US Army Corps of Engineers®

Oakland Harbor Turning Basins Widening

Revised Draft Integrated Feasibility Report and Environmental Assessment

APPENDIX A10b:

Response to Public Comments
Comments #63 - 94

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 – Location where revisions/updates were made 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.

Bay Ship & Yacht Co. & Alameda Commercial Properties, LLC District

6. Sheppard, Mullin, Richter & Hampton LLP on behalf of Bay Ship & Yacht Co. (Bay Ship) and Alameda Commercial Properties, LLC (ACP) District		
Commenter: Sheppard, Mullin, Richter & Hampton LLP		
Comment Number	**Response**	**Location in IFR**
63	In consideration of comments provided such as this one, the Recommended Plan has been realigned to reduce impacts to Bay Ship and Yacht operations, but will still impact the buildings to the east of the basin. See Response 22. USACE believes this achieves what your comment requested.	ES
64	The Port does not intend to utilize USACE's Draft IFR/EA and FONSI to meet their requirements under CEQA. The Port is currently scheduled to release its CEQA Environmental Impact Report at the end of 2023.	N/A
65	The City of Alameda and commenter have not provided substantiation for this assertion; therefore, USACE does not accept this claim as fact. See Response 23.	3.3.2, 6.3
66	The purpose of the Recommended Plan is to ensure safe and efficient navigation for the Port of Oakland. The GHG analysis is found in Section 6.14. The Recommended Plan is expected to result in a reduction of GHG emissions compared to a future without project and beneficial use of dredged material form the project will help the Bay Area combat sea level rise. See GC-1 - Induced Growth for response to comments on increased throughput.	1.2, 5.7, 6.14
67	The Recommended Plan does not assume that there will be no air quality impacts. The air quality analysis found that the Recommended Plan would not exceed federal de minimis levels and that the impacts are not significant with respect to NEPA. This inventory considered all emissions to be produced by the Recommended Plan. Electrified dredges are being	6.13

	proposed to reduce the localized impacts to disadvantaged communities.	
68	68a. The Draft IFR/EA discusses ground water impacts and finds that these effects are minimal because of the relatively small size of the Inner Harbor Turning Basin expansion area, and the Recommended Plan's location in the Central Bay, where impacts to freshwater flow regimes are typically minimal. Water in the area is already brackish due to it already being an active turning basin. 68b. The Recommended Plan will not impact the trans-bay or posey tubes since construction will be limited to the turning basins and immediately surrounding areas. Coordination with the appropriate entities is ongoing and will continue in PED. 68c. Analysis of potential impacts to ESA species is found in the Draft IFR/EA at Section 6.6. See GC-1 for an explanation as to why increased vessel traffic will not result from the Recommended Plan. 68d. See Section 6.4, GC-1. Further, commenter did not explain why water quality decrease or illicit bilge dumping would increase as a result of the Recommended Plan. 68e. The Recommended Plan's footprint was moved to minimize impacts to minimize the risk of encountering contaminated soils. Silt curtains will be used in areas where we would expect to find sediments with elevated contaminant concentrations. Prior to in-water construction, a silt curtain will be deployed from the water's edge and pushed out to the deployed location to avoid entrapping aquatic wildlife species. See Section 6.5.1. 68f. The Draft IFR/EA analyzes noise impacts at Section 6.15. 68g. Section 6.9 of the Draft IFR/EA discusses impacts to boaters.	2.1.2, 6.4, 6.4.1, 5.7, 6.6, 6.9, 6.14, 6.15
69	See Appendix B2 Geotechnical Engineering for additional descriptions and explanations of side slopes and buffers. The adjusted alignment should limit impacts to Bay Ship, as stated in this comment letter. Project grading and bulkhead wall configuration have not yet been finalized. USACE generally concurs that a buffer may be feasible in lieu of a 3:1 (H:V) slope in areas where a bulkhead wall is constructed.	Appendix B2

70	70a. USACE attempted to capture the inputs and impacts to Bay Ship and other landowners in the project footprint via questionnaires. However, no responses were received. USACE welcomes continued input to the potential impacts of the project to potential stakeholders. To minimize impacts to property owners in Alameda, avoid an electric conduit at Schnitzer Steel, and to minimize the risk of encountering HTRW, the study team has shifted the Inner Harbor turning basin northeast from the location presented in the Draft IFR/EA. 70b. Sediment sampling, construction and maintenance activities will be coordinated with impacted landowners and Port stakeholders. 70c. These are not details appropriately determined at this stage and are not normally included in a draft IFR/EA. 70d. The Recommended Plan would only have temporary impacts to the Bay Ship and Yacht's business operations. Further, commenter has not substantiated its connection to homeland security and national defense and therefore USACE cannot appropriately comment on that. 70e. These details are not determined at this phase of planning. 70f. The shift of alignment minimizes impacts to Bay Ship and Yacht. Should the Recommended Plan move forward towards design and construction, further project details will be developed and coordination with surrounding properties will ensue to minimize potential impacts during construction. 70g. It is not clear how this aspect of dredge operations would result in the stated impacts over and above other aspects of dredging operations. 70h. The Draft IFR/EA includes Appendix D, the Real Estate Plan, which will include a discussion on the land, easements, rights-of-way, relocations, and disposal sites (LERRDs) related to the Project. The purpose of the real estate plan is to identify the LERRD necessary to support construction, operation, and maintenance of the Recommended Plan.	ES, Appendix D
71	These limitations are discussed in the Draft IFR/EA in Sections 1.2, 2.1.6, 4.1, 4.5. The Draft IFR/EA discusses how the turning basins are the main cause of inefficiencies. The UCLVs are able to call at the Port, but they are not able to	1.2, 2.1.6, 4.1, 4.5

	utilize either turning basin. The Draft IFR/EA Recommended Plan is the result of significant consultation and input from the San Francisco Bay Pilots.	
72	USACE analyzed several alternatives. The economic analysis was prepared with multiport considerations. Generally, vessels travel from Asia to the West Coast and begin at the Port of Long Beach, then travel north. The Port of Oakland is usually their last stop before returning to Asia. Therefore, improvements at other Ports will not eliminate the need for these ships to travel to Oakland.	5.7, Appendix C
73	Navigational Servitude will apply to applicable submerged lands. Should any submerged lands fall outside of Navigational Servitude, then the normal acquisition process will occur to acquire the necessary lands, easements, and rights-of-way required for the construction, operation, and maintenance of the Project. Further, since the alignment has been shifted, Bay Ship should be less impacted.	N/A

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VIA EMAIL AND U.S. MAIL

United States Army Corps of Engineers
C/O Mr. Eric Jolliffe
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San Francisco, CA 94102
oaklandharborturningbasinsstudy@usace.army.mil

Re: Draft Integrated Feasibility Report and National Environmental Policy Act Environmental Assessment for the Oakland Harbor Turning Basins Widening Navigation Study

Dear Mr. Jolliffe:

On behalf of Bay Ship and Yacht Co. ("Bay Ship") and Alameda Commercial Properties, LLC ("ACP"), we appreciate the opportunity to offer these comments on the U.S. Army Corps of Engineers' and Port of Oakland's Draft Integrated Feasibility Report and National Environmental Policy Act Environmental Assessment for the Oakland Harbor Turning Basins Widening Navigation Study (the "Draft FR/EA").

Bay Ship and ACP support the Port of Oakland's (the "Port") efforts to maintain, modernize and improve the shipping facilities and the turning basin for the benefit of the community. But as set forth below, there are a number of issues with the proposal that we would like the U.S. Army Corps of Engineers (the "USACE") and the Port to address in the feasibility report and environmental assessment.

1. BAY SHIP'S INTEREST IN THE PROJECT.

Bay Ship operates a shipyard providing refit and repair services for commercial, government and private vessels at 2900 Main Street, in Alameda, California. The shipyard is located within the footprint of the proposed Oakland Harbor Turning Basins Widening Project (the "Project"). ACP owns a substantial portion of the shipyard, and is under common ownership with Bay Ship. Bay Ship's operations support the missions of national defense and homeland security, water emergency preparedness and the other support vessels essential to a thriving port. Bay Ship is the only shipyard in the region to have the capacity to support the region in the event of 24/7 emergency service, such as a major earthquake when bridges may be unusable. The Project will have substantial detrimental impacts on Bay Ship's shipyard and ACP's real property as well as impacts on Bay Ship's in-water and upland operations both during construction of the Project and thereafter.

Bay Ship is gravely concerned that the Draft FR/EA has not adequately assessed the feasibility of the Project or realistically considered the Project's impacts on local businesses such as Bay Ship, regional economic development, environmental quality, and other social effects. As such, Bay Ship believes that the Draft FR/EA fails as an informational document and fails to satisfy

the legal obligations of the USACE and the Port under the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (the "Principles and Guidelines"), the National Environmental Protection Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), and the California Environmental Quality Act, Public Resources Code §§ 21000, *et seq*. ("CEQA").

