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January 27, 2014

By: Email and Overnight Mail

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Department of Planning and Building
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San Luis Obispo, CA 93408-2040
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Re: Comments on the Draft Environmental Impact Report for the Phillips 66 Company Rail Spur Extension Project and Vertical Access Project Assessment

Dear Mr. Wilson:

We are writing on behalf of **Safe Fuel and Energy Resources California** (“**SAFER California**”) to comment on the Phillips 66 Company Rail Spur Extension Project Public Draft Environmental Impact Report and Vertical Access Project Assessment (“DEIR”), prepared for San Luis Obispo County pursuant to the California Environmental Quality Act (“CEQA”).¹ Phillips 66 proposes to modify an existing rail spur at its Santa Maria Refinery (“SMR”) and to construct a new offloading facility to accommodate up to 547,500,000 gallons (13,035,714 billion barrels)^{2,3} of annual crude oil shipments by rail to the SMR for processing at the SMR (“Project”).⁴ The offloading facility would be located at an existing coke storage area within the SMR. The Project includes unloading up to five trains per week, with an annual maximum number of trains expected to be approximately 250. The crude oil would be delivered to the SMR by unit and manifest trains. When delivered by manifest trains, a dedicated locomotive would remain on site to

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

² Phillips 66 Company Rail Spur Extension Project Public Draft Environmental Impact Report and Vertical Access Project Assessment at p. 2-21 (“DEIR”).

³ 2,190,000 x 250 = 547,500,000 gallons.

⁴ *Id.* at p. 2-21.

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move delivered railcars within the SMR. According to the DEIR, the refinery feedstock (i.e. crude oil) would be sourced from oilfields throughout North America, including North Dakota and Canada, depending on market economics.⁵

The Project is proposed within the Coastal Zone, approximately one half mile from Highway 1 and approximately sixteen miles northwest of Santa Maria in southern San Luis Obispo County. According to the DEIR, Project construction would occur within the SMR. The SMR and the Phillips 66 Rodeo Refinery are linked by a 200-mile pipeline, and are collectively referred to in the DEIR as the “San Francisco Refinery.”⁶ The Rodeo Refinery is located in Contra Costa County. In addition to being physically linked, the SMR and the Rodeo Refinery have integrated refining operations. The SMR processes heavy crude oil, and semi-refined liquid products are sent by pipeline from the SMR to the Rodeo Refinery for upgrading into finished petroleum products, such as butane and propane. The finished petroleum products are then shipped by rail to third party purchasers.⁷

Phillips 66 seeks a Conditional Use Permit from San Luis Obispo County authorizing the extension of the existing rail spur, construction of the unloading facility, new on-site transfer conveyance (pipelines), a restroom, an unpaved eastern Emergency Vehicle Access route between the eastern end of the rail spur and Highway 1, as well as work within the existing refinery connecting and upgrading existing infrastructure, including adding a new electricity cable to an existing pipeway and adding a new fire water pipeline to an existing pipe rack.⁸ The Project also requires authorizations from the San Luis Obispo County Air Pollution Control District (“APCD”), a National Pollution Discharge Elimination System (“NPDES”) permit from the State Water Resources Control Board, and a Coastal Development Permit from the County. The Project may also require Incidental Take Permits from the U.S. Fish and Wildlife Service (“USFWS”) and the California Department of Fish and Wildlife (“CalFWS”) for the federally endangered Nipomo lupine and a Report of Waste Discharge (“RWD”) from the Central Coast Regional Water Control Board.

⁵ DEIR, at p. 2-21.

⁶ *See id.* at p. 2-3.

⁷ *See ibid.*; Contra Costa Department of Conservation and Development, Propane Recovery Project Draft Environmental Impact Report, June 2013, at pp. ES-5, 1-1 *available at* <http://www.contracosta.ca.gov/documentcenter/view/26612> (“Propane Recovery Project DEIR”).

⁸ ARCADIS, Santa Maria Refinery Rail Project Land Use Application, Appendix A, June 2013, at p. 1 (“Project Land Use Application”).

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Based upon our review of the DEIR, County records, as well as pertinent public records in the possession of other agencies, we conclude that the DEIR is so inadequate under CEQA that it must be withdrawn. As a preliminary matter, the DEIR fails to include a complete and accurate description of the Project by excluding from the Project description the proposed change in SMR feedstock, the equipment and process changes that would be necessary to allow the SMR to refine Bakken field crudes, and to identify the Throughput Increase Project and the Rodeo Refinery Propane Recovery Project as part of the Project. As a result the DEIR fails to identify and mitigate the Project's potentially significant environmental impacts. In addition, the DEIR fails to provide a sufficiently detailed environmental setting for air quality, odors and hazards and fails to identify and reduce the Project's potentially significant impacts to air quality, public and worker health and safety, as well the Project's significant climate change impacts. The DEIR also fails to incorporate feasible mitigation into the Project to reduce the significant air quality impacts that are identified in the DEIR, and several of the water quality and air quality mitigation measures that are incorporated in the DEIR are otherwise inadequate and must be revised. These defects render the DEIR inadequate as an informational document.

The DEIR is also invalid because it fails to satisfy CEQA's basic requirements for format and content. In particular, the DEIR fails to include a Project hazards impacts analysis that can be understood by the public and decisionmakers. The hazards analysis included in the DEIR is convoluted, incomprehensible to the average reader, relies on outdated information and is otherwise unsupported. The numerous defects in the County's analysis, set forth in greater detail in the following paragraphs, are fatal errors. The County must withdraw the DEIR and prepare a revised DEIR which fully complies with CEQA.

