# MONTEREY COUNTY
## RESOURCE MANAGEMENT AGENCY

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February 4, 2016

Mr. Don Campbell, Chair
San Luis Obispo County Planning Commission
976 Osos Street, Room 200
San Luis Obispo, CA 93401

Mr. James Bergman, Director
San Luis Obispo County Planning and Building Department
976 Osos Street, Room 200
San Luis Obispo, CA 93401

Dear Chair Campbell and Planning Director Bergman:

We have provided comments in an earlier letter and would like to briefly respond to the Alston and Bird letter submitted to you on February 1, 2016. We have not rigorously analyzed their points, due to the short time frame, but have some instant responses to their comments for your consideration. We support your staff's recommendation and encourage you to listen to their responses related to this letter or the project applicant's testimony.

On page 1, they state that the Reduced Rail Deliveries Alternative will "reduce all impacts associated with on-site Project activities to less than significant." However on-site impacts are not the only impacts that should be considered. Off-site impacts remain significant and unavoidable.

Over several pages, they try to convince you that you are "...precluded from "regulating the railroads directly..." or "...attempting to regulate rail operations indirectly..." While we will leave that analysis to your legal experts, you are not precluded from regulating land use. Denying the land use would not "deny a rail carrier's ability to conduct rail operations." They cite, on page 9, an ordinance that was struck down by a court. Again, due to the short time, we have not researched the case. However, from the explanation in this letter, it appears that ordinance did affect the rail carrier. What is before you is completely different. Taking their arguments to an illogical extreme, and land use application tied to using a rail line could not be denied. We defer to your County Counsel guidance on these preemption arguments.

The arguments in the letter regarding ESHA are interesting but are not the standard the County should use to determine if ESHA exists. Stating that the only time ESHA can be determined is early in the process (prior to determining the application "complete") completely discounts, if not ignores, the CEQA public review process and the public hearing process. To state that your staff only has one opportunity to identify the ESHA areas, because of an ordinance requirement, and completely ignore whether there actually is ESHA on the ground is a legal or bureaucratic shield. If ESHA exists, it does not matter if it was not identified at some step in the process. What is on the ground is what should be considered by the County.

On page 13 of the letter, they argue that some Mitigation Measures are infeasible due to preemption. If so, does that change the impact conclusions? Does the EIR need to be recirculated pursuant to CEQA Guidelines section 15088.5(a)? On pages 16 and 17, they discuss approving an alternative. We agree that the County could approve a project with less environmental impact. However they are trying to persuade you that recirculation would not be required for that action; however, eliminating mitigation measures is a key difference from the court cases they cited.

On pages 34 and 35, the letter states that General Plan consistency is not required for every individual policy. We agree with that statement. However, the project must be found consistent with foundational policies. In addition, it is up to the County to determine if the project is consistent, as they cite in their letter on page 35, with an excerpt from the *San Franciscans Upholding the Downtown Plan v. the City and County of San Francisco* case (the agency "has broad discretion to construe its policies in light of the plan's purpose.").

The letter also cites concerns relating to a denial causing a constitutional taking of property. We are sure your staff is always cognizant of that issue. Your staff will provide you good guidance on whether the denial constitutes denying the property of all economically viable uses.

As stated earlier, we support your staff's recommendation to deny this proposal. You have been provided, in the Alston and Bird letter, with a lot of legal argument. Your staff will provide you with good guidance on ensuring that your actions comply with the legal requirements. Should you have any questions related to these comments, please feel free to contact me at novom@co.monterey.ca.us or by phone at (831) 755-5192.

Sincerely,

Mike Novo, AICP
Planning Director

cc: Monterey County Board of Supervisors

Enclosure: Letter dated 2/1/2016 from Alston & Bird LLP to SLO County Planning Commission

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February 1, 2016

VIA EMAIL & U.S. 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:

On behalf of Phillips 66 Company, I would like to begin by thanking the County staff for the substantial effort that must have been required to produce the Final Environmental Impact Report (FEIR) (December 2015) and staff report (January 2016) for the Company's Rail Spur Extension Project. Despite this effort, however, there are several points on which the FEIR and staff report do not state a clear conclusion, or suggest conclusions contrary to law. There also are a few points on which Phillips 66 disagrees with the FEIR and staff report. This letter will provide comments on the FEIR, and the staff report for the Planning Commission hearing scheduled for February 4-5, 2016, with respect to four primary topics: federal preemption of state and local regulation of railroads; Environmentally Sensitive Habitat Areas (ESHA); coastal access; and the Project's consistency with County policies.

The company looks forward to the hearing on February 4-5, when these issues can be explored more fully. In particular, we anticipate that the Planning Commission will be eager to discuss the Reduced Rail Deliveries Alternative. This alternative will reduce all impacts associated with on-site Project activities to less than significant.

## EXECUTIVE SUMMARY

### Federal Regulation Of The Railroads Preempts Local Regulation

Phillips 66 proposes to extend the existing rail spur at its Santa Maria Refinery in order to be able to receive unit trains delivering crude oil. While this Project will allow the company to participate more effectively in the competitive crude oil markets throughout North America, it will not result in trainloads of Bakken crude oil coming into San Luis Obispo County because the Refinery is not designed to process large quantities of light crude oils such as those that have been involved in a number of rail accidents in the past three years. Rather, the Santa Maria Refinery refines primarily heavy crude oils, and the types of crude oil received at the Refinery will not change substantially after the Rail Spur Extension Project is completed.

Although the Project will not bring unit trains of light crude to the refinery, risk of accident is clearly at the top of the minds of staff and the community. Thus, the current federal programs regulating rail safety are an important context for the Planning Commission's review of this project. The Federal Railroad Administration, together with the Pipeline and Hazardous Materials Safety Administration, administer programs regulating the design of locomotives, tank cars, track, breaking systems, signal systems, crossings, maintenance and work practices, and speed limits and routes, among other things. The FEIR identifies no fewer than 14 regulatory actions taken just in the past 18 months to enhance the safety of rail transportation of crude oil. The federal programs aim for a consistent set of standards across the country, in order to facilitate a safe and efficient rail transportation network. There is robust enforcement of these laws by both the federal agencies, and by the California Public Utilities Commission, under a provision of federal law that allows states to participate in enforcement of federal rail safety laws.

Given the importance of rail transportation to the national economy, for more than one hundred years the federal government has preempted local control over the railroads. In 1995, Congress strengthened the historical preemption with the adoption of the Interstate Commerce Commission Termination Act (ICCTA), which created the Surface Transportation Board as the sole authority regulating the construction, operation and abandonment of railroads. ICCTA, together with the laws administered by the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and other federal agencies, fully occupy the regulatory field with respect to railroad design, operation, equipment and safety. State and local governments are precluded from regulating the railroads directly, or from taking actions that interfere with the operation of the railroads under federal law. This includes attempting to regulate rail operations indirectly by imposing limitations or conditions on rail terminals or customers aimed at changing or controlling the mainline rail operations, or that impose a burden on a customer for accessing the interstate rail network. Accordingly, mitigation measures in the FEIR aimed at altering mainline transportation of crude oil to the Santa Maria Refinery, or that

would impose costs or burdens on Phillips 66 tied to the impacts of mainline rail transportation, are preempted and cannot be imposed by the County.

**Environmentally Sensitive Habitat Areas**

With respect to impacts on the Refinery site itself, Phillips 66 was dismayed to learn for the first time in the Staff Report that staff classifies the Project site as an Unmapped Environmentally Sensitive Habitat Area (ESHA). This is a reversal of the conclusions expressly stated in the Draft EIR and Revised Draft EIR. Declaring the site to be ESHA at this late date also is flatly contrary to the County code.

Under the County's Coastal Zone Land Use Ordinance (CZLUO), additional requirements must be met if a project is located on ESHA. ESHA may be designated one of two ways. Mapped ESHA refers to areas that contain certain sensitive habitat and that are depicted as combining designations on the County's zoning land-use maps. Mapped ESHA on the Phillips 66 property occurs only west of the UPRR railroad property. Everyone agrees that there is no mapped ESHA in the Project area (east of the UPRR railroad property).

The CZLUO provides limited power to designate Unmapped ESHA. With respect to a specific parcel and development proposal, the County may designate an area as Unmapped ESHA only "***at or before the time of application acceptance,***" based on the best information available to it at that time. The history behind this provision shows that it was intended to strike a balance between the desire to identify sensitive areas that had not yet been mapped, and the need for an orderly and predictable application process. The County accepted the Rail Spur Extension Project application in July 2013, more than two and one-half years ago, and the County's opportunity to designate Unmapped ESHA on the Project site ended at that time.

Yet in the summer of 2015, it appears that County staff collaborating with staff of the California Coastal Commission reconsidered its prior conclusion. Applying planning guidance developed by the Coastal Commission long after the Phillips 66 application was accepted, County staff concluded that the Project site is Unmapped ESHA, and recommends that the Project should be denied on that basis. County staff urges the Planning Commission to act contrary to the County's own ordinance both in timing and in the legal test to be applied. Ironically, this outcome would be to the detriment of biological resources in the vicinity. The FEIR concludes that the Project site is highly disturbed and degraded from decades of agricultural and industrial use, yet mitigation measures would require Phillips 66 to compensate for loss of that habitat at a greater than 1:1 ratio by restoring habitat at other locations on the Phillips 66 property. This means that ***the project will cause a net increase in the amount of high quality habitat on the Phillips 66 property.*** This benefit will not occur if the Project is denied.

The Planning Commission should adhere to the standards and deadlines in the CZLUO, and confirm the July 2013 conclusion that there is no Unmapped ESHA in the Project site.

**Vertical Coastal Access**

Chapter 9 of the FEIR reviews potential environmental impacts from various hypothetical approaches to providing vertical coastal access across the Phillips 66 property. This is not part of the Phillips 66 Rail Spur Extension Project. Rather, it arises out of the Phillips 66 Throughput Increase Project that was approved by the Planning Commission on December 3, 2012. The Throughput Increase Project was approved with a condition requiring that the company comply with the vertical coastal access provisions of the CZLUO. As discussed at the 2012 hearing, Phillips 66 believes that the exemptions from coastal access apply to this site, specifically, that access at this location would be contrary to protection of public safety and fragile coastal resources. Phillips 66 subsequently submitted a report detailing how access at its location would create risks to public safety and fragile coastal resources. Chapter 9 of the FEIR is intended to assist the Planning Commission in making a decision regarding the applicability of the exemptions to the public access requirement.

With respect to public safety, the Union Pacific Railroad tracks divide the Phillips 66 property. There is no safe crossing at this location, and UPRR does not consent to public access across their tracks. Improvement of public access through parking lots and roads or trails would simply encourage people to come to an unsafe location. The overpasses sketched in the FEIR are fictitious because they would require an easement or right of way from UPRR, and UPRR does not consent to public access at this location.

With respect to the protection of fragile coastal resources, the FEIR confirms that development of public access at this location would result in the loss of sensitive habitat. Virtually the entire Phillips 66 property west of the UPRR tracks is Mapped ESHA, and all three hypothetical public access scenarios reviewed in the FEIR would result in loss of and other impacts to habitat.

We request that the Planning Commission adopt a resolution finding that the Throughout Increase Project Condition 17 has been met by application of the exemptions. Specifically, we request that the Planning Commission find that vertical public access is not required at this location because it would not be consistent with protection of public safety and fragile coastal resources.

**Consistency With County Policies**

Exhibits A and B of the staff report present staff's view that the Project would be inconsistent with the County's General Plan and Ordinances, and should be denied on that basis. We believe the facts and the law require a different outcome, and that the Project can be approved as consistent.

