Nos. 18-16105; 18-16141

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAKLAND BULK & OVERSIZED TERMINAL, LLC,
Plaintiff-Appellee,

v.

CITY OF OAKLAND,
Defendant-Appellant,

and

SIERRA CLUB; SAN FRANCISCO BAYKEEPER,
Intervenor-Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF DEFENDANT-APPELLANT CITY OF OAKLAND

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INTRODUCTION

Oakland Bulk and Oversized Terminal, LLC's ("OBOT") Answering Brief ignores the language of OBOT's development agreement ("DA"), nearly all the evidence in the City Council record, and most of the argument in the City of Oakland's ("Oakland" or "the City") Opening Brief. OBOT offers no persuasive defense of the District Court's erroneous rejection, as unreasonable, of Oakland's determination that OBOT's storage and handling of coal would endanger Oakland residents.

The parties agree that the DA permitted imposition of new regulations that the City Council determined, "based on substantial evidence," were needed to avert substantial danger. OBOT does not dispute that evidence is "substantial" if it is "reasonable, credible, and of solid value." Answering Brief ("AB") 24. In deciding whether that standard was met, both the DA's plain language and California-law principles governing judicial review of agency and municipal factual determinations require deference to the Council's determination. The District Court's erroneous application of the DA's "substantial evidence" standard resulted in two independent but related mistakes, each of which separately supports reversal.

First, the District Court erred in relying on OBOT's extra-record evidence to undermine the evidence that *was* before the Council. OBOT's argument that the

court properly used extra-record evidence to "evaluate" the Council's evidence, AB 31-33, disregards the DA's clear language, which gives *the Council* the authority to determine whether substantial evidence of substantial danger was before it. OBOT's post-hoc litigation evidence, which was never presented to the Council, cannot help "evaluate" the soundness of the Council's determination. OBOT's argument is also at odds with settled limits of "substantial evidence" review, under which "extra-record evidence can *never* be admitted merely to contradict" record evidence. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal.4th 559, 579 (1995) (emphasis added).

Second, the District Court erred by weighing competing evidence and deciding which side was likely correct, instead of deferring to the Council's determination. OBOT's attack on the Council record focuses almost exclusively on *a single piece of evidence* (Environmental Science Associates' ("ESA") report), and all but ignores thousands of other pages of relevant evidence, including several other expert reports that, by themselves, suffice to support the Council's determination. OBOT alleges that the Council "principally" relied on ESA's report, AB 36, but cites no authority for its position that this Court should disregard the remainder of the Council record. In fact, the District Court rightly concluded that the *entire* Council record should be considered in deciding whether

substantial evidence supported the Council's determination, and OBOT has not challenged that ruling.

OBOT's selective challenges to the record evidence are also meritless. OBOT largely repeats the District Court's criticisms without meaningfully engaging with the arguments in Oakland's Opening Brief. Accordingly, OBOT fails to justify the District Court's erroneous conclusions about mitigation measures, substitution of its own scientific judgment for Oakland's experts', misplaced confidence that another regulatory agency would protect Oakland residents (and expectation that the Council rely on that), insistence that Oakland conduct its own air modeling, and disregard of the likely catastrophic effects of a coal fire at the terminal. The court's de novo reweighing of competing evidence was erroneous under any conception of "substantial evidence" review.

ARGUMENT

I. OBOT's construction of Section 3.4.2 ignores the provision's language and case law that informs its meaning.

OBOT's DA permits new regulation if the "City determines based on substantial evidence and after a public hearing that a failure to do so would place existing or future occupants … in a condition substantially dangerous to their health or safety." ER1970 ("Section 3.4.2"). OBOT does not dispute that, under

California law,[1] "substantial evidence" must be "reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion." *South Coast Framing, Inc. v. Workers' Comp. Appeals Bd.*, 61 Cal.4th 291, 303 (2015); *see also* AB 24. The DA thus permitted the Resolution so long as the Council could reasonably have determined that failing to adopt the Resolution would lead to substantial danger, so the court should have focused on the reasonableness (not correctness) of the Council's determination based on the evidence.

OBOT nonetheless contends that the District Court could make its "own assessment" of the evidence because, according to OBOT, Section 3.4.2's use of the word "determines" "establishes nothing about the nature of the district court's task." AB 27. But whether Oakland breached Section 3.4.2 turns on the appropriateness *of the City's determination*. *See* Opening Brief ("OB") 31-32. OBOT is wrong that the District Court's "own assessment" of the evidence, unmoored from consideration of the City's determination, establishes a breach of Section 3.4.2. AB 27. Under the DA's wording, it was only by reviewing the City's determination based on the evidence before the Council that the District Court could determine whether the provision had been breached.

[1] The DA provides that it is "governed by and interpreted in accordance with" California law. ER2000.