2. THE PROPOSED PROJECT IMPACTS BAY SHIP'S ABILITY TO EFFECTIVELY OPERATE.

Unfortunately, the Tentatively Selected Plan ("TSP") for expansion of the Inner Harbor Turning Basin significantly impacts Bay Ship's ability to operate effectively. This impact is caused by the decision to shift the turning basin further into the City of Alameda. This impact can be dramatically reduced, if not eliminated altogether, by simply shifting the basin further into Oakland. The impacts of the current design result from the decision by the USACE to minimize the loss of land in Oakland at the expense of taking more land located in the City of Alameda. But by making the adjustment shown below, in a manner that more equally shares the project impacts to the two cities, the impacts to Bay Ship's business will be minimized.

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Exhibit A below shows the impact to Bay Ship and Yacht from the current project proposal. Exhibit B shows how a slight shift in the project design significantly minimizes/avoids the impact to Bay Ship. Larger versions of these exhibits appear at the end of the letter.

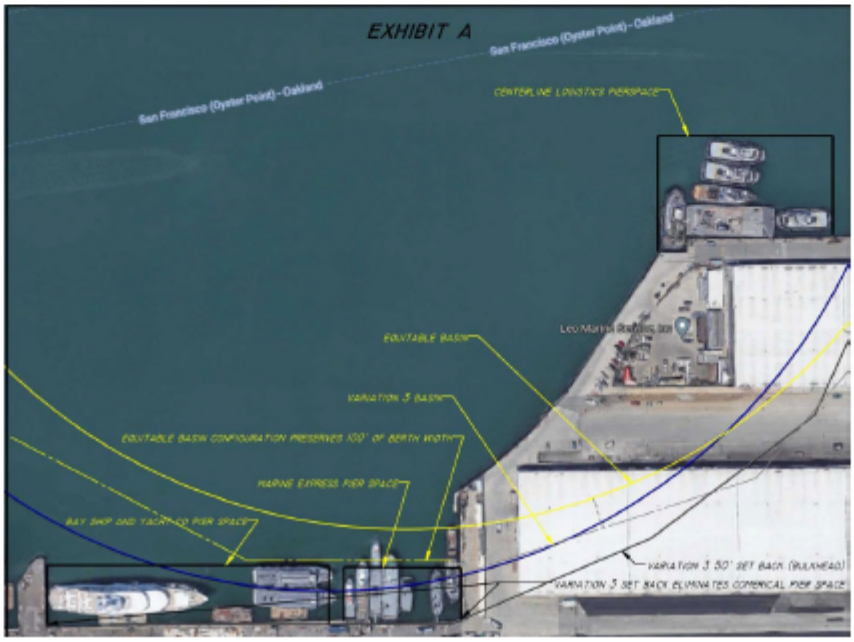

EXHIBIT B

3. <u>AN EIR/EIS SHOULD BE PREPARED FOR THE PROJECT BECAUSE IT HAS POTENTIAL TO CAUSE A DIRECT PHYSICAL CHANGE IN THE ENVIRONMENT.</u>

CEQA applies to projects undertaken, financed, or which require approval from any California state, regional or local agencies, including the Port. (CEQA Guidelines, § 15002) CEQA applies to any "project," which is defined to mean any action "which has a potential for resulting in … a direct physical change in the environment," (CEQA Guidelines, § 15378), such as the widening of the Oakland Harbor Turning Basin contemplated in the Project. It follows that the Port is required to adhere to the strictures of CEQA in approving the Project.

Although the Draft FR/EA is silent as to CEQA, it appears that the Port intends to rely on the Draft FR/EA, including its Finding Of No Significant Impact ("<u>FONSI</u>"), as the operative CEQA document. Although CEQA encourages cooperation with federal agencies, and recommends that state agencies rely on a NEPA Environmental Impact Study ("<u>EIS</u>") "whenever possible," that is only permissible so long as the EIS itself satisfies the requirements of CEQA. (Cal. Pub. Resources Code § 21083.7)

Bay Ship and ACP are concerned that the Draft FR/EA may not satisfy CEQA's requirements. Although the Draft FR/EA included a draft FONSI under NEPA, it may be inadequate to satisfy CEQA's more rigorous standards. Unlike NEPA, where an agency's conclusions are entitled to deference so long as the conclusion is supported by evidence in the administrative record, (40 C.F.R. § 1508.27), under CEQA no such deference is given and an Environmental Impact Report ("<u>EIR</u>") must be prepared if "substantial evidence" supports a "fair argument" that a project "*may* have a significant effect on the environment." (CEQA Guidelines, § 21082.2)

Here, there is more than sufficient evidence to support a fair argument that an EIR is required.

a. The Project Potentially Impacts Shoreline Stability.

The Draft FR/EA seems not to realistically address the impact of seismic activity and earthquakes. After the Port and the USACE completed the Oakland Harbor Navigation Improvement (-50 Foot) Project (the "50-Foot Project") to accommodate a 50-foot depth for larger cargo ships roughly 20 years ago, the City of Alameda discovered that the 50-Foot Project had destabilized the seismic stability of the southern shoreline of the Inner Harbor along the channel due to the increased slope caused by dredging to greater depth. As a result, any major earthquake would cause the southern shoreline of the Inner Harbor to fail, causing large areas of the Alameda shoreline to slough into the shipping channel.

The Draft FR/EA includes a perfunctory statement that "the proposed action alternatives would not introduce elements that would increase potential risks related to the rupture of a known earthquake fault," but that conclusion is not supported by the geotechnical appendix or the cited U.S. Geological Survey literature. Furthermore, that conclusion is belied by the experience of the 50-Foot Project.

Further, the Project may result in significant erosion to existing side slopes and shore protection, thereby mobilizing and recirculating contaminated sediments. None of these impacts are considered in any meaningful way in the Draft FR/EA, and any of them are independently sufficient to trigger the requirement that the USACE/Port prepare a EIR/EIS to more thoroughly consider the Project's impact on shoreline stability.

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b. The Project's Impacts On Climate Change and Sea Level Rise Should Be Considered.

The Draft FR/EA does not adequately consider the Project's potential impacts on climate change and sea level rise. The Draft FR/EA relies on the selection of the Project alternative involving use of electric dredge and construction vessels to conclude that the Project will not have any climate impacts. Of course, the electricity used by these electric vehicles will come from the regional electrical grid, and any realistic assessment of the environmental impacts of the Project must consider the greenhouse gas ("GHG") emissions from the sources of this electricity.

The Draft FR/EA's analysis is also deficient because it inappropriately considers only climate impacts associated with the construction phase of the Project. The Project's stated purpose is to facilitate the entry of more and larger cargo-carrying vessels into the Port of Oakland. Any realistic consideration of the climate impact of the Project therefore must consider the GHG emissions resulting from the anticipated increase in the use of the Port, including emission resulting from tug assist, work boats, crew transport vessels, survey craft, and other in-water sources. The GHG emissions contributed by the increase in cargo offloading equipment and transport trucks must also be considered.

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Furthermore, the Draft FR/EA should consider potential costs and impacts associated with climate change and sea level rise. Climate change is expected to continue to increase the frequency and severity of storms, and but the Draft FR/EA fails to consider the potential impact of the Project on the shoreline's ability to withstand these storms. Furthermore, the Draft FR/EA does not discuss in any meaningful way the Project's ability to withstand sea level rise and what impact sea level rise will have on the Project. 66

c. The Project's Impacts On Air Quality and Traffic.

As with the discussion on climate change, the Draft FR/EA assumes that because the selected Project alternative involves the use of electrical dredge and construction vessels, that there will be no impacts to local air quality. As with the discussion on climate change, this conclusion does not fully consider the air quality impacts of increased tug assist, work boats, crew transport, survey, and other vessels caused by the construction of the Project, and also the air quality impact of increased upland traffic. These significant air quality impacts should be considered in an EIR/EIS. 67

d. The Project's Other Substantial Environmental Impacts.

