port to date, the only conceivable reason to pursue a widening of the Oakland Harbor Turning Basins is to make navigation more efficient for ultra-large ships that call at the Port. But if navigation becomes more efficient, it is reasonably foreseeable that this could invite increased callings by ultra-large container vessels, which could in turn potentially "debottleneck" cargo throughput, or even facilitate a growth in cargo volume throughput. Either of these results would have significant effects that could reverberate throughout the local community and beyond, as discussed in Sections I.A and I.B.1 above. If the Army Corps' true motivation is, in fact, to debottleneck operations or induce increased cargo volume to flow through the Port of Oakland, the Draft Report should have defined "increased operations" as the goal, and analyzed the need for the Project and its resultant impacts accordingly. But characterizing the need for this Project as a mere construction improvement—without also acknowledging the potential for impacts on operational output at the Port due to visitation by ever-larger container ships—is disingenuous and violates NEPA.

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[167] Draft Report, pp. 14-15; see Draft Report, Appendix C, p. 32.

[168] Draft Report, p. 17.

[169] See Draft Report, p. 15 (Generation IV vessels represent 3 visits out of 8,449 from 2014-2019).

The Army Corps has a long history of pursuing dredging and port expansion projects, like this one, throughout the country, without first identifying a clear need. For example, the Port of Long Beach—which serves as a port of first call far more frequently than the Port of Oakland for vessels traveling along the Asian-to-West Coast U.S. routes[170]—is already undertaking a major dredging project, partially funded by the Army Corps, that will expand that port's capacity to receive ultra-large container ships like Generation III and IV vessels.[171] (Many members of the local community and environmental organizations opposed the Army Corp's proposed Long Beach dredging and expansion project for similar reasons to those expressed herein, including the unanalyzed possibility that dredging could result in an expansion of that port's operations and shipping throughput volumes.) The dredging project at the Port of Long Beach is expected to be completed in 2027.[172] The Corps fails to discuss in the Draft Report whether the completion of the forthcoming Long Beach dredging project may affect the need for the Project at the Port of Oakland.[173] The Army Corp's failure to consider the implications of other California port expansions that are already in progress also violates NEPA.

131

For all of these reasons, the Draft Report fails to identify a clear need for the Project. The Corps must withdraw its flawed EA and FONSI, and issue a revised EIS for public comment that clearly identifies whether there is a true "need" for this Project.

[170] See Draft Report, pp. 12-13.

[171] Hayley Munguia, "Army Corps Recommends Deepening Channels at Port of Long Beach," Long Beach Business Journal (Oct. 9, 2021), https://lbbusinessjournal.com/army- corps-recommends-deepening-channels-at-port-of-long-beach.

[172] Zlatan Hrvacevic, DredgingToday.com, "Port of Long Beach Dredging Project on the Way" (June 25, 2021), https://www.dredgingtoday.com/2021/06/25/port-of-long-beach- dredging-project-on-the-way/.

[173] See Draft Report, pp. 12-13.

The Draft Report Fails to Consider Meaningful Mitigation Measures

As outlined above, there are a broad range of significant impacts that the Army Corps failed to consider in its Draft Report. Because the Corps failed to identify those impacts (instead relying on the issuance of a FONSI that is unsupported by adequate analysis), the Draft Report likewise failed to identify meaningful mitigation measures that could help to avoid or reduce those impacts on the affected local community and the environment. CEQ NEPA regulations require agencies to identify mitigation measures that can be undertaken to avoid significant impacts.[174]

131a

Most fundamentally, the Corps should have considered implementing mitigation measures that could address any impacts caused by the potential for expansion of cargo throughput at the Port. CEQ NEPA regulations require agencies to take a hard look at all potential effects of a project that "are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives."[175] As discussed in Section I.B.1 above, it is reasonably foreseeable that expanding the Port's ability to receive larger ships could result in more visits from larger ships that carry more cargo and will take longer to unload, spending more time at the Port, and could also result in heavier reliance on cargo handling equipment, rail, and truck visits to handle the influx of larger cargo loads—all of which could foreseeably result in higher localized concentrations of pollution.[176] The Corps failed to consider these possibilities when developing mitigation measures.

