

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

lhorton@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS
JAMIE L. MAULDIN
ELLEN L. WEHR

March 9, 2016

VIA ELECTRONIC MAIL AND OVERNIGHT MAIL

San Luis Obispo County Planning Commission
c/o Ramona Hedges
Board of Supervisors Chambers
County Government Center
1055 Monterey Street, Room D170
San Luis Obispo, CA 93408
Email: rhedges@co.slo.ca.us

Ryan Hostetter
Senior Planner
Department of Planning and Building
San Luis Obispo County
976 Osos St., Room 200
San Luis Obispo, CA 93408
Email: rhostetter@co.slo.ca.us; p66-railspur-comments@co.slo.ca.us

**Re: Comments on the Final Environmental Impact Report for the
Phillips 66 Company Rail Spur Extension Project**

Dear Honorable Members of the San Luis Obispo County Planning Commission and
Ms. Hostetter:

We are writing on behalf of Safe Fuel and Energy Resources California
("SAFER California"), Ian Ostrov, and Gene Sewall in support of the San Luis
Obispo County ("County") Department of Planning and Building staff
recommendation that the Commission deny Phillips 66's application for a
Development Plan/Coastal Development Permit for the Rail Spur Extension Project
("Project"). We also support the findings prepared by County staff found in Exhibit
C to the January 25, 2016 Staff Report ("Staff Report").

3017-020rc

March 9, 2016

Page 2

In addition, these comments demonstrate that the Project will have even greater impacts than disclosed in the Project's Final Environmental Impact Report ("FEIR"). Therefore, the County's FEIR fails to comply with the California Environmental Quality Act ("CEQA").¹ Although the FEIR addresses some of the errors we identified in our comments on the Recirculated Draft EIR ("RDEIR"), there are still many more errors and omissions remaining, as well as new ones. These comments thus provide further evidence that the Project's severe environmental impacts outweigh the Project's public benefits.

The Project proposes to modify an existing rail spur at its Santa Maria Refinery ("SMR") and to construct a new offloading facility to accommodate an average of between 35,478 and 38,237 barrels per day of crude oil to be shipped by rail to the SMR for processing.² The offloading facility would be located at an existing coke storage area within the SMR. The Project includes unloading up to five trains per week, with an annual maximum number of trains expected to be approximately 250.³ A Reduced Rail Deliveries alternative of three trains per week, with an annual total of 150 trains, was also evaluated in the FEIR.⁴

According to the FEIR, the refinery feedstock (i.e., crude oil) would be sourced from oilfields throughout North America, including Canada.⁵ The Project is proposed within the Coastal Zone, approximately one mile from Highway 1 and approximately 3.5 miles west of the community of Nipomo in southern San Luis Obispo County.⁶

Based upon our review of the FEIR, responses to our comments on the RDEIR ("RTC"), the Staff Report, appendices, and other relevant records, we conclude that the FEIR fails to comply with the requirements of CEQA. The FEIR unlawfully piecemeals environmental review; fails to adequately address the crude

¹ Pub. Resources Code, §§ 21000 et seq.

² Phillips 66 Company Rail Spur Extension Project Final Environmental Impact Report ("FEIR"), p. ES-10; 2-23. The RDEIR anticipates 5 unit train deliveries per week. Each unit train can hold between 49,670 and 53,532 barrels of crude oil. Those calculations were then averaged over seven days.

³ FEIR, p. 2-22.

⁴ FEIR, p. 5-25.

⁵ *Id.*, at 1-4, 2-22.

⁶ *Id.*, at ES-1.

March 9, 2016

Page 3

switch; underestimates environmental impacts to air quality, biological resources, and public health and safety; and fails to incorporate all feasible measures to mitigate those impacts. The Project is also inconsistent with coastal land use plans, laws, and policies. Many of these flaws are described in detail in the Staff Report. However, the Staff Report fails to address *all* of the FEIR's fatal flaws. Furthermore, should the Commission reject the staff recommendation and move forward with certification of the EIR, the EIR must be recirculated because it includes new information regarding new significant impacts that were not previously disclosed, as explained further below.

We prepared these comments with the assistance of air quality and hazards experts Phyllis Fox, Ph.D., P.E.,⁷ and Petra Pless, D.Env.,⁸ and biologist Scott Cashen.⁹ Dr. Fox's, Dr. Pless', and Mr. Cashen's comments are fully incorporated herein. We also incorporate by reference all Project comments previously submitted by these experts and SAFER California.¹⁰

I. THE PROJECT IS PIECEMEALED

We previously commented that the RDEIR violated CEQA's prohibition on piecemeal environmental review because the Project is interdependent on two other refinery projects: the Rodeo refinery Propane Recovery Project and the SMR Throughput Increase Project. The FEIR's response challenging this claim is based on flawed analysis and assumptions. We provide further evidence here that these three Projects are part of a larger project that should have been evaluated together, as required under CEQA.

⁷ See Letter from Phyllis Fox, to Laura Horton re: Comments on Final Environmental Impact Report for the Santa Maria Rail Spur Project, March 1, 2016 (hereinafter, "Fox Comments"), **Attachment A**.

⁸ See Letter from Petra Pless, to Laura Horton re: Review of Phillips 66 Company Rail Spur Extension and Crude Unloading Project Final Environmental Impact Report and Vertical Coastal Access Project Assessment, February 29, 2016 (hereinafter, "Pless Comments"), **Attachment B**.

⁹ See Letter from Scott Cashen, to Laura Horton re: Comments on the Final Environmental Impact Report Prepared for the Phillips 66 Company Rail Spur Extension and Crude Unloading Project, January 28, 2016 (hereinafter, "Cashen Comments"), **Attachment C**.

¹⁰ SAFER California provided comments on the original Draft EIR on January 27, 2014, and the Recirculated Draft EIR ("RDEIR") on November 24, 2014.

The Phillips 66 San Francisco Refinery consists of two facilities linked by a 200-mile pipeline.¹¹ The SMR is located in Arroyo Grande in San Luis Obispo County, while the Rodeo Refinery is located in Rodeo in the San Francisco Bay Area. The SMR mainly processes heavy, high sulfur crude oil and sends semi-refined liquid products, *e.g.*, gas oil and naphtha (pressure distillates),¹² to the Rodeo Refinery for converting into finished products. Propane and butane would be recovered from these semi-refined products during refining at the Rodeo refinery and sold as liquefied petroleum gas (“LPG”) as part of the Propane Recovery Project.¹³

As explained by Dr. Fox, the Santa Maria projects would increase the amount of propane and butane that is recoverable at Rodeo in two ways. First, the increase in crude throughput would increase the amount of gas oil and naphtha recovered at Santa Maria and sent to Rodeo in direct proportion to the increase in throughput, or by about 10% based on permit limits, assuming no change in crude slate. Second, the change in composition of the rail-imported crudes, compared to the baseline crude slate, would additionally increase the amount of propane and butane in the naphtha sent to Rodeo.¹⁴

In response to the FEIR’s flawed analysis on the connection between the projects, Dr. Fox demonstrates that (1) that there is not sufficient LPG in Rodeo’s fuel gas to meet the Propane Recovery Project design basis of 14,500 bbl/day; (2) the Throughput Increase Project would increase LPG in the semi-refined products sent to Rodeo; (3) this Project would increase LPG in the semi-refined products sent to Rodeo; and (4) vapor pressure limits on the Junction Station tanks would not limit the amount of LPG sent from SMR to Rodeo.¹⁵ Thus, the Propane Recovery Project is reliant on this Project as well as the Throughput Increase Project to meet its goal of increasing propane and butane production.

Furthermore, specifically with regard to the Throughput Increase Project, Dr. Fox demonstrates that (1) the projects were designed and planned together; (2) local

¹¹ FEIR, Figure 2-2.

¹² Fox Comments, p. 58.

¹³ See, *e.g.*, Propane Recovery Project RDEIR, p. 3-25, <http://www.cccounty.us/DocumentCenter/View/33804>.

¹⁴ Fox Comments, pp. 60.

¹⁵ *Id.*

crude supplies were in serious decline and inadequate to satisfy the pre-Throughput Project permitted level (44,500 bbl/day), let alone the proposed increase; (3) local crude supplies were not cost competitive compared to North American cost-advantaged crudes available to ConocoPhillips/Phillips 66; (4) the truck unloading capacity at the Santa Maria Pump Station (“SMPS”) was not adequate to accommodate both a throughput shortfall at the SMR and the increased throughput limits;¹⁶ (5) the Throughput Increase Project could not be realized without a means to economically import the crude, which would be fulfilled by the Rail Spur Project; and (6) ConocoPhillips/Phillips 66 was actively developing North American cost-advantaged crude sources, which it planned to market to its existing refineries, including SMR, thus replacing higher priced local production.¹⁷ Thus, the Throughput Increase Project is reliant on this Project to meet the increased throughput.

Therefore, based on detailed evidence in the record, Dr. Fox concludes that these projects “are inextricably linked and should have been evaluated as a single project under CEQA.”¹⁸ The County’s failure to evaluate all three projects together violates CEQA. Prior to the County’s consideration of whether to approve the Project, the EIR must be revised to analyze the whole project and recirculated for further public review.

II. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE IMPACTS TO AIR QUALITY AND PUBLIC HEALTH AND SAFETY

Like the DEIR and RDEIR, the FEIR fails to satisfy CEQA’s two basic purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a Project before harm is done to the environment.¹⁹ The EIR is the “heart” of this requirement.²⁰ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public

¹⁶ According to Dr. Fox, the SMR was operating at 8,712 bbl/day below its permitted capacity at the same time it was asking for an increase in permitted throughput, thus the SMR had a permit shortfall to deal with before even attempting to meet the permit increase.