We prepared these comments with the assistance of air quality expert Petra Pless, Ph.D. Dr. Pless's technical comments are attached hereto and submitted in addition to the comments in this letter. Accordingly, the County must address and respond to the comments of Dr. Pless separately.

I. INTEREST OF COMMENTORS

SAFER California advocates for safe processes at California refineries to protect the health, safety, the standard of life and the economic interests of its members. For this reason, SAFER California has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential

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environmental impacts of, and ensure safe operations and processes for, California oil refineries. Failure to adequately address the environmental impacts of crude oil transport and refining processes poses a substantial threat to the environment, worker health, surrounding communities, and the local economy.

Refineries are uniquely dangerous and capable of generating significant fires and the emission of hazardous and toxic substances that adversely impact air quality, water quality, biological resources and public health and safety. These risks were recognized by the Legislature and Governor when enacting SB 54 (Hancock). Absent adequate disclosure and mitigation of hazardous materials and processes, refinery workers and surrounding communities may be subject to chronic health problems and the risk of bodily injury and death. Additionally, rail transport of crude oil has been involved in major explosions, causing vast economic damage, significant emissions of air contaminants and carcinogens and, in some cases, severe injuries and fatalities.

Poorly planned refinery projects also adversely impact the economic wellbeing of people who perform construction and maintenance work in the refinery and the surrounding communities. Plant shutdowns in the event of accidental release and infrastructure breakdown have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER California are also concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER California live, work, recreate and raise their families in San Luis Obispo County, including the towns of Arroyo Grande and Santa Maria. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of SAFER California's participating unions may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

SAFER California includes Mr. Ian Ostrov, who lives and works in the vicinity of the Project. SAFER California also includes Mr. Gene Sewell who lives and works in Arroyo Grande, California.

II. LACK OF TIMELY INFORMATION AND POTENTIAL NEED TO SUBMIT FURTHER COMMENTS

The County was required, but failed to make the DEIR and all documents relied on in the DEIR available for the duration of the public comment period.⁹ Access to these materials was essential to our review and evaluation of the County's draft findings. Despite our efforts to obtain immediate access to all materials referenced in the DEIR on the first day of the public comment period, the County finally granted us access to these materials only twelve days before the end of the public comment period.

The County released the DEIR for public review on November 27, 2013, the day before the Thanksgiving Holiday. On the same day, our office emailed a records request to the County for immediate access to documents referenced in the DEIR.¹⁰ On December 11, 2013, the County informed us in writing that documents referenced in the DEIR would be provided to our firm by December 13, 2013.¹¹ Our office did not receive the responsive materials until December 16th.¹²

On December 24, 2013, our office sent a second request for documents referenced in the DEIR.¹³ In a letter dated December 30, 2013, the County indicated that additional responsive materials may be forthcoming.¹⁴ On January 3, 2014, our office received a letter from the County confirming that certain records may have been excluded from the County's December 16th production and that the

⁹ See Pub. Resources Code, § 21092 subd. (b)(1); Cal. Code Regs., tit. 14, § 15087(c)(5).

¹⁰ See Letter from Meghan A. Quinn to Murry Wilson regarding Request for Immediate Access to DEIR and Documents Referenced in the DEIR – Phillips 66 Rail Spur Extension Project and Vertical Coastal Access Project, SCH # 2013071028, Nov. 27, 2013, attached as **Attachment 1**.

¹¹ See Letter from Rita L. Neal to Meghan A. Quinn, regarding Public Records Act Request Dated November 27, 2013 Phillips Rail Spur Extension Project, Dec. 11, 2013, attached as **Attachment 1**.

¹² See Letter from Rita L. Neal to Meghan A. Quinn, regarding Public Records Act Request Dated November 27, 2013 Phillips 66 Rail Spur Extension Project, Dec. 13, 2013 (stamped received December 16, 2013), attached as **Attachment 1**.

¹³ See Letter from Elizabeth Klebaner to Dan Buckshi and Annette Ramirez, regarding Phillips 66 Company Rail Spur Extension and Vertical Access Project (SCH # 2013071028), attached as **Attachment 1**.

¹⁴ See Letter from Rita L. Neal to Meghan A. Quinn, regarding Public Records Act Request Dated November 27, 2013 Phillips 66 Rail Spur Extension Project and Vertical Coastal Access Project, Dec. 30, 2013, attached as **Attachment 1**.

remaining records would be sent on January 10, 2014.¹⁵ The County completed its response to our November 27, 2013 request for all documents relied on in the DEIR on January 15, 2014.

On January 9, 2014, we requested an extension of the public comment period to allow an opportunity to review the materials provided by the County. Our request was denied. Accordingly, we provide these initial comments on the DEIR and, if necessary, we may submit supplemental comments on the DEIR at a future date.

III. THE PROJECT DESCRIPTION IS INADEQUATE

CEQA Guidelines section 15378 defines “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.”¹⁶ “The term “project” refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval.”¹⁷ Courts have explained that “[a] complete project description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all “*reasonably foreseeable* consequence[s] of the initial project.”¹⁸ “If a[n] . . . EIR. . . does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law.”¹⁹

The DEIR fails to meet CEQA’s requirements for an adequate project description, by omitting from the analysis the reasonably foreseeable consequences of the Rail Spur Extension Project. In particular, the DEIR fails to identify and analyze reasonably foreseeable changes to existing SMR feedstock, and the related environmental impacts. The DEIR also fails to identify and analyze the separately

¹⁵ See Letter from Rita L. Neal to Elizabeth Klebaner regarding Public Records Act Request Dated December 24, 2013 Phillips 66 Rail Spur Extension Project, Jan. 3, 2014, attached as **Attachment 1**.