Thus, Section 3.4.2's plain language required the District Court to defer to the City. Deference was also required under California-law principles applicable to judicial review of administrative agency and municipal factual determinations (although the record evidence plainly meets the standard OBOT agrees applies here, "reasonable, credible, and of solid value," even if these principles did not apply). OBOT does not dispute that terms of art in a contract are read to have the "'special meaning … given to them by usage.'" AB 33 (quoting Cal. Civ. Code §1644). Here, "substantial evidence" has an established, special meaning under California law, which the District Court should have applied.

Under this standard, the City's determination is presumed correct. A reviewing court, "after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it." *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1114 (2015).

OBOT contends that these well-established principles do not apply here because "substantial evidence" is a standard of proof, not a standard of review. AB 25. Under California law, however, "substantial evidence" is *both*. OBOT's argument confuses the City's and judiciary's discrete roles under the substantial evidence framework.

"Substantial evidence" has different meanings under California law depending on which entity is applying that standard. *See Berkeley Hillside*, 60 Cal.4th at 1114 (under substantial evidence standard, "reviewing court's 'role' in considering the evidence differs from the agency's"). For the administrative agency or municipality, "substantial evidence" defines the quantum of evidence the agency must find to support its determination. *Id*. ("agency serves as the finder of fact," requiring it to "weigh the evidence and determine which way the scales tip") (internal quotations omitted). For the judiciary, "substantial evidence" defines the standard of review it must apply to that agency's factual determination. *Id*. ("[R]eviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it").

Accordingly, "substantial evidence" is a standard of proof when applied to the initial factfinder (the City) and a standard of review when applied to the reviewing entity (the judiciary). It is fully consistent with California law for the parties to have intended "substantial evidence," as it appears in Section 3.4.2, to carry this dual definition, which is how courts construe that term of art.[2] By

[2] Indeed, Section 3.4.2 is written the same way as California regulations that have been uniformly construed to require courts to apply the standard-of-review aspect of "substantial evidence." *See, e.g.*, Cal. Code Regs., tit. 14, §15162 (2010)

arguing instead that the standard-of-proof component (which ordinarily applies to the municipality) should govern the *judiciary's* task, OBOT "wrongly conflates" standards of proof with standards of review. AB 25. OBOT cannot explain why a provision using a term of art with an accepted meaning under California law should be construed to have the different meaning of imposing the "substantial evidence" definition that applies to the *initial factfinder* on the District Court's *review* of those factual determinations.[3]

OBOT contends that if the parties meant to incorporate the substantial evidence standard they would have written Section 3.4.2 more like Section 14.14, which provides that "'[a]ny challenge made [to the] City's termination, modification, or amendment of this Agreement … shall be subject to review in the

(supplemental environmental review not required "unless the lead agency determines, on the basis of substantial evidence in the light of the whole record" that it is required); *Friends of the College of San Mateo Gardens v. San Mateo Cnty. Comm. College Dist.*, 1 Cal.5th 937, 953 (2016) (under §15162, reviewing court "is then to decide whether the agency's determination is supported by substantial evidence … not to weigh conflicting evidence and determine who has the better argument") (internal quotations omitted).

[3] OBOT's cases are not to the contrary. AB 25. Justice Thomas's concurrence in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 650-51 (1993), notes only that standards of review and of proof are different concepts. And *Dantran, Inc. v. U.S. Department of Labor*, 171 F.3d 58 (1st Cir. 1999), supports Oakland; it held simply that when the same legal term refers to *both* a standard of proof and standard of review, the term has a distinct meaning in each context—as California courts have similarly concluded. *Id*. at 70 ("preponderance of the evidence, when articulated as a standard of review, operates [like] the 'clearly erroneous' standard").

Superior Court of the County of Alameda and solely pursuant to California Code of Civil Procedure Section 1094.5(c).'" AB 26 (quoting ER2001).

However, Sections 3.4.2 and 14.14 impose different requirements and serve different purposes. Section 14.14 operates to limit OBOT's remedies for the DA's "termination, modification, or amendment" by providing that such actions may be challenged only via writ of administrative mandate, where the only remedy is to "set aside" the agency decision. Cal. Code Civ. Proc. §1094.5(f). Section 14.14 thus precludes OBOT from bringing other causes of action (such as contract claims) or seeking other remedies (such as damages) based on a "termination, modification, or amendment." *See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435, 455 (2010) ("relief pursuant to administrative mandamus would have been limited to a writ vacating a final decision by the town council" and "damages would not be available in such an action"). Moreover, Section 14.14 mandates that any such challenge be filed in Alameda County Superior Court. Section 14.14 does *not*, however, impose a specific standard of review, as §1094.5 provides for different standards of review depending on the circumstances. *See* Code Civ. Proc. §1094.5(c).

