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February 24, 2016

VIA ELECTRONIC & FIRST CLASS MAIL

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 Rail Spur Extension Project

Dear Commissioners:

Thank you for the opportunity to address the Planning Commission on February 4. Throughout the hearing on February 4th and 5th, we listened attentively to the remarks of staff and the public. Based on those remarks, we would like to clarify two topics: impacts and mitigation from onsite diesel particulate matter emissions; and consideration of Unmapped ESHA.

Diesel Particulate Matter (DPM) Emissions and Mitigation

The staff report for and staff presentation at the February 4 hearing recommended denial of the project in part because staff believed:

3. The Project includes a significant and unavoidable environmental impact with regards to cancer risk (air quality) for the population near the proposed rail spur.
4. The Project includes a significant and unavoidable environmental impact with regards to diesel particulate matter (air quality) due to an exceedance of the SLOCAPCD CEQA threshold.

(Staff Report, p. 5) Exhibit K to the Staff Report acknowledges that the Three Train Per Week Project eliminates Item 3 (cancer risk) as a significant, Class I impact. Because this is now the proposed Project, Item 3 is no longer an issue, as the Project would have a less than significant health risk impact. Regarding Item 4, staff classifies this as a Class I impact even for the Three Train Per Week Project. This is based on staff's assertion that there is

no feasible mitigation for the onsite DPM emissions. That simply is not the case. DPM emissions can be mitigated onsite through infrastructure and equipment upgrades and replacement, operational energy efficiency measures, and reductions in transportation emissions. Offsite mitigation measures are also available and equally effective. Phillips 66 is prepared to mitigate DPM emissions consistent with the SLOCAPCD CEQA Handbook, and consistent with mitigation conditions imposed on other projects approved by the County in recent years.

The Final EIR estimates that onsite emissions of PM_{10} (including DPM) will exceed 1.25 lb/day, which is identified in the SLOCAPCD CEQA Handbook as a significance threshold for DPM.[1] Onsite PM_{10} emissions subject to County mitigation authority for this Project are estimated to total 9.54 lb/day on the peak day.[2] The SLOCAPCD CEQA Handbook explains what should happen when a project may exceed one of the operational thresholds:

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[1] Our comments at the hearing on February 4 showed that there is no scientific or policy basis supporting 1.25 lb/day DPM as a CEQA significance threshold. We suggested that the 1.25 lb/day value could be used as a screening threshold for health impacts related to DPM as a toxic air contaminant, while remaining in harmony with the explanations in both the Air District CEQA Handbook and the EIR itself. Under this approach, if a proposed project may exceed 1.25 lb/day DPM, then a health risk assessment (HRA) must be prepared to determine whether the project may cause a significant health effect due to toxic air contaminants. This has been done for the Rail Spur Extension Project, and the HRA demonstrated that there will be no significant health impact from the onsite emissions, using the County's significance threshold of 10 in one million excess cancer risk. The 1.25 lb/day DPM value also can be applied as a screening value for ambient concentrations of particulate matter. Just as with carcinogenic risk, if a proposed project may exceed the 1.25 lb/day value, then closer examination of the implications of a project's emissions for compliance with ambient air quality standards would be warranted. In this case, the EIR concludes that the additional onsite DPM will not cause or contribute to additional exceedances of the ambient air quality standards for particulate because the same meteorological conditions that cause the current exceedances of the standards will actually result in quick dissipation of the DPM from the project. Subsequent to February 4, we have continued our research, and we have not identified anything that would preclude the County from applying the 1.25 lb/day value as a screening threshold. But even if the 1.25 lb/day value is applied as a strict CEQA significance threshold, this potential impact is not properly classified as a Class I impact because it can be mitigated to a less than significant level.

[2] In this letter, "onsite emissions" is used as shorthand for the emissions on or near the Refinery site that Phillips 66 and the County concur are subject to the County's mitigation authority for the Rail Spur Extension Project. As used in this letter, the term includes onsite fugitive dust, onsite PM_{10} emissions from diesel locomotives, and onsite and offsite PM_{10} emissions from vehicle exhaust from the increase in vehicle trips (autos, trucks, and additional sulfur trucks) associated with the Project. For the peak day, Table 5.5 of the Final EIR (p. 5-53) estimates these emissions at 1.32, 8.15 and 0.07 lb/day, respectively, for a total of 9.54 lb/day. Of the total 9.54 pounds, 9.47 pounds are estimated to occur onsite, and the remainder consists of vehicular emissions that will occur offsite. Of the total 9.54 pounds, 8.22 pounds are PM_{10} emissions from combustion of fuels, including diesel particulate that would occur both onsite and in the vicinity, and the remainder is fugitive dust.