¹⁶ 14 Cal.Code Regs, tit. 14, §15378 (“CEQA Guidelines”).

¹⁷ CEQA Guidelines, 15378 subd. (c).

¹⁸ *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, emphasis added; see also *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.

¹⁹ *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.
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proposed but related Rodeo Refinery Propane Recovery Project and the SMR Throughput Increase Project as part of the Project in the DEIR. These defects in the County's analysis, set forth in greater detail in the following paragraphs, are fatal errors. The County must withdraw the DEIR and prepare a revised DEIR which complies with CEQA.

A. The DEIR Fails to Identify and Address the Change in Refinery Feedstock

In *Communities for a Better Environment v. City of Richmond*, the First District Court of Appeal held that an EIR for a refinery project must disclose whether the proposed equipment and facility changes would allow the refinery to process heavier crude where a change in feedstock is a reasonably foreseeable consequence of the proposed project.²⁰ There, petitioners argued that the EIR was inadequate because the project description failed to clearly and consistently state whether the project would facilitate the future processing of heavier crudes at the refinery, and to analyze the consequences of such a change.²¹ In that case, the EIR acknowledged that the proposed project would allow the refinery to process a wider range of crude oils, including crude that contains a higher amount of sulfur and associated contaminants.²² However, the lead agency denied claims that the refinery would also be able to process heavier crudes than before.²³ Petitioners pointed to conflicting statements in the EIR and the project proponent's SEC filings, as well as the project proponent's rejection of a permit limitation precluding the alteration of the baseline crude slate mix, all of which suggested that the project would, contrary to the lead agency's claim, enable the refinery to process heavier crudes.²⁴ The court agreed with petitioner that a crude switch was reasonably foreseeable and invalidated the EIR "because the EIR's project description ... [was] inconsistent and obscure as to whether the Project enables the Refinery to process heavier crudes."²⁵

Here, the DEIR suffers from the same error. The DEIR fails to disclose that the Project would facilitate a change to the current feedstock at the SMR. As in the case of *Communities for a Better Environment v. City of Richmond*, a change in

²⁰ See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89.

²¹ See *id.* at p. 83.

²² *Id.* at pp. 76-77.

²³ See *ibid.*

²⁴ *Id.* at pp. 83-85.

²⁵ See *id.* at p. 89.

feedstock is reasonably foreseeable from statements in the DEIR and publicly available information. Statements in the DEIR and Phillips 66's public representations all suggest that Phillips 66 is undertaking the Project in order to access competitively priced crudes, which substantial evidence shows are chemically distinct from the current feedstock.

According to the DEIR, the purpose of the Project is "to allow SMR to access a full range of competitively priced crude oil" by providing the capability to source feedstock from North American sources that are served by rail.²⁶ The DEIR further provides that feedstock deliveries "will be sourced from oilfields throughout North America based on market economics and other factors [and that] these [sources] could include fields as far away as the Bakken field in North Dakota or Canada."²⁷ "The most likely sources of crude oil for the SMR would be North Dakota, Canadian and Mid Continental area."²⁸ This crude is chemically distinct from the crude that is currently processed at the SMR. The current refinery feedstock is heavy, non-volatile sour crude, whereas Bakken crude is a light, sweet crude with a high American Petroleum Institute ("API") gravity and a low sulfur content. The North American sources of crude referenced in the DEIR include Canadian tar sands crudes. These crudes are also chemically distinct from the current feedstock, containing large quantities of volatile diluents and toxic chemicals and requiring more heat and energy to refine than the current feedstock.

Further evidence of a crude switch is the DEIR's admission that the Project is necessary to offset the decline in locally sourced crudes currently processed at the SMR. The DEIR states that "if and when local crude oil production (the current major source of oil for the SMR) declines, the Rail Spur Project, if approved would allow the SMR to maintain operating up to its permitted throughput levels."²⁹ The Santa Maria Refinery currently receives all crude oil by pipeline from various, primarily local sources, including the Outer Continental Shelf, Price/Canyon/Santa Maria Valley/San Joaquin Valley, San Ardo and Canada (2-7%).³⁰ Most of these crudes are in decline, particularly offshore sources which are a major feedstock source for the SMR.³¹ As explained above, these local crudes are chemically distinct

²⁶ DEIR at p. 2-1; *see also* Project Land Use Application, Appendix A, June 2013, at p. 1.

²⁷ DEIR at p. 2-21.

²⁸ DEIR at p. 4.12-21.

²⁹ *Ibid.*

³⁰ *See* DEIR at p. 2-27.

³¹ *See* DEIR at pp. 6-3, 2-30.

from the North American crudes that could be imported by rail to the SMR if and when the Project is approved.

