



**Via priority U.S.
Mail, and email**

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RE: Vallejo Marine Terminal / Orcem Project

Dear Attorney General Harris, and Acting Administrator Strauss:

We write on behalf of Fresh Air Vallejo ("FAV"), a group of volunteer residents working together for a healthy environment and economy in Vallejo. We write to you to raise concerns about the inadequate environmental review that is being undertaken for the proposed Vallejo Marine Terminal / ORCEM project (the "Project"). The Project will result in significant adverse air quality and other cumulative impacts, disproportionately borne by low-income residents of color in South Vallejo. Thus far the City of Vallejo (the "City"), the lead agency for the Project, has not given adequate weight to these Environmental Justice concerns, or proceeded in accordance with the California Environmental Quality Act. FAV urges that federal-state-local coordination occur through a joint EIS/EIR process, to promote efficient and comprehensive review of all aspects of the Project, and ensure compliance with both state and federal law.

Project Background

The 39.1-acre Project site is located in the southwest portion of Vallejo, on the coast fronting the Mare Island Strait. There are two components to the Project: the Vallejo Marine Terminal ("VMT") and the Orcem Cement Factory ("Orcem") (DEIR, ES-2). The VMT component would install a modern deep-water marine terminal, while the Orcem component involves the construction and operation of an industrial facility for cement production, with raw materials being imported via ships docking at the VMT wharf. The City released a Draft EIR on September 2, 2015. After significant pressure from the community, the City later released an



Environmental Justice Analysis on April 26, 2016, separate from its CEQA review, with no formal notice, opportunity to comment, or written response process.

The VMT component initially included as Phase 2 the construction of a rock dike and lay down area. Phase 2 has been withdrawn, apparently in response to the San Francisco Bay Conservation and Development Commission's submission that parts of the Project were inconsistent with the *San Francisco Bay Plan*. The amended application made other significant changes to the proposed Project, including a temporary interim port use for five to ten years followed by a marine industrial use of an unknown nature with unknown significant impacts over the life of the Project, never mentioned in the Draft EIR. These changes and omissions, among other things, necessitate a recirculated environmental document prior to the City conducting public hearings on the Project anticipated for December 2016. Although the Vallejo City Staff has tentatively proposed a disapproval of the Project, the FEIR is anticipated to be finalized at the applicants' insistence and released in advance of the Planning Commission hearing so that the applicants may press the Project approval to the full Vallejo City Council. Accordingly, we urge state and federal involvement prior to the release of an already flawed EIR and City consideration of the Project.

This Project would add another heavy industrial facility and marine terminal to the "Bay Area Refinery Corridor," which already carries a considerable pollution burden. There are several marine terminals and refineries in the surrounding area, including the Valero Benicia refinery in the adjacent City of Benicia, the Chevron Richmond refinery and the Phillips 66 refinery in Rodeo. Such facilities have produced adverse environmental effects, particularly related to air quality, with the main impact felt by the surrounding low income and minority communities. For example, the Valero Benicia refinery paid \$300,300 in civil penalties for repeated air quality violations throughout 2011 and 2012,¹ and around 15,000 people had to receive medical treatment due to the Chevron Richmond refinery fire in 2012.² Likewise, the Phillips 66 refinery in Rodeo has recently agreed to pay \$793,250 to settle air pollution violations covering 87 violation notices from 2010 through 2014. As recently as two weeks ago, an oil spill and/or gas release attributed to Phillips 66 sent dozens of Vallejo residents to emergency rooms, with the foul odor first sensed in South Vallejo, eventually spreading throughout the city.

And these fossil fuel facilities only increase California's GHG emissions. Just last month California Governor Jerry Brown signed into law SB32, which states that:

Continuing to reduce greenhouse gas emissions is critical for the protection of all areas of the state, but especially for the state's most disadvantaged communities, as those communities are affected first, and, most frequently, by the adverse impacts of climate change, including an increased frequency of extreme weather events, such as drought,

¹ P. Fimrite, "Valero to Pay Fine for Air Quality Violations" *SF Chronicle* (Oct. 22, 2013).