Beyond that fundamental critique, there are several specific mitigation measures that the Corps should have considered, but failed to even propose as a possibility in the Draft Report. First, although the Corps did commit to using electric dredges during the construction phase of the project,[177] it should have required that *all* construction equipment commissioned by the Corps or the Port (including, but not limited to, tugboats, barges, trucks, cranes, tractors, excavators, power packs and generators, cargo handling equipment, etc.) rely on commercially available zero-emissions equipment during the construction phase of the project to the greatest extent feasible.[178] This kind of holistic mitigation measure would produce a meaningful improvement in regional air quality because it would reduce reliance on outdated diesel-powered and gasoline- fueled equipment that produces particulate matter pollution and contributes copious greenhouse gases to climate change; it would also simultaneously facilitate compliance with the Corps' environmental justice obligations under Title VI of the Civil Rights Act. and support the emissions reduction strategies in West Oakland's AB 617 plan.[179]

131b

[174] See 40 C.F.R. § 1501.6(c).

[175] 40 C.F.R. § 1508.1(g); see 40 C.F.R. § 1501.2(b)(2); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989).

[176] See generally CARB, "Emissions Impacts of Recent Congestion at California Ports," *supra*.

[177] See Draft Report, pp. 116-17.

We urge the Corps to consider implementing mitigation measures that commit the Corps and the Port to the use of commercially available zero-emissions vehicles and construction equipment to reduce the air quality impacts that will come from three years of nearly constant ground disturbances around the Turning Basins, as well as the foreseeable potential air quality impacts from expansion of Port operational activity due to debottlenecking or induced growth as described in Section I.B.1 above.[180] Electric dredges alone will not adequately mitigate the air quality impacts from this Project.

131b

Second, the Army Corps should develop a plan jointly with the Port to introduce local air quality monitors closer to the location of the two Turning Basins, which would be operational at a minimum for the duration of the planned construction phase of the Project. The Draft Report notes that "[t]he monitoring station closest to the study area is the Oakland West station, approximately 1.3 miles north." That station is not close enough to detect the air quality emissions from the various construction equipment (barges, tugs, tractors, excavators, power packs and generators, etc.) that will be operating during the planned construction periods at the Turning Basins. The undersigned organizations urge the Army Corps to approach the process of selecting a site for any air quality monitoring in a collaborative way that invites input from and dialogue with residents of the local community as to the location, frequency of testing, and public accessibility of the data. Relatedly, the Corps should review the "best clean air practices for Port operations" website that EPA has made available online to explore other ways that the Corps and the Port can work to mitigate air quality impacts stemming from the Project.[181]

131c

131d

Third, the Army Corps should have worked with the Port to explore mitigation measures that require larger vessels calling at the Port to rely on either zero-emissions technologies currently in development or the cleanest available technology. If use of zero-emissions vessels were independently determined to be infeasible, the Port and Corps should instead consider a mitigation measure that requires vessels to pay in-lieu fees or a certain percentage of their profits or revenues into a fund for zero-emissions demonstration or pilot projects for ocean-going vessels or other hard-to-abate sources of pollution near the Port. For instance, the California Air Resources Board's At-Berth vessel regulation requires ocean-going vessels to control their emissions at-berth with the use of shore power, but includes an "innovative concept compliance option" which allows the regulated entity to alternatively meet compliance by funding projects at or near the Port that achieve equivalent emissions reductions.[182] The Army Corps and Port should have examined the feasibility of such mitigation measures, which would either require adoption of zero-emissions technology outright, or allow for greater contributions to projects that enable accelerated future adoption of zero-emissions technologies. As discussed in Section I.F *infra*, these types of comprehensive mitigation measures can more appropriately be proposed (and members of the public can participate more meaningfully) when NEPA and CEQA analysis are not improperly segmented into separate environmental analyses.

131e

Fourth, the Corps should have considered as mitigation any of the 89 emissions reduction strategies included in West Oakland's AB 617 plan. These strategies include limiting truck hours of operation on local streets, moving truck routes away from residences, improving truck flow and congestion in the face of increasing visits from large container vessels, and planting vegetative borders between particulate matter sources and places where residents live, work, and go to school.[183] By essentially ignoring a plan adopted by BAAQMD, CARB, and WOEIP that reflects agency and community expertise and guidance specific to the Port's nearby communities, the Corps undermines the plan's goals and targets and fails to meaningfully consider relevant and site-specific mitigation measures for this Project.