Public statements by Phillips 66 also strongly suggest that the purpose of the Project is to allow Phillips 66 to change the feedstock at the SMR to “advantaged” North American crudes. Advantaged crudes are competitively priced because they are stranded, with no pipeline access, and must be delivered by rail. Advantaged crudes include tar sands and Bakken crudes. According to Phillips 66’s website, the challenge for refiners like Phillips 66 is getting the advantaged crude oil to the refineries that are equipped to process it.³² Phillips 66’s Chief Executive Officer Greg Garland states that the company is “looking at pipe, rail, truck, barge and ship – just about any way . . . [it] can get advantaged crude to the front end of the refineries.”³³ According to Phillips 66, until new pipelines projects come online, the easiest and most cost efficient way to get advantaged crude to some of Phillips 66’s refineries is by rail.³⁴ Jay Clemens, manager of Business Development for Phillips 66 and the leader of the advantaged crude strategy team states that the company’s refineries are not currently setup to take delivery of large volumes of crude oil from trains, “so we’re looking at building rail offloading facilities at several refineries”³⁵ According to Phillips 66, the next challenge is identifying strategies to get more advantaged crude oil to its California refineries.³⁶ Mr. Clemens states “California refineries are capable of running a wide range of crude oils which creates opportunities throughout North America to supply California if we can find a cost effective mode of transportation.”³⁷

Finally, a change in crude is reasonably foreseeable here because it is clearly in Phillips 66’s financial interest. According to Phillips 66, “[t]he single biggest lever . . . [Phillips 66 has] to improve value in . . . [its] refining business is through lowering . . . feedstock costs. A savings of \$1 per barrel . . . is worth about \$450 million of net income”³⁸ Advantaged crude oil sells at a discount relative to crude oils tied to the global benchmark, North Sea crude. Canadian tar sands

³² Phillips 66, *Phillips 66 Delivers Advantaged Crude Strategy*, available at <http://www.phillips66.com/EN/newsroom/feature-stories/Pages/AdvantagedCrude.aspx> (last accessed Jan 21, 2014), attached as **Attachment 2**.

³³ *Id.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

crudes have been identified as the most competitively priced crudes to import into California by rail.³⁹

The reasonably foreseeable crude switch from local heavy crudes to Bakken and/or North American shale and Canadian tar sands crudes is significant in that it will change the scope and nature of the Project's environmental impacts. The composition of crude slate determines a project's impacts on air quality, odors, public health and hazards and are relevant to, processing, as well as transporting and unloading the crude. The chemical composition of crude also determines its corrosive qualities, increasing the chance of accidental release and catastrophic events. Cost advantaged crudes in particular have been linked with such events, as demonstrated by the August 2012 catastrophic fire at the Chevron Richmond Refinery. The County is required to revise the DEIR to disclose that the Project would facilitate a change in feedstock at the SMR. The County is also required to disclose the chemical composition of the crude that could be processed at the SMR, as compared to current conditions, and analyze the environmental consequences of the change.

B. The Project Description Fails to Include the Equipment Changes Necessary to Process Bakken Crudes

The DEIR states that the Project would enable the SMR to receive rail deliveries of Bakken field crudes.⁴⁰ The SMR is designed to refine heavy, high sulfur crudes. As described above, Bakken crude is a light sweet crude with a high API gravity and a low sulfur content. The SMR is not designed to process light sweet crude. While small amounts of Bakken could be blended with locally sourced or heavy high sulfur crudes or imported tar sand crudes without significant refinery design changes, it is unlikely that Bakken crudes could comprise a large fraction of the SMR crude slate without major capital projects.

Since the Project proposes to import up to 100 percent of the Refinery's permitted crude capacity by rail and identifies Bakken crude as a potential feedstock, the DEIR must disclose the upgrades necessary to refine the crude. These changes are a reasonably foreseeable consequence of the Project and will change the scope and severity of the Project's environmental impacts. The County

³⁹ See Valero, UBS Global Oil and Gas Conference, May 21-22, 2013, at p.10, available at <http://www.valero.com/InvestorRelations/Pages/EventsPresentations.aspx>.

⁴⁰ See DEIR at p. 2-21.
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should require Phillips 66 to provide a complete Project description and include the description in a revised DEIR.

C. The DEIR Violates CEQA's Prohibition on Piecemeal Environmental Review

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a “piecemeal” approach and requires review of a project’s impacts as a whole.⁴¹ CEQA mandates “that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences.”⁴² Before approving a project, a lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.⁴³ “The significance of an accurate project description is manifest where,” as here, “cumulative environmental impacts may be disguised or minimized by filing numerous, serial applications.”⁴⁴

The California Supreme Court held that an EIR must treat activities as part of the project where the activities at issue are “a reasonably foreseeable consequence of the initial project and the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”⁴⁵ Both elements are met here. The Project is a reasonably foreseeable consequence of the Throughput Increase and Propane Recovery projects, and will change the scope of each project’s environmental effects. These separately proposed changes within the San Francisco Refinery must be analyzed as one Project in the revised DEIR.

The SMR Throughput Increase Project was proposed by Phillips 66 to increase the maximum limit of crude oil throughput at the SMR by 10 percent.⁴⁶

⁴¹ CEQA Guidelines, § 15378, subd. (a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.

⁴² *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.

⁴³ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school’s occupancy of a new medical research facility).

⁴⁴ *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1346.

⁴⁵ *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396.

⁴⁶ Phillips Santa Maria Refinery, Throughput Increase Project FEIR, Nov. 2012, at p. ES-1. 3017-006cv

According to the Throughput Increase Project FEIR, the project would potentially increase the volumes of crude oil delivered to the SMR and increase the volume of products leaving the SMR by pipeline to the Rodeo Refinery, among other changes.⁴⁷ The County and the APCD jointly approved the Throughput Increase Project in 2013.

Phillips 66 proposed the Propane Recovery Project at the Rodeo Refinery in June 2012.⁴⁸ The purpose of that project is to modify existing facilities at the Rodeo Refinery to enable the Rodeo Refinery to recover propane from refinery fuel gas and other process streams and ship it by rail and truck for sale.⁴⁹ Contra Costa County released an FEIR for the project in November 2013. The County's approval of the Propane Recovery Project has been appealed to the Contra Costa County Board of Supervisors and the appeal is expected to be heard in April 2014.