² U.S. Chemical Safety and Hazard Investigation Board, *Final Investigation Report: Chevron Richmond Refinery Pipe Rupture and Fire*, 32 (Jan. 2015).



heat, and flooding. The state's most disadvantaged communities also are disproportionately impacted by the deleterious effects of climate change on public health.

At some point this region must stop increasing the disproportionate burden on already disadvantaged communities. State and Federal involvement on this project is needed to ensure that local governmental agencies do not gloss over significant and unavoidable environmental and cumulative impacts on low income communities. Project proponents projected these impacts in reliance on unduly optimistic and biased data about economic growth.

I. Environmental Justice concerns

a. CEQA, NEPA and Environmental Justice

Despite the foregoing background, the DEIR did not include any data, assessment, or analysis of the environmental justice outcomes and impacts of the Project. In response to public pressure, the City later conducted and reported on an Environmental Justice Analysis ("EJA") in April, 2016, while at the same time claiming that an EJA "is not required for the proposed project in order to comply with California state law" (EJA, p. 21). This is not precisely correct; the Attorney-General of California has noted that, although CEQA does not mention the words "environmental justice", its principles engage a number of factors relevant to environmental justice (Attorney-General of California, *Environmental Justice at the Local and Regional Level: Legal Background*, 10 July, 2012). For example, "[w]here a project will cause pollution, the relevant question under CEQA is whether the environmental effect of the pollution is significant. In making this determination, two longstanding CEQA considerations that may relate to environmental justice are relevant – setting and cumulative impacts" (*Id.*, p. 3). This requires considering the nature of the community in which a project will be sited, including any existing sensitivities and pollution burdens. In this way, CEQA indirectly requires consideration of environmental justice impacts.

Federal agencies must also consider environmental justice issues as part of the NEPA permitting process (*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, (February 1994, EO 12898)). As the Project will involve construction near the mouth of the Napa River (which is a navigable waterway of the United States: 33 C.F.R. Part 329), VMT will need to acquire a CWA section 404 permit from the U.S. Army Corp of Engineers to dredge and fill. The U.S Army Corp must comply with NEPA in issuing permits, which means that a full EJA is required before the Project can be approved. The EPA defines "environmental justice" as requiring "fair treatment and meaningful involvement of all persons with respect to the development, implementation and enforcement of environmental laws." "Fair treatment" means that "[n]o group of people, including a racial, ethnic, or a socioeconomic group, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." The EJA conducted for the Project abjectly fails to give effect to the EPA guidelines.



There are three central problems with the way the EJA has been conducted. First, it does not accurately characterize the demographics of the community, particularly in its selection of a comparator and assessment of income levels. Second, the EJA fails to adequately consider the existing pollution burden and health issues in the community. Finally, the EJA has not provided for meaningful involvement by affected residents.

b. Failure to Accurately Characterize Demographics

The EJA fails to accurately describe the setting of the community. Census data from 2010 shows the minority population in the area is 79% and more than half of the households in that area, 58%, have an annual income under \$50,000 – an amount well below the cost of living for the San Francisco Bay Area. Thirty-six percent of the population in the communities surrounding the Project site are either children under age 17 or senior citizens over age 65. In addition, there is an elementary school sited less than 600 yards from the Project site and homes on the fence-line of the plant, and the California EPA EJSCREEN tool identifies the census block groups in the immediate proximity of the site as having very high rates of children under 5, a group that is very susceptible to permanent lung damage from particulate matter.

The EJA for the Project relies on the federal defined poverty thresholds to define “low-income” and determine the extent to which low-income populations would be disadvantaged by the Project. A person at the 2014 federal poverty threshold (\$24,230 for a family of four) is “extremely low-income” in Solano County (\$24,800 for a family of four) (EJA, p. 6). Typically, in an EJA the low income threshold would be two times the federal poverty threshold, which is more in balance with regional costs of living. The use of the federal poverty threshold to determine whether South Vallejo is an environmental justice community distorts the EJA analysis by dramatically underestimating the size of the low-income population, making it appear much smaller than it is in reality. In Solano County, the more accurate “low-income” level for a family of four is \$65,000, so that the EJA should either have considered the percentage of the community at this income level, or at least the frequently used standard of two times the federal poverty level. This is especially important even within the flawed findings of the EJA because the only potential adverse impact that disproportionately affects populations according to this study is related to the low-income population (EJA, p. 20), meaning this disproportionate impact may be worse than expressed.