¹⁷ Fox Comments, p. 80.

¹⁸ *Id.*, at 59.

¹⁹ CEQA Guidelines, § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

²⁰ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

and its responsible officials to environmental changes before they have reached ecological points of no return.”²¹

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”²² An adequate EIR must contain facts and analysis, not just an agency’s conclusions.²³ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.²⁴

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.²⁵ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.²⁶ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.²⁷ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.²⁸ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or

²¹ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

²² CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

²³ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

²⁴ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

²⁵ CEQA Guidelines, § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

²⁶ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

²⁷ *Id.*, §§ 21002-21002.1.

²⁸ CEQA Guidelines, § 15126.4(a)(2).

feasibility.²⁹ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”³⁰

Here, the FEIR fails to satisfy the basic purposes of CEQA. Like the DEIR and RDEIR, the FEIR’s conclusions regarding air quality, public health, hazards, and biological impacts are not supported by substantial evidence. In preparing the FEIR, the County (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; and (3) failed to incorporate feasible measures to mitigate environmental impacts to a less than significant level. The County must correct these shortcomings and recirculate a revised EIR for public review and comment.

A. Project Operational Emissions are Substantially Underestimated

We previously commented that the RDEIR’s air quality analysis was substantially flawed because it underestimated daily emissions from locomotives and associated health risks, and underestimated additional health risks.

The FEIR presents substantially revised operational emissions for criteria pollutants and precursors, including the ozone precursors reactive organic gases (“ROG”) and nitrogen oxides (“NOx”), and diesel particulate matter (“DPM”), which is a toxic air contaminant contributing to increased cancer risks. Dr. Pless finds that these estimates “substantially underestimate combustion emissions from locomotives...”³¹ Also, Dr. Fox finds that the FEIR’s revised operational emissions fail to account for fugitive emissions from railcars and underestimate emissions from other onsite emission sources.

As a preliminary matter, Dr. Pless explains that the DEIR, RDEIR, and FEIR present successively and substantially lower total operational emissions

²⁹ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

³⁰ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

³¹ Pless Comments, p. 5.

estimates within the County. The FEIR provides no explanation for these successive reductions. Dr. Pless states that “the Final EIR should have provided an adequate discussion of the revisions it incorporated to facilitate reviewers’ understanding of the changes compared to the Revised Draft EIR.”³² Despite the FEIR’s failure to account for these significant changes in its air quality analysis, Dr. Pless was able to review the FEIR’s spreadsheets and modeling files and made several findings regarding the FEIR’s flawed analysis.

First, Dr. Pless finds that the FEIR “considerably underreports total unmitigated Project operational emissions within San Luis Obispo County” because it fails to incorporate emissions from all offsite locomotive modes of operation, such as line haul, switching, and idling.³³ Furthermore, Dr. Pless finds that because the FEIR substantially underreports peak daily ROG+NO_x and DPM emissions, Mitigation Measure AQ 3, which is intended to reduce ROG+NO_x and DPM emissions to below the SLOCAPCD’s thresholds of significance, “will not reduce all Project emissions in excess of the air district’s daily thresholds of significance.”³⁴

Second, Dr. Pless finds that the FEIR substantially underestimates mainline locomotive emissions and fails to demonstrate that its assumptions are realistic for the Project trains.³⁵

Third, Dr. Pless finds that the FEIR fails to correctly characterize mitigated onsite locomotive emissions at the SMR and, consequently, total project emissions within the County. This is because the FEIR’s estimates of mitigated operational locomotive and total Project emissions assume the use of locomotives that comply with the U.S. Environmental Protection Agency (“EPA”) Tier 4 emission standards, as well as limited locomotive idling time onsite at the SMR to no more than 15 consecutive minutes. However, because the County continues to cast doubt on its ability to require Tier 4 locomotives due to federal preemption, this analysis is flawed.³⁶

³² *Id.*, at 6.

³³ *Id.*, at 8.

³⁴ *Id.*, at 13.

³⁵ *Id.*, at 14.

³⁶ *Id.*, at 22.

Fourth, Dr. Pless finds that the FEIR fails to adequately assess and identify significant impacts from emissions of criteria pollutants for all air districts outside of SLOCAPCD.³⁷

Therefore, Dr. Pless concludes that the FEIR fails to adequately disclose the severe extent of the Project's significant air quality impacts.³⁸ Dr. Pless' calculations thus provide further support for the Staff Report's recommendation for denial based in part on significant and unavoidable air quality impacts.

B. The FEIR Fails to Adequately Analyze Significant Health Risks

The FEIR presents two analyses for health impacts resulting from Project emissions: (a) a health risk assessment for on-site impacts and (b) an analysis of health impacts resulting from mainline operational emissions of ozone precursors. Dr. Pless concludes that both analyses are substantially flawed.

First, Dr. Pless demonstrates that the FEIR's health risk assessment is erroneous because the estimates for cancer risks are based on substantially underestimated emissions, as discussed above.³⁹ Thus, the FEIR fails to identify the magnitude of health risks near SMR and fails to require adequate mitigation.⁴⁰

Second, Dr. Pless demonstrates that the analysis of health impacts resulting from total mainline operational emissions of ozone precursors is erroneous and not supported.⁴¹ Indeed, the FEIR's analysis of ozone-related morbidity "fails to convey the seriousness of health impacts that may result from operation of the Rail Spur Project."⁴² In addition, Dr. Pless finds that "this failure undermines a full and adequate discussion of mitigation measures" required to reduce those impacts to the maximum extent feasible.⁴³

³⁷ *Id.*

³⁸ *Id.*, at pp. 5 – 26.

³⁹ *Id.*, at 27.

⁴⁰ *Id.*

⁴¹ *Id.*, at 28.

⁴² *Id.*

⁴³ *Id.*, at 35.

Dr. Pless concludes that total mortality and morbidity resulting from unmitigated locomotive emissions of ozone precursors ROG and NOx for all air districts within California add up to about 21 deaths per 1,000 persons per year and about 22 additional hospital admissions for chronic obstructive pulmonary disease for all ages, a factor of more than 10 higher than those disclosed by the FEIR of 2 deaths per 1,000 persons per year and about 2 additional hospital admissions for chronic obstructive pulmonary disease for all ages.⁴⁴

Therefore, Dr. Pless' calculations show much more severe significant health impacts than disclosed in the FEIR, and provide further support for the Staff Report's recommendation for denial based in part on significant and unavoidable health risks.

C. Impacts Due to Changes in Crude Slate Were not Evaluated

We previously commented that the RDEIR failed to adequately address the change in refinery feedstock. In addition, Dr. Fox previously commented that the Rail Spur Project would replace 97% of the baseline crude slate with up to 100% tar sands crude. She noted in her comments that these new crudes have many chemical and physical properties that distinguish them from the baseline crude slate and that will result in impacts that were not evaluated in the RDEIR.⁴⁵ Dr. Fox finds that the FEIR still fails to evaluate changes in emissions associated with a change in crude slate.⁴⁶ According to Dr. Fox, the FEIR's analysis is inadequate for several reasons.

First, Dr. Fox demonstrates that the Project will result in emission changes due to changes in fuel gas composition. Specifically, she notes that if the increased amounts of propane and butane are partitioned into the refinery fuel gas, as is stated in the FEIR, emissions would increase from heaters and boilers at the SMR.⁴⁷

⁴⁴ *Id.*, at 34.

⁴⁵ Fox Comments, p. 3.

⁴⁶ *Id.*

⁴⁷ *Id.*, at 4.

Second, Dr. Fox demonstrates that the FEIR fails to evaluate increased combustion emissions from tar sands bitumen. The RTC fails to adequately address this point.

Third, Dr. Fox demonstrates that the FEIR fails to evaluate increased metals content from tar sands crudes, which have higher metal content than the existing crude slate. Furthermore, she explains that “elevated levels of metals present in the tar sands crude will be present in emitted coke dusts, resulting in potentially significant environmental problems.”⁴⁸ These impacts were not adequately disclosed in the FEIR.

Therefore, based on detailed analysis on the Project’s changes to SMR’s crude slate, Dr. Fox concludes that “[t]he subject change in crude slate quality will result in significant on-site impacts that have not been disclosed to the public.”⁴⁹

D. Railcar Fugitive ROG Emissions are Significant

Dr. Fox previously commented that railcars emit ROG and TACs from their point of origin through unloading because railcars are not vapor tight. She presented an estimate of railcar fugitive ROG emissions, which exceed the SLOCAPCD ROG+NO_x significance threshold of 25 lb/day, requiring additional mitigation.⁵⁰ The FEIR asserts that the RDEIR included railcar fugitive emissions and that they are nominal, totaling only about 0.02 lbs per round trip within SLO County, based on fugitive leaks from tank car components.⁵¹

However, Dr. Fox finds that the FEIR “substantially underestimated these emissions due to numerous errors and omissions in its calculations.”⁵² These errors and omissions in the FEIR’s calculations of fugitive ROG emissions, which arise from leaking valves, fittings, and closures on the railcars, include flawed fugitive emission factors; incorrect assumptions on the number and type of fittings; an underestimated fugitive component leak rate; flawed analysis of valves; and failure to distinguish between full and empty railcars; among other errors.

⁴⁸ *Id.*, at 11.

⁴⁹ *Id.*, at 3.

⁵⁰ *Id.*, at 12.

⁵¹ FEIR, Responses To Comments (“RTC”), CBE-122.

⁵² Fox Comments, p. 12.