The Project will involve several other substantial environmental impacts necessitating consideration in the EIR/EIS, including the following:

- Potential saltwater intrusion to the shallow and mid-level freshwater aquifers of the area due to dredging of side slopes and/or installation of new bulkheads. This potential impact is evidenced by the recent experience of a similar project in Monterey Bay. 68a
- Potential impacts to the Bay Area Rapid Transit transbay tube and other submerged utilities due to dredging and anchor dragging. 68b
- Potential impacts to endangered and listed species, marine fisheries, and essential fish habitat, including impacts to marine mammals and the likelihood for an increase in whale strikes and potential closures during whale migrations as a result of increased vessel traffic. 68c
- Potential impacts on water quality due to increased vessel traffic and illicit bilge dumping. 68d
- Potential mobilization of hazardous or taxic materials currently sequestered in marine sediment that may be resuspended into the water table by dredging activities. 68e
- Noise impacts from construction activities and increased vessel and cargo shipment activities as a result of the Project. 68f
- The Draft FR/EA discussion of impacts to recreation is entirely shore-based and fails to account for waterway use by sailing, power boating, fishing and kayaking. 68g

4. THE DRAFT FR/EA DOES NOT ADEQUATELY SERVE AS AN INFORMATIONAL DOCUMENT TO GUIDE DECISION-MAKING.

In addition to the points above, the Draft FR/EA does not adequately serve as a useful informational tool to guide decision-making of the USACE. These shortcomings are discussed in more detail in the sections below.

a. The Draft FR/EA Does Not Adequately Consider Project Impacts On Local Businesses Such As Bay Ship.

The Draft FR/EA does not include any detailed description or rendering of the widened Inner Harbor Turning Basin. As such, it is impossible to comprehensively assess potential adverse impacts to local businesses such as Bay Ship or to other operations within the community. This omission is a glaring shortcoming for a document that is intended to assess the local and regional economic impacts of the Project. Stated succinctly, decision-makers cannot possibly adequately assess the economic impacts of the Project if they cannot ascertain the potential impacts on local businesses such as Bay Ship.

Furthermore, the Draft FR/EA describes the Project as including the widening the existing Inner Harbor Turning Basin ("IHTB") from 1,500 feet to 1,834 feet. In addition to in-water work to widen the IHTB, the Draft FR/EA states that upland areas would be impacted in three locations: Schnitzer Steel, Howard Terminal, and at undisclosed private properties located along the Alameda shoreline. It is unclear how the Project incorporates the dredging of side slopes (assumed to be a horizontal distance of 150 feet, based on the assumption of a 3:1 slope) and buffer areas necessary to ensure navigational safety. At some locations there may not be a need for a 3:1 side slope. If a bulkhead is being constructed long the shoreline, a 50' buffer adjacent to the Turning Basin may be enough. This has proven sufficient, for example, at the curved bulkhead on the FISC property immediately east of Bay Ship's shipyard, which was constructed as part of the -50' project. These omissions seem to be a shortcoming in Project planning that impacts cost, work duration, and also economic impacts on adjacent communities and businesses because of required lands, easements, rights-of-way, and relocations.

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The Regional Economic Development element of the Draft FR/EA did not consider adverse impacts to local businesses such as Bay Ship both on and off the water. The Project may disrupt Bay Ship's ability to conduct its business for extended periods of time. This risk is particularly high during the Project's construction, when the Project could literally put BSY and other Alameda companies out of business altogether if it were to interfere in a major way with their operations during construction. During the -50' Project, it took regular and frequent communication between the Corps, Port, their contractors, BSY, and other businesses on the Alameda shore, with a willingness on the part of all parties to be accommodative and lots of give and take. The Draft FR/EA needs to address these impacts and state how they will be minimized to insignificance. The deficiencies can be summarized as follows; all should be addressed in the Draft FR/EA:

70a

- The Project will disrupt the ability of Bay Ship and other Alameda shoreline businesses to conduct their businesses for extended periods of time while the Project is being

70b

constructed, and potentially during the iterative process of physical, chemical and biological characterization of the underlying sediments and sediment removal, and maintenance operations. 70b

- There is no discussion of the temporary staging and mooring of dredging and support equipment during construction, nor of any provisions for the relocation of that support equipment when vessels are transiting the turning basin and/or calling at Bay Ship. 70c

- The Draft FR/EA fails to consider the negative impact to homeland security and national defense due to disruptions of Bay Ship's business. 70d

- The Draft FR/EA does not discuss parking requirements during Project construction or the potential impacts on traffic and to local businesses. 70e

- Due to the construction and operation of larger/relocated turning basins and buffer areas, any space for the queuing and maneuver of vessels approaching Bay Ship for repairs and service would be eliminated. 70f

- The Draft FR/EA does not provide any analysis of impacts to Bay Ship's "synchrolift" vessel-lifting equipment or dry docking facilities, which reflect a significant business investment with reasonable expectation of returns.

- There are unknown impacts to Bay Ship's operations resulting from the installation, operation, and removal of silt curtains, which have been shown to be disruptive to shoreside businesses and navigation at the California State University Maritime Academy project in Vallejo.

- The "Multiple horizontal dredge cuts" reflected in Appendix A, Section 1.2.2 may impact Bay Ship's operations, introduce sloughing, mobilize contaminants, and require the acquisition of additional real estate. 70g

- The Draft FR/EA's failure to characterize lands, easements, rights of way, and relocations will impact long-term planning for local municipalities and businesses and will distort the Project's economics. 70h

These and other impacts are particularly worrisome when combined with the analysis below, which shows that due to shortcomings in the Draft FR/EA's analysis, it is unclear whether the Project will accomplish the goals that it seeks to achieve at great expense to the public.

b. <u>The Draft FR/EA Does Not Adequately Consider Whether the Project Will Accomplish the Project Goals.</u>

The Draft FR/EA identifies the Project goals as improving navigation within the Oakland Harbor, and in particular, allowing the Inner Harbor to accommodate longer, wider, and deeper vessels. These broad goals are intended to facilitate growth in the regional economy. But the Draft FR/EA fails to consider other navigational constraints and obstacles found within the San

Francisco Bay navigational channels and approaches. Vessels must transit through these navigational channels and approaches in order to call at the Port of Oakland, and the Draft FR/EA should more carefully examine whether the projected "economic benefits" will be realized if vessels cannot safely navigate across the San Francisco Bar and San Francisco Bay itself.

There are significant constraints, including tidal and weather constraints, that limit the ability of large vessels to navigate the Bay and which, absent further consideration, may undermine or significantly mitigate the projected economic benefits of the Project. For example, the Structural Measures element (pages 100-101) failed to consider widening at the entrance to the Inner Harbor Channel (between Alameda Point and Middle Harbor Shoreline Park) as a measure required to accommodate the larger design vessel and ultra-large container vessels ("ULCVs"). This widening would be required to permit larger ULCVs to maneuver and adjust speed to maintain steerage when transitioning from the San Francisco Bay to the Inner Harbor Channel, as has been demonstrated in previous ship simulation studies.

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Other potentially required structural measures include, but are not limited to, the reduction of underwater obstacles and shoals in San Francisco Bay as well as the deepening of the San Francisco Bar Main Ship Channel. Without further study of these navigational and approach challenges, the aforementioned navigational obstacles may prohibit the unrestricted transit of ULCVs across San Francisco Bay to the Port, and the Project could become the proverbial "bridge to nowhere."

The Draft FR/EA does not appear to reflect any consultation with or input from the San Francisco Bay Pilots regarding ULCV transits within these restricted channels. Although the Bar Pilots have always recommended a larger Inner Harbor Turning Basin, they have consistently requested that the center of the turning circle be the same as the center of the channel. The Project's depiction of the widened Inner Harbor Turning Basin has the center of the turning circle slightly to the south of the center of the navigation channel (this is based on a visual inspection of the Draft FR/EA, which does not include adequate survey data to inform a fulsome analysis of this issue).

Lastly, the USACE planning process is required by law to include a comprehensive alternatives analysis that includes an analysis of other ports' ability to service the design vessels at reduced costs compared to the massive expenditure of public funds associated with the Project. This alternatives analysis was not conducted in the Draft FR/EA, which instead assumed that expansion of the Port of Oakland is required to service ULCVs. The final Feasibility Report should consider the impact of improvements to the Panama Canal and other West Coast ports, including the Port of Long Beach and the Port of Seattle, as well as those in Canada and Mexico.

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5. ACP's SUBMERGED LANDS ARE OUTSIDE THE NAVIGABLE SERVITUDE.

Another factor that should be addressed is that the Tentatively Selected Plan ("TSP") takes submerged lands along the Alameda shoreline owned by ACP. ACP is entitled to just compensation for the taking of its property interests.

The Real Estate Plan for the TSP states that: "Navigation Servitude per Article I, Section 8 (Commerce Clause) will be applied in this project for the dredging of the Federal channel in the Inner and Outer Harbors where the County of Alameda owns submerged lands. *It will further apply in the turning basin where private parties own some of the submerged lands.*" (Appendix D Real Estate Plan, at Section 8, page 6.)(emphasis supplied).