Moreover, the use of the City of Vallejo as the reference group or comparison population is flawed (EJA, p. 12), essentially comparing the South Vallejo community with adjacent neighborhoods who suffer similar pollution burdens and have a similar EJ qualifying population. There are a number of choices for a reference group in order to show the differential access to environmental or health benefits: the reference group should more appropriately have been a group with very high environmental or health benefits, a non-EJ community in Solano County, or an average from the broader region could have been utilized. This would more accurately capture the differential access to environmental health and other benefits at baseline and after



the project is implemented.³ As the EJA itself notes, Vallejo has a higher poverty rate than Solano County. Additionally, the whole city of Vallejo will be impacted, so it is tautological and nonsensical to use the general population the same population as the reference population, especially, for example, for cumulative air quality, transportation and traffic impact assessment.

The Project will result in significant impacts to air quality, traffic, emergency response, among others, all borne by this disadvantaged community, and will be magnified by existing “cumulative” environmental conditions, considering the neighborhood has among the worst environmental scores from CalEPA in the state. For example, the CalEnviroScreen tool reveals that the census tracts near the Project site have high rates of toxic releases, traffic, cleanup sites, groundwater threats, and hazardous waste generators / storage facilities, relative to other census tracts in California. Moreover, Vallejo (and the project zip code in particular), experiences double the rates of asthma and asthma-related emergency room admissions than the California average. Indicators thus show that neighbors of the Project site already have a high environmental health burden, a situation further borne out by high rates of cancer and heart disease.

Despite the degraded levels of existing environmental conditions and public health threats, the DEIR does not even mention the Project’s effects on historical exposure to Asbestos, PCBs, Chromium, and other carcinogens that South Vallejo residents have already suffered from the shipyard, the historical mill, the adjacent sewage treatment plant, and the three major freeways running through the neighborhood.

The main impact analyzed in the EJA is the exceedance of the BAAQMD threshold. This impacts a population wider than the defined areas for the EJA and is wider than the defined general population. However, the EJA claims that “[d]ue to the relatively high concentration of minorities in the City of Vallejo, and their relatively broad distribution throughout the city, no disproportionate impacts are expected to be created for minority populations by the proposed Project.” This confounding use of the impacted population as their own reference group ignores the fact that Vallejo itself is low-income and suffers a significant environmental burden relative to other parts of the Bay Area and California, and also overlooks the broader air quality impact beyond the area considered by the EJA. Therefore, the EJA does not actually analyze how the project would affect the air quality of minority and low-income populations as compared to the general population or an appropriate reference population. The Project will exacerbate the significant air quality burdens in the area and worsen the related health impacts on the Vallejo community.

This inaccurate approach is also apparent in the woefully inadequate traffic analysis for the EJA, which examines the effect of more trains on traffic delays. The EJA concludes that, because “the people affected are those who happen to be traveling at the time of a train

³ See, Bay Area Air Quality Management District, “Review of Inequality Indicators and Distributional Analysis Methods for Environmental Justice Assessment of an Air Quality Management Plan,” May 4, 2016.



crossing, and can be from anywhere in the city or from outside the city,” minorities and low-income populations are not disproportionately affected (p. 18). This analysis does not provide a meaningful comparison for the impact on this community and ignores the role of geography in an environmental justice analysis; it merely states the impact on the general population already analyzed in the DEIR. The analysis acknowledges the likelihood of “substantial delays and queues at railroad crossing,” but disregards the impact of having lines of idling cars in the neighborhood, which affect the neighborhood’s noise, air quality, aesthetics, and safety.

c. Inadequate process for EJA

A proper environmental justice analysis requires the community to be afforded meaningful involvement in the decision-making process. Here, the EPA defines “meaningful involvement” as follows (EJA, p. 12):

1. Potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health;
2. The public’s contribution can influence the regulatory agency’s decision;
3. The concerns of all participants involved will be considered in the decision making process;
4. The decision-makers seek out and facilitate the involvement of those potentially affected.