When these errors and omissions are corrected, Dr. Fox calculates that the revised on-site railcar fugitive emissions are 2,587 lbs per unit train visit, assuming oil and gas production emission factors.⁵³ For a five unit trains per week project, the emissions would be 336 ton/yr.⁵⁴ For a three unit trains per week project, the emissions would be 202 tons/yr.⁵⁵ If marketing terminal emission factors are used, the on-site, per-unit-train ROG emissions drop to 790 lb per unit trains visit or 45 ton/yr for the five unit train case and 62 ton/yr for the three unit train case.⁵⁶ Regardless of which emission factor is used, these emissions exceed the SLOCAPCD ROG CEQA significance thresholds of 25 lb/day and 25 ton/yr. Thus, ROG emissions from on-site railcar fugitive leaks are a significant, on-site unmitigated operational air quality impact that was not disclosed in the FEIR for both five and three train-per-week Projects.⁵⁷

In addition, Dr. Fox calculates that off-site fugitive ROG emissions for each air district along the three routes that trains would take from the California border to the Project site would be 8.6 lb/mi-day and 1.1 ton/mi-yr.⁵⁸ Dr. Fox then concludes that railcar fugitive ROG emissions from both on-site operations and within all air districts through which the trains pass, except Placer County APCD (for daily ROG) and SLOCAPCD (for annual ROG), are “highly significant,” exceeding both daily and annual CEQA significance thresholds.⁵⁹

Dr. Fox then provides a detailed list of mitigation measures including emission reduction credits (“ERC’s”); actual reductions in emissions at SMR, including at the SMPS, tanker truck fleet, and storage tanks; Voluntary Emission Reduction Agreements (VERAs); following recommended industry practices to minimize railcar releases, including pre-loading inspection of all railcar fugitive components; replacing all non-closing pressure relief devices, such as rupture discs, rupture pins, or other one-time-use pressure relief device with standard pressure

⁵³ *Id.*, at 23.

⁵⁴ Annual railcar ROG emissions for 5 unit trains per week, using oil & gas production emission factors = [2,587 lb/train x 5 trains/week x 52 weeks/yr]/2000 lb/ton = 336 ton/yr.

⁵⁵ Annual railcar ROG emissions for 3 unit trains per week, using oil & gas production emission factors = [2,587 lb/train x 3 trains/week x 52 weeks/yr]/2000 lb/ton = 202 ton/yr.

⁵⁶ Fox Comments, p. 24.

⁵⁷ *Id.*, at 23.

⁵⁸ *Id.*, at 24.

⁵⁹ *Id.*, at 12.

relief valves; closing and sealing all tank car hatches during loading operations; and requiring the use of zero-leak fugitive components at the rail terminal and on the pipeline connecting the rail terminal and storage tanks; among others.⁶⁰

The EIR must be revised to include analysis of, and mitigation for, significant air quality and public health impacts resulting from fugitive ROG emissions both on and off site.

E. On-Site Hazards are Significant

Dr. Fox explains that the FEIR's analysis of on-site hazards is flawed and underestimates the public health and safety risks in several ways.

First, Dr. Fox notes that Canadian tar sands crudes are very high TAN and sulfur crudes. Indeed, she explains that the increases in TAN and sulfur are "substantial" when considering corrosion and "indicate a very significant potential for catastrophic releases cause by corrosion-induced accidents."⁶¹ However, the FEIR fails to consider significant and catastrophic releases of air pollution from these types of corrosion-caused accidents. Dr. Fox concludes that mitigation should be imposed to reduce significant impacts from reasonably foreseeable releases of air pollution from corrosion-induced accidents, including at least the following:

- All mitigation measures required in the Chevron Refinery Modernization Project FEIR;
- 100% component inspection of all carbon steel piping systems susceptible to sulfidation corrosion; and
- Modification of work processes for review of damage mechanisms for processes covered by the Process Safety Management standard to conform with the American Petroleum Institute Recommended Practice 571, Damage Mechanisms Affecting Fixed Equipment in the Refining Industry. The revised work processes shall require consideration of damage mechanism reviews as part of the Process Hazard Analysis process.⁶²

⁶⁰ *Id.*, at 29.

⁶¹ *Id.*, at 33.

⁶² *Id.*, at 37.

Second, the FEIR incorrectly characterizes on-site crude release accidents as insignificant and omits analysis of other reasonably foreseeable on-site accidents. The FEIR evaluated three types of on-site crude release accidents: (1) on-site crude railcar accident pool fires; (2) on-site crude railcar accident BLEVES; and (3) on-site crude pipeline accident pool fires.⁶³ The FEIR asserts none of these accident scenarios result in significant impacts. However, Dr. Fox explains how the FEIR incorrectly summarizes the issue as insignificant “when, in fact, they are highly significant.”⁶⁴ Furthermore, Dr. Fox explains that the FEIR fails to analyze several on-site accident scenarios that result in significant off-site impacts. These include the impacts of accidents on workers; impacts from coke as a combustible material; tank farm impacts; pool fire pipeline accidents; and on-site crude rail car accidents.

Dr. Fox then concludes that “railcar accidents within the Refinery boundary would result in significant impacts to both on-site and off-site populations.”⁶⁵ These significant impacts were not adequately disclosed, analyzed, or mitigated in the FEIR. Therefore, the EIR must be revised and recirculated.

F. Off-Site Hazards are Underestimated

The FEIR concluded that mainline rail accidents, spills, fires, and explosions associated with the Project would have significant and unavoidable impacts with regard to four issue areas:

- Hazards and Hazardous Materials
- Public Services and Utilities
- Water Resources
- Agricultural Resources

In addition to the Project, a number of other crude by rail projects have been proposed or undertaken within California. The FEIR concluded that the Project, together with other crude by rail projects, would have significant and unavoidable cumulative impacts from mainline rail accidents and spills, in regard to these same four issue areas.

⁶³ FEIR, pp. H.3-2/17.

⁶⁴ Fox Comments, p. 38.

⁶⁵ *Id.*, at 45.

The Project's main hazards are potential accidents along the Union Pacific Railroad ("UPRR") mainline that could result in oil spills, fires, and explosions.⁶⁶ The FEIR used a Quantitative Risk Analysis ("QRA") to determine the significance of mainline rail accidents and spills associated with the Project. Specifically, the QRA was used to determine the level of risk associated with the movement of trains from the SMR to the Roseville and Colton rail yards as well as to the California Border. The risk was found to be significant in the event of a crude oil release that resulted in a fire or explosion in the vicinity of a populated area.

However, despite the FEIR's acknowledgment of the significant risks along the mainline, Dr. Fox explains that "the FEIR does not adequately consider and recommend feasible options to mitigate hazards."⁶⁷ Specifically, Dr. Fox states that FEIR Mitigation Measure HM-2a should be amended to require higher standard DOT-120 or DOT-114 pressure tank cars.

In terms of tank car designs, the FEIR apparently only considered options from the Department of Transportation ("DOT") DOT rulemaking.⁶⁸ Mitigation Measure HM-2a requires use of tank cars designed to Option 1, which is identified as "the safest tank car design that was part of the [...] DOT [...] rulemaking",⁶⁹ but is not the safest tank car design available.

As demonstrated by Dr. Fox, Option 1 is in fact not the safest tank car design that is available and permitted for transporting crude. She explains that there are higher standard pressure tank cars that would provide an additional safety benefit. These cars, which are designed to minimize leaks, "would also provide feasible mitigation for one of the Project's significant air quality impacts, namely railcar fugitive ROG emissions along the entire route in California as well as on-site."⁷⁰

Therefore, Dr. Fox concludes that "the FEIR failed to incorporate all feasible mitigation measures to reduce significant impacts, as required under CEQA."⁷¹

⁶⁶ Rail Spur FEIR, p. ES-12.

⁶⁷ Fox Comments, p. 49.

⁶⁸ Rail Spur FEIR, pp. 4.7-24-4.7-27 (USDOT Proposed Rulemaking for High-Hazard Flammable Trains (HHFT)).

⁶⁹ Rail Spur FEIR, p. ES-12.

⁷⁰ Fox Comments, p. 50.

⁷¹ *Id.*, at 55.

G. Mitigation Measures are Deferred, Vague, Unenforceable, or Otherwise Inadequate

We previously commented that many of the Project's mitigation measures are deferred, vague, unenforceable, or otherwise inadequate. This is mainly due to misplaced concerns over preemption, as discussed further below. Dr. Pless notes that instead of developing a suite of feasible, well-defined mitigation measures in a process that is accessible to the affected community for public review, several mitigation measures that address air quality impacts require only that Phillips 66 provide mitigation, monitoring and reporting plans that "shall investigate methods" for reducing emissions.⁷² The County provides no evidence why it would be impracticable to investigate these methods during the CEQA process and provide the mitigation monitoring and reporting plan ("MMRP") for public review. This deferral of the development of mitigation measures is counter to CEQA.

Furthermore, the County argues in the RTC that the mitigation will be feasible and effective at reducing impacts:

SLOCAPCD has a well establish [sic] policy of requiring offsets for emissions and the agency issues permits for operations that enable it to ensure enforceability of the provisions in the EIR. Historical use of these instruments, and the permitting history of the SMR and the SLOCAPCD as well as consultation with and comments from the SLOCAPCD during the EIR process, provides the assurances that the mitigation measures are feasible, effective and will be adopted by the agencies.⁷³

As explained by Dr. Pless, the FEIR's mitigation analysis is not persuasive for several reasons.⁷⁴

First, Dr. Pless notes that the County's RTC only addresses the procedures for using ERCs to offset emissions, but does not address any other "methods for reducing the onsite and offsite emissions, both from fugitive components and from

⁷² Pless Comments, p. 38.