"Emissions which exceed the designated threshold levels are considered potentially significant and should be mitigated." (Handbook, p. 3-4.) Section 3.8 of the Handbook presents a list of suggested standard mitigation measures, aimed at site design, energy efficiency, and reductions in transportation emissions through reduction in vehicle trips or use of alternative fuels. Section 3.8 also explains that where standard measures are not feasible or sufficient, offsite mitigation may be used. The Handbook states:

> Operational phase emissions from large development projects that cannot be adequately mitigated with on-site mitigation measures alone will require off-site mitigation in order to reduce air quality impacts to a level of insignificance if emissions cannot be adequately mitigated with on-site mitigation measures alone. Whenever off-site mitigation measures are deemed necessary, it is important that the developer, lead agency and APCD work together to develop and implement the measures to ensure successful outcome. This work should begin at least six months prior to issuance of occupancy permits for the project.
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> If off-site mitigation is required, potential off-site mitigation measures may be proposed and implemented by the project proponent following APCD approval of the appropriateness and effectiveness of the proposed measure(s). Alternatively, the project proponent can pay a mitigation fee based on the amount of emission reductions needed to bring the project impacts below the applicable significance threshold. The APCD shall use these funds to implement a mitigation program to achieve the required reductions.

Phillips 66 is confident that there are emission reduction opportunities onsite and in the immediate vicinity of the Project that will provide the emission reductions necessary to mitigate the onsite emissions from the Project to a less than significant level. For example, many of the mitigation measures suggested in Section 3.8 of the Handbook involve repowering existing equipment, i.e., replacing an engine in existing equipment. Repowering can reduce emissions two ways. First, a newer engine is often more efficient, requiring less fuel to accomplish the same work. Second, repowering often involves replacing an existing diesel engine with a new electric engine or an engine that uses alternative fuels, thus eliminating DPM and reducing particulate emissions overall. Phillips 66 is reviewing its existing infrastructure and equipment to identify the equipment at the Refinery and opportunities in the vicinity that can be replaced, repowered or otherwise controlled to fully offset the onsite emissions of the Project.

Phillips 66 does not object to Mitigation Measure AQ-2a as it applies to the onsite emissions. Proposed Mitigation Measure AQ-2a provides:

> Prior to issuance of Notice to Proceed, the Applicant shall provide a mitigation, monitoring and reporting plan updated annually. The plan shall investigate methods or reducing the onsite and offsite emissions, both from fugitive components and from locomotives or from other SMR activities (such as the diesel pumps, trucks, and compressors to reduce DPM). In addition, locomotive emissions shall be mitigated to the extent feasible through contracting arrangements that require the use of Tier 4 locomotives or equivalent emission levels. The plan shall indicate that, on an annual basis, if emissions of ROG+NOx and DPM with the above mitigations still exceed the thresholds, as measured and confirmed by the SLOCAPCD, the Applicant shall secure SLOCAPCD-approved onsite and/or offsite emission reductions in ROG + NOx emissions or contribute to new or existing programs to ensure that project related ROG + NOx emissions within SLO County do not exceed the SLOCAPCD thresholds. Coordination with the SLOCAPCD should begin at least six (6) months prior to issuance of the Notice to Proceed for the Project to allow time for refining calculations and for the SLOCAPCD to review and approve any required ROG+NOx emission reductions.

With the exception of its preempted aspects,[3] proposed Mitigation Measure AQ-2a will work much the same as air quality mitigation measures imposed on the Throughput Increase Project approved by this Planning Commission in 2012. For that project, mitigation measures AQ-1.1 and AQ-1.2 specified the use of best available control technology on stationary equipment and newer engines on trucks to reduce NOx emissions. Mitigation Measure AQ-1.3 required that if the prior measures were not sufficient to offset emissions below the significance threshold, then offsite mitigation would be required in accordance with the SLOCAPCD CEQA Handbook. Consistent with the Handbook, Phillips 66 successfully worked with the Air District to deliver additional mitigation measures meeting the performance standard, and this demonstration was required to be completed to the Air District's satisfaction before the company received the Notice to Proceed for the Throughput Increase Project. This practice is routine in application of the Air District's Handbook to CEQA review of projects throughout the County.