Exhibit B evaluates consistency with respect to mainline rail operations. Due to the preemptive effect of federal regulation of the railroads, the Planning Commission should not consider Exhibit B in reaching a decision on the Rail Spur Extension Project. The

UPRR operates subject to federal law, and is authorized to haul crude oil in tanker cars along the mainline. The County may not deny the Project because it objects to the impacts associated with operation of the national rail network, or that portion within the County.

Exhibit A lists County policies with which staff claims the Project will be inconsistent. By and large, the staff assessments in Exhibit A turn on the issue of Unmapped ESHA. Because the staff recommendation on Unmapped ESHA is contrary to the County's own ordinance, its assessments on Exhibit A are unsupportable. With respect to the County policies regarding compatible land uses and open space, after implementation of the Project, ***there will still be a ½ mile buffer*** between the Refinery operations and the nearest resident. The Reduced Rail Delivery Alternative (3 trains per week rather than 5 trains per week) will eliminate the potentially significant impacts associated with diesel exhaust from trains and other equipment operating in and around the Refinery. Accordingly we believe the staff's assessment of consistency with County policies is incorrect and unfounded.

Even if the Project is not consistent with every applicable individual land use policy, the Project can still be found consistent with the General Plan. Under the legal standard governing consistency determinations with land use plans, a project must only be in "harmony" with the applicable land use plan to be consistent with that plan. An agency applying a land use plan to a project is expected to "weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purpose."

We request that the Planning Commission approve the project, finding that it is in harmony with the plan's policies and purpose.

## I. THE FEDERAL GOVERNMENT—NOT THE COUNTY—REGULATES MAINLINE RAIL OPERATIONS.

The issue attracting the most comment and attention in the FEIR and the staff report is not the fairly limited changes at the Refinery itself; rather, it is concerns regarding trains traveling across the county, the state or beyond. These concerns fall in two categories: the air emissions from the train locomotives, and the possible consequences in the event of a rail accident. As important as these questions are, they are not before the Planning Commission in this Project. The United States Constitution and federal law places those questions in the hands of the federal government. And the federal government has established comprehensive programs that regulate the railroads in a way that is consistent across the country.

### A. The Comprehensive Federal Regulatory Program.

One only has to skim the FEIR to appreciate the breadth of federal laws regulating railroad safety. FEIR pages 4.7-18 to 4.7-31 briefly summarizes regulatory programs administered by two of the primary federal agencies with authority over railroads: the Federal Railroad Administration (FRA), and the Pipeline and Hazardous Materials Safety Administration

(PHMSA), both within the Department of Transportation. In addition, the National Transportation Safety Board reviews rail accidents and makes recommendations to the FRA and PHMSA. FEIR p. 4.7-19. The Secretary of Homeland Security also consults with the Department of Transportation in the development of regulatory programs. 49 USC 20103(a). Other programs regulating railroads are adopted pursuant to the Clean Air Act, Clean Water Act, Occupational Safety and Health Act, Superfund and other laws. But naming the federal laws and agencies doesn't even scratch the surface. Altogether, the federal laws direct a comprehensive program of federal regulation of railroad track, locomotives, tank cars, routes, crossings, speed limits, signals, horns, staffing, operating practices, labeling, worker training, emergency response planning and training, inspections, and much more, encompassing hundreds of pages of detailed requirements.

The federal government regularly reviews and updates railroad safety standards. The FEIR lists no fewer than 14 regulatory actions taken just within the past 18 months to enhance railroad safety, and in particular the safety of rail transport of crude oil. FEIR p. 4.7-23. The enhancements concern tanker car design, the types of tanker cars that may be used to transport different types of crude oil, route selection, reduced operating speeds, disclosures to qualified state and local first responders, track and line inspections, enhanced braking systems, notifications to state and local first responders, and increased training – including tuition assistance – for state and local first responders.

The federal government also has a rigorous inspection and enforcement program. On January 20, 2016, the FRA announced that its 2015 enforcement of railroad safety regulations "led to the highest-ever civil penalty collection rate in the agency's 50-year history." See https://www.fra.dot.gov/eLib/Details/L17323. (The CPUC's enforcement efforts are summarized in its Annual Rail Safety Report for fiscal year 2014-2015, available at www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=8231.)

UPRR, the railroad that will serve the Phillips 66 Rail Spur Extension Project, is subject to this comprehensive federal regulatory scheme. In a letter commenting on the Revised Draft EIR for Phillips 66's Rail Spur Extension Project, Ms. Melissa Hagan of UPRR described the company's investment in safety and emergency preparedness, as well as the company's safety performance. From 2007-2013, UPRR spent more than $21.6 billion in capital investment in its infrastructure. See FEIR, Comment UPRR-02. As further explained in that comment:

> UP has decreased derailments 23% over the last 10 years, due in large part to our robust derailment prevention and risk reduction process. This process includes, among others, the following measures:
>
> - UP uses lasers and ultrasound to identify rail imperfections.
> - UP forecasts potential failures before they happen by tracking the acoustic vibration on wheels.

- UP performs a real-time analysis of every rail car moving on our system each time it passes a trackside sensor, equaling 20 million car evaluations per day.
- UP employees participate in rigorous safety training programs on a regular basis and are trained to identify and prevent potential derailments.

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> These efforts have paid off. The overall safety record of rail transportation, as measured by the FRA, has been trending in the right direction for decades. In fact, based on the three most common rail safety measures, recent years have been the safest in rail history: the train accident rate in 2013 was down seventy-nine percent from 1980 and down forty-two percent from 2000; the employee injury rate was down eighty-four percent from 1980 and down forty-seven percent from 2000; and the grade crossing collision rate was down eighty-one percent from 1980 and down forty-two percent from 2000.

The comment also details the efforts that UP makes to communicate with train fire departments and other emergency responders along its lines: "UP annually trains approximately 2,500 local, state and federal first-responders on ways to minimize the impact of a derailment in their communities. UP has trained nearly 38,000 public responders and almost 7,500 private responders (shippers & contractors) since 2003. This includes classroom and hands-on training." FEIR Comment UPRR-02.

Attachment 1 includes additional information from UPRR regarding its performance, safety record, and implementation of some of the key equipment upgrades required by recent changes to federal regulatory programs. The company was scheduled to spend another $4.3 billion in 2015 alone on additional infrastructure investments. The materials also describe how UPRR works with 184 fire departments along its lines in California, training more than 3,900 emergency responders in the state since 2010.

### B. Federal Law Preempts State and Local Regulation of Mainline Rail Operations.

The County does not have authority to regulate mainline rail operations. This includes direct regulation (e.g., adopting an ordinance telling the railroad how to operate) as well as indirect regulation through limiting access to the railroad or burdening access in ways that affect rail transportation in interstate commerce. The relevant law on preemption is documented in three letters contained in the FEIR:

- My letter of January 17, 2014 to Whitney McDonald in the County Counsel's office (found in the EIR as an attachment to Comment Letter AB-01).
- My letter of November 24, 2014 to Murry Wilson commenting on the Revised DEIR (found in the FEIR as Comment Letter AB-01).
- Letter from Melissa Hagan of Union Pacific Railroad (UPRR or UP) to Murry Wilson dated November 24, 2014 (found in the FEIR as Comment Letter UPRR-01.

Rather than repeat the extensive legal analysis presented in those letters, we hereby incorporate them by reference, and summarize the most important points below.

First, federal law preempts not only local efforts to regulate the construction of railroads, but also the regulation of **railroad operations**. The Interstate Commerce Commission Terminal Act (ICCTA) states:

> The jurisdiction of the [Surface Transportation] Board over—
>
> **(1)** **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; **and**
>
> **(2)** the construction, acquisition, **operation**, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, **is exclusive**. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and **preempt the remedies provided under Federal or State law**.

49 U.S.C. § 15051(b). The United States Supreme Court characterized federal regulation of the railroads as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Other courts have frequently quoted the decision in *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996): "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."

Second, federal judicial decisions confirm that preemption is not just limited to operations conducted by the railroad on the mainline, but also extends to local efforts to regulate terminals and customers in ways that burden the rail network or rail transportation. As quoted above, the ICCTA gives federal agencies exclusive authority over not only the mainline, but also spur tracks, industrial tracks and related facilities. ICCTA "categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations." *United States Environmental Protection Agency—Petition for Declaratory Order*, STB Decision Docket

No. FD 35803, at 7; see also *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Decision Docket No. FD 35861, at 8 (stating same). Judicial decisions demonstrate that local governments cannot use their local police power or land use authority over terminals or transloading facilities as a means of circumventing preemption. If they exercise those powers in a manner that interferes with mainline rail transport, their actions are preempted even if they are directed at the terminal or a customer rather than the railroad. For example, in *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010) a city that objected to the increase in rail delivery of ethanol to a transloading terminal facility within its boundaries adopted a new ordinance regulating and requiring permits for the local distribution of ethanol by surface tanker trucks. The ordinance was struck down by the courts because by regulating and limiting the trucks engaged in local distribution, the ordinance directly affected and limited the railroad's ability to ship goods by rail. ***The FEIR states that the County recognizes these legal authorities.*** (See FEIR, Response to Comment UPRR-04.)

In addition to preemption under the ICCTA, the Federal Railroad Safety Act also includes an express preemption provision. State agencies such as the California Public Utilities Commission may participate in enforcing federal law pursuant to the Federal Railroad Safety Act, provided they submit annual certification to the Secretary of Transportation regarding their qualifications to do so. 49 USC § 20105. Beyond inviting participation in enforcement of federal laws, the act states: "Laws, regulations, and orders released to railroads safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable." 49 USC § 20106(a)(1). States have limited authority to adopt or enforce their own regulations regarding railroad safety of security only until such time as the federal government prescribes a regulation covering the same subject matter, or to address a local safety or security hazard in a manner that is not incompatible with federal regulations and that does not unreasonably burden interstate commerce. 49 USC § 20106(a)(2). Express preemption provisions are also contained in the Clean Air Act with respect to locomotive engines and emissions. 42 USC §§ 209, 213.

Third, the State of California has long recognized the expansive scope of federal preemption. For example, the California Air Resources Board expressly recognized federal preemption in negotiating agreements with railroad companies in 1998 and 2005 addressing air emissions from railroad operations. These agreements not only acknowledged preemption, but explained why it is necessary and beneficial For example, the 1998 agreement stated:

> The interconnected nature of the rail network and the ability of locomotives to travel freely throughout the country allow for efficient deployment of locomotives to meet customer needs. Segmentation of the national locomotive fleets into multiple geographic areas would be very burdensome for the railroads because of the very high capital costs of the additional locomotives needed to establish area-specific locomotive fleets, creation of inefficient operations, and delay of time-sensitive customer shipments. A

> patchwork of different state and local programs would be an inefficient, costly and time consuming disruption of interstate commerce.

See Attachment 2, 1998 Railroad Memorandum of Mutual Understandings, pp. 4-5. Similarly, the 2005 agreement stated:

> It has been widely recognized that railroads need consistent and uniform regulation and treatment to operate effectively. A typical line-haul locomotive is not confined to a single air basin and travels throughout California and into different states. The U.S. Congress has recognized the importance of interstate rail transportation for many years. The Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Termination Act and many other laws establish a uniform federal system of equipment and operational requirements. The parties recognize that the courts have determined that a relatively broad federal preemption exists to ensure consistent and uniform regulation. Federal agencies have adopted major, broad railroad and locomotive regulatory programs under controlling federal legislation.

See Attachment 3, 2005 ARB/Railroad Statewide Agreement, p. 25, Attachment C, ¶ 8

The California Attorney General also has acknowledged federal preemption of regulation of the railroads in briefs dealing with CEQA matters in particular. See Attachment 4, *Application of California High Speed Rail Authority for Leave to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief in Support of Respondents* in *Friends of Eel River v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority, Case No. S222472*, currently pending before the California Supreme Court. See also Attachment 5, Supplemental Letter Brief filed August 9, 2013, in the matter of *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, No. C070877, at p. 3. "Courts and the STB [Surface Transportation Board] uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate."