The italicized statement is incorrect as a matter of law. The submerged lands on the ACP-owned property have been conclusively determined to be fast land that is *not* subject to the navigable servitude. This was litigated and lost by the Corps and Port in connection with their earlier -42' Project in *Alameda Gateway, Ltd. v. United States* (Dec. 23, 1999), 45 Fed. Cl. 757. This Court of Federal Claims decision is legally binding on the Corps and Port today. ACP's submerged lands are fast land, and the Port's acquisition of this property requires the payment of just compensation, including compensation for resulting severance damage (damage to the remaining property) and compensation for business damage to ACP's tenants, including Bay Ship.

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The seeming contradiction – that submerged lands are uplands – is because the navigable servitude is determined as of 1850, when California became a state. Today's Oakland Estuary did not exist in 1850. Instead, San Antonio Creek was located north of ACP's property. It was actually navigable in 1850 and so remains a navigable servitude today. In 1850 marshlands adjoined the south side of the Creek. Since they were not navigable, there was no navigable servitude in them. For navigable servitude purposes, they were fast land. All of this was determined by the Court (*Alameda Gateway, supra,* 45 Fed. Cl. 757, 765-766, 770-771).

The property owned by Alameda Gateway, Ltd. ("Gateway") in 1999 is the same as that owned by ACP today. ACP bought it from Gateway in 2014. The *Alameda Gateway* decision is binding on the USACE and Port under the well-settled legal doctrines of res judicata and collateral estoppel. Since the navigable servitude issue was actually litigated by the USACE and Port in 1999 and actually determined, they cannot reopen the Decision – they are bound by what they already litigated.

The *Alameda Gateway* decision does not specify the exact location of the boundary between the navigable San Antonio Creek and the non-navigable marshlands. We attach as Exhibit C a copy of the 1857 map on which the Court rested its decision. While our investigation is continuing, it is apparent that at least 80% of the submerged lands the Port wants to take from ACP were determined to be fast land.

The statement in the Real Estate Plan confuses the USACE's regulatory authority over navigable waterways, which is broad under special congressional legislation, with the navigable servitude, which takes property without compensation and is narrower. (*Alameda Gateway, supra,* 45 Fed. Cl. 757, 764-5; *Kaiser Aetna, et al. v. United States*, 444 U.S. 164, 171-3 (1979); *Boone vs. United States*, 944 F.2d 1489, 1492-3 (9th Cir. 1991).

6. CONCLUSION

We hope that the USACE and the Port will carefully consider these comments and fully involve all stakeholders, including the landowners and representatives of the businesses that will be impacted by the Project, in future discussions regarding how to proceed in compliance with federal, state, and local law.

Very truly yours,

Sean P. O'Connor

Sean P. O'Connor
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:4876-6912-8206.3

Attachments

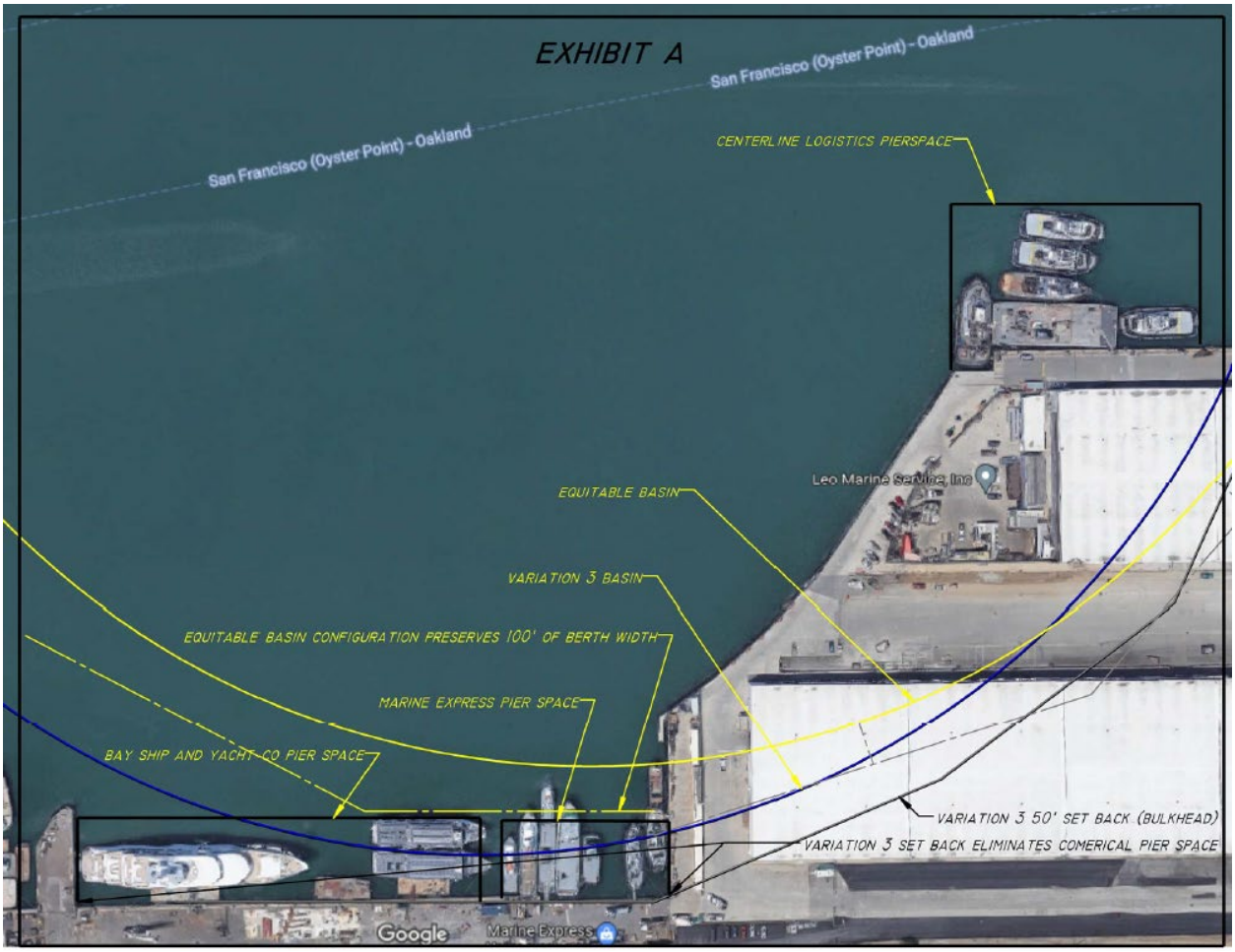
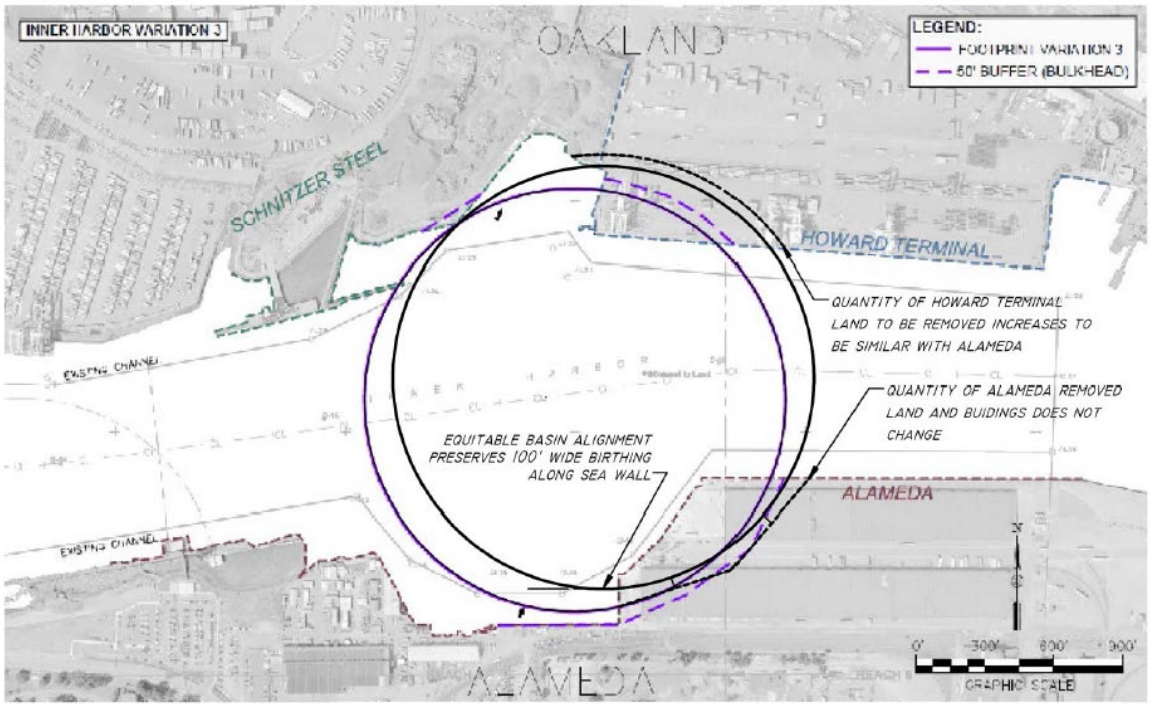
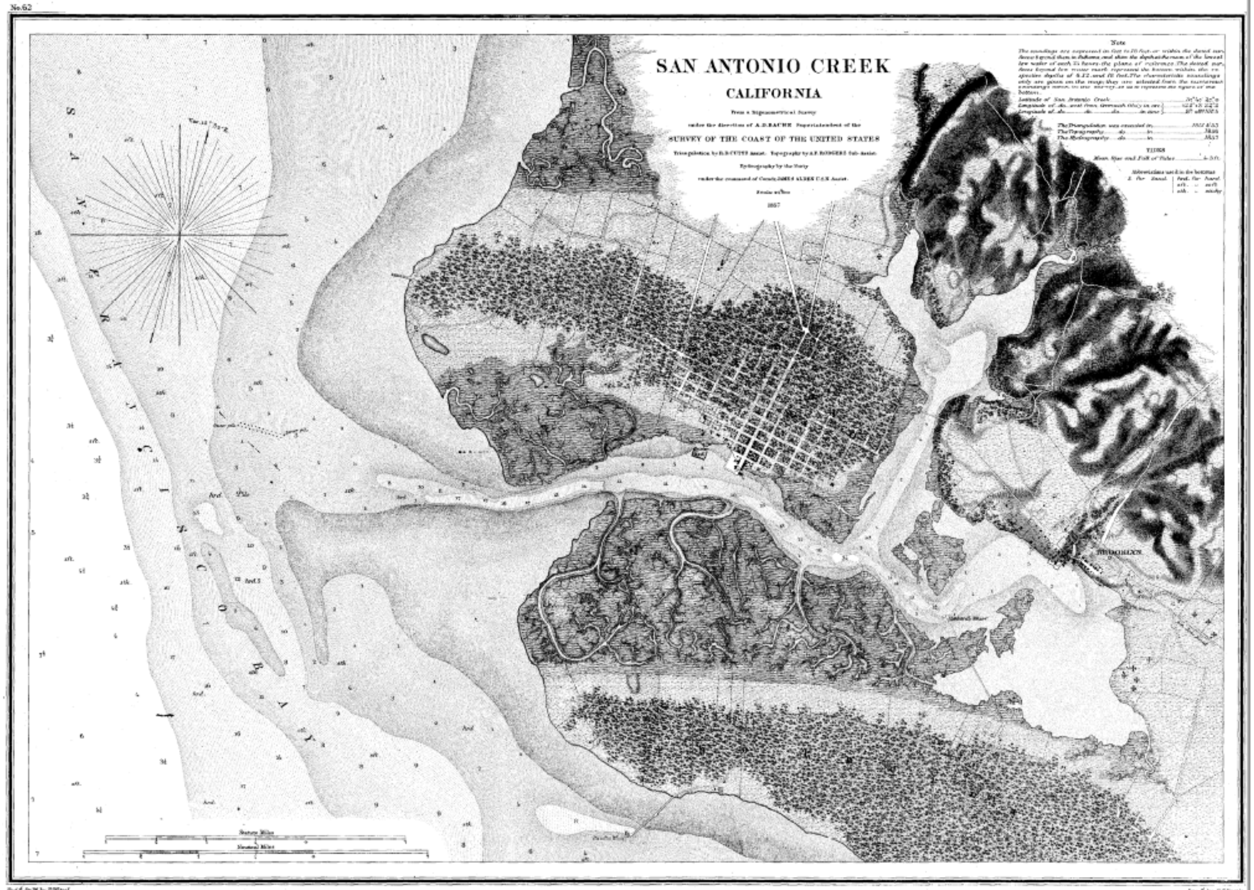