⁷³ RTC ABJC-35.

⁷⁴ Pless Comments, p. 38.

locomotives or from other SMR activities (such as the diesel pumps, trucks, and compressors to reduce DPM)” or “new or existing programs,” which it requires Phillips 66 to investigate.⁷⁵

Second, Dr. Pless demonstrates that despite the County’s assertion that existing protocols, policies, and permitting practices at the SLOCAPCD and the County provide assurance that the proposed mitigation measures for the Project are “feasible, effective, and will be adopted by the agencies”, history indicates otherwise.⁷⁶

Third, contrary to Phillips 66’s claim, offsite mitigation for project impacts is not preempted by federal law, as discussed further below.

Fourth, as we previously commented, there are a number of feasible measures that should have been evaluated and incorporated into the FEIR’s mitigation measures to reduce impacts. Specifically, Dr. Pless recommended evaluating the installation of additional and/or more efficient control technologies on existing units at the SMR and replacement of older emission units including, for example, replacement of leaking components with leakless components, replacement of low-NOx burners with ultra-low NOx burners on all fired sources, or equipping any older, high-emitting equipment with BACT, as well as off-site mitigation such as installing a vapor recovery system and replacement of leaking components at the Santa Maria Pump Station.⁷⁷ The County’s RTC failed to adequately address these feasible mitigation measures.

Indeed, Dr. Pless provides analysis on additional feasible mitigation measures that were not analyzed in the FEIR. These include alternatives for operation of UPRR locomotives in switching mode; a stationary locomotive emissions control system; and replacement or retrofitting of onsite shuttlewagon.

Finally, Dr. Pless demonstrates that the Project’s mitigation measures are inadequate to ensure that greenhouse gas emissions would be mitigated to the intended extent as they lack adequate performance standards.⁷⁸

⁷⁵ *Id.*, at 39.

⁷⁶ *Id.*, at 38.

⁷⁷ *Id.*, at 52.

⁷⁸ *Id.*, at 53 – 58.

Therefore, Dr. Pless concludes that the FEIR “fails to incorporate all feasible mitigation, both *onsite* and *offsite*, therefore failing to comply with CEQA’s requirement that the County evaluate and incorporate all feasible mitigation.”⁷⁹

H. The Reduced Rail Deliveries Alternative Would Result in Significant Impacts with Respect to Air Quality, Health Risks, and Greenhouse Gas Emissions

Phillips 66, presumably in response to Staff’s recommendation to deny the Project, now proposes adoption of the Reduced Rail Deliveries Alternative which would receive three, instead of five, 80-tank car trains per week. Phillips 66 claims that the three train alternative “will reduce all impacts associated with on-site Project activities to less than significant.”⁸⁰

Dr. Pless demonstrates that Phillips 66’s assertion is incorrect. According to Dr. Pless, the Reduced Rail Deliveries Alternative would result in significant impacts with respect to air quality and health risks for *onsite* emissions (as well as off-site, as acknowledged in the FEIR and Staff Report).⁸¹ According to Dr. Pless, not only are the FEIR’s findings regarding cancer risks for the Reduced Rail Deliveries Alternative unsupported, but the assertion of federal preemption of mitigation measures further undercuts the FEIR’s findings for health risks from the Alternative.⁸²

Contrary to the Phillips 66’s claim that the Reduced Rail Deliveries Alternative would “reduce all impacts associated with on-site Project activities to less than significant,” the FEIR’s underlying analysis actually demonstrates several significant impacts, for example:

- Daily unmitigated (not Tier 4) on-site locomotive emissions of NO_x+ROG (24.18 lbs/day ROG + 214.05 NO_x = 238.23 lbs/day ROG+NO_x) alone would exceed the SLOCAPCD’s daily significance threshold for these pollutants of 25 lbs/day by a factor of almost 10.

⁷⁹ *Id.*, at 58.

⁸⁰ Phillips 66 Letter to San Luis Obispo County, February 1, 2016, p. 1.

⁸¹ Pless Comments, p. 60 – 71.

⁸² *Id.*

- Daily unmitigated (not Tier 4) on-site locomotive emissions of diesel particulate matter (8.15 lbs/day) alone would by far exceed the SLOCAPCD's daily significance threshold for this pollutant of 1.25 lbs/day.

Dr. Pless notes that the Reduced Rail Deliveries Alternative “does nothing to reduce the impacts on air quality and associated health impacts due to ozone precursors in the SLOCAPCD and the uprail air districts. . . These remain significant and unavoidable impacts.”⁸³

Furthermore, Dr. Pless demonstrates that Phillips 66's February 24, 2016 letter attempting to discredit the SLOCAPCD's CEQA threshold of significance for DPM of 1.25 lbs/day, claiming it to be an “arbitrary and irrelevant value” that cannot be found in the cited supporting documentation,⁸⁴ is “without merit.”⁸⁵

Therefore, Dr. Pless concludes that the Reduced Rail Deliveries Alternative would result in significant impacts with respect to air quality, health risks, and greenhouse gas emissions both on and off-site.⁸⁶ Phillips 66's assertion that the Alternative would dispense of all of the on-site significant impacts to air quality and public health and safety is unsupported.

Should the Commission decide to move forward with review of the Reduced Rail Deliveries Alternative, the Commission must first direct staff to prepare a new EIR that fully discloses, analyzes, and mitigates all significant impacts from the Alternative, as required by CEQA.

III. THE FEIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE IMPACTS TO BIOLOGICAL RESOURCES

We commented that the RDEIR's analyses of the Project's impacts with respect to biological resources is substantially flawed because wildlife and botanical surveys were not conducted in accordance with applicable protocols, potentially

⁸³ *Id.*

⁸⁴ Letter from Jocelyn Thompson, Alston & Bird, to the SLO Planning Commission, February 24, 2016, **Attachment D**.

⁸⁵ *Id.*, at 67.

⁸⁶ *Id.*, at 66.

significant impacts to biological resources were not properly analyzed, and mitigation for those impacts was inadequate.

The FEIR provided responses to our comments based on additional biological fieldwork. However, according to Mr. Cashen, the FEIR's responses not only reveal new information that requires recirculation of the EIR before it could be certified by the County, but also fail to address the FEIR's continued failure to adequately analyze and mitigate impacts to several sensitive species in the Project area. Thus, the FEIR fails to comply with CEQA.

Mr. Cashen concludes that "the Project would cause significant, unmitigated impacts to several sensitive biological resources."⁸⁷ Consequently, Mr. Cashen "concur[s] with County Staff that the Planning Commission should deny the Applicant's request for a Development Plan/Coastal Development Permit."⁸⁸

A. Existing Conditions

We commented that the RDEIR's analysis of existing conditions was inadequate because surveys were not conducted in a manner consistent with protocols set forth by state and federal wildlife agencies. We also commented that the RDEIR failed to adequately assess whether environmentally sensitive habitat areas ("ESHA"), as defined under the Coastal Act and local coastal plans and policies, occur on the Project site. The FEIR's responses regarding surveys fail to fully address these issues, as described below. In addition, the FEIR reveals that the County's conclusions regarding ESHA have been updated and that part of the Project site is designated as Unmapped ESHA. This constitutes new information showing a new significant impact.

1. Rare Plants

Mr. Cashen notes that approximately 100 dune larkspur, which is a California Rare Plant Rank 1B.2 species, were detected on the Project site during surveys conducted after publication of the RDEIR. These plants were not previously known to occur on the Project site, and thus their presence on the Project

⁸⁷ Cashen Comments, p. 12.

⁸⁸ *Id.*

site constitutes new information regarding a previously undisclosed significant impact. Mr. Cashen describes the plant's populations as being extremely limited, such that the "presence of approximately 100 dune larkspur plants on the Project site constitutes one of the largest known populations of the species."⁸⁹

The FEIR fails to provide any specific analysis of Project impacts to dune larkspur and fails to map the plants or identify their locations in relation to the Project disturbance area. This omission of information critical to evaluating and mitigating the Project's impacts violates CEQA.

In addition, Mr. Cashen finds that "[t]he recent detection of dune larkspur (a Rare Plant Rank 1B species) on the Project site provides additional evidence that the surveys conducted by the Applicant's consultant were inadequate,"⁹⁰ on which we previously commented. The FEIR not only fails to cure the RDEIR's flaws in establishing a baseline for rare plants, but actually provides more support for the notion that the 2012/2013 surveys were not conducted properly because the dune larkspur was not detected at that time.

2. *Burrowing Owl*

The FEIR was revised to state that "Arcadis conducted additional focused [rather than protocol, as was stated in the RDEIR] surveys for burrowing owl in 2013 to confirm whether the species was a year-round resident or overwintering individual. The results of this effort determined that the species was an overwintering individual."⁹¹ According to Mr. Cashen, this statement is misleading because "Arcadis did not conduct the protocol-level surveys needed to 'confirm' absence of nesting owls (i.e., overwintering birds only)."⁹² Only by confirming absence can the County ensure that the species is not a year-round resident.

Mr. Cashen describes the difficulty of detecting burrowing owls and the importance of following the California Department of Fish and Wildlife's ("CDFW") *Staff Report on Burrowing Owl Mitigation*, which indicates that (a) four independent surveys are necessary to provide reliable information on the presence

⁸⁹ *Id.*, at 2.

⁹⁰ *Id.*, at 3.

⁹¹ FEIR, p. 4.4-12.