As described by Dr. Petra Pless in her comments, information contained in the Project DEIR makes clear that the throughput increase at the SMR could not be realized but for the crude oil that would be brought in by rail.⁵⁰ In particular, the DEIR indicates that the SMR would be unable to continue operating at current throughput levels if the Rail Spur Project were not implemented.⁵¹ According to the DEIR, the bulk of the crude oil currently processed at the SMR (60 to 85 percent) is currently delivered via pipeline from offshore platforms in the Outer Continental Shelf of Santa Barbara.⁵² This pipeline system is currently the only way that the SMR can receive crude oil.⁵³ While crude oil can also be trucked to the Santa Maria Pump Station and then placed into the pipeline, truck deliveries to the Santa Maria Pump Station are limited to a permitted maximum of 26,000 barrels per day,⁵⁴ far below the SMR's throughput limit of 48,950 barrels per day sought by the SMR Throughput Increase Project.⁵⁵ Thus, absent further permit revisions, any additional crude would have to be brought in to the SMR by rail.

⁴⁷ *Id.* at p. ES-4.

⁴⁸ Phillips 66 Rodeo Refinery Rodeo, California Rodeo Propane Recovery Project Land Use Permit Application, June 2012, attached **Attachment 3**.

⁴⁹ *Id.* at p. 1.

⁵⁰ Pless Comments at pp. 2-5, attached as **Attachment 4**.

⁵¹ *Id.*

⁵² *See id.*, citing DEIR, at pp. 2-27 and 2-30.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *See id.*, citing SMR Throughput Increase FEIR, at p. 2-24.

As further documented by Dr. Pless, crude oil production in California has been in substantial decline for decades.⁵⁶ For example, the DEIR discloses that crude oil production in Santa Barbara County, both onshore and off-shore, has declined to 30,000 barrels per day.⁵⁷ Given the limitations on truck import to the Santa Maria Pump Station and the long-standing knowledge of a declining crude oil supply,⁵⁸ particularly from the off-shore sources in the Outer Continental Shelf, Dr. Pless concludes that it is highly unlikely that Phillips 66 would have sought an increase in throughput at the SMR without simultaneously contemplating additional ways to deliver crude oil to the facility.⁵⁹ In other words, a throughput increase cannot be implemented at the SMR unless Phillips 66 can import crude to offset declining local crude supplies. Dr. Pless's analysis makes clear that the Project is a reasonably foreseeable consequence of the Throughput Increase Project.

As further described by Dr. Pless in her comments, the Propane Recovery Project cannot be implemented but for the Rail Spur Extension Project. The Throughput Increase Project, the Propane Recovery Project and the Project are all inextricably linked.⁶⁰

The Project will also will likely change the scope or nature of the environmental effects of the Throughput Increase Project and the Propane Recovery Project.⁶¹ As described above and in the comments of Dr. Pless, cost-advantaged North American crude is chemically distinct from the crude that is currently processed at the SMR. A change in the chemical composition of the SMR crude would also alter the chemical composition and the environmental impacts of the semi-refined products that would be sent from the SMR to the Rodeo Refinery to be converted into sellable petroleum products.

The fact that the Throughput Increase Project has already been approved does not negate the requirement for preparing a revised DEIR which analyzes the

⁵⁶ Pless Comments at pp. 3-4.

⁵⁷ DEIR, p. 2-30.

⁵⁸ *See, e. g.*, California Energy Commission, California Crude Oil Production and Imports, CEC-600-2006-006, April 2006, Figure 2, p. 4; <http://www.energy.ca.gov/2006publications/CEC-600-2006-006/CEC-600-2006-006.PDF>; and California Energy Commission, Transportation Energy Forecasts and Analyses for the 2009 Integrated Energy Policy Report, CEC-600-2010-002-SF, May 2010, p. 6; <http://www.energy.ca.gov/2010publications/CEC-600-2010-002/CEC-600-2010-002-SF.PDF>.

⁵⁹ *See* Pless Comments at pp. 4-5.

⁶⁰ *Id.*

⁶¹ *See id.*

whole of the Project. The requirement to evaluate the whole of a project applies even where one of the phases has already undergone prior environmental review. It was precisely such piecemealing that was rejected by the Second District in the *Natural Resources Defense Council v. City of Los Angeles* case.⁶² In that case, the Port of Los Angeles analyzed Phase 2 of a three-phase project in a negative declaration. The Court held that an EIR was required to analyze the entire three-phase project as a whole, even though earlier CEQA review had been completed on Phase I of the project.⁶³ Similarly here, the County must prepare a revised DEIR to analyze the impacts of the Project, together with the Throughput Increase Project and the Propane Recovery Project, rather than analyzing each individual proposal as unrelated and distinct projects.

IV. THE DESCRIPTION OF THE ENVIRONMENTAL SETTING IN THE DEIR IS INADEQUATE

CEQA requires the lead agency to include a description of the physical environmental conditions in the vicinity of a project as they exist at the time environmental review commences.⁶⁴ The description of the environmental setting constitutes the baseline physical conditions by which a lead agency may assess the significance of a project's impacts. The EIR must also describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁶⁵

Describing the environmental setting accurately and completely for each environmental condition in the vicinity of the project is critical to an accurate, meaningful evaluation of environmental impacts. The courts are clear that, “[b]efore the impacts of a Project can be assessed and mitigation measures considered, an [environmental review document] must describe the existing environment.”⁶⁶ It is:

a central concept of CEQA, widely accepted by the courts, that the significance of a Project's impacts cannot be measured unless the DEIR

⁶² *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 284.