Unfortunately, the Staff Report merged the discussion of onsite emissions with the discussion of preempted emissions. Likewise, it merged the mitigation of these two categories into a single mitigation measure. This affected the conclusion regarding the feasibility of mitigation, since the final conclusion is driven by the fact that the County does not have authority to require emissions offsets for mainline locomotive emissions. In so doing, the Staff Report obscures the fact that the onsite emissions, including the onsite DPM subject to the 1.25 lb/day threshold, are capable of being fully mitigated.

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[3] See my letter to the Planning Commission dated February 1, 2016, Attachment 11, for a discussion of the aspects of Mitigation Measure AQ-2a that are preempted.

As described in our letter of February 1, 2016, ultimately the Planning Commission—not the EIR or Planning Department staff—is responsible for determining whether there is feasible mitigation for an impact. Planning Department staff may be pessimistic, but the Phillips 66 staff has greater familiarity with the range of DPM-emitting equipment onsite and in the vicinity of the Project, and company staff is confident that it can meet the requirements of the mitigation measure as proposed in the Draft and Revised Draft EIRs. Moreover, there is no risk to the County in classifying this impact as Class II—potentially significant with mitigation—because if the company's confidence proves to be unfounded, it would not be able to proceed with the Project without further discretionary review by the County.

We suggest that in adopting findings supporting its decision on the Project that the Planning Commission separately address the feasibility of mitigation for the onsite emissions. To reiterate, Phillips 66 agrees for this Project that the onsite emissions will be subject to the County's permitting and mitigation authority, and the company expects will fully mitigate this amount.

Unmapped ESHA

Section 23.11.030 of the County's Coastal Zone Land Use Ordinance ("CZLUO" or "Ordinance") defines "Unmapped ESHA" as ESHA that staff designates on a parcel "at or before the time" that staff accepts an application for development on that parcel as complete. In this case, the Staff Report urges the Planning Commission to ignore the clear deadline imposed by the Ordinance. For the reasons stated in our February 1, 2016, letter (starting at page 17), the Planning Commission should remain faithful to the plain and pragmatic language of the County Ordinance and conclude that, because staff found no unmapped ESHA at or before the time it accepted Phillips 66's application as complete in June 2013, *the Project site has no unmapped ESHA*.

Public comments at the February 4-5 hearings introduced a new argument for ignoring the County Ordinance's deadline for designating unmapped ESHA, but this argument is legally flawed. The argument turns on Section 30240 of the Coastal Act, which states that "[ESHA] shall be protected against any significant disruption of habitat values." Pub. Res. Code § 30240. Proponents of this argument contend that, if enforced as written, the Ordinance's deadline for designating unmapped ESHA will leave habitat areas otherwise deserving of protection forever unprotected, in contravention of Section 30240. The argument reflects a serious misunderstanding of ESHA law, as well as the protections and mitigations already embodied in the Final EIR.

ESHA is a legal concept that, when applied to a parcel, restricts its use and development. In that sense, it is much like zoning. Whether an area is "zoned" as ESHA depends only in part on the area's biological characteristics. *See, e.g.*, Pub. Res. Code § 30107.5 (defining "Environmentally Sensitive Area"). While those characteristics are a necessary condition for any determination that an area is ESHA, they are by no means sufficient. The relevant permit authority must take the additional step of deciding ***as a matter of law*** that an area within its jurisdiction should be zoned as ESHA.

The Coastal Act is silent on the legal procedures that local governments must enact for designating ESHA. As for Section 30240, that provision merely states that, ***if*** there is ESHA, it must be protected. It says nothing about how or when ESHA determinations are to be made in the first place. LCPs, like the County's CZLUO, have long filled in that gap in the California Coastal Act.