131f

Fifth, the Corps should consider exploring a partnership with other state, federal and international bodies to facilitate the creation of a zero-carbon trade corridor between the Port and Asian markets. The

131g

United States recently committed to pursuing the creation of such "green shipping corridors" in the Clydebank Declaration during the 2021 Glasgow Climate Change Conference (COP 26).[184] The Corps' proposed Project at the Port of Oakland represents a meaningful opportunity to pursue the goals of the Clydebank Declaration—not only because of the significant Trans-Pacific trade that the Port of Oakland engages in,[185] but also because the Draft Report and other projections make the fundamental assumption that there will be constant growth in total container cargo throughput.[186] There has been significant progress and momentum on zero- carbon and zero-emissions shipping in the past two years alone. For example, major international shipping company Maersk recently revised forward their target date for full decarbonization from 2050 to 2040,[187] and announced the introduction of eight new carbon-neutral large ocean-going container vessels that will be introduced starting the first quarter of 2024.[188] Recent reports have also highlighted the potential to decarbonize maritime shipping, including through zero-emissions solutions such as green hydrogen or ammonia plus fuel cells.[189] Exploring this type of mitigation measure would have meaningful air quality and climate impacts.

131g

Sixth, the Corps should consider developing and implementing acoustic monitoring together with a noise budget to protect vulnerable wildlife and fisheries species from noise pollution generated by ship traffic associated with the Oakland Harbor.[190] Quantitative management targets identified under the budget could form the basis for Port regulations or incentive-based sound reduction initiatives.[191]

131h

Seventh, the Corps should consider working with the Port to require that incoming and outgoing vessels adhere to a set speed limit when transiting through shipping lanes to and from the Port. Implementing such a measure would reduce the possibility of ship strikes, mitigate some of the noise concerns, and reduce emissions.

131i

Finally, in addition to the specific ideas outlined above, we urge the Army Corps to think more deeply about and identify mitigation measures to address the serious effects that sea level rise will have on the Port and local communities in the decades to come. The Draft Report dismisses sea level rise as essentially irrelevant to the Project on the theory that it will be a "net positive [to deep draft navigation] due to the increased channel depth and reduced channel maintenance needs."[192] That short- sighted analysis fails to consider the potential for major impacts to the Port's operations and local communities, should critical shoreline infrastructure be submerged. As the federal agency tasked with regulating work in jurisdictional wetlands adjacent to coastal communities throughout the United States, the Corps should be a leader in addressing and mitigating the effects of sea level rise, not dismissing it as a convenient side effect to global shipping.

131j

178 See, e.g., CARB, Draft State Implementation Plan 2022, *supra*, at p. 72; Bellona, "Zero Emission Construction Machinery – Manufacturers," https://bellona.org/database- emission-free-construction-equipment-by-manufacturer (database accessed Feb. 1, 2022); BAAQMD, "Diesel-Free by '33: Resources for Zero-Emission Vehicles and Equipment," (n.d.), https://dieselfree33.baaqmd.gov/available-equipment.

179 See *supra*, Section I.B.2.

180 See Draft Report, p. v (describing estimated 2.5 year duration of construction activity).

181 See U.S. EPA, "Best Clean Air Practices for Port Operations" (n.d.), https://www.epa.gov/ports-initiative/best-clean-air-practices-port-operations.

182 CARB, *Final Regulation Order – Control Measure for Ocean- Going Vessels At-Berth* at p. 54, https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2019/ogvatberth2019/fro.pdf.

183 *Owning Our Air: The West Oakland Community Action Plan*, *supra*, at pp. 6-3, 6-22, 6-26.

184 COP 26: Clydebank Declaration for Green Shipping Corridors (Nov. 10, 2021),

https://www.gov.uk/government/publications/cop-26-clydebank-declaration-for-green- shipping-corridors/cop-26-clydebank-declaration-for-green-shipping- corridors#signatories.

185 See Draft Report, pp. 12-13 (describing frequency of Trans-Pacific routes involving the Port of Oakland).

186 See, e.g., Draft Report, p. 95 (indicating Corps' expectation that TEU volume at the Port will continue to increase by 2.1% annually); MAQIP Update, *supra*, at p. 4 (indicating TEU growth rates between 2.4% to 3.0% in the coming years).

187 Reuters, "Maersk Speeds Up Decarbonisation Target by a Decade" (Jan. 13, 2022), https://www.reuters.com/markets/commodities/maersk-moves-net-zero-target- forward-by-decade-2040-2022-01-12/.