⁹² Cashen Comments, p. 3 – 4.

of burrowing owls; (b) the surveys should be at least three weeks apart; and (c) data from the four surveys is essential to avoiding, minimizing, and properly mitigating the impacts of a project.⁹³ Mr. Cashen notes that Arcadis conducted two surveys that were three days apart.⁹⁴ This failure to adhere to CDFW protocols fails to ensure an accurate determination of existing conditions, as required by CEQA.

3. *Environmentally Sensitive Habitat Area*

The RDEIR initially stated that ESHA does not occur on the Project site. However, we provided evidence that ESHA does occur on and adjacent to the Project site. We further commented that the Project, which is not coastal-dependent, would result in impacts to ESHA, thus conflicting with the Coastal Act and the County's local coastal plans and policies, including the County Coastal Zone Land Use Ordinance ("CZLUO").

Following further investigation by the County and corroboration by Coastal Commission staff,⁹⁵ the FEIR determines that the Project area meets the definition of Unmapped ESHA.⁹⁶ Indeed, the FEIR may even underestimate the amount of ESHA that exists on the Project site.⁹⁷ Nevertheless, the FEIR states: "[i]t is important to also consider that the Rail Spur Project area has been highly disturbed and degraded from agricultural, industrial, and human activities for several decades and does not appear to contain features that have an equivalent characteristic or natural function as other mapped ESHA."⁹⁸ Mr. Cashen finds that this statement is not supported by substantial evidence. He explains that "[a]lthough the dune habitats at the Project site have been disturbed and degraded,

⁹³ See Appendix D, California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation, www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf.

⁹⁴ Cashen Comments, p. 4.

⁹⁵ Coastal Commission Letter to County, June 4, 2015,

<http://agenda.slocounty.ca.gov/agenda/sanluisobispo/5611/RXhoaWJpdCBELnBkZg==/12/n/56200.doc>.

⁹⁶ FEIR, p. 4.4-31.

⁹⁷ Expert biologist Lawrence E. Hunt submitted comments to the Commission stating that he "consider[s] the entire project area, including the SMR facility, to be an unmapped ESHA of statewide importance because of its geological and biological uniqueness." Letter from Lawrence Hunt to Commission, January 30, 2016,

[http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+\(PostEIR\)/Post+EIR+Comments/Letter+Larry+Hunt+02_02_2016.pdf](http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+(PostEIR)/Post+EIR+Comments/Letter+Larry+Hunt+02_02_2016.pdf).

⁹⁸ FEIR, p. 4.4-31.

they still contain native vegetation and special-status plant species.”⁹⁹ He further explains that “the diversity of native vegetation and rare plants within the dune habitats is remarkable and worth conserving.”¹⁰⁰ Thus, any disturbance that has occurred on the site has not lessened the importance of the ESHA, according to Mr. Cashen.

Therefore, the FEIR’s determination that an ESHA exists on the Project site, and that the ESHA will be permanently impacted by the Project, constitutes new information of substantial importance showing that the Project will result in new significant effects.

B. Project Impacts and Mitigation

We commented that the RDEIR’s analysis of impacts to biological resources was inadequate and that mitigation measures were vague, deferred, unenforceable, or otherwise ineffective. The FEIR’s responses fail to fully address these issues, as described below. Therefore, impacts to biological resources on the Project site remain significant and unmitigated, in violation of CEQA.

1. Burrowing Owl

The FEIR includes the possible “translocation” of burrowing owls as mitigation for impacts to the species.¹⁰¹ Mr. Cashen explains that CDFW’s *Staff Report on Burrowing Owl Mitigation* discourages passive relocation of owls and recommends consideration of all other possible avoidance and minimization measures before passive relocation is implemented.¹⁰² Furthermore, CDFW has concluded passive relocation is a potentially significant impact under CEQA that must be analyzed.¹⁰³ According to the CDFW, temporary or permanent closure of burrows may result in: (a) significant loss of burrows and habitat for reproduction and other life history requirements; (b) increased stress on burrowing owls and

⁹⁹ FEIR, Appendix C.7.

¹⁰⁰ Cashen Comments, p. 3.

¹⁰¹ FEIR, p. 4.4-50.

¹⁰² California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. p. 10, <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>.

¹⁰³ *Id.*

reduced reproductive rates; (c) increased depredation; (d) increased energetic costs; and (e) risks posed by having to find and compete for available burrows.¹⁰⁴

According to Mr. Cashen, the FEIR fails to disclose or analyze the effects of passively relocating burrowing owls from the Project site. Mr. Cashen explains that “[t]he need for full analysis of potential impacts from passive relocation is supported by research that indicates most burrowing owl relocation projects fail.¹⁰⁵ Investigators attribute the limited success of translocation to: (a) strong site tenacity exhibited by burrowing owls, and (b) potential risks associated with forcing owls to move into unfamiliar and perhaps less preferable habitats.¹⁰⁶

Research has shown that passive relocation is most likely to be successful when there are suitable replacement burrows within 100 meters of the destroyed burrow(s); there is sufficient, protected foraging habitat adjacent to the replacement burrow(s); and a Burrowing Owl Exclusion Plan has been developed and approved by the CDFW.¹⁰⁷ Mr. Cashen finds that the likelihood that passive relocation would significantly impact burrowing owls at the Project site could not be adequately evaluated because (a) Phillips 66 has not prepared a Burrowing Owl Exclusion Plan; and (b) the FEIR fails to describe the distribution and abundance of suitable replacement burrows and foraging habitat at the proposed mitigation site.

Thus, the FEIR fails to disclose, analyze, and mitigate all potentially significant impacts to burrowing owls, in violation of CEQA.

2. *Legless Lizards and Coast Horn Lizards*

According to the FEIR, coast horned lizards and silvery legless lizards could be impacted by the Project.¹⁰⁸ Mitigation incorporated into the FEIR includes capturing these species and moving them off the Project site prior to grading.¹⁰⁹ However, Mr. Cashen explains that efforts to translocate (or relocate) animals often fail and can actually harm the species.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ FEIR, p. 4.4-12.

¹⁰⁹ FEIR, Mitigation Measure BIO-3.

Animals that are captured, handled, and/or forced to move from their territory often become stressed, which can lead to the increased production of lactic acid or “stress hormones” in the organism.¹¹⁰ These physiological changes often cause a non-trivial amount of mortality. In addition, silvery legless lizards use tail autotomy (shedding of the tail) as an escape tactic when captured by a predator. Tail autotomy affects the lizard’s physiology and behavior, which may reduce survival and reproductive output.¹¹¹ One study that reviewed projects involving relocation, repatriation, and translocation (“RRT”) of amphibians and reptiles showed that “[m]ost RRT projects involving amphibians and reptiles have not demonstrated success as conservation techniques and should not be advocated as if they are acceptable management and mitigation practices.”¹¹²

Mr. Cashen provides further examples of the adverse effects of translocation in his comments and concludes that “[t]he translocation of wildlife out of the Project area constitutes a significant impact that was not disclosed or analyzed in the FEIR.”¹¹³

3. *Special Status Plants*

The FEIR acknowledges the Project would impact Rare Plant Rank 1B species (e.g., dune larkspur and Blochman’s leafy daisy), and that those impacts would be potentially significant.¹¹⁴ However, the FEIR then concludes that “given the estimated population and the relatively common occurrence of these species, with the implementation of mitigation measure BIO-2, residual impacts are considered to be *less than significant with mitigation* . . .”¹¹⁵ According to Mr. Cashen, there are two significant flaws with that conclusion.

¹¹⁰ *Id.*

¹¹¹ Bateman PW, PA Fleming. 2009. To cut a long tail short: a review of lizard caudal autotomy studies carried out over the last 20 years. *Journal of Zoology* 277:1-14.

¹¹² Dodd CK Jr., RA Seigel. 1991. Relocation, repatriation, and translocation of amphibians and reptiles: Are they conservation strategies that work? *Herpetologica* 47(3):336-350.

¹¹³ Cashen Comments, p. 5.

¹¹⁴ FEIR, p. 4.4-36.

¹¹⁵ FEIR, p. 4.4-36.

First, Mr. Cashen explains that “dune larkspur and Blochman’s leafy daisy are not relatively common or abundant species.”¹¹⁶ Mr. Cashen notes that there are only 16 occurrence records of dune larkspur in the California Natural Diversity Database (“CNDDDB”). Similarly, he states there are only 23 occurrence records of Blochman’s leafy daisy, of which only 6 have been verified extant during the past 20 years.¹¹⁷

Second, Mr. Cashen finds that implementation of mitigation measure BIO-2 “would not mitigate Project impacts to a less than significant level.”¹¹⁸ BIO-2 simply requires population estimates “as the basis for the in-kind replacement of these species described in Mitigation Measure BIO-5e.”¹¹⁹ Mitigation Measure BIO-5e requires replacement of Nipomo Mesa lupine at a 3:1 ratio (based on square feet cover) within the designated restoration area with 100% success in 5 years.¹²⁰ However, Mr. Cashen explains that the FEIR fails to identify the replacement ratio and performance standards for dune larkspur, Blochman’s leafy daisy, and other rare plants that could be affected by the Project. Thus, he concludes that “mitigation for Project impacts to those species would be uncertain and unenforceable.”¹²¹

4. *Nipoma Mesa Lupine*

The Nipomo Mesa lupine is listed as endangered at both the federal and state levels. The FEIR states that the presence of Nipomo Mesa lupine at the Project site is “unlikely due to the distance from historically mapped populations.”¹²² However, Mr. Cashen finds that “[t]his conclusion contradicts evidence.”¹²³ He notes that the disturbance area for the entire Project is within approximately 3,200 feet of a documented occurrence of the species, and a portion of the Project disturbance area is located within 500 feet of a documented occurrence.¹²⁴ Historically and currently,

¹¹⁶ Cashen Comments, p. 6.