Historically, local governments have implemented a mapping procedure to designate ESHA within their jurisdictions. Based on science and policy considerations, a local government will adopt ESHA maps as part of their LCPs, after hearings at which scientific evidence, policy arguments, and public comments are considered. Once the Coastal Commission certifies LCP maps as consistent with Coastal Act requirements, those maps become dispositive of whether a particular area is, as a matter of law, ESHA. If an LCP relies on the mapping procedure to identify and protect ESHA, a permit authority has no power to unilaterally zone an area as ESHA in contravention of LCP maps. *Security National Guaranty, Inc. v. California Coastal Commission*, 159 Cal. App., 4th 402, 422 (2008) (Sand City LCP designating ESHA precluded unmapped ESHA designations during the application review process). The only mapped ESHA on Phillips 66 property is west of the Union Pacific railroad right-of-way and is not affected by the proposed rail project. In fact, that area has been actively managed for ecological value by Phillips 66 for many years in partnership with the Land Conservancy of San Luis Obispo and others. However, the County has supplemented its LCP maps with a second procedure for designating "unmapped ESHA" early in the application-review process. But the point is that the County LCP—as certified by the Coastal Commission as consistent with the Act—institutes specific legal procedures for designating ESHA.

Whatever procedure is identified in a local jurisdiction's certified LCP for designating ESHA, some areas that meet the ***biological*** criteria of ESHA may not be formally designated as ESHA—at least not until the ***legal*** criteria also have been met (e.g., maps have been updated or those areas become subject to new permit applications). In the meantime, the biological resources in those areas may receive protection through CEQA, along with other state and federal environmental statutes that require consideration and protection of biological resources, including non-ESHA resources. Complete and accurate biological resource reports, prepared by a County-approved company, in full compliance with the County's guidelines for biological assessment reports, were provided to the County as part of the Phillips 66 application. The type and distribution of vegetation

described in the initial reports is the same as what is described in the multiple drafts and the final EIR.

As important, both the Coastal Commission (through its certification of LCPs) and the courts have upheld the use of legal criteria to limit how and when ESHA can be designated. *Security National*, 159 Cal. App., 4th 402, is a case in point. There, Sand City had a Commission-certified LCP with maps designating where in the jurisdiction there was ESHA. The City approved a project on a parcel that the LCP did not designate as ESHA. On appeal, the Coastal Commission denied the project on the grounds that the parcel *did* have ESHA. The Court of Appeal set aside the denial, holding that an LCP's ESHA maps are the final word on whether a parcel is ESHA—and the Commission has no independent authority to unilaterally designate ESHA on appeal. *Id.* at 422. This, despite the fact that the City's LCP maps may have been "outdated" and did not reflect the most "current conditions" on the ground. *Id.* at 422 n. 10 (effectively recognizing that whether a parcel is designated ESHA does not turn solely on the parcel's biological characteristics). Indeed, as the California Supreme Court has held, a local government is not required to demonstrate that "the conclusions in the LCP still relate to current conditions." *Citizens of Goleta Valley v. Bd. Of Supervisors*, 52 Cal. 3d 553, 574 (1990) (internal citations omitted) (Requiring "a reexamination of basic land-use policy with every permit application would impose an unnecessary and wasteful burden on local governments.").

Additionally, as a reminder, the Unmapped ESHA issue is not about whether the Project will cause significant adverse impacts to biological resources. The Final EIR confirms that impacts to biological resources all will be less than significant with mitigation. Among other measures, Mitigation Measure BIO-5a will require that the highly disturbed and degraded habitat that will be removed for the Project must be replaced by high quality habitat elsewhere on the Phillips 66 property at a ratio of greater than 1:1.

To summarize, no inconsistency exists between the County's procedure for designating unmapped ESHA and Section 30240 of the Coastal Act. The former dictates ***how*** unmapped ESHA is to be designated, while the latter dictates—once it is lawfully designated as ESHA—it must be protected against any significant disruption of habitat values, consistent with the overall framework of the certified LCP. Both historic and judicial precedents have long sanctioned this complementary approach to identifying and protecting ESHA, even though particular procedures may preclude ever-evolving determinations based on ever-changing information. To the extent new information in the future justifies an ESHA designation on the Project site, the County will be able to update its maps to reflect that information or designate unmapped ESHA on the site if and when Phillips 66 submits a new permit application. But what the law does *not* authorize is the rewriting of the County LCP, which the Coastal Commission itself certified as consistent with the Coastal Act.

The Planning Commission should apply the County Ordinance as written and find that, on the facts of this case, the project site has no unmapped ESHA.

Again, we appreciate the Commission and County staff taking the time to review the proposed Rail Spur Extension Project, and we look forward to the continued hearing on February 25, 2016.

Very truly yours,

ALSTON & BIRD LLP

Ann Wam for

Jocelyn Thompson

JNT

cc: Ryan Hostetter (via Email)
Whitney McDonald (via Email)

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