188 Maersk, "A.P. Moller – Maersk accelerates fleet decarbonisation with 8 large ocean- going vessels to operate on carbon neutral methanol" (Aug. 24, 2021), https://www.maersk.com/news/articles/2021/08/24/maersk-accelerates-fleet- decarbonisation.

189 World Bank, *The Potential of Zero-Carbon Bunker Fuels in Developing Countries* (Apr. 2021), https://openknowledge.worldbank.org/handle/10986/35435.

The Draft Report Fails to Consider a Reasonable Range of Alternatives

By failing to properly define the purpose, need, and scope of this Project, the alternatives and mitigation measures considered by the Corps in the Draft Report are far too narrowly constrained. The alternatives analysis in the Draft Report is therefore wholly inadequate and the Corps must address these deficiencies.

132

NEPA regulations require the Corps to consider a reasonable range of alternatives that would mitigate the environmental and other impacts from the Project, including consideration of choosing the no-action alternative.[193] An agency may choose the no-action alternative even though it does not fulfill a project's purpose and need.[194] The "agency's decision may be based on any relevant considerations of law or policy" and "as long as [those considerations] are explained in the decision document" the decision to choose the no-action alternative is justified.[195]

All of the Corps' alternatives are virtually the same, save the no-action alternative, because each basically considers different widening areas:

- **Alternative A**: no-action alternative
- **Alternative B**: Inner Harbor Only (Inner Harbor Variation 3), with beneficial placement of eligible material
- **Alternative C**: Outer Harbor Only (Outer Harbor Variation 8), with beneficial placement of eligible material
- **Alternative D-1**: Inner and Outer Harbor (Inner Harbor Variation 3 and Outer Harbor Variation 8), with beneficial placement of eligible material
- **Alternative D-2**: Inner and Outer Harbor (Inner Harbor Variation 3 and Outer Harbor Variation 8), with beneficial placement of eligible material and the electrification of dredges[196]

132

The Draft Report thus fails to conduct a true alternatives analysis or consider meaningful mitigation measures beyond moving dredged material elsewhere and using electric dredges. For example, the Corps could have considered an alternative that addresses impacts from outdated diesel-powered and gasoline-fueled equipment commonly used during construction projects by relying on commercially available zero-emissions equipment instead. The Corps also could have considered alternatives consistent with the emissions reduction measures in West Oakland's AB 617 plan, or that require visiting vessels to limit ship speeds to address ship strikes that cause marine mammal deaths. Instead of moving dredged material elsewhere, the Corps could have considered an alternative that uses the dredged material to raise the Bay's shoreline and protect local communities against flooding from rising sea levels.[197] Without proper consideration of these and other reasonable alternatives, the analysis in the Draft Report fails to comply with NEPA.

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190 See, e.g., Merchant et al. 2017, *supra*; Haver et al. 2018, *supra*; Redfern et al. 2017, *supra*; Viola et al. 2017, *supra*.

191 *Cf.* Heise, K.A. et al. Proposed Metrics for the Management of Underwater Noise for Southern Resident Killer Whales Coastal Ocean Report Series (2) (Ocean Wise, Vancouver, 2017) (providing example of what metrics could look like for another cetacean species).

192 Draft Report, p. 96.

193 40 C.F.R. § 1502.14(c), (e).

194 See, e.g., *Agdaagux Tribe of King Cove v. Jewell*, 128 F. Supp. 3d 1176, 1194 (D. Alaska 2015).

195 See, e.g., *id.*

196 Draft Report, p. 113.

The Draft Report Fails to Coordinate NEPA and CEQA Review

The Corps failed to adequately coordinate NEPA review with review under the California Environmental Quality Act ("CEQA"). Federal regulations require that "to the *fullest extent practicable* . . . , [federal] agencies shall cooperate with State . . . agencies to reduce duplication between NEPA and comparable State . . . . requirements."[198] The regulations further provide that "[s]uch cooperation shall include, to the fullest extent practicable, joint environmental impact statements."[199] Combining NEPA and CEQA review is so important that the U.S. Executive Office of the President and the California Governor's Office of Planning and Research jointly issued a report specifically on the topic of how to integrate state and federal environmental reviews under NEPA and CEQA.[200]

Here, the Corps issued its Draft Report and FONSI on an entirely separate timeline from the forthcoming CEQA process that the Port will be overseeing as lead agency beginning later in 2022.[201] The Corps did not adequately justify its decision to segment out NEPA review from the forthcoming CEQA process. The Corps failed to demonstrate in its Draft Report that it sought to cooperate with the state CEQA process "to the fullest extent practicable."