EXHIBIT A
San Francisco (Oyster Point) - Oakland
San Francisco (Oyster Point) - Oakland
CENTERLINE LOGISTICS PIERSPACE
Leo Marine Service, Inc
EQUITABLE BASIN
VARIATION 3 BASIN
EQUITABLE BASIN CONFIGURATION PRESERVES 100' OF BERTH WIDTH
MARINE EXPRESS PIER SPACE
BAY SHIP AND YACHT CO PIER SPACE
VARIATION 3 50' SET BACK (BULKHEAD)
VARIATION 3 SET BACK ELIMINATES COMERICAL PIER SPACE
Google
Marine Express

EXHIBIT B


INNER HARBOR VARIATION 3
OAKLAND
LEGEND:
FOOTPRINT VARIATION 3
50' BUFFER (BULKHEAD)
SCHNITZER STEEL
HOWARD TERMINAL
QUANTITY OF HOWARD TERMINAL LAND TO BE REMOVED INCREASES TO BE SIMILAR WITH ALAMEDA
QUANTITY OF ALAMEDA REMOVED LAND AND BUIDINGS DOES NOT CHANGE
EQUITABLE BASIN ALIGNMENT PRESERVES 100' WIDE BIRTHING ALONG SEA WALL
ALAMEDA
EXISTING CHANNEL
EXISTING CHANNEL
ALAMEDA
0'
300'
600'
900'
GRAPHIC SCALE

No.62



Pacific Merchant Shipping Association

8. Pacific Merchant Shipping Association		
Commenter: Mike Jacob		
Comment Number	**Response**	**Location in IFR**
74	Acknowledged. Thank you for your review. See GC-1 – Induced Growth for a response to how the Recommended Plan does not cause growth.	N/A
75	While USACE agrees with the premise that Ocean-going vessels produce less GHG emissions than other means of moving freight, the Recommended Plan is not expected to impact freight volume or routes. Expansion of the turning basins will ensure safe and efficient vessel movement at the Port for current and future trade. Further GHG emissions are expected to be reduced in a with project future when compared to a without project future. See GC-1.	5.7, 6.14
76	Acknowledged. Thank you for your review.	N/A

PMSA
PACIFIC MERCHANT SHIPPING ASSOCIATION

February 14, 2022

US Army Corps of Engineers, San Francisco District
Attn: Mr. Eric Joliffe
450 Golden Gate Ave., 4th Floor
San Francisco, CA 94102
Delivered via email to: OaklandHarborTurningBasinsStudy@usace.army.mil

Re: Oakland Harbor Turning Basins Widening Navigation Study - Draft Integrated Feasibility Report and Environmental Assessment, Draft Finding of No Significant Impact

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), including the majority of ocean carriers calling on and all of the marine terminals operating at the Port of Oakland, we respectfully submit these comments in support of the conclusion of feasibility for the Oakland Harbor Turning Basin Widening Navigation Study and wholeheartedly endorse future efforts of the US Army Corps of Engineers (USACOE) and the Port to move forward with this widening project as expeditiously as possible. The Turning Basin widening project will increase efficiency, promote economic growth, and will improve the environment by reducing both the rate of growth of emissions by increasing cargo units per vessel and actual total vessel emissions through improved efficiency and avoiding cargo diversion.

The existing channel and turning basins were designed for pre-panamax container vessels which were state of the art 25 years ago – and which carried 1/3 the capacity of today's ultra-large container vessels. While larger ships have been able to be accommodated, these vessels are not operating at maximum efficiency and have little to no margin for error upon their approach or departure within the turning basin. These current limitations on the Port of Oakland stem directly from the size and dimensions of the current turning basins, not from the balance of the channels which are continue to be maintained at the depths authorized by the -50 Foot Project.

PMSA agrees with, and supports, the identification of both Alternative D-1 and Alternative D-2 as feasible scenarios that maximize benefits and advance the purposes of the proposed project. PMSA further agrees that selection of Alternative D-2 is the superior plan for achieving Inner Harbor and Outer Harbor Modifications by application of electric dredges and beneficial placement of dredge spoils.

The expansion of the turning basins in both the Inner and Outer Harbors will facilitate safety, accessibility, and growth in vessel size for all ocean carrier strings calling on the Port of Oakland, and enhance the competitive position of the Port of Oakland and, by providing for expansions in both sides of the Port, for all of the container terminals at the Port.