¹¹⁷ *Id.*

¹¹⁸ *Id.*, at 6 – 7.

¹¹⁹ FEIR, p. 4.4-36.

¹²⁰ FEIR, p. 4.4-41.

¹²¹ Cashen Comments, p. 7.

¹²² FEIR, p. 4.4-34.

¹²³ Cashen Comments, p. 7.

¹²⁴ *Id.*

the species is known only from the southwestern corner of San Luis Obispo County, where it is scattered over an area of approximately 2 miles wide and 2 miles long.¹²⁵ The Project site is located within that area. Indeed, Mr. Cashen notes that “almost all habitat for the species is located in the immediate Project area on land owned by the Applicant.”¹²⁶ Thus, the FEIR’s conclusion that the species is not likely to be found on the Project site is unsupported.

The FEIR concludes that “[s]hould this species be identified within the Rail Spur Project area, direct impacts to Nipomo Mesa lupine would be *less than significant* with mitigation . . . Implementation of a Dune Scrub Habitat Restoration Plan would mitigate any significant impacts to the Nipomo Mesa lupine.”¹²⁷ However, Mr. Cashen again finds that “[t]his conclusion is not supported by evidence.”¹²⁸ Specifically, the FEIR’s conclusion is based on the assumption that restoration efforts would be successful in establishing Nipomo Mesa lupine at the mitigation site, at a ratio of three new plants for every plant that is removed or damaged by the Project.¹²⁹ However, Mr. Cashen notes that the FEIR provides “no evidence that restoration efforts have ever been successful for this species.”¹³⁰ According to the U.S. Fish and Wildlife Service (“USFWS”), a successful restoration effort for Nipomo Mesa lupine has not yet been achieved.¹³¹ Mr. Cashen states that “this issue is exacerbated by the FEIR’s failure to include contingency measures that would be required if Phillips 66’s restoration effort is unsuccessful.”¹³²

Mr. Cashen explains that the only information the FEIR provides regarding the Phillips 66’s proposed habitat restoration efforts is removing invasive species and planting appropriate native species.¹³³ The FEIR fails to identify any other measures that would be implemented to restore the specific habitat conditions required by Nipomo Mesa lupine and other rare plants impacted by the Project.

¹²⁵ U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation.

¹²⁶ *Id.*

¹²⁷ FEIR, p. 4.4-35.

¹²⁸ Cashen Comments, p. 7.

¹²⁹ FEIR, pp. 4.4-40 and -41.

¹³⁰ Cashen Comments, p. 7.

¹³¹ FEIR, comment USF&W-02 from the U.S. Fish and Wildlife Service.

¹³² Cashen Comments, p. 7.

¹³³ FEIR, p. 4.4-40.

Nipomo Mesa lupine requires open habitat to persist, according to the USFWS.¹³⁴ Open habitat for this species is maintained by natural disturbance from coastal winds and from the activity of wildlife.¹³⁵ Therefore, Mr. Cashen explains that any attempt to “restore” habitat for the species must incorporate measures to promote natural disturbance regimes.¹³⁶ However, the FEIR fails to include any mitigation measures that require Phillips 66 to promote natural disturbance regimes at the mitigation site, which would be fenced.¹³⁷ Furthermore, Mr. Cashen finds that although removing invasive species would temporarily enhance habitat for Nipomo Mesa lupine (and other special-status plants), the invasive species control program described in the FEIR “provides no long-term benefit to rare plants because it would be implemented for only five years (or less).”¹³⁸ Thereafter, he explains, veldt grass and other invasive species present in the Project area would recolonize the restoration site and eliminate the habitat conditions needed to sustain rare plants.¹³⁹

Therefore, the FEIR’s conclusion that impacts to the endangered Nipomo Mesa lupine are less than significant is unsupported. The FEIR fails to adequately analyze and mitigate significant impacts to the species. Thus, the EIR must be revised and recirculated to include feasible and enforceable measures that would actually reduce the impacts to less than significant levels.

5. *Invasive Species Control Program*

The FEIR requires Phillips 66 to implement a Dune Habitat Restoration Program that incorporates an invasive species control program.¹⁴⁰ We previously commented that the invasive species control program should include quantifiable goals based on the reduction of cover and abundance of specific weed species to ensure that tangible and meaningful performance standards are met. The FEIR provided the following response to our comments:

¹³⁴ U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 6.

¹³⁵ *Id.*

¹³⁶ Cashen Comments, p. 8.

¹³⁷ RTC ABJC-51.

¹³⁸ Cashen Comments, p. 8.

¹³⁹ *Id.*

¹⁴⁰ FEIR, p. 4.4-51.

No revisions or additions to the RDEIR have been made. Mitigation Measure BIO-5a is intended to set quantifiable success criteria for native plant species. Control of invasive species is intended to assist the applicant in reaching that goal. Any reduction in non-native species would be a beneficial impact.¹⁴¹

As the FEIR acknowledges, (a) proposed construction activities could result in the introduction or spread of invasive plant species; (b) the Project could facilitate the spread of invasive species in and out of the Rail Spur Project area; and (c) mitigation is required to reduce those impacts to a less than significant level.¹⁴² Mr. Cashen finds that “[t]he measures incorporated into the FEIR are insufficient to mitigate the significant, adverse impacts from invasive plant species” for three reasons.¹⁴³

First, Mr. Cashen explains that quantifiable performance standards assigned to specific invasive species are required to ensure the success of Phillips 66’s invasive species control program. Because the FEIR fails to include performance standards, the County has no basis for concluding the invasive species control program would achieve the intended outcome and that impacts due to invasive plants would be reduced to a less than significant level.¹⁴⁴

Second, the FEIR states the invasive species control program would be limited to the construction phase of the Project, or at most, for five years following habitat restoration efforts.¹⁴⁵ However, Mr. Cashen explains that five years or less of invasive species control is “insufficient to ensure impacts associated with the introduction or spread of invasive plant species would be less than significant.”¹⁴⁶ He further explains that the presence of veldt grass is considered the greatest long-term threat to Nipomo Mesa lupine and its habitat.¹⁴⁷ Because veldt grass, which is

¹⁴¹ FEIR, RTC ABJC-51.

¹⁴² FEIR, pp. 4.4-50 and -51.

¹⁴³ Cashen Comments, p. 9.

¹⁴⁴ *Id.*

¹⁴⁵ FEIR, pp. IST-30, -31, and 4.4-43.

¹⁴⁶ Cashen Comments, p. 9.

¹⁴⁷ U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 9.

an invasive species, is abundant in portions of the Project area, it is likely to colonize or recolonize the habitat restoration area(s) incorporated as mitigation.¹⁴⁸ Mitigating that threat requires a long-term invasive species control program, according to Mr. Cashen.¹⁴⁹ For example, the Land Conservancy of San Luis Obispo County has been actively removing veldt grass from Nipomo Mesa lupine habitat since 2000.¹⁵⁰ However, according to the USFWS, “[w]hile these efforts may have slowed the conversion to a monoculture of veldt grass, it is likely that the habitat will have to be managed *in perpetuity* to maintain the open patches that is required by *L. nipomensis* [Nipomo Mesa lupine].”¹⁵¹

Third, the FEIR requires Phillips 66 to implement the invasive species control program on 41.76 acres within the dune habitat restoration area.¹⁵² However, Mr. Cashen finds that “[l]imiting the invasive species control program to the dune habitat restoration area does not comport with the County’s conclusion that the Project could facilitate the spread of invasive species in *and out* of the Rail Spur Project area.”¹⁵³

Therefore, the invasive species control program measures are not sufficient to reduce significant impacts to sensitive plant species in the Project area. The EIR must be revised and recirculated to include an invasive species control program or some other substantial evidence showing that mitigation would actually reduce the impacts to less than significant levels

6. *Maintenance and Management of Mitigation Lands*

The FEIR requires implementation of an open space or conservation easement to protect the mitigation site in perpetuity.¹⁵⁴ An easement over the Dune Habitat Restoration area is the only measure incorporated into the FEIR for mitigating residual Project impacts to special-status plants, sensitive natural

¹⁴⁸ FEIR, Vol III, comment CNPS-04.

¹⁴⁹ Cashen Comments, p. 8.

¹⁵⁰ U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 8.

¹⁵¹ *Id.*

¹⁵² FEIR, p. 4.4-51.

¹⁵³ Cashen Comments, p. 9.

¹⁵⁴ FEIR, p. 4.4-41.

communities, and burrowing owls. However, the FEIR did not establish the legal conditions associated with the easement, and thus Mr. Cashen concludes “there is insufficient evidence to conclude the easement would mitigate Project impacts to a less than significant level.”¹⁵⁵ In order to mitigate biological impacts to less than significant levels, the County first must establish (a) the rights of the grantee and grantor, (b) restrictions of undesirable activities, and (c) a general restriction of all uses inconsistent with the purposes of the easement.¹⁵⁶ The FEIR fails to establish these components.