⁶³ *Id.*

⁶⁴ CEQA Guidelines, § 15125 subd. (a); see also *Communities for A Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 321.

⁶⁵ *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

⁶⁶ *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.
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first establishes the actual physical conditions on the property. In other words, baseline determination is the first rather than the last step in the environmental review process.⁶⁷

Additionally, it is axiomatic that the baseline information on which an EIR relies must constitute substantial evidence.⁶⁸ The CEQA Guidelines define “substantial evidence” as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion.”⁶⁹ “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” “[U]nsubstantiated opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence.”⁷⁰

The DEIR fails to establish the environmental setting for air quality, hazards, odors, toxic air contaminants and public health because the information presented in the DEIR is not sufficiently detailed. The County must revise the DEIR to include an adequate description of the environmental setting. Absent this information, the County cannot conclude that the Project’s potentially significant impacts have been reduced to a less than significant level.

A. The DEIR Fails to Establish the Environmental Setting for Air Quality Resources

An EIR must describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁷¹ The stated objective of the Project is for Phillips 66 to gain access to “a full range of competitively priced crude oil by providing [the SMR with] the capability to source raw material from North American sources that are served by rail.”⁷² The chemical composition of crude oil varies significantly depending on its geographic location which, in turn, changes the air quality impacts of refining the crude. Thus, the DEIR must identify the

⁶⁷ *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125.

⁶⁸ See CEQA Guidelines, §15063 subd. (a)(3) (“An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings.”).

⁶⁹ CEQA Guidelines, §15384.

⁷⁰ Pub. Resources Code, § 21082.2 subd. (c).

⁷¹ *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

⁷² DEIR, at p. 2-1.

chemical composition of the current feedstock in order to determine the environmental impacts of the reasonably foreseeable crude switch.

The Air Quality section of the DEIR fails to identify the chemical composition of the current SMR feedstock. As Phillips 66 proposes to change the current SMR feedstock by supplying the refinery with advantaged North American crudes, the Project's environmental impacts cannot be accurately assessed unless the DEIR fully discloses the baseline feedstock and assesses the environmental consequences of transitioning the SMR to refining advantaged North American crudes. In particular, when assessing the future feedstock's potential emissions it is necessary to consider the properties (*e.g.*, emission rates, toxic compounds) of the existing feedstock. The DEIR fails in this regard.

While the DEIR enumerates the existing pollutant-emitting stationary and mobile sources at the SMR, the information provided in the DEIR is insufficient to enable a proper analysis of the Project's impacts.⁷³ Volatile chemicals and toxic air contaminants in crude are emitted from tanks, pumps, connectors and valves involved in transporting, storing and refining the crude. The nature and amount of emissions and releases is largely dependent on the chemical composition of the feedstock. Certain crudes also require additional energy to refine, resulting in increased combustion emissions. For these reasons, the DEIR must be revised to disclose the chemical composition of the baseline crude. The Project's impacts cannot be accurately assessed absent this data. In addition, absent disclosure of the baseline feedstock, it is impossible for the public and the decisionmakers to assess the accuracy of the assumptions relied upon in the DEIR, including whether emissions rates and air contaminants relied on in the DEIR are representative of actual conditions.

B. The DEIR Fails to Establish the Environmental Setting for Odors

An EIR must describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁷⁴ The stated objective of the Project is for Phillips 66 to gain access to "a full range of competitively priced crude oil by providing [the SMR with] the capability to source raw material from North

⁷³ See DEIR at pp. 4.3-17-22.

⁷⁴ *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.
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American sources that are served by rail.”⁷⁵ The chemical composition of crude oil varies significantly depending on its geographic location which, in turn, changes the odor impacts of refining the crude.

While the DEIR enumerates the existing odiferous processes at the SMR, the information provided in the DEIR is insufficient to enable a proper analysis of the Project’s impacts.⁷⁶ The Air Quality section of the DEIR fails to identify the chemical composition of the current SMR feedstock. As Phillips 66 proposes to change the current SMR feedstock by supplying the refinery with advantaged North American crudes, the Project’s environmental impacts cannot be accurately assessed unless the DEIR fully discloses the baseline feedstock and assesses the environmental consequences of transitioning the SMR to refining advantaged North American crudes. The DEIR fails in this regard.

While the DEIR enumerates the existing odor-emitting stationary and mobile sources at the SMR, the information provided in the DEIR is insufficient to enable a proper analysis of the Project’s impacts.⁷⁷ Odiferous chemicals are emitted from tanks, pumps, connectors and valves involved in transporting, storing and refining the crude. The nature and amount of emissions and releases is largely dependent on the chemical composition of the feedstock. For these reasons, the DEIR must be revised to disclose the chemical composition of the baseline crude. The Project’s impacts cannot be accurately assessed absent this data. In addition, absent disclosure of the baseline feedstock, it is impossible for the public and the decisionmakers to assess the accuracy of the assumptions relied upon in the DEIR, including whether emissions rates and air contaminants relied on in the DEIR are representative of actual conditions.

C. The DEIR Fails to Establish the Environmental Setting for Hazards

An EIR must describe the existing environmental setting in sufficient detail to enable a proper analysis of project impacts.⁷⁸ The stated objective of the Project is for Phillips 66 to gain access to “a full range of competitively priced crude oil by providing [the SMR with] the capability to source raw material from North

⁷⁵ DEIR, at p. 2-1.

⁷⁶ See DEIR at p. 4.3-22.

⁷⁷ See DEIR at pp. 4.3-17-22.

⁷⁸ *Galante Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1121-22.