By contrast, Section 3.4.2 does not limit the types of challenges that may be brought, available remedies, or venue for such challenges, but *does* identify a specific standard for evaluating the evidence. Had the parties drafted Section 3.4.2

to reference §1094.5 (as Section 14.14 does), its effect would have been completely different: OBOT would be barred from bringing contract (or any other non-writ) claims at all. As written, Section 3.4.2 instead permits OBOT to bring claims (including for contract breach) to challenge a City determination under Section 3.4.2. Accordingly, Section 14.14 is not an "express" version of Oakland's construction of Section 3.4.2. AB 26.

Finally, OBOT cursorily asserts that a contract cannot "dictate" the applicable standard of judicial review. AB 28. But Section 3.4.2 provides the *substantive standard* that governs OBOT's breach claim. Breach requires proof that the Council's determination was not based on "substantial evidence"—i.e., that the evidence before it was *not* "such that a reasonable mind might accept it as adequate to support a conclusion." *South Coast Framing*, 61 Cal.4th at 303. Thus, rather than referencing "substantial evidence," Section 3.4.2 could have stated: "City shall be liable for breach of this provision only if OBOT proves that no reasonable municipality would have made the same determination based on the evidence before City at the public hearing." There is no plausible argument that this version would impermissibly dictate how courts resolve disputes. It does not matter that the parties identified the governing standard by instead referencing "substantial evidence," a term of art that carries the same established meaning.

The single case OBOT cites to support its argument is readily distinguishable. *Kyocera Corporation v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), addressed whether an arbitration agreement could provide additional bases for judicial review beyond the "limited grounds on which a federal court may vacate, modify, or correct an arbitral award" under the Federal Arbitration Act ("FAA"). *Id*. at 994. *Kyocera* held that "private parties may not contractually impose their own standard on the courts" because "Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision." *Id*.; *see also Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (FAA's bases for judicial review are "exclusive"). Here, federal law imposes no such substantive limitation upon judicial review of Oakland's compliance with its contract, so *Kyocera* is inapposite.[4]

OBOT's broader reading of *Kyocera*'s dicta also does not help it. To support its statement that "private parties lack the power to dictate *how* the federal courts conduct the business of resolving disputes," *Kyocera* cites three decisions rejecting arguments that appellate courts should disregard the legally applicable standard of review because a party failed to identify the proper standard in its

[4] In fact, OBOT's contract claim is governed by state law, under which parties *can* contractually impose a standard of review even in the arbitration context. *See Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 1340 (2008) (in contrast to FAA, arbitration agreements governed by California Arbitration Act "may alter the usual scope of [judicial] review").

advocacy to the court. 341 F.3d at 1000 (citing *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001); *K&T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996); *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992)) (emphasis in original).[5] Here, Oakland's argument is not that this Court should deviate from the legally applicable standard of appellate review but instead that it should apply Section 3.4.2's substantive standard to evaluate, under California law, whether Oakland breached the DA.

II. The District Court erred in relying on OBOT's extra-record evidence.

Under Section 3.4.2's language, extra-record evidence was irrelevant to OBOT's contract claim and should not have been admitted. It makes no sense to evaluate whether the Council's *determination* was based on substantial evidence by considering evidence never presented to the Council, of which the Council was necessarily unaware. OB 35-36 (citing cases where courts measure reasonableness determination in light of then-existing knowledge). Without such a limitation, parties would also have an incentive to withhold evidence from adjudicatory

[5] *Worth* rejected an argument that the plaintiff's failure to argue for "clear error" review required fact findings to be reviewed under a standard other than "clear error." 276 F.3d at 262 & n.2. *K&T Enterprises* reviewed the denial of a Federal Rule of Civil Procedure 50(b) motion *de novo*, even though both parties believed the abuse of discretion standard applied. 97 F.3d at 175. And *Vontsteen* reviewed a defendant's sentencing challenge for plain error even though the government had not proposed this standard until oral argument. 950 F.3d at 1091-92.

agencies and then use it to attack the agency in court. OBOT ignores these arguments completely.[6]

If Section 3.4.2's plain language were not enough, the substantial evidence standard incorporated by that provision establishes that "extra-record evidence can *never* be admitted to merely contradict the evidence the administrative agency relied on." *Western States*, 9 Cal.4th at 579 (emphasis added). This limitation thus does not read "substantial evidence" out of the DA (as OBOT contends (AB 31)), but is instead *essential* to substantial evidence review.[7]

OBOT justifies its use of extra-record evidence by complaining that it had no "meaningful opportunity" to present evidence to the Council. AB 30. Even if that were true, it might support a *procedural* challenge to the Council's actions but would not authorize ignoring Section 3.4.2's limitation on extra-record evidence,

[6] Section 3.4.2's "public hearing" requirement further supports the exclusion of extra-record evidence. OB 35. OBOT counters that the public hearing requirement is designed to protect against "secret[] process," AB 30-31, but the requirement can further *both* purposes. OBOT does not dispute that, while the Council's hearing was "public" (thereby vindicating Section 3.4.2's open government purpose), OBOT did *not* submit to the Council the evidence it later relied on at trial.