Furthermore, the FEIR fails to include a mitigation management plan or a funding mechanism that ensures the long-term success of the mitigation land. Mr. Cashen explains that “[e]nsuring success of the proposed mitigation site requires a management plan that addresses the long-term ecological sustainability and maintenance of the site.”¹⁵⁷ For example, burrowing owl mitigation sites typically require management actions to keep the sites free of tall vegetation, excessive human and human-related disturbance, and loose or feral pets that make the environment uninhabitable for burrowing owls.¹⁵⁸ To ensure the durability of the proposed mitigation, Mr. Cashen states that the County must establish a funding mechanism that ensures long-term monitoring, protection, and management of the mitigation land.¹⁵⁹

To the contrary, the FEIR indicates that (a) long-term maintenance of the mitigation site would be the responsibility of a non-profit organization, and (b) funding for any future long-term maintenance activities at the mitigation site shall be facilitated by the non-profit organization.¹⁶⁰ However, as Mr. Cashen explains, “there are no assurances that either activity would occur.”¹⁶¹ Indeed, Phillips 66 indicated it would only *consider* providing a non-profit organization with access to the mitigation site, and that long-term maintenance activities would occur only if permitted by the company.¹⁶² As a result, the mitigation is unlawfully vague and

¹⁵⁵ Cashen Comments, p. 10.

¹⁵⁶ *Id.*

¹⁵⁷ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. p. 12.

¹⁵⁸ Cashen Comments, p. 10.

¹⁵⁹ *Id.*

¹⁶⁰ FEIR, p. 4.4-42.

¹⁶¹ Cashen Comments, p. 10.

¹⁶² *Id.*

March 9, 2016

Page 32

Mr. Cashen concludes “there is no evidence that it would benefit sensitive biological resources after the Applicant’s 5-year Dune Habitat Restoration Program terminates.”¹⁶³

The FEIR states that a “five year program is a reasonable span of time in which the applicant may successfully implement the Dune Habitat Restoration Program. Five years is also the typical monitoring period that has been required by resource agencies on past projects.”¹⁶⁴ However, Mr. Cashen finds that these statements are incorrect. He notes that dune environments are extremely dynamic and complex, which is an opinion shared by the California Coastal Commission (“CCC”).

Thus, the CCC, which is the agency with jurisdiction over most projects in coastal dune environments, has required project proponents to (a) ensure the permanent preservation *and maintenance* of the restored habitat, and (b) assess restoration performance standards every year for the first five years, and then every 10 years henceforth.¹⁶⁵ In addition, projects permitted by the CCC are required to incorporate performance standards for biodiversity and vegetative cover for each vegetation type.¹⁶⁶ Mr. Cashen explains that the FEIR “fails to include performance standards for biodiversity and vegetative cover for each vegetation type.”¹⁶⁷ Indeed, the only performance standard specified in the FEIR pertains to Nipomo Mesa lupine.¹⁶⁸ The FEIR fails to provide *any* performance standards for the other sensitive resources requiring mitigation (e.g., Rare Plant Rank 1B species, burrowing owl, etc.).

Therefore, Mr. Cashen concludes that “the County does not have the basis to conclude the mitigation (restoration) site would mitigate Project impacts to special-status plants, sensitive natural communities, and burrowing owls.”¹⁶⁹

¹⁶³ *Id.*, at 11.

¹⁶⁴ FEIR, Response to comment CNPS-04.

¹⁶⁵ *Id.*, at 99.

¹⁶⁶ *Id.*

¹⁶⁷ Cashen Comments, p. 11.

¹⁶⁸ FEIR, p. 4.4-41.

¹⁶⁹ Cashen Comments, p. 11.

7. *American Badger*

The FEIR requires a pre-construction survey for American badgers 14 to 30 days prior to construction activities.¹⁷⁰ Mr. Cashen notes that badgers may actually construct new burrows or immigrate onto the Project site immediately before construction activities.¹⁷¹ Thus, he finds that a survey conducted 14 to 30 days before ground disturbance “is insufficient to avoid take of badgers.”¹⁷² Consequently, Mr. Cashen concludes that the County must require pre-construction surveys for badgers immediately before all ground disturbance activities.¹⁷³

IV. THE PROJECT IS INCONSISTENT WITH LAND USE PLANS, LAWS, AND POLICIES

We previously commented that the Project is inconsistent with various land use plans, laws, and policies covering the Project area, including the South County Coastal Area Plan (“SCCAP”), the Coastal Zone Land Use Ordinance (“CZLUO”), the Local Coastal Plan (“LCP”), and the Coastal Act. Specifically, we commented that the Project conflicts with the SCCAP because of the expansion of the SMR and resulting reduction of the surrounding buffer zone, as well as the EIR’s lack of information regarding the decommissioning phase of the Project. We further concluded that the Project conflicts with the CZLUO, LCP, and Coastal Act because the Project is sited in, and would permanently impact, unmapped ESHA.

As discussed above, the FEIR and Staff Report now acknowledge that Unmapped ESHA, over 20 acres of which (and possibly more) would be permanently impacted by the Project, is present on the Project site.¹⁷⁴ Furthermore, the Staff Report recommends denial of the Project based on the many inconsistencies

¹⁷⁰ FEIR, p. 4.4-38.

¹⁷¹ Messick JP, MG Hornocker. 1981. Ecology of the badger in southwestern Idaho. Wildl. Monogr. No.76. 53pp.

¹⁷² Cashen Comments, p. 12.

¹⁷³ *Id.*

¹⁷⁴ FEIR, Responses to Adams Broadwell Joseph & Cardozo Comments, PDF p. 486-487, 505 (“The Project Site is not currently mapped as ESHA under the County Local Coastal Plan, but based upon additional field work done since the rerelease of the RDEIR portions of the Rail Spur Project Area does qualify as Unmapped ESHA as described within the FEIR.”), 507, 508 (“As currently revised, the FEIR identifies the Rail Spur Project area as Unmapped ESHA.”); FEIR, p. 4.4-26, 4.4-31; see Staff Report, Exhibit C.

March 9, 2016

Page 34

between the Project and land use plans, laws, and policies including SCCAP, CZLUO, and the Coastal Act, among others, due to impacts on ESHA and other resources, such as air quality and public health.¹⁷⁵

Indeed, the Staff Report lists several other land use conflicts as a basis for denial of the Project, including various sections of the County's General Plan such as the Conservation and Open Space Element and the Safety Element.

We concur with these findings, as well as other public commenters such as the Environmental Defense Center ("EDC").¹⁷⁶ These findings and comments, in addition to our comments on the RDEIR and FEIR, demonstrate that the Project will permanently impact ESHA, which results in inconsistencies between the Project and land use plans and policies. Furthermore, additional public comments have shown the FEIR fails to adequately analyze the Project's consistency with all relevant LCP policies and other applicable plans, policies, and regulations, and fails to disclose the full extent of the ESHA onsite.¹⁷⁷

Phillips 66 submitted a letter to the County on February 1, 2016, arguing that the County's ESHA determination is contrary to County Code on procedural grounds and that, even if ESHA were present, the County could still approve the Project because the site is highly disturbed and the company is implementing a restoration program elsewhere on the site. Phillips 66 also argued that denying the Project on the basis of ESHA would be an unconstitutional taking. However, as discussed in our oral comments to the Planning Commission on February 4, 2016, as well as in the Staff Report and other public comments, Phillips 66's analysis is flawed in several ways.

First, the County's previous failure to designate Unmapped ESHA on the Project site was not based upon the best available information, as required by the

¹⁷⁵ Staff Report, p. 5.

¹⁷⁶ Letter from EDC to Commission, February 2, 2016,

[http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+\(PostEIR\)/Post+EIR+Comments/Letter+from+Environmental+Defense+Center+02_08_2016.pdf](http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+(PostEIR)/Post+EIR+Comments/Letter+from+Environmental+Defense+Center+02_08_2016.pdf); Letter from EDC to Commission, February 3, 2016,

[http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+\(PostEIR\)/Post+EIR+Comments/Letter+No.+2+from+The+Environmental+Defense+Center+02_02_2016.pdf](http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project+Comments+2+(PostEIR)/Post+EIR+Comments/Letter+No.+2+from+The+Environmental+Defense+Center+02_02_2016.pdf).

¹⁷⁷ *Id.*; Letter from Lawrence Hunt to Commission.

March 9, 2016

Page 35

CZLUO.¹⁷⁸ According to the Staff Report, the best available information was only utilized in the recent designation of Unmapped ESHA, which shows that (a) the area is currently occupied by plant species that are listed as Rank 1B status by the California Native Plant Society; and (b) the area is currently occupied by sensitive communities as classified by CDFW under the National Vegetation Classification system described in *A Manual of California Vegetation, Second Edition*.¹⁷⁹ In addition, the site is occupied by various other sensitive species.

Second, because the County's 2013 ESHA determination was not based on the best available information, the later ESHA determination is the correct and applicable determination. Thus, the Project will permanently impact ESHA, which is clearly prohibited by local coastal laws and policies, as well as the state Coastal Act. Phillips 66 has failed to demonstrate how the current level of disturbance and restoration elsewhere obviates their legal requirement under the LCP, CZLUO, and Coastal Act to avoid impacts to ESHA. As explained above, Mr. Cashen concludes that the ESHA on the Project site is "remarkable" and thus extremely important to the biological resources on site.

Third, Phillips 66's argument that the Project is coastal-dependent is flawed. As explained in the Staff Report, "[t]he Refinery does not rely on the ocean or marine resources and is therefore not coastal dependent."¹⁸⁰

Fourth, denying the Project would not result in an unconstitutional taking of property because Phillips 66 will be able to continue operating the refinery as currently permitted.¹⁸¹

Therefore, Phillips 66 has failed to demonstrate that the Project may lawfully be approved. Indeed, based on the Project's numerous inconsistencies with the General Plan, SCCAP, CZLUO, LCP, and Coastal Act, the Project must be denied. The Staff Report's detailed findings for denial, along with our comments and other public comments, provide ample evidence to support this conclusion.

¹⁷⁸ CZLUO § 23.11.0303.