California acknowledged federal preemption yet again when addressing that most relevant topic of rail transportation of crude oil. The California's Interagency Rail Safety Working Group stated, in a publication cited in the FEIR on other points: "The federal government has primary authority over railroad safety," and "Federal law governs most major aspects of rail transport, and preempts most state regulation." (Attachment 6, *Oil by Rail Safety in California*, June 10, 2014, pages 1, 5.) According to the report, the State, through the California Public Utilities Commission, shares authority with the federal government to enforce the federal safety laws and certain state safety rules, and state and local agencies

take the lead in emergency planning, preparedness and response. (*Id.*, p. 1.) The report identified what it described as gaps or deficiencies in the regulatory program.[1] However, while it listed the numerous crude by rail projects undergoing review by local agencies – including the Phillips 66 Santa Maria Refinery project[2] – nowhere did the report suggest that local lead agencies are in a position to fill these gaps. Rather, the report recommended that the California Legislature provide additional funds for CPUC inspectors and for emergency preparedness and response. Clearly mindful of the scope of federal preemption, the report's other recommendations were phrased as requests to federal agencies to enhance their efforts, or requests to railroads to take certain actions. For example, the report recommended:

- The California Office of Emergency Services (OES) "should request that railroads provide a complete inventory of their firefighting and spill recovery resources to the state. (Report, p. 9.)
- OES "should request that the railroads provide 'Worst Case Scenario' plans for responding to a multi-car incident in any part of California." (*Id.)*
- "CPUC and OES should request that Class I railroads operating in California establish a system where emergency responders can securely log-in and access the daily location and status of rail cars and train consists". (Report, p. 11.)
- "The CPUC should request that the DOT [federal Department of Transportation] move expeditiously to finalize new and retrofitted tank car regulations that will result in a more rapid phase out of DOT 111 tank cars." (Report, p. 12)
- "The CPUC should request that the FRA [Federal Railroad Administration] identify routes that crude oil trains are expected to run on without PTC [positive train control] in California under current requirements and consider requiring the implementation of Positive Train Control on these routes." (*Id.*)
- "The CPUC should request that the FRA require electronically-controlled brake technology on crude oil trains." (Report, p. 13.)

The state agencies participating in the Interagency Rail Safety Working Group clearly understood the limits of their authority in light of preemptive federal law. These same limits apply to San Luis Obispo County.

In reviewing other crude by rail projects in California, other lead agencies have concluded that they are preempted from regulating the mainline rail operations or imposing mitigation for mainline impacts. For example, in 2014, Kern County concluded it was preempted from imposing mitigation measures directed at impacts from mainline rail activities supporting the project. See Attachment 7, Excerpts from the Final EIR for the Alon

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[1] Given the numerous actions taken by regulatory agencies in the past 18 months, the report's conclusions do not reflect the current state of regulation of crude by rail transportation.

[2] Report, p. 1.

Bakersfield Refinery Crude Flexibility Project, SCH# 2013091062, certified by Kern County on September 9, 2014. The recently released Final EIR and staff report from the City of Benicia reach a similar conclusion with respect to Valero's proposed Crude By Rail Project, scheduled to be heard by the city's Planning Commission on February 8, 2016. See Attachment 8, Revised Draft EIR for Valero's Crude By Rail Project, Appendix G; and Attachment 9, Staff Report to Planning Commission dated January 28, 2016 re Valero Crude By Rail Project.

The County's staff report for the Phillips 66 Project states that "federal law would *likely* limit the ability of the County to regulate the type and design of locomotives since they are owned and operated by UPRR to transport goods throughout the nation and because regulation of the types of locomotives that could be used for this project would likely interfere with interstate commerce." Staff Report p. 13. There is no justification for the staff to continue to pretend that there is uncertainty on this point. The federal law is clear. Staff has never identified any law or judicial decision that calls this into question. In short, federal law preempts all questions raised with respect to the proposed Project dealing with locomotive design, tanker car design, track design, and safety equipment for mainline operations, including such things as positive train control. Federal law also fully preempts all questions raised with respect to the proposed Project dealing with mainline rail operations, including routes, speed limits, and information disclosures to first responders. Again, staff has never identified any law or judicial decision suggesting to the contrary.

The FEIR portrays federal preemption over on-site Project components as uncertain. The staff report goes further, stating: "[I]t is clear that for the activities performed within the Santa Maria Refinery (SMR) site the County is not preempted by federal law since these activities would not occur on UPRR property and would not involve infrastructure or trains operated by UPRR." On this point, the staff report and FEIR are again incorrect. The FEIR describes the train unloading sequence at pages 2-26 to 2-27, and clearly discloses that the UPRR locomotives that deliver the train to the site are the same locomotives that will position the tanker cars for unloading, and will maneuver the tanker cars throughout the time that they are on-site. These locomotives are an integral part of interstate commerce – the tanker cars cannot arrive without the locomotives – and their status under federal law does not change when they cross the property boundary. In addition, their brief stay on Phillips 66's property does not give the County power over the locomotives and their impacts in ways that would otherwise be preempted by federal law.

The FEIR seems to be premised on the belief that if a mitigation measure is phrased as a requirement imposed on Phillips 66 rather than directly on the railroad, then preemption is less likely, even if the purpose and effect of the mitigation measure are the identical. This is an incorrect understanding of the law. In many cases, terminal operators have asserted – and courts have agreed – that activities associated with receiving trains and unloading cargo at terminals clearly fall within the federal preemption. See, for example, the *Norfolk Southern Railway Company v. City of Alexandria* case described above. Here in California, this view has been documented by the attorneys representing Valero with respect to its

crude by rail project in the City of Benicia. See Attachment 10, Letter from John Flynn of Nossamon LLP to Amy Million, City of Benicia, September 15, 2014, p. 6. In my letter of January 17, 2014 at page 8, I stated that in the specific facts of this case Phillips 66 would accept state and local regulation of the construction and operation within the Refinery site, so long as it is conducted in a way that does not infringe on federal preemption of the regulation of railroad operations. Specifically, I explained:

> Federal preemption affects the review and permitting in three important ways. First, the impacts from mainline rail operations should not be subject to CEQA conclusions regarding significant impacts. Likewise, the impacts of operations on the mainline may not be considered in deciding whether to approve or disapprove the proposed project. Finally, project approval may not be conditioned on implementation of mitigation measures or alternatives aimed at reducing impacts of mainline operations, or that would otherwise burden such transportation.

This remains Phillips 66's position.

### C. Federal Law Preempts Many Mitigation Measures in the FEIR.

Ultimately, it is the job of the lead agency's decision-making body (here, the Planning Commission) to decide whether mitigation is feasible. Preempted mitigation measures are not feasible and should be rejected. Accordingly, in considering the Project, the Planning Commission should clearly identify which mitigation measures are preempted. This includes all measures that directly or indirectly regulate the equipment, operations, routes etc. of mainline rail network; measures that require Phillips 66 to enter into a contract with Union Pacific Railroad (UPRR) or that specify the terms of any such contract; and measures that impose costs or other burdens on Phillips 66 tied to the mainline rail operations and their impacts.

The CEQA Guidelines confirm that a lead agency's authority to require mitigation is limited by the United States Constitution. (CEQA Guidelines, §§ 15041(a), 15126.4(a)(4).) Additionally, where an EIR determines that a project may cause significant adverse impacts, CEQA requires only that the lead agency impose "feasible" mitigation measures to reduce the potential impacts. (*See* Pub. Res. Code §§ 21002, 21081.) "Feasible" is defined in the CEQA Guidelines as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, ***legal***, social, and technological factors." (CEQA Guidelines, § 15364, emphasis added.) Again, imposing mitigation measures that are preempted by federal law would be contrary to the U.S. Constitution. Thus, the preempted mitigation measures would be legally infeasible and would not be required mitigation under CEQA.

Judicial decisions applying CEQA confirm that the Planning Commission—not the FEIR—is ultimately responsible for determining whether a mitigation measure is feasible.

For example, in *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 999, the court evaluated a lead agency's analysis of feasible alternatives and held that "[w]hile it is up to the EIR preparer to identify alternatives as potentially feasible, the decision-making body may or may not reject those alternatives as being infeasible when it comes to a project approval." The same is true of mitigation measures. The *Native Plant Society* court further held that "[l]ike mitigation measures, potentially feasible alternatives are suggestions which may or may not be adopted by the decisionmakers," and the "[r]ejection [of alternatives] by the decision-makers does not undermine the validity of the EIR's alternatives analysis." (*Id.*; *see also No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256, holding "[t]he EIR is required to identify possible ways to minimize significant effects," and "[m]itigation measures are suggestions which may or may not be adopted by the decision makers." Thus, the Planning Commission must make the final determination as to whether certain mitigation measures are feasible to impose on the Project, and a finding of infeasibility will not undermine the adequacy of the FEIR as an informational document.

For the reasons explained further above in Section I.B., many of the mitigation measures presented in the FEIR are preempted by federal law under the Supremacy and Commerce Clauses of the U.S. Constitution and therefore cannot be imposed by the County. The following measures are fully preempted and must be rejected in their entirety: AQ-3; AQ-5; BIO-11; CR-6; HM-2a; HM-2b; HM-2c; text following HM-2d; PS-4a; PS-4b; PS-4c; PS-4d; PS-4e; TR-4; and WR-3. The following measures are preempted to the extent they require mitigation for impacts from mainline rail activities, and must be edited to remove the preempted requirements: AQ-2a; AQ-4a; AQ-6; AQ-8; and N-2a. Attachment 11 to this letter presents more detail regarding the preempted mitigation measures.

**D. The Reduced Rail Deliveries Alternative.**

The Revised Draft EIR presented the Reduced Rail Deliveries Alternative as a means of avoiding or reducing impacts from mainline rail operations, including locomotive emissions and other impacts. But it would be impermissible for the Planning Commission to approve the Reduced Rail Deliveries Alternative in lieu of the Proposed Project in order to reduce mainline rail impacts. As described in my letter of November 24, 2014, due to federal preemption, local governments do not have the authority to restrict a shipper's access to the interstate rail network because they object to the impacts from the mainline rail operations. (*See* FEIR, Comment AB-11.)

