

April 13, 2016

Members of the Planning Commission
San Luis Obispo County Planning Commission
976 Osos Street, Room 300
San Luis Obispo, CA 93408

Attention: Ramona Hedges, Planning Commission Secretary

RE: Phillips 66 Company Rail Spur Project – ESHA Comments

Dear Planning Commissioners:

During the recent hearings, County Staff and members of the public commented on the application of the County's Environmentally Sensitive Habitat Area (ESHA) provisions as they pertain to the Phillips 66 property and the proposed rail spur project. The discussions have repeatedly confused two related ESHA standards (mapped ESHA and unmapped ESHA), and have frequently and erroneously considered one or both of these standards as synonymous with or dependent upon the California Environmental Quality Act (CEQA).

ESHA is primarily a land use and zoning concept in which certain parcels (within the coastal zone), supporting certain biological characteristics (generally rare and sensitive resources), trigger an alternative set of development standards. ESHA designations establish the rules of development and are to be known at the beginning of a project, not announced two and a half years later in the review and approval process.

"Mapped ESHA" applies to properties mapped by the County with Land Use Element combining designations. "Unmapped ESHA" was developed by the County, to provide the County with the opportunity to designate certain lands not previously mapped as ESHA, as unmapped ESHA prior to initiation of consideration for development. As explained below, the County's ESHA provisions are entirely consistent with state law (including CEQA) and, in this case, do not result in a designation of ESHA on the project site.

The Project Site Has No Mapped or Unmapped ESHA

The following definitions come from the County's Coastal Zone Land Use Ordinance (CZLUO) that recognizes these two types of ESHA: Mapped ESHA and Unmapped ESHA:

Mapped ESHA

"A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily [be] disturbed or degraded by human activities and development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats and are mapped as Land Use Element combining designations. Is the same as an Environmentally Sensitive Habitat."

No Impacts to Mapped ESHA

The proposed project area is not within mapped ESHA. It is not within an area mapped with Land Use Element combining designations. The project would not impact ESHA. The County has designated (mapped) ESHA on the western property also owned by Phillips 66, located west of the Union Pacific

Railroad (UP) mainline tracks. The proposed project occurs on the eastern property, east of the UP mainline, and does not occur in or adjacent to mapped ESHA. On this, County Staff is in full concurrence.

Unmapped ESHA

“A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development. They include, but are not limited to, known wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats that may not be mapped as Land Use Element combining designations. The existence of Unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information.”

No Impacts to Unmapped ESHA

The County accepted the Phillips 66 application as complete on July 12, 2013. As stated in the Draft EIR, County staff found no unmapped ESHA on the project site at or before the time that it accepted the Phillips 66 application. Before the County accepted the application in July, all of the following biological reports were provided. These detailed and comprehensive reports of the project area were prepared in compliance with the County’s guidelines for the preparation of biological survey reports and included:

- Botanical Assessment; Santa Maria Refinery Rail Project, San Luis Obispo County California (Arcadis, March 2013; submitted with first project application as Appendix G)
- Updated Botanical Assessment; Santa Maria Refinery Rail Project, San Luis Obispo County California (Arcadis, June 2013; submitted with second project application to include results from 2013 spring surveys for sensitive annual species including the Nipomo lupine as Appendix G)
- Wildlife and Habitat Assessment; Santa Maria Refinery Rail Project, San Luis Obispo County California (Arcadis, March 2013; submitted with first project application as Appendix G)
- Updated Wildlife and Habitat Assessment; Santa Maria Refinery Rail Project, San Luis Obispo County California (Arcadis, June 2013; submitted with second project application – no substantive changes, only edits to the project description)

In the Revised Draft EIR (October 2014), the County stated that they reviewed the biological reports prepared by the applicant, conducted site visits, conducted independent review of available data, and corresponded with experts to determine that the site does not qualify as unmapped ESHA. Although this was more than 15 months after the required date of the unmapped ESHA determination, the County reiterated that the site does not qualify as unmapped ESHA.

Discussion of Unmapped ESHA

During the public hearings, County Staff discussed its recently changed position, which now attempts to consider portions of the project area as unmapped ESHA. At the outset in responding to Commissioner questions, County Staff stated that ESHA and CEQA are separate. But as their responses continued, staff began to merge the issues, and concluded with the statement that CEQA and the ESHA provisions of the County ordinance are in conflict. This is simply not correct. There is no conflict between CEQA and the CZLUO. Staff stated that the purpose of the CEQA is to facilitate and allow for detailed study of a project’s potential environmental impacts; and that therefore, it was appropriate that County Staff assert a finding of unmapped ESHA based on the CEQA process more than two years after accepting the Phillips 66 application as complete. County Staff suggested that this was allowable in consideration of the portion of the definition of unmapped ESHA that requires the County use the best available information at the

time the application is accepted. This assertion is completely unfounded and is in direct conflict with the County's zoning ordinance requiring that the determination be made *at or before accepting the application*.