The City identified these guidelines in its EJA, but has failed to give them effect. It released its environmental justice analysis of the Project after the DEIR comment period had taken place. The City has provided no formal channels to hear or respond to public comments on the environmental justice analysis. In addition, the EJA did not consider the negative social and economic impact that the Project would have in the community and did not provide any channels for public input or participation where this omission, among other flaws in the study, could be highlighted. It erroneously suggests this inquiry is not required under CEQA, despite the Attorney-General’s report holding otherwise. Humans are an integral part of the environment that will be affected by the project, so that the environmental justice review should have been incorporated into the DEIR.

These problems are compounded by the City’s failure to ensure that potentially affected community residents are adequately informed about the Project as a whole. Only two public meetings related to the Project have taken place, one of which was organized by Fresh Air Vallejo. Nor has the City tailored its communications about the Project to the demographics of the community. According to data from the 2009-2013 American Community Survey, 29% of the residents of Vallejo-Fairfield speak a language other than English at home, including 16.6% who speak Spanish at home. Of the Spanish-speaking group, 43.5% speak English less than “very well”. On a more granular level, the California EPA EJSCREEN tool shows that several Vallejo census tracts near the Project site have relatively high levels of “linguistic isolation”, which is the term used by the U.S. Census Bureau for households in which no adults speak English well.

Accordingly, the City should have provided the Draft EIR materials in Spanish to facilitate meaningful community engagement. As Governor Jerry Brown noted when vetoing AB



543 (regarding criteria for translating CEQA documents), “[t]ranslating public notices and other important information is often good practice. In fact, Title VI of the Civil Rights Act of 1964 and Government Code Section 11135 require lead agencies to do just that.” The City should have taken the needs of Vallejo’s Spanish-speaking population into account in its communications about the Project.

II. Violations of Air Quality Rules

a. Significant, unavoidable impacts

The Project will result in significant, unavoidable impacts on air quality in Vallejo and the Bay Area. However, the DEIR fails to include numerous required elements to support a meaningful analysis of the Project’s significant adverse impacts on air quality standards. Nor does it propose adequate mitigation measures.

The DEIR admits that the Project would exceed the Bay Area Air Quality Management District’s (“BAAQMD”) threshold for NOx emissions. (DEIR, ES-10). As the DEIR notes in its discussion of Impact 3.2-2, this exceedance of the BAAQMD’s NOx threshold “would conflict with the Clean Air Plan’s goal of bringing the San Francisco Bay Area into attainment for ozone since NOx is a precursor . . . of ozone.” (*Id.*) The Project would also substantially contribute to a significant cumulative impact because the Project would exceed BAAQMD’s NOx threshold during project operations. (Impact 3.2-4.)

Impact 3.2-1 has “the potential to introduce a more intensive land use to the property” and the potential change was “not taken into account in the most recent state ozone plan.” (DEIR, § 5.2.) Relatedly, the Project will also exceed the “BAQQMD threshold for operational GHG emissions of 10,000 metric tons of carbon dioxide equivalent (MT CO₂E) per year.” (DEIR, § 5.2, Impact 3.6-1.) Impacts 3.6-2 and 3.6-3 cannot be mitigated to a level to ensure that the Project’s greenhouse gas emissions will be consistent with the City of Vallejo Climate Plan’s emissions reductions goals for 2020 and 2035, or with the state’s target greenhouse gas reduction goals under AB 32.