Enhancement of the competitiveness of the Port of Oakland is critical to its ongoing success. While the Port is naturally positioned to serve California exporters, in particular agricultural commodity shippers from the central valley, it must compete with other Pacific Coast ports and ports in the Gulf and Atlantic seaboards for discretionary import cargoes. Competitiveness for import growth is imperative for the Port's future, otherwise it cannot grow its revenues, support the growth of its marine terminal tenants' throughput and our longshore labor force, and maintain its commitment to an environmental

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improvement program which requires accelerated investments in non-revenue infrastructure and equipment. In short, if the Port of Oakland can no longer physically accommodate the vessels plying the Pacific trade lanes, it will result in a significant limitation on the Port's ability to grow both its volumes and revenues as well as meet its aggressive environmental commitments and goals.

74

In addition to the environmental benefits of lowering emissions per ton and emissions per container which are endemic to the usage of larger and more efficient vessels, the inability to accommodate vessels at the Port of Oakland may result in diversion which would also lead to increased levels of greenhouse gas emissions system wide. Ocean-going vessels are the most environmentally-friendly means of moving cargo as they have the smallest greenhouse gas (GHG) emissions footprint of any transportation mode. Because California ports are primary cargo gateways for Asian cargo, the transportation of cargo by ship from the US West Coast to and from Asia is the most optimal way to conduct trade per ton of cargo relative to greenhouse gas emissions. PMSA commissioned a study to evaluate the relative impacts of cargo diversion on GHG emissions, and the result was that GHG emissions were an average of 22% higher when shippers bypassed a California port for an East Coast or Gulf Coast port. There is simply no question that if projects like the turning basin expansion do not go forward to facilitate the most efficient and beneficial use of the cleanest vessels in the trade lanes with the shortest distances, that the resulting impact of the associated diversion of this cargo will be higher GHG emissions.

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PMSA also agrees with the USACOE and Port of Oakland for the selection of Alternative D-2 which requires the utilization of electric dredges in order to reduce the potential cumulative impacts of additional diesel particulate matter on the surrounding community. As you may be aware, every component of the intermodal supply chain at California ports has been successfully employing aggressive measures for many years in an effort to significantly reduce the emissions of diesel emissions and improve air quality in the communities and regions surrounding our freight hubs. These include significant investments and remarkable progress made by ocean-going vessels and marine terminal operators. We welcome the project joining in these efforts and ensuring that the additional emissions associated with the turning basin expansions are truly "Minor" as identified in the report.

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Thank you for affording PMSA and other stakeholders the opportunity to comment on this important Study. We commend the USACOE and Port of Oakland for their efforts to improve the safety, economic vitality, and environmental footprint of vessel operations represented by the expansions of the Inner Harbor and Outer Harbor turning basins and implore this feasible and beneficial project move forward as quickly as possible.

Sincerely,

Mike Jacob,
Vice President & General Counsel

cc: Mr. Danny Wan, Executive Director, Port of Oakland
Mr. Bryan Brandes, Maritime Director, Port of Oakland

9. San Francisco Bar Pilots Association		
Commenter: Mike Jacob		
Comment Number	**Response**	**Location in IFR**
77	Acknowledged. Thank you for your review.	N/A

SAN FRANCISCO BAR PILOTS ASSOCIATION
Pier 9 East End
San Francisco, CA 94111

February 14, 2022

Army Corps of Engineers
Attn: Oakland Harbor Turning Basins Study

Subject: Public Comment - Draft Integrated Feasibility Report and National Environmental Policy Act Environmental Assessment

To whom it may concern:

The San Francisco Bar Pilots are an association of state licensed maritime pilots who provide pilotage services to commercial vessels calling at the Port of Oakland. The services we provide are critical to an efficient supply chain and the economic well-being and environmental protection of the State. Safe navigation and maneuvering of all vessels is our number one priority.

Today, many vessels calling at the Port of Oakland exceed the existing design parameters of the navigation channel and improvement to the existing design would be a welcome safety improvement.

We have reviewed the Tentatively Selected Plan proposed in the report and have concluded the project would enhance the safety margin of maneuvering large vessels in what is currently a very restricted maneuvering area.

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Respectfully,

John Carlier

Capt. John Carlier
Port Agent

SSA Terminals

	10. SSA Terminals	
	Commenter: Jim Rice	
Comment Number	**Response**	**Location in IFR**
78	See GC- 1 and Response 75. Acknowledged. Thank you for your review.	5.7, 6.13
79	Acknowledged. Thank you for your review.	

SSATerminals

February 14 2022

US Army Corps of Engineers, San Francisco District
ATTN: Mr. Eric Joliffe
450 Golden Gate Ave, 4thFl.
San Francisco, CA 94102
Delivered via email to: OaklandHarborTurningBasinsStudy@usace.army.mil

RE: Oakland Harbor Turning Basins Widening Navigation Study – Draft integrated Feasibility Report and Environmental Assessment, Draft finding of No Significant Impact

Dear Mr. Joliffe,

On behalf of SSA Marine, and more specifically, SSA Terminal operating Oakland International Container Terminal at the Port of Oakland, we appreciate the expedited study that is underway for this critically important project of widening the Turning Basins. SSA Terminal is currently handling 65% of the movement of goods through the Port, contracted with 23 different steamship lines and turn approximately 20 ships a week at the Inner Harbor Turning Basin. Over the years we have all witnessed the continued growth in both size and TEU capacity of the vessels call Oakland, which in turn has reduced the amount of space necessary to complete the vessel turns at the Inner Harbor Turning Basin.

SSA has heavily invested in the Port's future environmentally and infrastructurally to accommodate the larger TEU vessels that will be deployed to Oakland in full anticipation of the widening of Turning Basins. This project is vital to the Port of Oakland' s continued growth and ability to remain competitive. If we are unable to grow due to the Port's current infrastructure not meeting the needs of the larger vessels, then the steamship lines and their customers will look to other Ports for their business needs. 78

Additionally, as the steamship lines rotate in their larger more environmentally clean ships it comes down to less vessel calls and some of the older less environmentally friendly ships would be removed from Oakland's port call. SSA is already plugging ships into our berths reducing particulate emissions into the air by 95%.

SSA strongly supports the identification of both Alternative D-1 and Alternative D-2 as feasible solutions in order to advance this critical project. We also agree that Alternative D-2 is the preferred plan for achieving Inner Harbor and Outer Harbor Modifications by application of electric dredges and useful placement of dredge spoils. 79

We look forward to working with the US Army Corps of Engineers and the Port of Oakland on this vital project.

Sincerely,

Jim Rice

Jim Rice, General Manager
SSA Terminal Oakland

Department of Justice

10. Department of Justice		
Commenter: Rob Bonta		
Comment Number	**Response**	**Location in IFR**
79	USACE respectfully disagrees and believes the Draft IFR/EA adequately meets the requirements of NEPA. Detailed responses to commenters assertions are found below.	
80	See GC-1 – Induced Growth. USACE also disagrees with your calculation of 200%. For growth projections, see 2020 Tioga report and Appendix C. Capacity at a Port is not based on its design vessel, therefore capacity cannot be calculated in the method used by commenter. Further, ships that arrive at the Port of Oakland are generally not at full capacity.	5.7, Appendix C
81	See Response 15.	6.1
82	See Response 1.	Appendix A-4b
83	See GC-1 - Induced Growth for an explanation as to why the Recommended Plan will not increase capacity at the Port of Oakland. See Response 3 and 7.	5.7, 6.14, Appendix A-7
84	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. See GC-1 Induced Growth.	1.2, 5.7
85	85a. See GC-1 – Induced Growth. 85b. This statement does not conflict with USACE's position that the Recommended Plan will not induce growth. UCLVs are able to call at the Port of Oakland, but they are unable to utilize the turning basins. Should the Recommended Plan not be authorized, then the Port is still able to accommodate the same amount of forecasted growth, it will do so with smaller ships and less efficiently. 85c. The cargo capacity for ships has not grown at 2.1%. This percentage represents the projected growth expected for the Port of Oakland, independent of the Recommended Plan.	1.2, 4.6, 5.7, Appendix - C

	The Draft IFR/EA has modified the language quoted to explain that vessel traffic increase was meant for a future without project scenario. Vessel traffic is still expected to grow under the Recommended Plan as a product of the projected growth, just not as significantly as in a future without project. This is because the growth is independent of the Recommended Plan. See GC-1, 4.6, 5.7, Appendix C. 85d. See Response 85c. 85e. See Response 85c. The move toward larger vessels is an assumption the study has considered as a baseline, something that will persist in a future without project. Growth in trade or cargo will incentivize the shipping industry to utilize larger ships. This decision is not based on the existence of the Recommended Plan. UCLVs are able to call at the Port currently despite not being able to use the turning basins. The Recommended Plan is not expected to reverse any pattern. In fact, UCLVs have been calling more frequently in recent years as a product of growth. 85f. See Responses 85a-e.	
86	No FONSI has been issued or finalized. A draft FONSI is provided for review and comment.	Appendix A-11
87	The Draft IFR/EA conducts its air quality impact analysis at 6.13 and GHG analysis at 6.14. The draft HRA is also included in Appendix A-4b. These revisions provide the support requested. See GC-1- Induced Growth.	5.7, 6.12, 6.13, Appendix A-4b
88	See Response 49 and 68a.	6.4.1
89	Traffic is analyzed in Section 6.10. A traffic management plan will be created by the contractor during construction. Trucks will be restricted by the Truck Management Plan, GC-2. Mitigation measures are found in Appendix A-7.	6.10, Appendix A-7
90	Cumulative Impacts are now included in Section 6.16. It discusses both Eagle Rock and Howard Terminal.	6.16
91	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	3.1.2, 6.1