American sources that are served by rail.”⁷⁹ While not express in the DEIR impact analysis for hazards, the DEIR suggests that the SMR currently receives feedstock exclusively by pipeline (and, indirectly, by truck).⁸⁰ Elsewhere, the DEIR provides:

[T]he bulk of the crude oil processed at the SMR is delivered via pipeline from offshore platforms in the Outer Continental Shelf of Santa Barbara County and from oil fields in the Santa Maria area. This pipeline system is currently the only way that the Phillips 66 refinery can receive crude oil. Crude oil can be trucked to the Santa Maria Pump Station and then placed into the pipeline for delivery to the refinery. Truck delivery to the Santa Maria Pump Station is limited to a permitted maximum of 819,000 gallons (26,000 bbls) per day by the Santa Barbara County APCD. Having only one pipeline system available for delivering crude oil to the refinery limits the refinery’s ability to obtain crude oil from sources outside of the local area.⁸¹

The environmental setting for hazards must be revised to clearly state that currently, feedstock is delivered to the SMR exclusively by pipeline, and assess the hazards of transitioning feedstock deliveries to rail.

V. THE DEIR FAILS TO IDENTIFY AND REDUCE POTENTIALLY SIGNIFICANT AIR QUALITY IMPACTS

In the following sections, we address the DEIR’s analysis of the Project’s environmental impacts as discussed in the DEIR. Accordingly, the following comments analyze the potentially significant impacts that would result from the Rail Spur Extension Project alone. The potentially significant impacts discussed here would be more severe if all Project components – the Rail Spur Extension Project, the Throughput Increase Project, the Propane Recovery Project, the

⁷⁹ DEIR, at p. 2-1.

⁸⁰ See, e.g., DEIR at pp. 4.3-18, 4.7-33 (“Currently, the rail operations associated with the Phillips 66 Refinery consist of the *export* of petroleum coke from the SMR for commercial use throughout the U.S. and abroad”)(emphasis added), 4.7-37 (“Materials transported by pipeline could cause impacts if those materials are spilled. Crude oil transported from the Santa Maria Pump Stations....”), 4.7-39, 4.3-65 (“The majority of crude oil currently being delivered to the SMR is from offshore, Outer Continental Shelf (OCS) sources, which are delivered to the SMR by pipeline and electrically power pumps...”).

⁸¹ DEIR at p. 2-30.

equipment changes necessary to allow the SMR to process Bakken crudes, etc. – were analyzed together.

A. The DEIR Substantially Underestimates Operational ROG Emissions

The DEIR concludes that emissions of ROGs and NO_x would exceed daily and annual emissions thresholds and are significant.⁸² However, as demonstrated by Dr. Pless, the Project's ROG emissions are dramatically higher than disclosed in the DEIR. It is a foundational principle of CEQA that the analyses and the conclusions in an EIR must be supported by substantial evidence. Substantial evidence is defined to include "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."⁸³ "[E]vidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence."⁸⁴ Dr. Pless documented in her comments that the calculations underlying the ROG emissions estimates in the DEIR are plainly erroneous and, therefore, unreliable.

In particular, the DEIR preparers failed to rely on emissions factors specifically adopted for refineries to calculate fugitive Project ROG emissions.⁸⁵ The DEIR and the underlying analyses also fail to substantiate this significant discrepancy in the analysis. Using the appropriate emissions factors, Project operational ROG emissions amount to 150 pounds per day ("lbs/day"), or about **24 times greater than the emission rate disclosed in the DEIR.**⁸⁶ Similarly, annual ROG emissions would amount to approximately 27 tons per year, or approximately **27 times the emission rate disclosed in the DEIR.**⁸⁷ The DEIR must be revised to disclose the actual severity of the Project's air quality impacts.

B. The DEIR Fails to Require Feasible Mitigation Measures to Reduce ROG and Diesel Particulate Emissions

An EIR is inadequate unless it includes "a detailed statement setting forth... mitigation measures proposed to minimize [the project's] significant effects on the

⁸² See DEIR at p. 4.3-43.

⁸³ CEQA Guidelines, § 15384.

⁸⁴ CEQA Guidelines, § 15384 subd. (a).

⁸⁵ See Pless Comments at pp. 8-11.

⁸⁶ See *id.*

⁸⁷ *Ibid.*

environment.”⁸⁸ CEQA requires lead agencies to incorporate all feasible mitigation measures into a project to reduce the project’s potentially significant impacts to a level of insignificance.⁸⁹ The DEIR finds that Project operational emissions of ROG_s and diesel particulate emissions are potentially significant and proposes a series of off-site mitigation measures to reduce impacts to a less than significant level.⁹⁰ However, as demonstrated by Dr. Pless in her comments, on-site mitigation measures are feasible and more effective at reducing emissions, and should be included in the DEIR. Moreover, on-site measures should be included in the DEIR for the County’s consideration in the event that Phillips 66 objects to the proposed off-site mitigation, or if the off-site mitigation is determined to be infeasible.

As summarized by Dr. Pless, on-site mitigation should include installation of additional, more efficient control technologies on existing units at the SMR and the Santa Maria Pump Station such as, for example, vapor recovery units, replacement of leaking components, installation of leakless components, installation of low NO_x burners or replacement of older, high-emitting equipment.⁹¹ In addition, the County should require use of best available control technology (“BACT”) for the Project carbon canisters. The DEIR proposes a removal efficiency of at least 95 percent. However, much higher removal efficiencies can be achieved with carbon canisters (99 percent or greater) or thermal incinerators (99.8 percent).⁹²

Substantial evidence supports the finding that the above measures are feasible and effective at reducing emissions. Moreover, on-site measures should be considered because ROG emissions would more severe than disclosed and in the event that mitigation included in the DEIR is rejected by Phillips 66 or determined to be infeasible. The County should prepare a revised DEIR which includes a consideration of on-site mitigation measures to reduce Project operational emissions, and circulate its analysis for public and agency review and comment.