[7] Oakland's contention about the appropriate scope of the record does not contradict its jury trial demand below. *See* AB 29. The jury trial question is separate from the question of what evidence may be considered by the factfinder. Oakland demanded a jury trial only because OBOT refused to state whether it would seek damages (SER593-94), and Oakland *repeatedly* objected to the District Court's consideration of extra-record evidence, OB 23, so there is no inconsistency between its positions here and below.

especially when OBOT did not seek an additional opportunity to present evidence to the Council.

Moreover, it is not true. Oakland held its first health and safety hearing regarding the terminal in September 2015 and continued to receive evidence over the next *ten months* before adopting the Ordinance and Resolution in June 2016. ER0835-36, 1168-74. OBOT therefore had sufficient time to present its evidence to the Council (and in fact submitted an expert report in September 2015). ER1571-86.[8] OBOT notes that the ESA report was released one business day before the June 2016 hearing, and complains about per-speaker time limits. AB 16, 30. But OBOT never asked to delay the June 2016 hearing, or for additional time to address the Council.[9]

In any case, OBOT's allegations about procedural defects do not permit it to introduce substantive evidence that would otherwise be inadmissible and irrelevant. OBOT challenges the Resolution's *substantive validity*, and its

[8] OBOT's expert report is a mere 15 pages, and does not address the proposed terminal's specific features.

[9] Had OBOT asked, additional time would have been provided. FER003-05. And any suggestion the Council's determination was preordained was waived by OBOT's failure to challenge the District Court's exclusion of evidence of "the allegedly predetermined outcome of the [Council's] vote" on the Ordinance and Resolution. FER007; *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("[A]n appellee waives any argument it fails to raise in its answering brief").

argument about procedural defects does not justify consideration of extra-record evidence to resolve that challenge.

OBOT further contends that the District Court used extra-record evidence only to "evaluate" the Council record. AB 31-33. But it is beyond dispute that the court cited extra-record information, of which the Council was unaware, as a basis for criticizing and ultimately discounting the evidence that was before the Council. *See, e.g.*, ER0021-22. Section 3.4.2 did not permit this reliance on extra-record evidence to undermine the soundness of the Council's determination. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014) (error to admit extra-record expert declarations "judging [agency determination's] wisdom").

OBOT's justification is also incompatible with California-law substantial evidence review. In *Western States*, a challenger to an agency's determination attempted to justify consideration of extra-record evidence on grounds identical to OBOT's argument here. 9 Cal.4th at 577-78 (arguing that "only way to demonstrate [the] inaccuracy [of record evidence] is to admit the extra-record expert evidence that supposedly reveals it"). The California Supreme Court rejected that argument as "a thinly veiled attempt to introduce conflicting expert testimony to question the wisdom and scientific accuracy of the [agency's] decision." *Western States*, 9 Cal.4th at 578; *see also Eureka Citizens for*

Responsible Gov't v. City of Eureka, 147 Cal.App.4th 357, 366-67 (2007) (applying *Western States* in challenge to city council's adjudicatory determination). So too with OBOT's argument here.

III. The District Court also erred in second-guessing the City's reasonable interpretation of the evidence.

Even aside from its error in considering extra-record evidence, the District Court also misapplied Section 3.4.2 in re-weighing the evidence in the Council record. Rather than deferring to the Council's determination, the court made numerous errors in its own assessment of the evidence: it wrongly assumed the efficacy of mitigation measures and the Bay Area Air Quality Management District's ("BAAQMD") regulation, decided technical questions based on its own judgment, and rejected credible record evidence demonstrating how OBOT's activity would affect air quality and neighborhood safety.

A. Substantial evidence in the Council record supports the City's determination of substantial health-related danger.

1. "Substantially dangerous" does not require evidence that the terminal would be more dangerous than existing pollution sources.

Section 3.4.2 permits new regulation based on a finding that failing to act would result "in a condition substantially dangerous to" health and safety. The District Court wrongly interpreted the term "substantially" to require comparison to other pollution sources, and faulted the City for not "compar[ing] emissions from the OBOT project to emissions from other sources nearby" like the "Port of

Oakland," "iron foundry," and "Bay Bridge toll plaza." ER0031. OBOT argues that this construction of "substantially" is consistent with its "'ordinary and popular'" meaning. AB 33-35 (quoting Cal. Civ. Code §1644). But OBOT cites *no* authority that supports this interpretation. The District Court cited only a dictionary definition of "substantial"—"of considerable importance, size, or worth"—that itself provides no hint that relative harm analysis is required, before providing its *own* gloss on the term. *See* ER0030.