	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.	
92	References to WOCAP and CARB added. Specifically West Oaklands air pollution burdens and the allowances of Diesel Particulate matter. In support of these goals, the Port of Oakland has agreed to fund the expense of electric dredges.	3.13.2, 3.14.1, 6.1, 6.13
93	See Response 92. The Recommended Plan is expected to reduce GHG emissions over a future without project due to reduced vessel idle times and wetland sequestration.	6.14
94	See GC-1 Induced Growth. The Recommended Plan is not inconsistent with any of the WOCAP Strategies. It does not interfere with the Port's ability to achieve zero-emission trucks, or other truck mitigation, electric barge and tugs, and Tier 2 and 3 marine vessels. Newer, larger vessels are more efficient and their use should result in lesser emissions over time.	3.13.2, 5.7, 6.14

VIA ELECTRONIC MAIL

May 9, 2022

Eric Jollifee,
Environmental Planner
United State Army Corps
of Engineers 450 Golden
Gate Avenue, 4th Floor
San Francisco,
California 94102

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

Dear Mr. Jollifee:

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

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

[2] Our comments are not intended to object to the Project as a whole, but rather to express severely overburdened neighborhoods in West Oakland, which will bear the brunt of the impacts of the Project.

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

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

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The Project Study Area includes West Oakland, a community of color where 42% of its residents identify as African American, 18% identify as Hispanic, and 11% identify as Asian. It is also a relatively low-income community with approximately 52% of the population living two times below the poverty level, compared to 23% in the broader Bay Area.[5] West Oakland already experiences high levels of air pollution from the Port, four highways, industrial facilities, and truck-related businesses.[6] According to California's statewide pollution burden screening tool, CalEnviroScreen 4.0, West Oakland residents endure greater pollution exposure than 85-90% of all other Californians.[7] CalEnviroScreen identifies the census tracts surrounding the Port as falling within the top 90% of all census tracts statewide for exposure to traffic pollution from diesel particulate matter (DPM) emissions, with the Prescott neighborhood scoring within the top 98%, and falling within the top 100th percentile statewide for exposure to contaminants from cleanup site and groundwater threats.

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

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

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

[6] *Id.*

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

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

The pervasive harms facing West Oakland have been recognized by various government agencies. In 2019, per Assembly Bill 617[12] ("AB 617"), the California Air Resources Board ("CARB") identified West Oakland as a community disproportionately burdened by environmental pollution, and with the participation of community stakeholders and the Bay Area Air Quality Management District ("BAAQMD"), adopted a community emissions reduction plan ("CERP") for West Oakland–the West Oakland Community Action Plan ("WOCAP"). The WOCAP disclosed that Port-related emissions contribute 57% of the diesel PM emissions to West Oakland, 52% of the cancer risk, and 17% of the $PM_{2.5}$ emissions, and that diesel PM emissions account for over 90% of the community's total cancer risk.[13] The WOCAP further found that West Oakland suffers from cancer risk exposure in excess of BAAQMD risk thresholds, and that the community was subjected to $PM_{2.5}$ concentrations of around 1.70 $\mu g/m^3$ in 2017.[14] To address these serious burdens faced by the West Oakland community, BAAQMD and CARB established emissions reductions goals and targets in the WOCAP to improve conditions in West Oakland, and identified 89 strategies that multiple agencies, including the Port, must implement to meet these goals.

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

[8] Muntu Davis, Air Pollution Risks & Vulnerability to Health Impacts: A Look at West Oakland (March 2018) at Slide 4, https://ww2.arb.ca.gov/sites/default/files/2018-03/capp_consultation_group_march_2018_alameda_county_health_presentation.pdf.
[9] Environmental Defense Fund, Traffic Pollution Causes 1 in 5 New Cases of Kids' Asthma (April 2019), http://blogs.edf.org/health/2019/04/29/traffic-pollution-causes-1-in-5-new-cases-of-kids-asthma-in-major-cities-how-data-can-help/.
[10] Davis, *supra* note 8, at Slides 8-10.
[11] West Oakland is also a historically redlined community. Beginning in the 1930s, federal housing policy directed investment away from "risky" communities of color in the East Bay, including West Oakland, Emeryville, and parts of Berkeley, Alameda, and Oakland. *Id.* at 2-2. The neighborhoods in West Oakland were coded red, signifying the least desirable areas where investment was to be avoided. *Id.* See also University of Richmond Digital Scholarship Lab, Mapping Inequality, Oakland, CA, https://dsl.richmond.edu/panorama/redlining/#loc=14/37.804/-122.293&city=oakland-ca&adview=full.
[12] Cal. Health & Safety Code, § 44391.2(c) (West 2018).
[13] WOCAP, *supra* note 5, at 5-9 (Fig. 5-4), 4-5.

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

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

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

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[14] *Id.* at 4-7 (Fig. 4-4).

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

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

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

83

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

The EA's description of the Project's purpose is inaccurate.

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

The Army Corps has not fully disclosed the purpose and need for the Project. The EA states that the purpose of the Project is: "to address navigation inefficiencies currently experienced by vessels in the Oakland Harbor." (EA at 1.) But the EA also acknowledges that the Project will "realize economies of scale" that will significantly expand operations at the Port. (EA at 93, 20 [noting the positive correlations "between the economic condition of a port and its total nominal vessel capacity"].) The Army Corps glosses over this particular motivation for the Project by calling it a "navigation improvement project." (EA at 1.) In doing so, the Army Corps skews the EA's environmental analysis by intentionally excluding an important dimension of the Project– that the Project will increase the volume of cargo that is processed at the Port as larger ships with significantly greater carrying capacity more efficiently maneuver the wider turning basins in the Inner and Outer Harbors. Based on this inaccurate project description, the EA does not discuss the environmental impacts of the Project's expanded Port operations. Because the Army Corps' EA does not accurately describe the Project's purpose, it precludes meaningful review of the Project's impacts in violation of NEPA.

84

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

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

NEPA requires that the Army Corps "[i]dentify [the Project's] environmental effects and values in adequate detail so they can be compared to economic and technical analyses," 40 C.F.R. § 1501.2(b), "to ensure that relevant environmental information is identified and considered . . . to ensure informed decision making by Federal agencies," 40 C.F.R. § 1500.1(b). Here, the Army Corps failed to comply with this requirement because the EA does not examine the Project's operational impacts; the EA's analyses of every environmental category of impacts is limited to the Project's construction phase (i.e. activity associated with widening the turning basins in the Inner and Outer harbors). 85a

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

- The existing turning basins were designed for a ship that is 1,139 feet long, 140 feet wide, and has a carrying capacity of 6,500 twenty-foot equivalent units (TEUs). (EA at ii.) The Project will widen the width of the turning basins to allow larger ships with three times the cargo carrying capacity of the turning basins' original design vessel to efficiently rotate in the turning basins. (*See* EA at iii [the Project will accommodate ships that are 1,310 feet long, 193 feet wide, and can carry 19,000 TEUs].) 85b

- The cargo capacity for ships serving the Port has "grown at an average rate of 2.1% per year, and that rate of growth is expected to persist throughout the forecast period, which ends in 2050. This will roughly double the TEU volumes handled by the Port by the end of the forecast period. [. . .] *The Port will see an increase in vessel traffic to accommodate this increase in volume*." (EA at 95, 101 [emphasis added].) 85c

- "While smaller vessels are being replaced by larger ones to carry more cargo on a single voyage, the *overall number of vessels will have to increase* to match increasing [cargo capacity] volumes over time." (EA 101-102 [emphasis added].) 85d

- "It is reasonable to assume that upwards of 40% of Oakland's [cargo capacity] volume would be shifted to these larger classes of vessels [referring to vessels with 15,000 to 23,000 TEUs] by the end of the forecast period." (EA at 102.) These ships "have called infrequently at the Port historically" due to the turning basins not being wide enough, but the Army Corps anticipates that pattern will reverse and the Port can achieve "economies of scale" after widening the width of the turning basins (the Project). (*Id.*) 85e

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

85f

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

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

86

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

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

86

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

The EA acknowledges that the Bay Area is a designated nonattainment area for the federal ozone and $PM_{2.5}$ standard, (EA at 182), and that West Oakland has a "high cumulative air pollution exposure burden, particularly to DPM [diesel particulate matter]." (EA at 186.) The Army Corps also found that the Project would exceed BAAQMD's local threshold of 54 pounds of NO_X [nitrogen oxide] per day. *Id.* Nevertheless, the EA concludes that its proposed construction mitigation measures (i.e., requiring electric dredge equipment and certified Tier 4 Final construction equipment, and implementing BAAQMD's recommended mitigation measures) will reduce emission-related health risks to sensitive receptors in the West Oakland community. (EA at 126, 182, 189). There is no support for this determination.