The FEIR now presents additional analysis that puts the Reduced Rail Deliveries Alternative in a different light. Specifically, the revised Health Risk Assessment in the Final EIR (FEIR Appendix B.2) demonstrates that with the Reduced Rail Deliveries Alternative, all impacts from equipment and operations under the jurisdiction of the County (i.e., the non-preempted equipment and activities) would be reduced to less than significant. (*See* FEIR pp. 5-51 to 5-63, and 5-69.) The FEIR does not identify any Class I impacts from the Reduced Rail Deliveries Alternative other than those associated with

mainline rail operations.[3] Accordingly, the County may consider approval of the Reduced Rail Deliveries Alternative as a means of reducing impacts under its regulatory authority, and Phillips 66 would not object to such an approval on preemption grounds, provided the approval does not include the impermissible, preempted mitigation measures identified in Attachment 11.[4]

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[3] The staff report states that on-site emissions from the Reduced Rail Delivery Alternative would exceed a DPM significance threshold of 1.25 pounds per day. Staff Report, p. 21. However, 1.25 pounds appears to be an arbitrary and irrelevant value. The FEIR references the April 2012 SLOCAPCD CEQA Air Quality Handbook as the source for the 1.25 pounds-per-day threshold. FEIR p. 4.3-34. The SLOCAPCD in turn references another document – the Carl Moyer Program Guidelines – as the origin of the 1.25 pound per day threshold. See Attachment 12, SLOCAPCD CEQA Air Quality Handbook, p. 3-4. Yet there is no mention of any such threshold in the Carl Moyer Program Guidelines, which relate to the administration of certain grants by the California Air Resources Board and have no connection whatsoever to CEQA. Due to its length and irrelevance, the Carl Moyer Program Guidelines are not attached, but can be found at http://www.arb.ca.gov/msprog/moyer/guidelines/2011gl/2011cmpgl_20151218.pdf. The document contains no discussion of CEQA, contains no emissions thresholds established to protect public health, and uses the word 1.25 only four times, for completely unrelated purposes. See Carl Moyer Guidelines at pages 13-11, 13-1, 13-14, and G-3. As a practical matter, the 1.25 pound per day value can be applied as a screening threshold that triggers additional, more sophisticated analysis. See, e.g., SLOCAPCD CEQA Air Quality Handbook p. 3-5: "Diesel particulate matter (DPM) is seldom emitted from individual projects in quantities which relate to local or regional air quality attainment violations. DPM is, however, a toxic air contaminant and carcinogen, and exposure [to] DPM may lead to increased cancer risk and respiratory problems." For projects that emit more than 1.25 lbs/day of DPM, "[i]f sensitive receptors are within 1,000 feet of the project site, a Health Risk Assessment (HRA) may also be required." This is precisely what occurred in this case. The FEIR evaluates DPM as a toxic air contaminant (FEIR pp. 4.3-21-24; 4.3-64 to -68; 5-56 to 5-59), and demonstrates that the health risk associated with DPM from on-site activities would be reduced to less than significant as a result of the Reduced Rail Delivery Alternative (FEIR pp. 5-56 to 5-59). The assertion in the staff report that the DPM from on-site activities "would contribute to the localized PM10 emissions, which already exceed the State PM10 air quality standard" (Staff Report p. 21) is disingenuous if not flatly wrong. The FEIR concludes that "rail spur operations are not anticipated to contribute to additional exceedances" of the state standard because the meteorological conditions causing the current exceedances (i.e., strong winds out of the northwest) would actually "produce substantial dispersion of the diesel PM emissions from the project site." FEIR p. 4.3-53.

[4] As described above, other terminals have asserted that federal law preempts local regulation of terminals or unloading facilities as well as mainline rail operations. We agree this is generally a correct statement of law. But in the specific circumstances of this Project,

The County's consideration of the Reduced Rail Deliveries Alternative will not require further environmental review under CEQA. The Reduced Rail Deliveries Alternative is identical to the proposed project, except under this alternative, the Refinery would receive only a maximum of three train units per week (with up to 150 trains per year) instead of the proposed five trains per week (with up to 250 trains per year). The FEIR already evaluates the potential environmental impacts of this alternative and concludes all impacts from this alternative under the County's jurisdiction would be reduced compared to the proposed Project. Environmental documents need not be revised when a project is modified to reduce a project's potential environmental impacts. (See *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* ("*Western Placer*") (2006) 144 Cal.App.4th 890, 902-03; *Dusek v. Anaheim Redevelopment Agency* ("*Dusek*") (1985) 173 Cal.App.3d 1029, 1041; see also *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199 [holding "[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision to the original proposal"].)

For example, in *Western Placer*, the Court upheld an EIR after the County revised a proposed mining project to lessen its environmental impacts. (*Western Placer*, *supra*, 144 Cal.App. at p. 902-03.) The County did not incorporate that modification into a revised project description and did not recirculate the final EIR for that project. Yet the Court upheld the County's environmental review, holding that challengers to the project pointed to "no provision in CEQA or the Guidelines, and we have found none, that requires all changes made to a project after the final EIR is released but prior to certification to be included in the EIR." (*Id.* at p. 899.) As the *Western Placer* Court highlighted, the public agency was able to work with the project applicant and the public to identify ways in which the environmental damage from the proposed mining project could be avoided or significantly reduced, and through that process "CEQA fulfilled its purpose." (*Id.* at p. 905.) The *Western Placer* Court further held that "CEQA did not require the [public agency] to delay the project further in order to evaluate the new project's reduced impacts on the environment." (*Id.*)

In *Dusek*, the Court similarly upheld an EIR and project approvals to demolish a historic hotel after the public agency approved a project that was a reduced version of what was contemplated in the EIR. The Court noted that the EIR's project description was much broader than the project ultimately approved, but the EIR still addressed the environmental consequences of demolishing the hotel. (*Dusek*, *supra*, 173 Cal.App.3d at p. 1041.) As the Court held, the EIR fully analyzed the portion of the project ultimately approved – demolition of the hotel. The Court further held, "CEQA does not handcuff decisionmakers in the manner proposed by the [petitioners of the project]." (*Id.*) The Court continued, the

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Phillips 66 has elected not to assert preemption with respect to an alternative aimed at reducing impacts from activities conducted the Refinery site.

project approved "need not be a blanket approval of the entire project initially described in the EIR. If that were the case, the informational value of the document would be sacrificed. Decision-makers should have the flexibility to implement that portion of the project which satisfies their environmental concerns." (*Id.*)

Like the reduced projects considered in *Western Placer* and *Dusek*, the Reduced Rail Deliveries alternative is a reduced version of a project that was already fully analyzed in the FEIR. CEQA gives a lead agency the flexibility to implement a portion of a project contemplated in an EIR to satisfy that lead agency's environmental concerns. The Reduced Rail Deliveries Alternative is exactly the same as the proposed project in the FEIR, but will lead to no significant environmental impacts as a result of equipment and activities on the Refinery site. Thus, further environmental review of the Reduced Rail Deliveries Alternative is not required.

## II. THE COUNTY'S ESHA PROVISIONS DO NOT BAR PROJECT APPROVAL.

The County's ordinances impose additional requirements for approval of development in an Environmentally Sensitive Habitat Area (ESHA), but these provisions do not bar approval of the Rail Spur Extension Project. The FEIR correctly states that there is no "Mapped ESHA" on site, but confusingly alludes to the "potential" for Unmapped ESHA and to EHSA as defined by Coastal Commission guidelines that do not apply to the County's decision on this Project. The staff report goes a step further and wrongly declares—contrary to fact and law—that the site should be designated as Unmapped ESHA. There is no basis for concluding at this late stage of the permitting process that there is Unmapped ESHA on the Project site. Even if ESHA were present, and contrary to the staff report's assertion, the Planning Commission still can find the Project consistent with the additional ESHA-related requirements in the County's ordinance.

### A. There Is No Basis for Designating the Site As ESHA.

#### 1. Legal Background[5]

Under the County's ordinances, there are only two kinds of ESHA that the County has the power to designate on a parcel in the coastal zone: "Mapped ESHA" and "Unmapped ESHA." The County's Coastal Zone Land Use Ordinance (CZLUO) provides specific

[5] On August 13, 2015, we submitted a letter to Deputy County Counsel, Ms. Whitney McDonald, detailing the reasons the Project site cannot be designated "Unmapped ESHA." The letter was not included or referenced in the FEIR. Accordingly, the 2015 letter is Attachment 13 to today's letter in order to ensure its consideration and inclusion in the record. We urge the Commission to review the letter for a comprehensive overview of the scientific and legal reasons why the Project site cannot be designated as Unmapped ESHA.

definitions for these two legal concepts. CZLUO § 23.11.030. Both concepts are defined in terms of science (the presence of certain biological resources) and legal process. Simply put, a parcel that satisfies neither definition cannot be found to contain ESHA. There is no other kind of ESHA defined or recognized by the CZLUO, which is the sole authority on ESHA in the County's coastal zone.

Mapped ESHA refers to areas that contain certain sensitive habitat ***and*** that are depicted as combining designations on the County's zoning land-use maps. The combining designations are special overlay categories that clearly identify where more detailed project review is needed to avoid adverse environmental impacts. (FEIR p 4.8-2.) Mapped ESHA on the Phillips 66 property occurs only west of the UPPR railroad property. There is no mapped ESHA in the project area (east of the UPRR railroad property).

In areas that are not mapped as ESHA as part of the combining designations on the zoning maps, the County's ordinance provides limited power to designate Unmapped ESHA. The ordinance specifies an unambiguous deadline by which an Unmapped ESHA designation must be made with respect to a specific parcel and development proposal. County staff can designate an area as Unmapped ESHA only "***at or before the time of application acceptance,***" based on the best information available to it at that time. CZLUO § 23.11.030 (emphasis added). This definition was carefully crafted to strike a balance between (1) the need to protect sensitive habitat and (2) the need to protect both project applicants and the County against an unpredictable and burdensome permitting process. The FEIR purports to apply the portion of the definition of Unmapped ESHA dealing with the presence of biological resources, but ignores the portion of the definition dealing with legal process and timing, even though the latter has always been viewed as critical to achieving the balance desired by the County in adopting the ESHA provisions. (*See* FEIR p. 4.4-26.)

The history of the Unmapped ESHA definition clearly establishes that both the County and the Coastal Commission believed any designation of Unmapped ESHA would need to be made early in the application process. For example, on February 2, 2001, when the Coastal Commission and the County were just starting to discuss updating the County's Local Coastal Plan (LCP) to include an Unmapped ESHA power, the Coastal Commission recommended a very involved process (ultimately rejected) whereby the Coastal Commission and other agencies would "review" the County's and applicant's final on-site biological reports and ESHA delineations "before applications for development in or adjacent to ESHA are filed as complete" so as not to impose "undue delays in the development review process."[6] In a July 12, 2001 report, the Coastal Commission revised its recommendation to suggest that any such review by it and other agencies be completed within 14 days of receipt—again so as not to impose "undue delays in the development

[6] *See* http://documents.coastal.ca.gov/reports/2001/2/Th5b-2-2001.pdf at p. 124. A copy of relevant pages from this document is attached to this letter as Attachment 14.

review process."[7] The County agreed with the Coastal Commission about the need for early decisions regarding designation of Unmapped ESHA, "underscor[ing] the importance of identifying ESHA issues early in the review process."[8] Thus, both the Coastal Commission and the County agreed the designation of any Unmapped ESHA should be done very early in the application-review process. The two agencies had different views about *how* to conduct the on-site study for Unmapped ESHA, with the Coastal Commission calling for a more costly and lengthy process, and the County insisting on a more streamlined process. But at all times, the Coastal Commission and the County shared the same aversion to imposing undue delays and costs in the application review process.

Ultimately, the Coastal Commission certified the County's language, which allows Unmapped ESHA designations to be made only "at or before the time of application acceptance." CZLUO § 23.11.030. This compromise language is consistent with the Coastal Commission's and County's oft-repeated goal of ensuring that such designations be made early on in the application process and that the Unmapped-ESHA power not impose undue delays on the application review process. The result is a predictable and reliable application review process, not just for applicants, but for the County as well. The existence of a strict legal deadline for designating Unmapped ESHA insulates the County from later claims that it could have or should have undertaken on-site inspections, studies, and analyses throughout every stage of application review—which often spans many years, as it does in this case.

In sum, the purpose and text of the Unmapped ESHA provision make clear that the County can designate Unmapped ESHA on a parcel only at or before the time it accepts an application for a development project as complete. The definition promotes the County's and Coastal Commission's twin goals of ensuring protection for unmapped sensitive habitat while simultaneously protecting the rights of applicants and the interests of the County. Implementation of the Unmapped ESHA provision must be consistent with both goals.

### 2. The FEIR's Discussion on ESHA

The FEIR concludes the Project site has no Mapped ESHA. (FEIR at 4.4-26.) We agree.