In addition to having no support in California law or common usage, the District Court's definition of "substantially" makes no sense. OBOT ignores Oakland's argument that construing "substantially dangerous" to require proof of greater danger than existing pollution sources in the relevant area would make it difficult (if not impossible) to regulate in polluted areas most in need of regulation. It would be *easier* to prevent additional pollution in areas that need it least because of their relatively clean air, and comparatively *harder* in communities (like West Oakland) that already suffer disproportionately from air pollution. To avoid that unjust result, California law sensibly requires that new pollution sources be evaluated in the context of "baseline physical conditions" in the "vicinity" (i.e., new sources are evaluated not to determine if they are more harmful than existing sources but instead to measure the overall effect *including* both the new source *and*

existing sources). *See* Cal. Code Regs., tit. 14, §15125(a).[10] Accordingly, the Council properly considered whether OBOT's emissions posed *additional* danger by pushing pollution levels above established safety thresholds. *See* OB 18-20. The District Court's construction of "substantially" turns this settled approach on its head.

Compounding its error, the District Court did not demand relative harm analysis only for pollution sources under Oakland's jurisdiction but also included the "Bay Bridge toll plaza." ER0031. But whether OBOT's terminal poses less risk than the toll plaza is even more obviously irrelevant. Oakland cannot do *anything* about pollution from the toll plaza. Section 3.4.2 defines Oakland's regulatory power over potential new sources of harm to the public, so it is illogical to construe its use of "substantially dangerous" by reference to dangers Oakland cannot control.

2. OBOT ignores evidence before the Council that, by itself, establishes substantial evidence of health-related danger.

Many expert reports and other comments were before the Council when it adopted the Resolution, including reports from Dr. Phyllis Fox, a team of scientists from Sustainable Systems Research (led by Dr. Deb Niemeier), and the

[10] Even if existing sources emit *more* pollution than the source under review, moreover, that does not mean that the new source is not itself substantially dangerous. *See* Intervenors' Opening Brief 40.

Public Health Advisory Panel ("PHAP")—a group of nine physicians, scientists, and public health professionals with expertise in fields such as air quality health effects, oncology, and environmental science. OB 11-15 & n.7. Oakland also commissioned *two* expert analyses of the entire record, from ESA and Dr. Zoë Chafe, a public health professional. Together, this provides overwhelming evidence of substantial danger, especially because OBOT submitted very little contradictory evidence during the hearing process. *See* OB 15.

Even setting aside the ESA report (discussed below), the Council could reasonably conclude from these expert reports that the terminal would generate substantial quantities of coal dust, including the fine particulates PM_{10} and $PM_{2.5}$, which are so harmful to human health that each additional increment of exposure can "contribute to the likelihood of adverse health outcomes." ER1045-46; *see also* ER1041-42, 1316. The Council could also reasonably determine that exposure to fine particulates correlates with premature death, and cardiovascular and respiratory disease, that these adverse health effects can manifest at exposure levels below the federal and World Health Organization guidelines (ER1045-52, 1316, 1654), and that these effects would be borne disproportionately by the vulnerable residents of West Oakland, who already exhibit high rates of emergency room visits and hospitalizations from pollution-related health problems like asthma and cancer (ER1071-72, 1323, 1684-85). Indeed, the PHAP report

(which OBOT barely acknowledges) found that emissions from OBOT's rail transportation activity alone could cause $PM_{2.5}$ concentrations in the vicinity to exceed the federal National Ambient Air Quality Standards ("NAAQS") 12 $\mu g/m^3$ threshold. ER1337.[11]

By itself, this evidence provides reasonable support for the Council's determination. Yet OBOT, like the District Court, simply ignores most of it. OBOT's Answering Brief refers to the PHAP report only twice (*see* AB 37-38, 50-51), cites Sustainable Systems Research's report only once (*id*. 40 n.8), and *completely ignores* Drs. Fox's and Chafe's submissions.

Instead, OBOT focuses almost exclusively on ESA's report, asserting that the "Council principally relied" on it. AB 36. But there is no basis for OBOT's assertion that ESA's report (which in fact *summarized* the record evidence and explicitly cited Sustainable Systems Research's report in its emissions calculations (ER0944-45)) was the Council's principal basis. *Cf. Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking."). Indeed, OBOT concedes that the Agenda Report from the June 2016 hearing expressly cited the PHAP report. AB 38 (citing ER0844).

[11] Oakland addresses OBOT's criticisms of the PHAP report *infra* at 26.