As a related concern, the DEIR does not consider the “social cost of carbon” in its analysis. Federal agencies are required to utilize the social cost of carbon protocol when undertaking a NEPA cost-benefit analysis, or at least give reasons for not doing so (*High Country Conservation Advocates v. U.S. Forest Service*, No. 13-cv-01723-RBJ (D. Colo. June 27, 2014)). This is an important inquiry because it accounts for the potential climate change impacts of an action, and is closely related to environmental justice concerns. As a coastal, low-lying city, Vallejo is vulnerable to potential climate change impacts. Yet the DEIR contains no consideration of the downstream effects of the Project’s emissions, or the social cost of exceeding GHG emission thresholds. State-federal coordination is needed here for a joint EIS/R to comprehensively assess the impacts of the Project.

The BAAQMD highlighted the air quality impacts in its submission to the City dated November 2, 2015 (attached), noting that the San Francisco Bay Area Basin is “currently



designated as a non-attainment area for federal and state ozone and fine particulate matter (PM2.5) ambient air quality standards”, and that the “EPA recently lowered the national ozone standard, further highlighting the need to reduce ozone precursor emissions in the region.”

The DEIR likely understates the true impact of NOx to the local and regional environment, while also failing to properly evaluate and impose feasible mitigation measures that could reduce this impact to less than significant levels. Its review of air quality impacts, for example, assumes air quality permit requirements for Orcem, but not for VMT, then imposes delayed mitigation measures on VMT, and not Orcem. (DEIR at 3.2-43). The principal mitigation measure envisaged by the DEIR is MM-3.2-1, which provides:

MM-3.2-1: After the calendar year at which 15 vessels arrive at the site, the project operators for the VMT facility and Orcem Plant shall retain a qualified air quality specialist to calculate and report annual emissions from trucks and on-site equipment to confirm that emissions are below 10 tons per year. This report shall be submitted to the City of Vallejo for review. At the time emissions exceed 10 tons per year, the project operators shall ensure that at least 75% of the trucks entering the site are model year 2010 or later. This measure shall be enforced until year 2023, when the Drayage Truck Regulation adopted by the California Air Resources Board will require 100% of trucks to be model year 2010 or newer.

This delayed mitigation provision is inexplicable, given the previous acknowledgement that the Project *will* result in BAAQMD exceedances. These anticipated exceedances require immediate mitigation steps to help reduce the significance of the air quality impact. As the BAAQMD noted in its comment, “[t]here are feasible mitigation strategies available now that could be implemented by the Project to ensure that the air quality impacts are reduced from the start of operation at these facilities, as opposed to deferring mitigation to some time in the future.” These measures include immediately requiring all heavy duty diesel trucks used at either site to be model year 2010 or newer, and requiring dockside electrification to which ships at berth must connect.

Further, the DEIR wrongly assumed that the Orcem facility need not receive a Major Facility permit, despite the fact it intends to process Portland cement. Nor does the DEIR explain its conclusion that, as a result of Orcem’s BAAQMD permit, the Orcem contributions to NOx impacts would be fully offset. There is no explanation regarding where and how these NOx impacts will be offset, or the extent to which local impacts will remain the same. The applicants have subsequently clarified they will seek permit coverage for this activity,⁴ but this triggers the CEQA recirculation requirement (PRC § 21166(a), CEQA Guidelines § 15162(a)(1)).

⁴ See <http://www.ci.vallejo.ca.us/cms/One.aspx?portalId=13506&pageId=504593>.



b. Health risk assessment

The shortcomings to the emission estimates in the DEIR carry over to the associated health risk assessment, so that the emissions analysis needs to be refined to ensure an accurate health impacts assessment. The BAAQMD noted several areas for improvement, including recommendations that the EIR:

- Quantify the toxic content of the granulated blast furnace slag and ground granulated blast furnace slag and include this information in the revised health risk analysis;
- Estimate the quantity of the toxic emissions from the handling of cement and include this information in the revised health risk analysis;
- Estimate mobile source emissions for all travel associated with the Project expected in the San Francisco Bay Area Air Basin (SFBAAB) and include this information in the analysis in the DEIR. The DEIR currently estimates haul trip emissions for a distance of less than 0.5 mile and locomotive emissions for one mile.