The Army Corps' failure to coordinate NEPA and CEQA review has a detrimental impact on environmental review by members of the public. It is inefficient for members of the public to review two separate sets of environmental documents supporting the Project, especially when each will presumably be separately supported by voluminous and lengthy appendices. In particular, various state and federal government agencies with oversight authority over aspects of the Project may need to weigh in on both the NEPA and CEQA documentation, which will compound the inefficiencies for members of the public who intend to track both the federal and state processes simultaneously.

133

Furthermore, segmenting out NEPA and CEQA review makes it less feasible for commenters to identify meaningful mitigation measures: some of the mitigations that could best offset the impacts from increased vessel size visitation at the Port would necessarily require joint action by the Corps and the Port, which either entity alone may not be able to pursue. It is also conceivable that any mitigation measures the Port selects during its CEQA review process could ultimately change the scope of the Project to a degree that would require renewed analysis by the Corps under NEPA. All of these inefficiencies could have been avoided if the Corps had pursued a combined review under NEPA and CEQA from the outset.

We urge the Corps to withdraw its flawed Draft Report and FONSI, and to issue a full EIS and an Environmental Impact Report jointly with the Port as the lead state agency.

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[197] P. Rogers, "San Francisco Bay Report Decries Waste of Protective Sediment" (Apr. 13, 2021), https://www.marinij.com/2021/04/13/san-francisco-bay-report-decries-waste-of- protective-sediment/.

[198] 40 C.F.R. § 1506.2(c), emphasis added.

[199] *Id.*

[200] U.S. Executive Office of the President & Cal. Governor's Office of Planning & Research, "NEPA and CEQA: Integrating Federal and State Environmental Reviews" (Feb. 2014), https://opr.ca.gov/docs/NEPA_CEQA_Handbook_Feb2014.pdf.

[201] See generally U.S. Army Corps of Eng'rs, "Turning Basins Widening Study: Community Stakeholder Meeting #2" at Slide 17 (Jan. 12, 2022).

C. *The Army Corps Failed to Provide Adequate Public Comment* Opportunities

The Corps should re-open the unnecessarily brief comment period for the Draft Report to allow for more meaningful public participation. Incorporating and inviting public participation into the government's environmental decision making is a core element of the NEPA process. CEQ regulations state that agencies must "[m]ake diligent efforts to involve the public" when implementing NEPA.[202] The opportunity to comment on draft environmental documents is one of the main avenues by which the public can participate in the NEPA process.

The Army Corps' comment period was inadequate under NEPA, because the Corps provided too few public participation meetings and the comment period was too short given the factual circumstances and the complexity of the information provided.

134

First, as far as the undersigned organizations are aware, the Army Corps offered only two public participation meetings regarding this Project: one in late August 2021 and another in mid-January 2022, the latter of which fell nearly four weeks *after* the comment period for the Draft Report had already opened on December 17, 2021. The Army Corps failed to provide adequate notice of these meetings or to alert members of the affected communities about the scope of the proposed Project or the potential impacts. The Corps' failure to do so represents a violation of NEPA and undermines the goals and obligations of AB 617 and Title VI.

Second, the Corps designated an unnecessarily short timeframe to submit comments, which constrained the ability of community groups to develop meaningful comments. The Corps issued the Draft IFR/EA on December 17, 2021 shortly before a major national holiday period when schools are closed and many organizations have holiday breaks and are not working at full capacity. The holidays, including the travel period surrounding Christmas and New Year's Day, removed essentially two weeks of time to review the Draft IFR/EA.

Furthermore, the ongoing COVID-19 pandemic has led to office and school closures throughout the country, with COVID cases peaking at an all-time national high in early January 2022.[203] As a result, members of the public as well as attorneys and support staff at organizations engaged in this Project have been forced to make necessary adjustments, including alternative childcare arrangements and coordination for timely filing of comments. This has made it even more challenging to review and prepare comments in the allotted time.