Even if ESA *were* the Council's "principal" source, moreover, OBOT has waived any argument that the Resolution can be justified only based on the principal source, rather than on the record as a whole. The District Court ruled that "[*a*]*ll* materials that the relevant Oakland officials have declared were received by the City on or before June 27, 2016 are deemed part of the record" and that the Resolution may be justified on the "basis of evidence that was before the City Council at the time the decision was made," including "the oral and written testimony received at the public hearings, the comments submitted to the City Council by community members, the reports commissioned by public officials, and any other documents the City Council considered in connection with the ordinance before its passage." ER0001 (emphasis added), ER0012. Having not challenged those rulings, OBOT cannot now argue that only ESA's estimates may be considered in determining whether substantial evidence exists. *Dreyer*, 804 F.3d at 1277.[12]

3. The District Court's criticisms of the ESA report are erroneous.

ESA specifically calculated $PM_{2.5}$ emissions for each phase of OBOT's operations, estimating that rail transportation through Oakland would annually

[12] Moreover, under substantial evidence review findings are evaluated in "light of the whole record." *Int'l Brotherhood of Elec. Workers v. Aubry*, 42 Cal.App.4th 861, 868 (1996).

generate 6 tons, staging 11.7 tons, and terminal operations 2.7 tons, for a total of roughly 21 tons of $PM_{2.5}$, which easily exceeds the 10-ton threshold of significance that Oakland and BAAQMD use to identify a "significant and adverse impact on air quality." OB 17. The District Court improperly re-weighed the evidence in discarding these estimates.

a. There is no credible evidence of effective mitigation measures.

The District Court's criticism of the Council for inadequately accounting for potential mitigation measures is erroneous under any standard of review. According to the court, Oakland was required to further examine whether coal car covers or surfactants would reduce emissions. ER0015-17. But neither the Council nor the trial record contains *any* scientific data supporting the effectiveness of such mitigation measures, so it is unclear *how* the City could have more "meaningfully explore[d]" those topics. ER0015.

In fact, there is *no evidence* that coal covers *are in use* (let alone effective), so the Council logically declined to rely on any purported OBOT promise to adopt them. ER0896-98, 1342-44, 1664, 1669-70, 1681-83. OBOT cites evidence of cover use with other materials but concedes that covers have *never* been tested (let alone certified) for coal. AB 44-45. OBOT's promise regarding a product that is not in use and thus necessarily unproven cannot render unreasonable Oakland's decision to regulate to protect its residents rather than rely on such measures.

In the absence of any evidence that coal car covers would reduce emissions, the District Court impermissibly shifted the burden onto Oakland to prove their *ineffectiveness*. OBOT contends that the court simply faulted Oakland for failing to "'meaningfully explore'" coal covers' impact. AB 43-44 (quoting ER0015). But in light of the complete "lack of existing data about the effectiveness of a new technology like rail car covers," ER0016, "meaningfully explore" would necessarily require Oakland to perform its own experiments. Rather than take the unprecedented step of testing coal covers itself to justify health and safety regulation, the City reasonably determined from existing knowledge that it could not rely on coal covers to ameliorate the terminal's risks.

Regarding surfactants, OBOT cites its willingness to follow South Coast Air Quality Management District ("SCAQMD") Rule 1158 (AB 41-42) but ignores Oakland's argument that Rule 1158 would provide no meaningful protection. *See* OB 54. Rule 1158 requires only the moistening, "*upon arrival*," of coal shipped by rail to a SCAQMD facility if the coal originates from outside California (as all coal does (ER0912)). SER530, 535 (subparts (e)(10), (k)(9) (emphasis added)). Accordingly, OBOT's promise was simply to moisten incoming coal on "arrival"

at the terminal—i.e., *after* the rail transport and staging activities estimated to generate nearly 18 of the 21 $PM_{2.5}$ tons attributable to OBOT.[13]

As with coal covers, a dearth of scientific evidence supports surfactants' efficacy. OBOT cites a Burlington Northern-Santa Fe Railway ("BNSF") study regarding surfactants. AB 45. But numerous comments in the Council record explained that BNSF's study was not credible because it did not disclose its methodologies and was not published in a peer-reviewed journal. *See* ER0900-02, 1524, 1682. By contrast, the only reported peer-reviewed study on the subject (by Dr. Dan Jaffe) documented significant *spikes* in $PM_{2.5}$ immediately after the passage of coal trains required to have used surfactants. ER1337.

OBOT argues that the Jaffe study evaluated sub-bituminous coal, not the bituminous coal OBOT asserts the terminal would handle. AB 37.[14] But OBOT does not dispute that the Jaffe study is *the only known study* specifically addressing $PM_{2.5}$ concentrations following passing coal trains, and so is the most relevant extant scientific study and thus a source on which the Council could reasonably

[13] Rule 1158 also requires coal cover use (or "alternative method of control") for railcars loaded with coal at a SCAQMD facility for transport *into* the country, SER530 (subpart (d)(12)), but none of OBOT's submissions to the Council anticipate importing coal.

[14] OBOT ignores Oakland's argument that the Council could reasonably have determined that, given the lease's 66-year term, nothing guaranteed that the terminal would not at some point handle sub-bituminous coal. OB 57.

rely. *See* OB 56-57.[15] BNSF's study thus establishes, at most, a conflict in the evidence about surfactants that the Council was entitled to resolve. *See O.W.L. Found. v. City of Rohnert Park*, 168 Cal.App.4th 568, 593 (2008) ("[I]t is not for this court to weigh the relative merits of different studies"); *Oakland Heritage Alliance v. City of Oakland*, 195 Cal.App.4th 884, 900 (2011) ("public agency may choose between differing expert opinions").

b. OBOT cannot now second-guess Oakland's experts' consensus about the appropriate "threshold friction velocity."