With respect to Unmapped ESHA, the Revised Draft EIR explicitly states that staff found no Unmapped ESHA on the site at or before the time that it accepted Phillips 66's application as complete on July 12, 2013. (*See* Revised Draft EIR at 4.4-24.) We agree with this conclusion as well. The "no Unmapped ESHA" finding was and continues to be supported by the best available information supplied by Phillips 66 and corroborated by County staff before application acceptance in July 2013. While the FEIR omits the explicit

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[7] *See* http://www.coastal.ca.gov/recap/slo/slo-esha.pdf, at p. 138-39. A copy of relevant pages from this document is attached to this letter as Attachment 15.

[8] *See id.* at p. 134.

statement that staff found no Unmapped ESHA present on the Project site at or before the Project application was accepted as complete, it does not contradict the Revised Draft EIR on this point. Thus, all the information in the Revised Draft EIR and the FEIR is consistent: Using the best available information, the staff found no Unmapped ESHA on the Project site at or before the time it accepted the application for the Rail Spur Extension Project, which is the only relevant time period for this Project.

Unfortunately, the FEIR then introduces confusion through vague references to categories of ESHA that the CZLUO does not recognize. Those references may mislead the Planning Commission to believe that it should designate the project site as Unmapped ESHA, despite the fact that the time for making such a designation expired 2-1/2 years ago.

The FEIR states that the site "***appears*** to meet the definition of Unmapped ESHA" (FEIR at 4.4-31 (emphasis added)), and that some of the more recent information "***suggests*** the ***potential*** for Unmapped ESHA" (FEIR at 4.4-26 (emphasis added)).[9] But under the CZLUO, a site either does or does not have Unmapped ESHA, and an Unmapped ESHA designation has legal consequence only if it is made at or before the time the application is accepted. There is no basis in the law for treating a parcel as Unmapped ESHA based on suggestions of its potential, particularly where such suggestions arise years later. The only possible legal relevance of the FEIR's references to "apparent," "suggested," or "potential" ESHA is that they highlight the fact that even as late as December 2015 when the FEIR was released, the staff could provide no findings supporting a determination of Unmapped ESHA within the parameters of the County's ordinance. Beyond that, the FEIR's vague inferences regarding ESHA have no legal effect.[10]

The FEIR also states that "the site was evaluated to determine whether ESHA is present, per the ESHA Identification guidance of the California Coastal Commission (July 31, 2013)." (FEIR at 4.4-30.) The FEIR is referring to the Commission's "LCP Update Guide," which advises cities and counties about ways to update their LCPs to maximize ESHA protection.[11] After some discussion about the Coastal Commission's guidelines,

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[9] In the Land Use chapter, the FEIR states more definitively that "unmapped ESHA was determined to be present" (*see* p. 4.8-19), but refers the reader to Section 4.4.4 of the EIR for a discussion of that determination. Section 4.4.4 contains only the vague references to suggestions of potential ESHA, and to time periods not relevant under the County's ordinance. Accordingly, there is no evidence in the FEIR supporting the statement in the Land Use chapter.

[10] The more recent information giving rise to suggestions of potential Unmapped ESHA may be relevant to a ***future*** application affecting the Phillips 66 Refinery site, ***if*** additional analysis leads the County to definitively designate Unmapped ESHA at or before the time of acceptance of such a future application. But it has no bearing on the Rail Spur Extension Project.

[11] http://www.coastal.ca.gov/lcp/LUPUpdate/LUPGuidePartI_4_ESHA_July2013.pdf.

the FEIR finds that the project "meets the definition of ESHA as defined in the guidelines set forth by the California Coastal Commission for defining ESHA." FEIR at 4.4-31. There are several fatal problems with this analysis.

First, the CZLUO, a part of the County's certified LCP, is the *only* legal authority for making ESHA determinations in the County's coastal zone. No other authority, including informal guidelines issued by another agency, governs the designation of ESHA within the County's jurisdiction. Pub. Res. Code § 30603(b)(1) (any appeal to Coastal Commission must be based on violation only of LCP and public-access policies of Coastal Act); *Security National Guarantee, Inc. v .Cal. Coastal Comm'n*, 159 Cal.App.4th 402, 422-23 (2008) (a local government's certified LCP exclusively governs over those issue as to which it speaks). Second, the Coastal Commission guidelines that the FEIR invokes do not even purport to be legally binding or relevant here. They constitute the Coastal Commission's guide for cities and counties that are updating their LCPs—not for those municipalities that are applying certified LCPs to particular projects. Third, reliance on the Coastal Commission's LCP Update Guide to designate Unmapped ESHA on the site would violate section 23.11.030 of the CZLUO, which required staff to make a definitive finding on Unmapped ESHA on the Rail Spur Extension Project site no later than July 12, 2013—*before the Coastal Commission's LCP Update Guide was even published.* For these reasons, the Planning Commission should give no weight to the FEIR's conclusions on the ESHA issue, as analyzed using the Coastal Commission's LCP Update Guide.

### 3. Staff Report's Recommendation on Unmapped ESHA

Nor should the Planning Commission accept the staff report's even more confused treatment of the Unmapped ESHA issue. The staff report acknowledges the deadline imposed by the CZLUO's "unmapped ESHA"—namely, that an Unmapped ESHA designation must be made "at or before the time of application acceptance." And the staff report concedes that the deadline was the product of efforts by the County and the Coastal Commission to designate any Unmapped ESHA on a parcel "at the earliest possible point in processing a coastal permit." (Staff Report, Exh. A at 1.) But then the staff report proceeds to recommend the Project site for Unmapped ESHA designation—2-1/2 years after application acceptance. The staff report justifies its circumvention of the legal deadline on several flawed grounds that the Planning Commission should reject.

First, the staff report claims that it is "often" impossible for staff to satisfy the legal deadline for making Unmapped ESHA determinations, because Department staff have only "limited, if any, information" at or before the time of application acceptance. (Staff Report, Exh. A at 1.) The implication is that staff is at the mercy of a deadline that it cannot control. But that is simply untrue.

The "Unmapped ESHA" definition dictates that a decision on Unmapped ESHA must be made by the time the application is accepted as complete, but staff itself determines when to accept an application as complete. In this important sense, staff is in control of the

deadline. As long as staff has assessed an application as incomplete, the time for making an Unmapped ESHA determination remains open. But as soon as staff accepts the application as complete, that date becomes the deadline for making Unmapped ESHA determinations. Thus, if staff believes that an application is not supported by the best available information concerning the presence or absence of Unmapped ESHA on a site, it has the option of not accepting the application as complete and specifying what information is necessary for the application's acceptance. Gov't Code § 65943. Put differently, nothing in section 23.11.030 or any other provision requires staff to ***accept*** applications that are incomplete—including applications that lack sufficient information to decide the Unmapped ESHA issue. Section 23.11.030's twin mandates that any Unmapped ESHA determination be made "at or before the time of application acceptance" ***and*** be based on the "best available information" always can (and must by law) be satisfied.

Second, the staff report attempts to excuse its untimely Unmapped ESHA declaration with the explanation that it is difficult to make early Unmapped ESHA determinations because often "technical studies pertaining to ESHA have yet to be prepared or peer reviewed." (Staff Report, Exh. A at 1.) The "Unmapped ESHA" definition does not impose a qualitative requirement on the kind of information that is necessary to make the determination. It only requires the "best ***available*** information," not the best information that could be created or compiled at some future time. CZLUO§ 23.11.030 (emphasis added). Nor does the definition equate "best available information" with "peer-reviewed studies," as the staff wrongly assumes. The best information available at or before the time of application acceptance could be a peer-reviewed study, or it could just as validly be multiple comprehensive studies of the project site undertaken by the applicant's consultant (as in this case). To interpret section 23.11.030 as requiring staff to wait until it has the best possible information, or until it has a "peer reviewed" study, is to add words to the definition of "Unmapped ESHA," while simultaneously deleting the clear deadline it imposes. And that misinterpretation undoes the careful, common-sense balance that the ordinance strikes between the need to protect actual sensitive habitat (using the best current information "available"), without unduly burdening the application-review process (by insisting that any Unmapped ESHA determination be made "at or before the time of application acceptance.")

As staff acknowledges, Phillips 66 ***did*** prepare and submit no fewer than three comprehensive technical studies characterizing, quantifying, and mapping the ecological resources of the project site prior to application acceptance in July 2013. [12] These studies

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[12] Phillips 66 submitted to staff its "Wildlife and Habitat Assessment" on March 10, 2013, and its "Biological Assessment" and "Botanical Assessment" on June 13, 2013. Before application acceptance, staff had over *four* months to review the first study, and one month to review the second and third studies. Those studies satisfied all of the County's stringent requirements for biological surveys—both at the time they were undertaken and today. The County's Guidelines for Biological Resources Assessment, 2015 (2016 Draft) do not specify a particular vegetation classification scheme to be followed by biological

were prepared following the County's robust and comprehensive Guidelines for Preparing Biological Resources Studies. The descriptions of the plant community characteristics and wildlife resources provided in those studies are entirely consistent with the subsequent studies provided by the County's consultants and presented in the FEIR. Phillips 66's studies clearly constituted the best available information necessary to make an Unmapped ESHA determination by that time. But staff remarkably dismisses those studies on the grounds that they were not "peer reviewed by the EIR consultant and fully vetted during the Draft EIR public review process" under CEQA. *Id.* But staff confuses what is necessary for an Unmapped ESHA determination and what is necessary for adequate EIR review under CEQA. Importantly, nothing in CEQA requires that the determination of "Unmapped ESHA"—a special creature of the County's ordinance—be based on peer-reviewed studies. While CEQA may require that EIRs provide the most accurate information about a project and its potential impacts, it does not require that particular *legal conclusions* be drawn, like whether certain facts justify designating an area as "Unmapped ESHA." *Banning Ranch Conservancy v. City of Newport Beach*, 236 Cal. App. 4th 1341, 1359 n.13 (2015) (holding that CEQA did not require city to identify ESHA (a "legal conclusion") in its EIR).[13]

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consultants. Currently, there are several classification systems in widespread use by biological experts, including the Holland plant community classification system used in the technical reports submitted by Phillips 66. The County has approved other projects reviewed using the Holland classification system as recently as 2015. For example, the Mitigation Monitoring Plan for the 33 acre expansion of the Hanson Santa Margarita Quarry (SCH# 2013061051) requires compensation ratios of 1:1 or 3:1 based on the Holland plant communities of oak woodland, riparian woodland, northern mixed chaparral and chamise chaparral. (See http://www.slocounty.ca.gov/Assets/PL/environmental/HansonAggregatesFIER/Appendix+A+Mitigation+Monitoring+Plan.pdf .) Staff's recent vegetation findings purport to follow vegetation-type schemes that the County's survey requirements do not mandate. (*See, e.g.*, Staff Report, Exh. A at 5, identifying "sensitive vegetative communities" on the Project site based on the vegetation classification system described in "A Manual of California Vegetation," which is not prescribed by the County's survey requirements). A desire to transition to a different classification system 2 ½ years after the deadline for deciding Unmapped ESHA does not justify failure to meet that deadline.

[13] In addition to being legally groundless, the staff report's suggestion that the Unmapped ESHA decision took 2-½ years because it needed to be peer reviewed is not factually credible. Certainly, the County's expert technical consultants reviewed the technical reports of Phillips 66's expert biologists and botanists in order to prepare the Draft EIR, which was released for public review in November 2013. If peer review were not conducted prior to release of the Draft EIR, certainly it occurred in the ten-month interval between January and October 2014, when the Draft EIR was being re-written. Yet both documents expressly concluded that the Project site contained no Unmapped ESHA. The only possible conclusion supported by the facts is that during the first two or more years of permit evaluation and environmental review, the expert opinion of the County's staff

Third, the staff report asserts that abiding by the deadline imposed by the "Unmapped ESHA" definition would be "inconsistent with the Local Coastal Program because it would not include the best available data." But the report has it exactly backwards: To ignore the deadline is to violate the ordinance's definition, which the Coastal Commission certified as part of the County's LCP. The staff report's concern is based on an imagined conflict between the requirement that Unmapped ESHA determinations be made at or before the time of application acceptance and the requirement that it be based on the best available information. The definition does not present these two requirements in the disjunctive (i.e., "either ... or"), leaving it to staff's discretion to decide that the "best available information" mandate always trumps the deadline—as staff has done in this case. Rather, the requirements are in the conjunctive so that both must be satisfied. And, as a practical matter, they ***can*** be: Unmapped ESHA determinations must be made based on the best information available at or before the time of application acceptance.