Although the Army Corps extended the deadline to submit written comments by 14 days (from the originally designated January 31, 2022 deadline to February 14, 2022) upon the request of some of the undersigned organizations as well as U.S. EPA, that limited 14-day extension does not make up for the unnecessarily abbreviated timeline for comment submission in light of the timing constraints and public outreach inadequacies outlined above. The Draft IFR/EA is 243 pages and includes 8 appendices with at least 544 additional pages, bringing the total to at least 787 pages of material. It takes a substantial amount of time to review large amounts of materials and provide meaningful comments. The Corps did not allow adequate time to review the supporting materials.

For these reasons, the undersigned organizations respectfully request that the Army Corps withdraw its flawed Draft Report, issue a substantially improved draft Environmental Impact Statement jointly with an Environmental Impact Review with the Port, and reopen the comment period on a draft EIS to allow community groups and those affected by the Turning Basins proposal to have more time to develop

meaningful comments that will enable the Corps and the Port to improve their environmental review.

[202] 40 C.F.R. § 1506.6(a).

[203] Lisa Shumaker, "U.S. Reports 1.35 Million COVID-19 Cases in a Day, Shattering Global Record," Reuters (Jan. 10, 2022), https://www.reuters.com/business/healthcare- pharmaceuticals/us-reports-least-11-mln-covid-cases-day-shattering-global-record- 2022-01-11/.

The Draft Report Fails to Comply with the Clean Water Act

The Army Corps also failed to comply with the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, in several respects, many of which overlap with the NEPA compliance issues described above. First and foremost, the Corps has failed to clearly articulate whether and under what circumstances it may seek in the future to obtain any necessary CWA permits. The Draft Report says only that "all dredge material will be placed at a permitted upland beneficial reuse site or landfill," without specifying the location or possible alternative placements.[204] Based on that statement alone, the Corps elected not to provide a 404(b)(1) analysis with the issuance of the Draft Report.[205] The Corps also states that it will "obtain a water quality certification for the [P]roject [pursuant to CWA section 401]. . . *if applicable* . . . after the feasibility phase, in the pre- construction design phase."[206] The Corps' approach to compliance with the Clean Water Act in the Draft Report is flawed.

135a

First, the Corps has adopted an overly narrow definition of this Project's scope and purpose, as well as an inadequately articulated need for the Project, both of which are more fully discussed in Sections I.A and I.C above. By artificially defining this Project as confined to a mere construction activity, the Corps disregards myriad potential water quality impacts that are broader than the construction activities themselves. The Draft Report ignores the possibility that the construction or future operational phases of the Project could require or result in the discharge of material into jurisdictional waters, or otherwise cause discharges that require CWA permitting.[207] The excessively narrow scope of the Draft Report violates the CWA.

135b

Second, the Draft Report inappropriately postpones analysis of the need for any water quality certification permitting until the pre-construction design phase of the Project, which deprives members of the public from having adequate opportunity under NEPA to review and comment on that analysis.[208] In so doing, the Draft Report fails to provide adequate information that would enable members of the public to evaluate whether the Project will conform to the EPA's Section 404(b)(1) guidelines.[209] The Army Corps should have included a CWA Section 404(b)(l) alternatives analysis within the Draft Report to provide a more meaningful opportunity to evaluate potential impacts.

135c

Third, if the Corps ultimately does need to seek a permit under the CWA for any portion of the Project activities, the Draft Report fails to demonstrate that it has selected the "least environmentally damaging practicable alternative" ("LEDPA") to achieve the Project's purpose. The Corps is required to make a LEDPA finding before it may approve any Section 404 permit under the CWA.[210] Because the Corps has deferred a determination about whether it will need to rely on a Section 401 or 404 permit until a later stage of the Project that post-dates the issuance of this Draft Report, the undersigned organizations do not have adequate information about the dredging or water quality certification alternatives the Corps may consider or the environmental impacts of those options.[211] At a minimum, the Draft Report failed to include any analysis of the potential impacts of debottlenecking and/or induced expansion on Port operations due to the Report's improperly constrained scope.[212] If such analysis had been included, that would have facilitated a determination about whether the proposed Project and the proposed dredging waste disposal locations would represent the LEDPA under the CWA. The Corps' omission of such analysis frustrates the goals of the CWA and impedes public participation.