Impermissibly relying on OBOT's expert's trial testimony, the District Court rejected the emissions estimates before the Council on the basis that they used the wrong "threshold friction velocity" value ("fine coal dust on concrete pad"). ER0020. But it is undisputed that *two* different commenters (ESA and Sustainable Systems Research) chose that value as the best among the available choices, and that *no* commenter even suggested that a different value would be more appropriate. *See* OB 49-50 (citing ER0934-51, 1688-89). The Council was entitled to rely on this consensus among the experts before it.

[15] OBOT also criticizes the Jaffe study for failing to account for mitigation measures. AB 51. But Dr. Jaffe measured emissions from coal trains that were required to have used surfactants, so his data already reflect mitigation measures' impact. *See* ER1337.

OBOT contends that the District Court did not actually rely on OBOT's expert's calculations based on a different friction velocity. AB 40. But regardless of whether the court decided which side's ultimate calculations were more accurate, OBOT does not dispute that the court used OBOT's estimates "to shed[] light" on ESA's calculations' accuracy. *Id*. at 32 (quoting ER0012). The court specifically cited OBOT's estimates before concluding that ESA's were a "significant flaw in the record." ER0021-22. And even if this reliance on extra-record evidence were proper, it would (at most) establish a disagreement among experts on a technical question within the Council's discretion to resolve. *See* OB 50-51.[16]

c. OBOT's argument that the Council failed to consider local conditions ignores record evidence.

The District Court similarly erred in relying on extra-record evidence to fault the emissions estimates before the Council for employing a constant emissions rate. *See* OB 50-51. OBOT erroneously suggests that the court merely noted a lack of discussion on this issue in the Council record. AB 37. To the contrary, the

[16] OBOT also argues that ESA's calculations are undermined by Oakland's expert's testimony. AB 32-33 (citing ER0021). OBOT mischaracterizes this testimony, which was that the value ESA chose was the best among available options and, if anything, *underestimated* emissions. *See* OB 50 n.23. Once again, OBOT's criticisms simply identify the limits of existing science.

District Court cited OBOT's specific trial estimates before concluding that "a more precise estimate of coal dust emissions is possible." ER0022.

OBOT also fails to detract from the PHAP study that *accounted for local train speed and ambient wind conditions* and thus answers any concerns about local conditions. *See* ER1337. It is irrelevant that the ESA report does not cite PHAP's estimates (AB 38) because *all* material before the Council is relevant to whether substantial evidence supports the Resolution. *See supra* at 19-20. OBOT is also wrong to disregard the PHAP report for relying on the Jaffe study, because the Council was entitled to rely on the most relevant extant scientific study regarding coal trains and $PM_{2.5}$. *See* AB 37; *supra* at 23-24; OB 56-57.

d. Any dispute about Best Available Control Technology does not undermine the City's determination.

OBOT does not dispute that Best Available Control Technology ("BACT") relates only to terminal operations, which ESA estimated would generate only a fraction (2.7) of the 21 tons of annual $PM_{2.5}$ attributable to OBOT's operations. AB 49. And OBOT completely ignores Oakland's argument that other project phases would generate nearly 18 $PM_{2.5}$ tons, which *far* exceeds Oakland's and BAAQMD's 10-ton threshold of significance. OB 52-53. The District Court's BACT conclusion is thus no basis for discarding the City's determination. *See also* OB 52.

e. BAAQMD's limited ability to regulate the terminal does not prevent Oakland from acting.

The District Court also erred in rejecting the City's determination based on the City's purported failure to consider the possibility that BAAQMD would "step in" to protect Oakland residents. ER0025-26. BAAQMD has jurisdiction only over OBOT's terminal itself, and cannot regulate the rail transport and staging activities *outside* OBOT's property, which ESA estimated would generate most of the $PM_{2.5}$ attributable to the terminal (nearly 18 of the 21 total annual tons). *See* OB 53-54.[17]

OBOT responds only that BAAQMD could "require 'OBOT to limit emissions by using rail car covers, surfactants, and other controls'" or limit the amount of coal the terminal can process. AB 47-48 (quoting ER0025). But the Council could reasonably have been concerned that any attempt to directly regulate rail activity would fail, because it could reasonably doubt BAAQMD's authority over mobile sources and whether federal law would permit such regulation (especially as *OBOT* repeatedly told the Council that federal law preempts local

[17] OBOT has no credible authority for its assertion that BAAQMD's jurisdiction extends beyond the terminal. AB 47. OBOT cites testimony from the Vice-President of the company that controls OBOT (SER083-84) and OBOT's expert (ER0125) stating only that BAAQMD "measure[s] regional and community air quality" rather than emissions from "any individual specific facility." Neither statement shows that BAAQMD has jurisdiction beyond the terminal itself. Indeed, OBOT's expert acknowledged at trial that BAAQMD's authority is limited to "the fence line of a facility." ER0183.