Under CEQA, a fundamental purpose of preparing an EIR is to inform the decision-maker and the public of the potential impacts of a proposed project, that is, disclosure to the government and the public. Under the CZLUO, the timing of the ESHA determinations informs the property owner of the rules of development that will apply to the use of his property at the outset of the permit process, that is, it serves as disclosure to the project applicant. It reflects a decision by the County that a property owner should be able to determine, at the beginning of the process, what rules will apply to a project proposal, and that the rules should not suddenly change late in the process.

The County was in possession of detailed biological information addressing the site prior to accepting the application; the project area does not support threatened or endangered species and in fact, approval of the project would result in a net increase in high quality native habitat suitable for the endangered Nipomo Mesa lupine through 2:1 habitat restoration for project impacts; County Staff visited the site and reviewed the grazing land proposed for the project (east of the UP railroad) as well as the high quality mapped ESHA on the western property (west of the UP railroad and outside the project area) prior to accepting the application; and the County determined that the site does not support unmapped ESHA.

As is addressed in the EIR and supporting technical reports, the project area has been actively grazed for decades and does not support the diversity or density of native species that typify the mapped ESHA on the western property. Presumably, these factors are why the County did not designate the eastern property as ESHA when it designated the western property as ESHA. One of the defining elements of unmapped ESHA is that it supports equivalent characteristics and natural functions as mapped ESHA.

At the March 11 hearing, staff stated the following:

- The CZLUO requires decisions regarding unmapped ESHA to be made at or before the application is accepted as complete.
- Biologists performed multiple surveys prior to application submission.
- Biological reports were submitted with the application for review prior to application acceptance. Staff suggested that they needed more time to review the technical reports, but failed to note however, that the biological reports were submitted to the County in March of 2013, four months prior to application acceptance as part of the initial application package submittal. In response to County and applicant discussions, a second application package was submitted in June of 2013 that included the previously submitted biological reports as well as updated botanical survey results from the 2013 spring surveys for sensitive annual species including the endangered Nipomo lupine.
- The application was complete when staff accepted it as such.

The County did not designate unmapped ESHA at or before accepting the application as complete; therefore there should be no further discussion of this matter.

CEQA Does Not Authorize, Let Alone Require, Violation of County Law

At the last Planning Commission hearing, it was suggested that CEQA mandates ongoing Unmapped ESHA analysis and re-analysis throughout the EIR process, even if such analysis conflicts with the "firm deadline" (as County counsel correctly stated) imposed by the County's own ordinance. Simply put, there

is no conflict between CEQA requirements and the County's unmapped ESHA ordinance. Rather, CEQA and the Unmapped ESHA ordinance impose independent, non-conflicting obligations.

CEQA imposes obligations on lead agencies to assess, consider, and mitigate the environmental impacts of a proposed project. The EIR concluded that impacts to on-site biological resources are less than significant and are fully mitigable on the Phillips 66 property through habitat restoration that will result in a net increase in high quality native habitat on the property. The County's expert agreed that Phillips 66 has succeeded in this elsewhere on its property.

Staff readily acknowledges that the County's ordinance imposes a strict deadline on unmapped ESHA designations, but suggests that the deadline can be ignored or over-ridden by CEQA. To reiterate, no conflict exists between CEQA and the County's ordinance, because CEQA and the unmapped ESHA ordinance impose independent and completely consistent legal requirements. The Planning Commission should reject all calls to violate its own ordinance and recognize that it is too late to designate unmapped ESHA on the project site.

Finally, staff suggested at the last hearing that Phillips 66 was "well aware" that no final unmapped ESHA determination would be made until after the EIR process was complete. That is simply untrue. Phillips 66 understood the CEQA process and the County's CZLUO through previous projects, and Phillips 66 had no idea—and certainly would not agree—that staff would take the additional and distinct legal step of labeling its site as unmapped ESHA at the end of that process in direct conflict with the County's ordinance.

Thank you for the opportunity to provide this additional information. Please let us know if you have any questions or if we may be of further service.

Sincerely,



Greg McGowan
Principal Ecologist