135d

Fourth, there is inadequate information in the Draft Report about whether this Project could reasonably fulfill the Army Corps' public interest review, should a CWA permit be required at some point in the future. The CWA and the Army Corps' own regulations require that the Army Corps may issue a CWA permit only when a proposed project will meet certain environmental standards.[213] The Corps'

135e

regulations require it to consider numerous factors, including several most relevant here: "conservation, . . . aesthetics, general environmental concerns, wetlands, . . . fish and wildlife values, flood hazards, . . . land use, . . . shore erosion and accretion, . . . water quality, . . . and, in general, the needs and welfare of the people."[214] The Draft Report largely skims over many of these factors—in part by inappropriately confining the scope of the Project to construction impacts only—and fails to adequately analyze the adverse impacts of the Project on these factors. Particularly concerning is the Army Corps' failure to consider environmental justice issues ("the needs and welfare of the people") in developing the Draft Report, as more fully discussed in Section I.B.2 above; the impacts to local and protected species discussed in Sections I.B.5 and 6 above also lack adequate analysis. These and other omissions in the Draft Report prevent members of the public from being able to weigh in on whether the Corps will perform an appropriately thorough public interest review as required by the CWA.

135e

For all of these reasons, the Army Corps should withdraw its flawed Draft Report and develop a more thoughtful and extensive analysis of the potential water quality impacts that could emanate from the Project to ensure compliance with the Clean Water Act.

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204 See Draft Report, p. 200.

205 *Id.*

206 *Id.*, emphasis added.

207 See, e.g., *supra*, Sections I.B.1, I.B.5, and I.B.6.

208 Draft Report, pp. 181-82, 200.

209 See, e.g., 33 C.F.R. § 323.6 (requiring district engineer to "review applications for permits for the discharge of dredged or fill material into waters of the United States in accordance with guidelines promulgated by the Administrator, EPA, under authority of section 404(b)(1) of the CWA"); 40 C.F.R. § 230.12 (requiring disposal sites for discharge of dredged or fill material to comply with EPA guidelines).

210 See 40 C.F.R. § 230.10(a).

211 See *supra*, Section I.E. (discussing how the Draft Report inadequately explores a range of alternatives that could achieve the Project's goals).

212 See generally *supra*, Section I.B.1.

Conclusion

The Draft Report for the Project fails to adequately define the scope of or need for the project, to adequately analyze the potentially significant impacts of the Project, or to consider meaningful mitigation measures or a reasonable range of alternatives, and therefore, it fails to comply with NEPA and the CWA. The Corps must revise the Draft Report to include a fulsome analysis of environmental justice impacts that could result from widening the Turning Basins, including analysis of the foreseeable implications of debottlenecking or an expansion in freight volume throughput at the Port. The Draft Report must also be revised to fully address, disclose, and mitigate the significant environmental effects of the Project, including the operational impacts of expanding freight activity at the Port, as well as impacts on air quality, climate change and greenhouse gas emissions, water quality impacts, and endangered species and marine mammal impacts, as described above.

136

We urge the Corps to fulfill its duties under NEPA and the CWA by withdrawing the flawed Draft Report and FONSI, and issuing a meaningful draft EIS that informs the public, and particularly communities most impacted by the Project, about the associated impacts of widening the Turning Basins, and proposes meaningful mitigation measures. The Corps should expand public comment opportunities to ensure that these proposals can be vetted by members of the public.

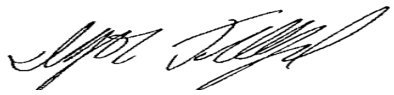
[213] See generally 33 C.F.R. § 320.1 to 320.4; see also 33 U.S.C. § 1341.
[214] 33 C.F.R. § 320.4(a)(1).

Thank you for your consideration of these comments, and please do not hesitate to reach out if you have any questions.

Signed,

Marie Logan, Senior Associate Attorney Michelle Ghafar, Senior Attorney
Sasan Saadat, Senior Research and Policy Analyst
Earthjustice
50 California Street, Suite 500 San Francisco, CA 94111

/s/ Ms. Margaret Gordon
Ms. Margaret Gordon, Co-Director Brian Beveridge, Co-Director
West Oakland Environmental Indicators Project



Igor Tregub, Chair
Sierra Club, Northern Alameda County Group

Miyoko Sakashita, Oceans Director, Senior Counsel **Center for Biological Diversity**

Sam Wilson, Senior Vehicles Analyst **Union of Concerned**