regulation of rail activity). *See* ER1228-37, 1280-81, 1716; *see also* OB 48 (citing federal preemption authority).[18]

The Council also reasonably decided not to rely on the hope that BAAQMD would limit the amount of coal processed at the terminal. On this point, the District Court simply guessed (without evidentiary support) and, once again, shifted the burden of proof onto Oakland, stating that "there is strong reason to believe the Air District would step in, *and the City provides no reason to think otherwise*." ER0025 (emphasis added). But OBOT does not cite any evidence that BAAQMD *would* impose such limits. The Council record lacks any such evidence, including evidence that BAAQMD has regulated existing terminals within its jurisdiction in this manner, so Council reasonably declined to rely on BAAQMD intervention to protect Oakland residents.

f. Air modeling was not necessary to adopt the Resolution.

Finally, the District Court wrongly concluded that the Council could not reasonably determine that the terminal posed a substantial danger without evaluating air modeling. Oakland was not required to commission air modeling in

[18] OBOT suggests that the City's regulatory actions undermine its argument about federal preemption. AB 42-43. But whether a ban on coal handling is preempted is a different question than whether a rule specifically requiring rail mitigation measures would be. Indeed, the Ordinance does not "apply exclusively and directly to railroad activity," *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010), so is it meaningfully different from a BAAQMD regulation requiring coal car covers or surfactants.

order to conclude there was substantial evidence of danger to Oakland residents, because other record evidence demonstrated how OBOT's emissions "would actually affect air quality in Oakland." AB 49 (quoting ER0026-27).

The record evidence suffices to demonstrate that the area immediately adjacent to the terminal (the vulnerable West Oakland community) would be disproportionately burdened by OBOT's emissions. *See* AB 50. First, the PHAP found that OBOT's emissions would cause $PM_{2.5}$ levels to exceed, or nearly exceed, the annual NAAQS in the terminal's immediate vicinity. *See* OB 55-56. OBOT faults the PHAP for relying on the Jaffe study, AB 50-51, but that study's differences from the precise circumstances of OBOT's terminal do not preclude the Council from drawing reasonable inferences from it. *Supra* at 23-24. The District Court's decision to cast it aside essentially precludes Oakland from regulating without conducting its own study in circumstances the District Court would deem analogous. *See* OB 55-56.

Second, evidence in the Council record reported that winds blow from west to east (i.e., off the San Francisco Bay, across the terminal, and into Oakland) "100% [of the time] in the summer" and "about 70% of the time" in the winter. ER1337. Based on this information, the Council could reasonably infer that most $PM_{2.5}$ emissions would end up *immediately* downwind of the terminal, in West Oakland. OBOT ignores this argument completely.

B. The Council record also contains substantial evidence of safety-related danger.

OBOT's arguments also fail to justify the District Court's erroneous rejection of safety-related evidence before the Council. OBOT does not dispute that coal generates coal dust and releases methane gas, both of which can ignite from a single spark, especially in enclosed spaces like OBOT's proposed enclosed conveyor and storage areas. ER0957-58, 1085-89, 1362-63, 1670. Nor does OBOT dispute that coal is prone to spontaneous combustion and ignites easily, or that its fires release toxic compounds (like mercury, hydrogen cyanide, and uranium) during combustion and can be extremely difficult to extinguish, or that a single combustion event's effects would be catastrophic. ER0958-59, 1088-90, 1093-94. Given the ground lease's *66-year* term, these undisputed facts suffice to establish substantial evidence of substantial dangerousness, either itself or cumulatively with the emissions-related evidence discussed above.

OBOT attacks this evidence as "speculative" given coal's relatively low National Fire Protection Association rating. AB 53. But the Council record contains evidence of *numerous* documented coal fires in recent years, including at terminals in Los Angeles, Scotland, and Australia as well as at a site in Nevada where coal was stored *inside* (as OBOT proposes). *See* OB 59; ER0957, 1087-

89.[19] Indeed, given OBOT's proposal for a new, untested design involving indoor coal storage, the Council could also reasonably determine that the fire danger risk was substantial notwithstanding Fire Department oversight. OB 59.

CONCLUSION

This Court should reverse and remand for entry of judgment in Oakland's favor on OBOT's contract claim.[20]

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[19] The two Los Angeles fires that occurred within an eight-month period in 2000-01 are most concerning, as they demonstrated that a single piece of malfunctioning equipment can start a fire. ER0905-06.

[20] OBOT ignores (and therefore waives any opposition to) Oakland's argument that, if this Court determines that the District Court erred, it should remand for entry of judgment in Oakland's favor on OBOT's contract claim. *See* OB 61-62; *Dreyer*, 804 F.3d at 1277.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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