¹⁷⁹ Staff Report, Exhibit C, p. 3.

¹⁸⁰ Staff Report, Exhibit C, p. 3.

¹⁸¹ See, i.e., EDC Letter, Feb. 3, p. 4 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).)

V. THE COUNTY IS NOT PREEMPTED FROM IMPOSING FEASIBLE AND ENFORCEABLE MITIGATION MEASURES

We previously commented that the Project violates CEQA because the County failed to require feasible mitigation measures for many of the Project's significant impacts due to concerns over federal preemption. The Staff Report continues to assert that the County may be preempted from imposing various mitigation measures on UPRR equipment and train movements statewide on the mainline. Indeed, the inability to effectively mitigate many of the Project's impacts, leading to significant and unavoidable findings, is cited as a basis for denial of the Project.

We agree with the Staff Report that the Project should be denied based on the many significant and unavoidable air quality, public health and safety impacts, as well as impacts on biological resources. However, we disagree that the County is unable to impose feasible mitigation measures because of federal preemption. Existing law does not preempt CEQA's requirement that the County require Phillips 66 to mitigate significant impacts from its Project. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") does not preempt state and local regulations of general application with a remote or incidental effect on rail transportation, and which do not unreasonably burden rail transportation.¹⁸² We explained in our RDEIR comments that the Project is intended solely to benefit the Phillips 66's business and refinery operations, not rail travel.

The Project includes the installation, operation and maintenance of new equipment and associated infrastructure, and modifications of the rail spur within the refinery boundary, to allow Phillips 66 to receive crude oil by rail.¹⁸³ These Project activities are neither undertaken by UPRR, nor are they integral to UPRR's interstate operations. Moreover, a permit condition requiring Phillips 66 to source feedstock via Tier 4 locomotives does not regulate UPRR's interstate operations. State regulation of in-state actors, which may impact contractual arrangements in interstate commerce, does not burden interstate commerce.¹⁸⁴ Likewise, a condition

¹⁸² *Association of American Railroads*, (2010) 622 F.3d 1094, 1097.

¹⁸³ FEIR, Section 2.0.

¹⁸⁴ *Rocky Mountain Farmers Union v. Corey* (2013 9th Cir.)730 F.3d 1070,1103.

requiring Phillips 66 to contribute to off-site mitigation fee programs in uprail communities in no way regulates UPRR's operations.

We further explained that CEQA requires the County to endeavor to find alternative mitigation that would not fall within the zone of preemption. CEQA undoubtedly requires the County to incorporate all feasible mitigation measures into the Project.¹⁸⁵ As discussed above, Dr. Fox and Dr. Pless propose various feasible mitigation measures that are clearly not preempted and would reduce the Project's significant impacts.

Phillips 66 argues that the County may not consider mainline impacts of the Project as part of its CEQA review because the federal government—not the county—regulates mainline rail operations.¹⁸⁶ Thus, Phillips 66 argues that the County may not deny the Project on the basis of significant and unavoidable mainline impacts.¹⁸⁷ However, this is an overly broad interpretation of the federal government's control over local land use decisions.

Federal courts, including the Ninth Circuit, have plainly stated that Congress narrowly tailored the ICCTA preemption provision to displace only regulation that has the effect of managing or governing rail transportation, while preserving state laws with “a more remote or incidental effect on rail transportation.”¹⁸⁸ For those laws, Congress intended for states to retain police powers.¹⁸⁹ In a preemption analysis, courts begin with the presumption that police powers to protect the health and safety of citizenry are not superseded by federal law unless that is Congress' clear purpose.¹⁹⁰

¹⁸⁵ See Pub. Resources Code, § 21081(a)(1)-(3); CEQA Guidelines, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

¹⁸⁶ Phillips 66 Letter to Commission, p. 5 – 17.

¹⁸⁷ *Id.*

¹⁸⁸ *Association of American Railroad v. South Coast Air Quality Management District*, 622 F.3d at 1097, quoting *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d at 1337.

¹⁸⁹ *Id.*

¹⁹⁰ *Rice v. Santa Fe Elevator Corp.* (1914) 331 U.S. 218, 230; *Oxygenated Fuels Assn. v. Davis* (9th Cir. 2003) 331 F.3d 665, 673.

State laws aimed at pollution prevention and environmental protection (like CEQA) fall within a state's traditional exercise of its police powers.¹⁹¹ The ICCTA's legislative history shows that Congress intended that the "states retain the police powers reserved by the Constitution."¹⁹² Accordingly, courts have found that the ICCTA allows the exercise of local police power to protect the health and safety of the local community if the regulation does not unreasonably burden or discriminate against rail operations.¹⁹³ The Surface Transportation Board itself found that a local agency could hold a railroad to be financially responsible for disposing of waste from construction of a railroad line in a way that did not harm the health or well-being of a local community. This is because such a requirement neither unreasonably burdens nor discriminates against rail operations.¹⁹⁴

Exercising its police powers under CEQA, the County can and must deny the Project because the benefits of the Project do not outweigh its environmental harm. When an EIR shows significant and unmitigated environmental effects, a lead agency has the authority to deny the project.¹⁹⁵

[W]hen an EIR shows that a project would cause substantial adverse changes in the environment, the governmental agency *must* respond to the information by one or more of the following methods:

- (1) Changing a proposed project;
- (2) Imposing conditions on the approval of the project;
- (3) Adopting plans or ordinances to control a broader class of projects to avoid the adverse changes;
- (4) Choosing an alternative way of meeting the same need;
- (5) Disapproving the project;
- (6) Finding that changing or altering the project is not feasible;

¹⁹¹ *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 328-29; *Exxon Mobil Corp. v. U.S. EPA* (9th Cir. 2000) 217 F.3d 1246, 1255.

¹⁹² See H.R. Rep. No. 104-311, p. 96, reprinted in 1995 U.S.C.C.A.N. 793, 808.

¹⁹³ *Norfolk Southern Ry. Co. v. City of Alexandria* (4th Cir. 2010) 608 F.3d 150, 160; *N.Y. Susquehanna & W. Ry. V. Jackson* (3d Cir. 2007) 500 F.3d 238, 254.

¹⁹⁴ *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line* (S.T.B. July 1, 1997), WL 362017 at 6.

¹⁹⁵ CEQA Guidelines, §§ 15002(h)(5), 15042; *Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892.

March 9, 2016

Page 39

- (7) Finding that the unavoidable significant environmental damage is acceptable as provided in Section 15093.¹⁹⁶

Section 15093 states that an agency must issue a statement of overriding considerations whenever significant effects have not been avoided or substantially lessened, but the benefits of the project outweigh its environmental harm.

In this case, either (1) the mitigation measures are legally feasible (i.e. they are not preempted because they do not have the effect of managing or governing rail operations) and must be required by the County, or (2) the measures are legally infeasible because they are preempted, the impacts are significant and unavoidable, and the County must deny the project since the benefits do not outweigh the risks. Phillips 66 can't have it both ways.

Notably, for the recently denied Valero Benicia Crude by Rail Project, Valero and City of Benicia staff made similar arguments to Phillips 66 regarding preemption of mitigation measures. However, on February 12, 2016, the City Planning Commission denied the Project on various grounds, including mainline significant and unavoidable impacts. The Commission's Resolution plainly states that "[s]taff's interpretation of preemption is too broad and the EIR should consider including mitigation measures to offset the significant and unavoidable impacts associated with rail operations, such as air pollution emissions, improved rail car requirements, additional funding for emergency responders and degasifying the oil before transport."¹⁹⁷

Here, Phillips 66's application of preemption is likewise overbroad and contrary to the County's constitutional police powers. Although the Staff Report disagrees with Phillips 66's argument that mainline impacts cannot be considered, the report still calls into question the feasibility of mitigation measures due to preemption. This is also an overly broad interpretation of federal rail regulation. The ICCTA does not preempt the County from requiring Phillips 66 to mitigate significant Project impacts from rail operations by, for example, paying for emissions offsets. Further, if the Project would result in significant and avoidable

¹⁹⁶ CEQA Guidelines, § 15002(h) (emphasis added).

¹⁹⁷ Resolution No. 16- 1 (PC) A Resolution of the Planning Commission of the City of Benicia Denying Certification of the EIR And Denying a Use Permit for the Valero Crude by Rail Project at 3400 East Second Street (12pln- 00063), **Attachment E**.

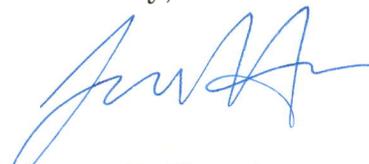
impacts that are not outweighed by the Project's benefits, the ICCTA does not preempt the County from denying the Project based in part on mainline impacts; rather, CEQA *requires* the County to deny the Project. Thus, the concern over preemption is misplaced.

VI. CONCLUSION

For all of the reasons discussed above, the FEIR for the Project remains wholly inadequate under CEQA. It must be thoroughly revised to disclose, analyze, and mitigate all significant impacts to air quality, public health and safety, and biological resources. The Reduced Rail Deliveries Alternative would not dispense of any of the significant impacts identified in the FEIR. However, should the Commission decide to move forward with review of the Reduced Rail Deliveries Alternative, the Commission must first direct staff to prepare a new EIR that discloses, analyzes, and mitigates all significant impacts resulting from the Alternative Project, as required by CEQA.

We urge the Commission to deny this Project based on the Staff Report findings for denial, as well as these and other public comments. Until the violations, flaws, and omissions described in these documents are resolved, the County may not lawfully approve the Project.

Sincerely,



Laura E. Horton

LEH:ric
Attachments