The BAAQMD also noted the absence of a cumulative local pollutant health risk screening analysis for the Project. This is particularly concerning in light of the existing health risks and pollution burden for the surrounding community (as discussed above), as the Project would be built adjacent to a residential area, and within ¼ mile of a school. Accordingly, all emissions from nearby sources within 1000 feet of the project site should be estimated and included in a cumulative local pollutant health risk screening analysis.

III. Failure to Disclose / Prohibit Coal or Petcoke

The DEIR failed to disclose that coal, crude oil or petroleum coke may be foreseeably handled by the facility. (DEIR at 3.2-27.) The DEIR also fails to provide any information regarding whether the rail transport facility and marine terminal could foreseeably be used or modified to ship crude oil by rail.

Petroleum coke, or “petcoke” is a solid carbon material resembling coal that is a product of oil refining. EPA regulates petcoke under the PM10 umbrella because pet coke particles are of the size of particle that generally passes through the throat and enters the lungs. Once inhaled, this particulate matter can affect the heart and lungs and cause serious health effects. Again, despite the obvious potential for significant environmental and public health impacts, the DEIR omits environmental analysis for a hazardous substance regulated by EPA that the DEIR suggests may enter the community because of the Project.

The East Bay is already affected by particulate matter from coal dust. For example, coal trains pass through Richmond weekly, often with uncovered cars that can lose up to 500 pounds and one ton of coal in dust in transit. (See Julie Small, “Coal Train Dust Worries Richmond Residents,” KQED Science, June 22, 2015.) Nonetheless, the DEIR fails to provide any



information regarding whether the rail transport facility and marine terminal could foreseeably be used or modified to transport coal by rail.

VMT and Orcem have subsequently stated that “the VMT Terminal would prohibit the handling of municipal waste, coal, petroleum coke or any other petroleum-based product such as gasoline or crude oil”.⁵ However this assurance does not foreclose the potential for the facility to be used in this way in the future, unless and until the terms of any permit issued specifically prohibit such use. The pitfalls of relying solely on a developer’s statements to this effect have been borne out at the Port of Oakland / Army Base redevelopment, and should not be repeated.⁶

IV. The Need for Cross-Agency Collaboration

Both CEQA and NEPA contain provisions to avoid the unnecessary duplication of the environmental review process. PRC § 21083.7(a) provides that, where a project requires both an EIR under CEQA and an environmental impact statement (“EIS”) pursuant to NEPA, “the lead agency shall, whenever possible, use the environmental impact statement as such environmental impact report.” In order to comply with this section, the CEQA lead agency must “as soon as possible” consult with the federal agency required to prepare the EIS. CEQA encourages the preparation of a joint EIR/EIS where possible (14 CCR §§15222, 15226(d)) and the NEPA regulations similarly encourage interagency cooperation in the preparation of one document that satisfies both statutes (40 CFR §1506.2).

FAV is not aware of the extent to which the Lead Agency has communicated with the Army Corp of Engineers, or any other federal agency. Given the implications of the Project under NEPA, it would be extraordinary for the relevant federal agencies to not be involved at this point. Following the DEIR, significant changes were made to the proposed Project. The applicants have submitted an amended application reflecting the revisions, but the DEIR was not recirculated. Given these changes, prior omissions including an environmental justice analysis, and the apparent lack of collaboration with federal / state agencies thus far, we suggest the best course of action is for a joint DEIS/R to be circulated for public review and comment, consistent with both state and federal requirements for environmental justice protections, and urgent climate change and air quality mitigations, among other significant environmental changes. We are further concerned that a delayed federal EIS, following City or state project approval, could improperly segment review to only a portion of the Project. To avoid any state/federal inconsistencies, to ensure a comprehensive environmental review occur, and to do so in the most efficient manner available, a joint EIS/R is appropriate at this time.

⁵ See <http://www.ci.vallejo.ca.us/cms/One.aspx?portalId=13506&pageId=504593>

⁶ See <http://www.sfchronicle.com/bayarea/article/Developer-planning-Oakland-coal-shipment-an-ally-7116423.php>



We look forward to hearing from your respective offices regarding your involvement in this Project.

Very truly yours,


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