Fourth, the staff reports remarkably claims that it somehow was *Phillips 66*'s fault that staff could not comply with the deadline imposed by the "Unmapped ESHA" definition. The staff report states that, upon filing its application (May 2, 2013), Phillips 66 requested and staff agreed to a "facilitated" schedule that would culminate in a Planning Commission hearing within 14 months. (Staff Report, Exh. A at 2.) Setting aside the fact that this schedule was not met, staff merely committed to process the application approximately by the deadline for County action established by CEQA and the Permit Streamlining Act. *See* Pub. Res. Code § 21100.2 (EIR must be completed within twelve months); Gov't Code § 65950 (lead agency must act on project within 180 days of certification of EIR). This is not expedited review or special treatment; it is compliance with the law.

Even if the staff report's recitation of purported facts were correct, staff never told Phillips 66 that it would ignore the legally mandated deadline for determining Unmapped ESHA, let alone as a condition of complying with CEQA and Permit Streamlining Act deadlines. Phillips 66 asked for timely CEQA review. It did not ask for the Unmapped ESHA question to be postponed until the very end of the CEQA review process.

Fifth, staff seems to be operating under the misimpression that the California Coastal Commission was the author and is the chief implementer of the Unmapped ESHA ordinance. In its report, staff incorrectly asserts that it was the *Coastal Commission* who "includ[ed]" the "Unmapped ESHA" definition in the CZLUO, and that the Coastal Commission's "intent . . . is to ***require*** the Department to determine on a project-by-project basis . . . whether Unmapped ESHA is present . . . ." (Staff Report, Exh. A at 1 (emphasis added)). In the same vein, the staff report goes on to tout a Coastal Commission visit to the Project site on May 27, 2015, and the fact that the Coastal Commission

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and its own consultants was that the Project site contains no Unmapped ESHA. The law has not changed in the past six months. The biological resources have not changed in the past six months. The conclusion on Unmapped ESHA should not have changed.

"corroborate[d]" staff's "Unmapped ESHA" determination. (*Id.* at 2.) Staff invited the Coastal Commission to do a joint site visit. It is now clear that the Coastal Commission influenced, if not outright ordered, staff to designate the Project site as "Unmapped ESHA." (Staff Report, Exh. D (Coastal Commission letter expressing its "understanding" (i.e., *expectation*) that County staff "is to . . . consider[] [the habitat on the Project site] an environmentally sensitive habit area").)

The Planning Commission should vigilantly guard the County's jurisdiction against inappropriate, if not unlawful, encroachment by outside agencies. The Coastal Commission has no authority to "include" any law in a local government's Local Coastal Program, let alone "require" the County or its staff to do its bidding. Quite the contrary, "[t]he precise content of each local coastal program shall be determined by the local government." Pub. Res. Code §§ 30500(c), 30512.2 ("[T]he commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan."). Equally important, once there is a certified LCP, the local government is the agency responsible for the LCP's implementation—not the Coastal Commission, let alone its staff. *Yost v. Thomas*, 36 Cal. 3d 561, 574 (1984) (has "wide discretion . . . to determine how to implement certified LCPs). At present, the Project is within the County's original permitting authority, and the County has the exclusive right and obligation to apply its own laws as written, including the ordinance defining "Unmapped ESHA."

The Coastal Commission is also bound by the Unmapped ESHA provision in the County's LCP because it certified the provision under the California Coastal Act. The Coastal Commission may no longer like the "Unmapped ESHA" definition that it certified several years ago. It may wish there were no deadline for determining Unmapped ESHA. But the Coastal Commission cannot—and should not—use its authority to influence or direct staff in staff's interpretation and application of the LCP in a manner contrary to the clear language and original legislative intent. If the Coastal Commission has an issue with the Unmapped ESHA definition, it can recommend an amendment or appeal to the California Legislature for a change to the California Coastal Act. Until then, the Coastal Commission and County staff should acknowledge the Coastal Commission's very limited ***appellate*** jurisdiction. In 2012, the Court of Appeal took the Coastal Commission to task for its unlawful attempt to amend a local government's LCP, holding:

> The Coastal Commission cannot "diminish or abridge the authority of a local government to adopt ... the precise content of its land use plan." ([Pub. Res. Code] § 30512.2, subd. (a).) Development review authority can no longer be exercised by the Coastal Commission and is "delegated to the local government that is implementing the local coastal program," with limited rights of appeal to the Coastal Commission. (§§ 30519, 30603.) Indeed, if the Coastal Commission determines that a certified LCP is not being carried out in conformity with a policy of the Coastal Act, the Coastal Commission's power is limited to recommending amendments to the local

> government's LCP; and if the local government does not amend its LCP, the Coastal Commission's only recourse is to recommend legislative action. (§ 30519.5.)[14]

*City of Malibu v. Cal. Coastal Comm'n*, 206 Cal. App. 4th 549, 563 (2012).

To summarize, the deadline for making an "Unmapped ESHA" determination was July 12, 2013, when the staff chose to accept Phillips 66's application. County staff did *not* find "Unmapped ESHA" on the Project site at or before application acceptance, based on the best information available at that time—namely, comprehensive environmental studies submitted by Phillips 66 that were prepared by biologists on the County's approved consultant list and in full conformance with the County's guidelines for biological report preparation. Regardless of what the Coastal Commission may think the County should do, the ordinance bars reconsideration of the Unmapped-ESHA issue at this late date. *See also* Pub. Res. Code § 30604(b) ("After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program."); *Douda v. Cal. Coastal Comm'n*, 159 Cal. App. 4th 1181, 1192 (2008) ("[A]n issuing agency cannot deviate from a certified local coastal program and designate an additional environmentally sensitive habitat area.")

#### 4. Fairness and Public Policy Considerations Militate Against a Belated Unmapped ESHA Designation

In addition to the requirements of the law, basic fairness and sound public policy dictate a finding of "no Unmapped ESHA" on the Project site. Phillips 66 relied both on the clear language of the Ordinance and on staff's "no Unmapped ESHA" representations to proceed with its application, after the County accepted it in July 2013. In so doing, Phillips 66 invested significant amounts of time and money to work towards project approval.

The belated emergence of new and legally unauthorized concepts—"potential" Unmapped ESHA or ESHA as defined by the Coastal Commission's LCP Update Guide—could result in new, unwarranted obstacles or burdens on development of the land. This is especially so if the Planning Commission treats a belated suggestion of these unauthorized categories of ESHA the same as a designation of actual Unmapped ESHA made "at or before the time of application acceptance," as required by the ordinance. Such a reversal on the "Unmapped ESHA" issue would be unfair to Phillips 66 and to those who have worked diligently over the past 2-1/2 years to see this application through to a final EIR. Phillips 66 has spent several million dollars on application preparation, processing, and EIR preparation. The Declaration of Mr. Bill Schroll itemizes the costs incurred by Phillips 66

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[14] Despite its significant involvement and influence in this Project, the Coastal Commission is inexplicably omitted from the list of agencies and individuals with whom staff consulted during the EIR.

subsequent to application acceptance in July 2013. *See* Attachment 16, p. 4, ¶ 15. Of the total amount, approximately $1,423,898 was paid directly to the County. The deadline in the ordinance for designating Unmapped ESHA was designed precisely to avoid imposing these costs on applicants on sites where the presence of ESHA would preclude or constrain development.

The Planning Commission also should consider the general public policy implications of belatedly designating parcels as Unmapped ESHA. Such a belated designation in this case will set a dangerous policy precedent for future applicants. As discussed above, the Ordinance's deadline protects the rights of project proponents and the interests of the County. It guarantees an orderly and predictable permit process that permit applicants and County staff can both rely on. A contrary rule permitting the County to make Unmapped ESHA designations *at any time*—including at the very end of the application review process, in the Final EIR—would wreak havoc on that orderly and predictable permit process. Sound public policy demands that an applicant know early in the process whether and how the ESHA provisions in the CZLUO may affect the feasibility or design of the project site *before* expending years and millions of dollars trying to secure authorization.

### B. The Planning Commission May Approve the Project Even if the Site Could Be Designated As Unmapped ESHA.

The FEIR omits any discussion of the consequences of an Unmapped ESHA designation to Project approval. But even if there were Unmapped ESHA in or adjacent to the Project site, the Planning Commission may still approve the Project consistent with the County's LCP. Indeed, the LCP affirmatively supports certain developments, including the Project, in and around alleged ESHA.

Section 23.07.170 of the CZLUO clearly contemplates that development can occur in or adjacent to ESHA. For example, subsection (a) sets forth the requirements for "[a] land use permit application for a project on a site located within or adjacent to an Environmentally Sensitive Habitat"; if a project in or near ESHA were categorically prohibited, no such application process would be needed. Similarly, subsection (b) sets forth the required findings before the County may grant "[a]pproval of a land use permit for [such] a project." And subsection (e) requires that development in or adjacent to ESHA "shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values," establishing that projects with less-than-significant impacts on habitat values are allowed.

Against this permissive backdrop, section 23.07.170(e) contains a nonexclusive list of "[c]ircumstances in which a development project would be allowable within an ESHA." The list illustrates the kinds of projects approvable in ESHA and the relevant conditions of approval. Among these are projects that involve "habitat creation and enhancement," like Phillips 66's Rail Spur Extension Project.

Under section 23.07.170(e), where a project "results in an unavoidable loss (i.e., temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant.... Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ('same-kind') and within the same biome ('same-system'), and shall be permanently protected by a deed restriction or conservation easement."

Phillips 66 has proposed and the EIR requires on-site restoration of dune habitat ("same-kind"); Phillips 66 has prepared a dune habitat restoration plan; and Phillips 66 has identified a suitable location on its property ("same-system") to implement the restoration. The proposed on-site native habitat restoration meets or exceeds the 2:1 replacement ratio specified in the EIR (Mitigation Measure BIO 5-a), and results in *a net increase in high quality native dune habitat on the Phillips 66 property following development of the Project.* Indeed, the habitat that would be created would be of much better quality than that impacted by Project construction. According to the FEIR, the Project site "has been highly disturbed and degraded from agricultural, industrial, and human activities for several decades ... Removal of agricultural practices and large-scale restoration efforts would be necessary to restore the functions and values to the area." FEIR p. 4.4-31.[15] In other words, the acreage that will be adversely impacted by the Project is not currently functioning effectively as habitat.

Moreover, the County's Coastal Plan Policies affirm the vital economic importance of the energy-development industry, including refineries like Phillips 66 that are "coastal-dependent." A "Coastal-Dependent Development or Use" is "[a]ny development or use that requires a permanent location on or adjacent to the ocean." Coastal-dependent development has "priority" over other development on the coast, and "shall be encouraged to . . . expand within existing sites and shall be permitted reasonable long-term growth." County of San Luis Obispo, Coastal Plan Policies (Revised April 2007), Chapter 4, at 4-1 (quoting Public Resources Code sections 30001.5, 30255, and 30260). Importantly, "where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of [the Coastal Act], they may nonetheless be permitted . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible." *Id.* at 4-1 to 4-2 (quoting Public Resources Code section 30260).