87

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

87

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

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

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

88

NEPA requires the Army Corps take a hard look at the extent to which groundwater in the whether impacts to groundwater could be avoided). The Army Corps should identify feasible mitigation measures to avoid anticipated harms to groundwater.

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

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

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

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

89

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

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

90

Where several projects have a "cumulative environmental impact," their consequences must be discussed in an EA and EIS. *Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dept of the Interior*, 927 F.Supp.2d 921, 942 (S.D. Cal. 2013) (citations omitted). A "cumulative impact" is the impact of a project "'when added to other past, present, and reasonably foreseeable future actions.'" *Id.* (citing 40 C.F.R. §§ 1508.7, 1508.8(b)). Similarly, "indirect effects" are defined as effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* at p. 945 (citing 40 C.F.R. § 1508.8(b)). Indirect effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." *Ibid.*

Cumulative impacts analyses are particularly important in EAs "because so many more EAs than EISs are prepared, and thus there is a higher risk of cumulative impacts resulting from the many smaller decisions." *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241, 1266 (E.D. Cal. 2006) (citations omitted).

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

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

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

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

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

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

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

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

90

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

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

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

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

[23] *Ibid.*

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

[25] *Ibid.*

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

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

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

91

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

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

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

environmental justice analysis and into "the surrounding communities of the West Oakland and Alameda." (EA at 130); *see also Vecinos para el Bienestar de la Comunidad Costera v. Federal Energy Regulatory Commission* 6 F.4th 1321, 1330-31 (D.C. Cir. 2021) (rejecting the federal agency's environmental justice analyses under NEPA because it limited the analysis to "within

two miles of the project site" even though it had "determined that the environmental effects of the project would extend beyond the . . . two-mile radius").

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

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

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

92

The Project is Inconsistent with the WOCAP's Primary Goals and Targets

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

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

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

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

POLLUTANT	2025 TARGET	2030 TARGET
Diesel PM	< 0.25 µg/m^3	< 0.13 µg/m^3
$PM_{2.5}$	< 1.7 µg/m^3	< 1.2 µg/m^3
Cancer Risk	< 200/1 million	< 110/1 million

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

93

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

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

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

[28] Converting the Project's construction emissions into a µg/m^3 figure and a comparative point of analysis to the WOCAP is an essential part of an EA or EIS, but no such analysis occurred here.

The Project is Inconsistent with WOCAP Strategies.

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

94

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

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

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

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

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

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

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

94

CONCLUSION

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

Sincerely,

OMONIGHO OIYEMHONLAN DAVIN WIDGEROW
Deputy Attorneys General

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Attorney General

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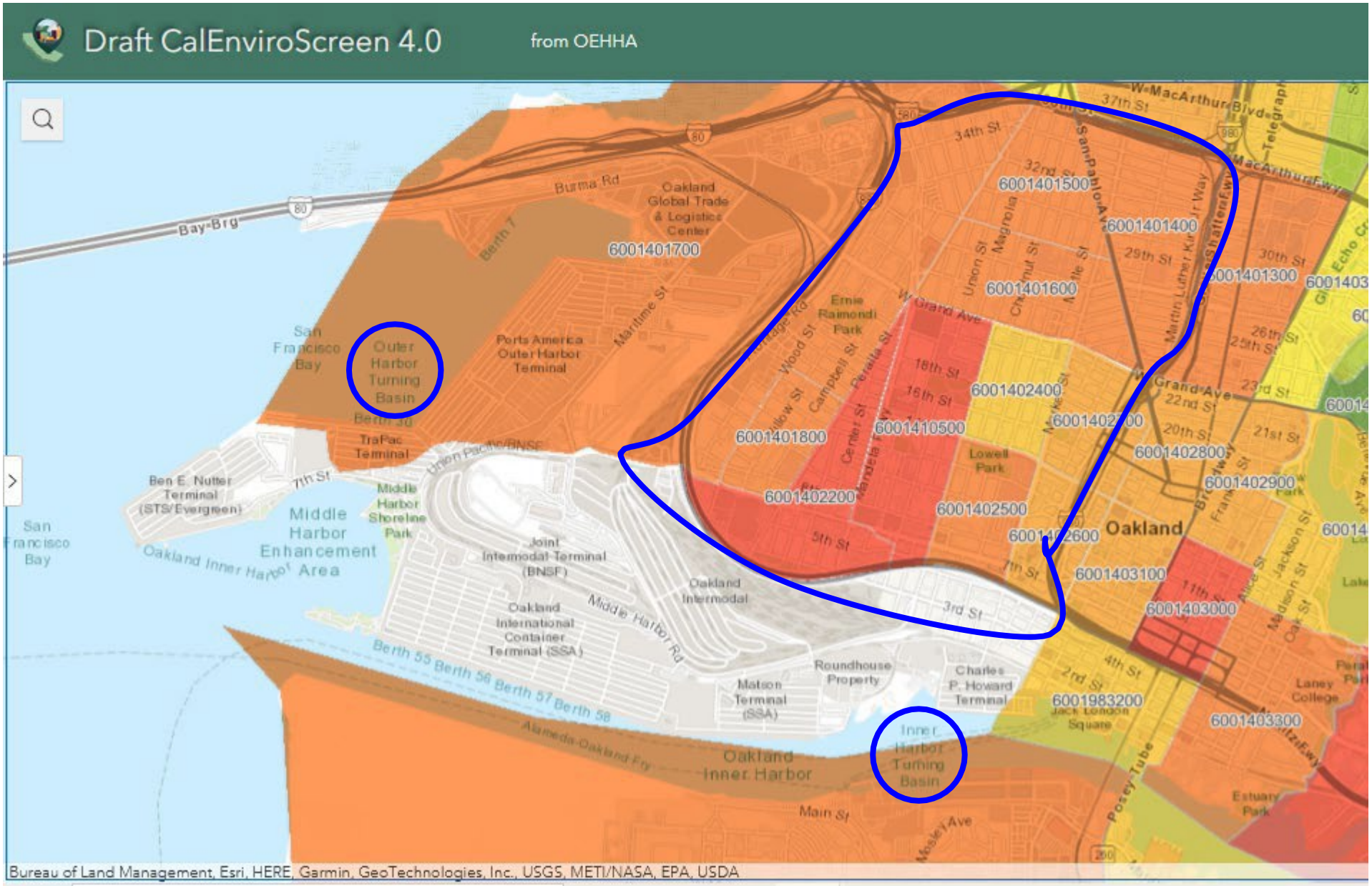
Draft CalEnviroScreen 4.0
from OEHHA
Bay Brg
Burma Rd
Oakland Global Trade & Logistics Center
6001401700
Berth 7
Maritime St
Ports America Outer Harbor Terminal
San Francisco Bay
Outer Harbor Turning Basin
Berth 30
TraPac Terminal
Union Pacific/BNSF
Ben E. Nutter Terminal (STS/Evergreen)
7th St
Middle Harbor Shoreline Park
Middle Harbor Enhancement Area
Oakland Inner Harbor
Joint Intermodal Terminal (BNSF)
Oakland Intermodal
Middle Harbor Rd
Oakland International Container Terminal (SSA)
Berth 55 Berth 56 Berth 57 Berth 58
Matson Terminal (SSA)
Roundhouse Property
Charles P. Howard Terminal
Alameda-Oakland Fry
Oakland Inner Harbor
Inner Harbor Turning Basin
Main St
Mosley Ave
34th St
32nd St
6001401500
W MacArthur Blvd
MacArthur Fwy
San Pablo Ave
6001401400
29th St
30th St
6001401300
Union St
Magnolia
Chestnut St
Apgar St
6001401600
Martin Luther King Jr Way
Ernie Ramondi Park
W Grand Ave
Ridge Rd
Wood St
Campbell St
Peralta St
18th St
16th St
6001402400
6001401800
6001410500
Market St
Grand Ave
22nd St
23rd St
20th St
21st St
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Lowell Park
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Oakland
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Oak St
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Laney College
Posey Tube
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