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[15] See also FEIR p. 4.4-40: "Short term impacts to these sensitive communities vegetation types ... would not be considered significant due to the lack of quality within the vegetation type. Specifically, the degraded condition of the habitat type has resulted from decades of livestock grazing and industrial land use practices."

Regarding the threshold criterion, the Project clearly is "coastal dependent" because it must occur within the coastal zone, where both the Refinery and the mainline rail to which the rail spur is connected are located. In addition, the Project is inextricably tied to a facility (the Refinery) that is itself coastal dependent, as evidenced by the fact that the Refinery operates under a National Pollutant Discharge Elimination System ("NPDES") permit for outfall into the Pacific Ocean. The FEIR demonstrates that alternative Project locations are infeasible or more environmentally damaging.[16]

Barring the Project would seriously undermine the public welfare, meeting the second criterion in Section 30260. Extending the rail spur is critically important to Phillips 66 securing a competitively priced crude supply for the Refinery, thereby supporting approximately 200 permanent jobs provided by the Refinery. The Refinery is also a link in the manufacturing chain necessary to meet the energy needs of "hundreds of thousands of consumers," and the Project will allow the Refinery to remain competitive and viable under increasingly challenging business conditions. Coastal Plan Policies, *supra*, at 4-5.

With respect to the third criterion, the County's Coastal Policies state that "when new sites are needed for industrial or energy related development, expansion of facilities on existing sites or on land adjacent to existing sites shall take priority over opening up additional areas or the construction of new facilities" and that "adverse environmental impacts from the siting or expansion of coastal-dependent industrial or energy developments shall be mitigated to the maximum extent feasible." Coastal Plan Policies, *supra*, at 4-6 (Policy 1). The Rail Spur Extension Project clearly conforms to this policy, as it involves the expansion of an existing facility on an existing site, and incorporates generous mitigation for adverse environmental impacts. The FEIR contains numerous mitigation measures designed to avoid or lessen any environmental impacts. In this regard, both CEQA and the Coastal Act require feasible mitigation. Here, the Project goes beyond mitigating for biological resources impacts and actually *results in a net increase of native habitat.*

Finally, even if there were Unmapped ESHA in or near the Project area, denial of the Project on that basis would subject the County to claims of unconstitutional taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, government action that takes private property without just compensation is unconstitutional. Government can effect an unconstitutional taking by regulation—for example, by declaring property to be undevelopable ESHA. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *McAllister v. California Coastal Comm'n*, 169 Cal. App. 4th 912, 937-38 (2008). Neither the Coastal Act nor the County's CZLUO authorizes permit actions that result in uncompensated takings. To the contrary, such actions are expressly prohibited. CZLUO § 23.07.17(e)(2); *see also* Pub. Res. Code § 30010 (declaring that the Coastal Act "shall not be construed as authorizing the

[16] Section 5 of the FEIR discusses alternative modes of transportation and alternative sites for a rail unloading facility. None were found to be feasible alternatives that would reduce impacts compared to the proposed Rail Spur Extension Project.

commission . . . or local government acting pursuant to this [Act] to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor."). Consequently, if designating an area as ESHA threatens an uncompensated taking, the constitutionally appropriate action is for the agency to allow the parcel to be developed enough to avoid a taking. The FEIR repeatedly describes the Project site as "highly disturbed and degraded" from decades of agricultural, industrial and human activities. (FEIR p. 4.4-31.) Given the Project's modest impact to biological resources on the site, and the extent to which it mitigates for impacts to environmental values, there is little question that these takings considerations militate in favor of Project approval.

## III. COASTAL ACCESS.

The FEIR discusses the issue of vertical public access in the Executive Summary and in Chapter 9. In some places, the discussion is accurate, but in other places certain statements are confusing or unclear if taken in isolation. Our comments below are intended to clarify the discussion.

First, it is important for the Planning Commission to understand that coastal access is not a component of the proposed Rail Spur Extension Project. Because preparation of the EIR for the Rail Spur Extension Project was underway, County staff expanded the Rail Spur EIR to include Chapter 9, which contains environmental review of several hypothetical approaches to public access. Phillips 66 is not expecting the Planning Commission to approve any particular approach to public access as part of the decisions on the Rail Spur Extension Project. Indeed, Phillips 66 has provided evidence showing that public access is not appropriate at this location, and would be contrary to County policies.

The public access question first arose several years ago in conjunction with approval of an independent Phillips 66 project, the Throughput Increase Project. In approving the Throughput Project, the County imposed a condition requiring Phillips 66 to comply with CZLUO Section 23.04.420 regarding public access. The condition required compliance with the ordinance. The condition did not direct the company to offer to dedicate public access because the County had not yet determined whether public access is required under the ordinance for the Throughput Increase Project.[17] The condition required that construction for public access, ***if required***, must be completed within 10 years of the effective date of the Throughput Project permit, or at the time of approval of any

[17] The FEIR states in the Executive Summary that Phillips 66 was "required" to provide "vertical public access from State Route 1 to their western property." FEIR at ES-20. Likely that was shorthand for the more complicated facts described in this letter and elsewhere in the FEIR, but it could benefit from clarification.

subsequent use permit approved at the Refinery site, whichever occurs first.[18] Recordings of the Planning Commission discussion on the Throughput Increase Project demonstrate that the Planning Commission fully understood that the threshold question of ***whether*** a dedication of public access was required had not yet been decided. See Attachment 17, Informal Transcription of Excerpts of Planning Commission Hearing of December 3, 2012.

Phillips 66 preferred to make an offer to dedicate public access (OTD) only after the County examined the criteria for requiring public access in the Section 23.04.420, including the exceptions in the ordinance, and determined that the ordinance required a dedication of public access notwithstanding the features of the Throughput Increase Project and the site. However, County staff preferred to receive the OTD and hold it until the applicability of Section 23.04.420 could be fully assessed. County staff explained that in the event the County determined no public access is required by the ordinance, it will reject and return the OTD. County staff advised Phillips 66 that the County would not issue the Notice to Proceed authorizing the company to proceed with the Throughput Increase Project until the County received the OTD. In an effort to move its Throughput Project forward, Phillips 66 agreed to give the OTD before the County determined the applicability of the access requirement, on the County staff's express assurances that the County will not accept the OTD unless and until it has made the legally required findings—and that the County will reject the OTD in the event the findings cannot be made.

Those legally required findings are found in CZLUO section 23.04.420(c). That section states generally that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects," but that access is not to be required if it "would be inconsistent with public safety" or "the protection of fragile coastal resources."

The County has yet to make the required findings that access would be consistent with public safety and the protection of fragile coastal resources.[19] Without such findings, the County cannot accept the OTD. The FEIR states that the analysis in Chapter 9 is intended to assist the Planning Commission in making these decisions. (FEIR p. ES-20.) In addition, Phillips 66 has submitted a report to the County demonstrating that both exceptions apply to its site.

The FEIR acknowledges the environmental problems that would be created by a public access trail on Phillips 66's property. Any public access route across the portion of the

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[18] Staff Report for Planning Commission Hearing on Santa Maria Throughput Increase Project (Meeting Date: Dec. 13, 2012) (acknowledging that public access would be constructed only "if required").

[19] *See* FEIR p. ES-20: "Construction of the vertical coastal access would only be required if the County finds that coastal access for this location is consistent with the requirements of Section 23.04.420 of the Coastal Zone Land Use Ordinance."

Phillips 66 property west of the railroad tracks would have to traverse Mapped ESHA: "[T]he entire area located west of the UPRR tracks is within the Terrestrial Habitat ESHA designation, pursuant to the LCP." (FEIR p. 9-33.) All three public access options would result in the loss of high quality, sensitive habitat in order to create parking lots for visitors' cars, and to expand the existing, narrow dirt track or replace it with a two lane road. Overpasses for crossing the railroad tracks would also cause substantial loss of high quality habitat. One can only marvel at the irony of proposed Mitigation Measure BIO-3, which would impose on Phillips 66 an obligation to relinquish use of 53 ***additional*** acres of its property (even more, if needed to achieve a 2:1 acreage replacement ratio), on which the company would be required to restore or enhance habitat to compensate for the high quality ESHA that would be lost to public access. (*See* FEIR p. 9-29; for some species, replacement ratios would be even higher.) The company would be required to dedicate an open space easement or conservation easement over these additional acres as well (Mitigation Measure BIO-3.g.), dramatically inflating the amount of property that would be "taken" from the company through a public access project.[20]

Finally, the FEIR acknowledges that public access threatens sensitive habitats because the visitors may stray from the path and trample rare and sensitive plants. The FEIR describes (at p. 9-31) the very poor condition of this land prior to excluding the public in 1998:

> Prior to 1997, an extensive trail network and associated erosion, dune destabilization, and weed dispersal was occurring in the vegetated dune areas on the SMR property. Around 1998, this area of the SMR was fenced to prevent uncontrolled access and has been managed through an agreement with CSPR to exclude general public use. Through the efforts of CSPR and the Land Conservancy of San Luis Obispo County, with the support of Phillips 66, invasive plant species have been reduced in the buffer zone area, and native plant communities and native dune stabilization have been enhanced."

Over the past 20 years, Phillips 66 has been a careful custodian of the biological resources on its property. Through hard work and substantial human and economic resources, this habitat has been restored and is thriving. The FEIR acknowledges the threat to these resources if public access returns. (E.g., sensitive species "could be impacted ... from users straying from the designated path into areas that have sensitive wildlife species." FEIR p. 9-40; see also p. 9-60.) The FEIR does not identify any effective means of preventing a relapse of these sensitive lands to a disturbed and degraded state. Altogether,

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[20] The Throughput Increase Project involved no physical modifications to the Refinery or the surrounding land, and no changes in operation that would have any effect whatsoever on public access. Accordingly, imposing any of these public access requirements on the company would constitute a taking of property. *See* discussion in section II.B., above, for a discussion of unconstitutional takings.

public access at this location would unquestionably undermine protection of fragile coastal resources, particularly west of the UPRR railroad tracks.

Because a CEQA document must focus on the environmental consequences of an action, the FEIR sidesteps the most important public safety issue associated with public access at this location: how people would move from the eastern portion to the western portion of Phillips 66's property. Public access across Phillips 66 property cannot physically provide the public access to the shore because the Phillips 66's property is bisected by the UPRR tracks. UP owns this intervening land, and Phillips 66 has no right to give the public permission to cross it. See Attachment 18, Letter from Ms. Kristen Kopp of Phillips 66 to Ms. Jessica Reed of the Coastal Commission dated January 23, 2015; and Attachment 19, Letter from Ms. Whitney McDonald, Deputy County Counsel, to Ms. Jessica Reed of the Coastal Commission dated March 23, 2015. UP has stated that will not agree to at-grade public access at this location,[21] and Phillips 66 has no authority to force UP to submit to at-grade public access across its private property. Thus, any public access that could be granted by Phillips 66 would be *discontinuous* and *inherently unsafe*. The Hazards section of the FEIR reveals that nearly all fatalities involving railroad accidents or incidents involve trespassers (*see* Table 4.7.2, pp. 4.7-4 to 4.7-13), so inviting public access across the Phillips 66 property would create a real public safety risk that Phillips 66 itself has no ability to mitigate.

The FEIR sidesteps the public safety risks by conjuring two versions of an overpass. But even the elevated, grade-separated crossings described in the Final EIR would require UP's agreement and cooperation, neither of which UP has indicated it is willing to provide. Thus, continuous public access from State Route 1 to the coast is a practical ***impossibility***. Public access would at most extend from State Route 1 to the UP railroad tracks, from which point the public would have no lawful or safe way to access Phillips 66's property west of UP's railroad tracks.

The right to cross another's private property typically takes the form of an easement. An easement is a property right, and UPRR is under no obligation to grant such an easement. Moreover, nothing in the Coastal Act or any other law authorizes the County to compel one landowner (Phillips 66) to acquire a new property interest (an easement from UPRR) for the sole purpose of then dedicating that property interest to the public. If the County determines that public access at this location is consistent with CZLUO section 23.04.420(c), then the County itself must pursue an easement on its own, and any

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[21] See letter from Melissa Greenidge of Randolph Cregger & Chalfant, attorneys for UPRR, to James Anderson of Phillips 66 dated August 6, 2013, which is included as part of Attachment 18: "Union Pacific understands that the County has conditioned the approval of its Land Use Permit on the requirement that Phillips 66 provide public coastal access over its parcel. To do so, however, Phillips 66 would have to provide access over railroad tracks owned by Union Pacific. Union Pacific does not consent to use of its property for public access."

construction costs (e.g., for an elevated crossing) or operational costs (e.g., for an escort) needed to ensure public safety in crossing the railroad tracks will be the responsibility of the County, not Phillips 66, because the hazards of such a crossing are wholly unrelated to the Phillips 66 property or the Throughput Increase Project.

Finally, even if the County could make the relevant findings under section 23.04.420, it still would have to establish that the dedication bears an "essential nexus" and "rough proportionality" to the impacts of the project. This is a federal constitutional requirement applicable to all permit conditions. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring the permit authority to establish an "essential nexus" between permit conditions and a project's impact); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring the permit authority to establish "rough proportionality").

We continue to believe that the County would be unable to make the requisite showing under *Nollan* and *Dolan*. Indeed, the only way for the County to *constitutionally* justify public-access condition would be to show that the Throughput Project would adversely affect or destroy ***existing*** public access. But construction was not required for the Throughput Increase Project. And even the County recognized that the Throughout Project would have no such impacts.[22] Because the Throughput Project had no such adverse effect, the County cannot constitutionally condition that project on the dedication of public access across Phillips 66's property. The same is true for the Rail Spur Extension Project, although the FEIR does not separately analyze the public access impacts of the Rail Spur Extension Project. The FEIR does not provide any evidence that either project adversely affects public access in a manner that could justify the condition requiring an OTD.

## IV. THE PROJECT IS CONSISTENT WITH APPLICABLE COUNTY LAND USE POLICIES.

The Project is consistent with the applicable policies in the County's General Plan. Appendix G of the FEIR provides a preliminary analysis of the Project's consistency with the General Plan and other applicable land use ordinances. Appendix G states that the Project will be either "potentially consistent" or "potentially inconsistent" with the applicable polices in the County's General Plan. (*See* Appendix G, pp. G-2 through G-49, G-79 through G-84.) For those policies with which the Project is identified as being "potentially consistent," there is substantial evidence in the FEIR and remainder of the administrative record that the Project unquestionably will be consistent with those policies.

For those policies with which the Project is identified as being potentially inconsistent, we believe there is substantial evidence that supports a finding of consistency. Those policies

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[22] http://slocleanair.org/images/cms/upload/files/4_8_Other%20Issue%20Areas.pdf ("The Proposed Project would not increase the demand for parks or trails or affect the access to recreational area[s] . . . .").

with which the Project will be consistent are detailed in Attachment 20, Project Consistency with County Policies.

Even if the Project is not consistent with every applicable individual land use policy, the Project can still be found consistent with the General Plan. Under the legal standard governing consistency determinations with land use plans, a project must only be in "harmony" with the applicable land use plan to be consistent with that plan. (*See Sequoyah Hills Homeowners Assn. v. City of Oakland* ("*Sequoyah Hills*") (1993) 23 Cal.App.4th 704, 717-18.) "Because policies in a general plan reflect a range of competing interests," an agency applying a land use plan to a project "must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purpose." (*San Franciscans Upholding the Downtown Plan v. the City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678.)[23]

As the Court further explained in *Sequoyah Hills*, "state law does not require an exact match between a proposed subdivision and the applicable general plan." (*Sequoyah Hills Homeowners Assn., supra,* 23 Cal.App.4th at p. 717.) To be "consistent" with a general plan, a project must be "compatible with the objectives, policies, general land uses, and programs specified in the applicable plan," meaning, the project must be "in agreement or harmony with the applicable plan." (*Id.* at pp. 717-18; *see also Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406; *San Franciscans Upholding the Downtown Plan, supra,* 102 Cal.App.4th at p. 678.) Further, "[a]n action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817.)

In sum, a project need not be consistent with every applicable policy in a general plan for that project to be consistent with the general plan. The analysis in Appendix G and in Attachment 20 to this letter show that the Project will further the overall objectives and policies of the County's General Plan and will not obstruct their attainment. Given the competing interests within one general plan, the County has discretion to weigh and balance those competing interests and can consider the Project in light of the General Plan's overall purpose.

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[23] The FEIR seems to have taken this very approach in assessing the consistency of the coastal access alternatives with the County policies. For example, the FEIR states: "[T]he introduction of increased human activity in the natural dune setting would create the increased potential for conflicts with the sensitive plant and wildlife species that currently exist at the site. Widening of the current access road would result in impacts to Mapped ESHA since most of the area west of the UPRR railroad tracks is Mapped ESHA... These impacts must be balanced against the potential benefit of providing public coastal access in this area to determine if development of the Coastal Access Project would be feasible at this location pursuant to CZLUO Section 23.04.420." FEIR p. 9-60.

## V. OTHER COMMENTS ON THE FEIR.

### A. The FEIR Discloses All Changes to the Refinery Operations as a Result of the Rail Spur Extension Project.

Section 2.6 of the FEIR provides an overview of the crude refining process, and correctly states that this process will not change as a result of the Project. Section 2.6 discusses the Refinery's design, types and sources of crude oil refined in recent years, and the characteristics of crude oils that may be delivered via unit trains as a result of the Project.

Comment ABJC-06 notes Phillips 66 corporate statements that the company aims to deliver what it calls "advantaged crudes" to its refineries, and suggests that the Rail Spur Extension Project is actually part of larger changes in the crude oil slate to be refined at the Santa Maria Refinery that have not been analyzed. (See also Comment ABJC-32.)

The response to Comment ABJC-06 correctly notes that the Rail Spur Extension Project does not involve any changes to the Refinery operating equipment that would allow a shift in the properties of the crude slate that the refinery is capable of refining. The Declaration of Mr. Bill Schroll confirms that the information in the FEIR is accurate and complete. (See Attachment 16, ¶ 12.)

In addition, Mr. Schroll explains the term "advantaged crude", as it is used by Phillips 66. In short, it simply means crude that can be delivered to a particular refinery at less cost than the delivered cost of benchmark Brent crude. (Schroll Declaration ¶ 7.) The Declaration of Ms. Maureen McCabe (Attachment 21) further notes that the Santa Maria Refinery is already operating nearly 100% advantaged crude. (McCabe Declaration ¶ 10.) Thus, there is no basis for the commenter's suspicions that the Rail Spur Extension Project will result in an undisclosed and unanalyzed shift in the Refinery's crude slate in order to achieve the company's objective of using cost advantaged crude oil.

### B. CEQA Review Has Not Been Impermissibly Piecemealed.

CEQA requires that an EIR analyze the entire project. A lead agency may not chop a larger project into smaller parts to avoid environmental review. Where environmental review is impermissibly chopped into smaller pieces, it is often referred to as "piecemealed" review.

ABJC-31 asserts that the Rail Spur Project is part of the Throughput Increase Project approved in 2013 and, therefore, the two projects should have been evaluated in a single EIR. This comment is premised on the belief that the processing rates approved in the Throughput Increase Project "could not be achieved but for the Rail Spur Project."

The premise is wrong. The Response to ABJC-31identifies many potential local sources of crude oil as well as transportation options that have and can continue to deliver crude to the Refinery from outside the region in amounts exceeding the processing rates approved in the Throughput Increase Project. In addition, the Declaration of Mr. Bill Schroll also dispels the premise in Comment ABJC 31 that the refining rates approved in the

Throughput Increase Project cannot be achieved without the Rail Spur Extension Project. In fact, the approved processing rates have been achieved already. (Schroll Declaration ¶ 13.)

**C. Detailed Comments on FEIR Mitigation Measures.**

Attachment 22 is a table with comments on several additional mitigation measures and other parts of the FEIR.

Again, we appreciate the effort that the County staff has expended in reviewing the proposed Rail Spur Extension Project, and look forward to the hearing on February 4-5, 2016.

Very truly yours,

ALSTON & BIRD LLP

Jocelyn Thompson

JNT
Attachments

cc: Ryan Hostetter
Whitney McDonald

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**List of Attachments**

| Attachment | Document | Relevance |
|---|---|---|
| 1 | Union Pacific Railroad Materials Regarding Rail Safety | Preemption |
| 2 | Railroad Memorandum of Mutual Understandings and Agreements, 1998 | Preemption |
| 3 | Air Resources Board/Railroad Statewide Agreement, 2005 | Preemption |
| 4 | Amicus Brief of California High Speed Rail Authority in *Friends of Eel River v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority, Case No. S222472* | Preemption |
| 5 | Supplemental Letter Brief of California High Speed Raul Authority in the matter of *Town of Atherton v. California High Speed Rail Authority*, Case No. C070877, filed August 9, 2013 | Preemption |
| 6 | California Interagency Rail Safety Working Group report: Oil by Rail Safety in California, June 10, 2014 | Preemption |
| 7 | Alon Crude Flexibility Project, Excerpts from Draft EIR, (unchanged in Final EIR certified by Kern County September 9, 2014) | Preemption |
| 8 | Valero Crude By Rail Project, Revised Draft EIR Appendix G (unchanged in Final EIR dated January 2016) | Preemption |
| 9 | City of Benicia Planning Commission, Staff Report dated January 28, 2016, regarding Valero Crude By Rail Project | Preemption |
| 10 | Letter from John Flynn of Nossamon LLP to Amy Million, City of Benicia, September 15, 2014 | Preemption |
| 11 | List of Preempted Mitigation Measures | Preemption |
| 12 | San Luis Obispo County Air Pollution Control District CEQA Air Quality Handbook, April 2012, Excerpt | Air Quality; County Policies |
| 13 | Letter from Mr. Paul Beard of Alston and Bird to Deputy County Counsel, Ms. Whitney McDonald, dated August 13, 2015 | ESHA |

| Attachment | Document | Relevance |
|---|---|---|
| 14 | California Coastal Commission Staff, "Executive Summary: Preliminary Report on the Periodic Review of the San Luis Obispo County LCP" (February 2, 2001). | ESHA |
| 15 | California Coastal Commission, "Preliminary Report. Periodic Review of the San Luis Obispo County Certified Local Coastal Program, Exhibit A in Report of July 12, 2001 (As Revised to Incorporate Errata/Clarifications of the July 12, 2001 Action). | ESHA |
| 16 | Declaration of Mr. Bill Schroll dated January 29, 2016 | ESHA; Project Description |
| 17 | Informal Transcription of Excerpts of Planning Commission Hearing of December 3, 2012 | Coastal Access |
| 18 | Letter from Ms. Kristen Kopp of Phillips 66 to Ms. Jessica Reed of the Coastal Commission dated January 23, 2015. | Coastal Access |
| 19 | Letter from Ms. Whitney McDonald, Deputy County Counsel, to Ms. Jessica Reed of the Coastal Commission dated March 23, 2015 | Coastal Access |
| 20 | Project Consistency with County Policies. | County Policies |
| 21 | Declaration of Ms. Maureen McCabe dated February 1, 2016 | Project Description |
| 22 | Additional Detailed Comments on the FEIR | Various |