⁸⁸ See Pub. Resources Code, § 21100 subd. (b)(3); see also CEQA Guidelines, §§ 15126 subd. (e).

⁸⁹ See Pub. Resources Code, § 21081 subd. (a)(1)-(3); CEQA Guidelines, §§ 15002 subd. (a)(3), 15021 subd. (a)(2), 15091 subd. (a)(1).

⁹⁰ See DEIR at pp. 4.3-43-46.

⁹¹ See Pless Comments, at pp. 12-13.

⁹² See *id.*

C. The DEIR Fails to Identify a Potentially Significant Child Cancer Risk at Nearby Residences

The DEIR recognizes that operational activities associated with the Project would result in emissions of toxic air contaminants from fugitive emissions sources (e.g., valves, pumps, and vapor recovery canisters) and diesel exhaust from locomotive engines.⁹³ The DEIR's health risk assessment estimates excess cancer risks at the SMR parcel boundary immediately south of the rail spur location of up to 78.1 in one million at the Point of Maximum Impact ("PMI") and the highest excess cancer risk at a residential or sensitive receptor parcel boundary of 9.7 in one million.⁹⁴ The DEIR then concludes that because excess cancer risk at the residential receptor would be below the APCD's significance threshold of 10 in one million, the health risk impacts would be less than significant.⁹⁵ The DEIR's conclusion is invalid because it is unsupported.

As demonstrated by Dr. Pless in her comments, the DEIR fails to address the incremental cancer risk for receptors during the first 16 years of life. To address the higher risk of early-in-life exposure, California's Office of Environmental Health Hazard Assessment ("OEHHA") recommends the use of age-dependent adjustment factors, or age sensitivity factors, to account for the higher risks during early stages of life. Specifically, OEHHA recommends:

In order to address the issue of early-in life exposures, OEHHA has adopted a policy, based on the available scientific data, of weighting cancer risk from exposures from the third trimester to <2 yrs of age by a factor of ten, and exposures from age two to less than sixteen years by a factor of three. In addition to innate sensitivities to some carcinogens, children have greater exposures due to physiological and behavioral factors. As a result, a greater proportion of total lifetime risk is accrued by age 16 with lifetime exposure to a constant air concentration than was previously recognized.⁹⁶

⁹³ DEIR, at p. 4.3-47.

⁹⁴ DEIR, at p. 4.3-48.

⁹⁵ DEIR, at p. 4.3-48.

⁹⁶ OEHHA, Air Toxics Hot Spots Program Risk Assessment Guidelines, Technical Support Document for Exposure Assessment and Stochastic Analysis, Final, August 2012 (hereafter OEHHA Technical Support Document"), pp. 11-2 (internal citations omitted);

http://oehha.ca.gov/air/hot_spots/pdf/2012tsd/TSDportfolio2012.pdf.

EPA recommends the same age-dependent adjustment factors.⁹⁷ Because children are potentially present at residential locations, age-dependent excess cancer risk must be evaluated. The results of including age sensitivity factors in a health risk assessment are commonly referred to as “child cancer risk.”

Dr. Pless has shown that when adjusting the DEIR’s calculations for child cancer risk, the Project’s cancer risk is potentially significant and unmitigated. In particular, Dr. Pless found that excess child cancer risk resulting from emissions associated with the Project’s locomotive diesel exhaust alone, 13.9 in one million, would exceed the APCD’s significance threshold of 10 in one million.⁹⁸ Dr. Pless further concludes that because the DEIR substantially underestimates emissions from fugitive equipment leaks, the Project would likely exceed the APCD’s thresholds for adult receptors if the DEIR preparer’s error were to be corrected.⁹⁹

As explained by Dr. Pless, crude oil vapors contain various amounts of toxic air contaminants including the carcinogenic contaminants benzene, toluene, ethylbenzene, and xylene, in sum known as “BTEX.”¹⁰⁰ Among the crude types potentially imported to the SMR is Canadian tar sands bitumen diluted to pipeline specifications with diluents (“DilBits”). The diluent is typically natural gas condensate, pentanes, or naphtha. DilBits, in particular, contain high amounts of BTEX. These very high concentrations in the crude oils result in very high concentrations in crude vapor that would be emitted from equipment leaks and the carbon canisters and could result in significant public health impacts.¹⁰¹

The DEIR’s conclusion that the Project will not result in a potentially significant cancer risk is unsupported. Substantial evidence in the record shows that the Project will result in potentially significant, unaddressed cancer risks. The County should prepare a revised DEIR which discloses this potentially significant impact and proposes measures that could avoid the impact, or reduce the impact to a level of insignificance.

⁹⁷ EPA, Cancer Risk Calculations;
<http://www.epa.gov/oswer/riskassessment/sghandbook/riskcalcs.htm>.

⁹⁸ See Pless Comments at pp. 14-19.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *ibid.*

VI. THE DEIR FAILS TO IDENTIFY THE PROJECT'S POTENTIALLY SIGNIFICANT CLIMATE CHANGE IMPACTS

The DEIR presents estimates for greenhouse gas (“GHG”) emissions from construction, on- and off-site locomotives, electricity, and other offsite sources resulting from Project construction and operation.¹⁰² Specifically, the DEIR estimates emissions of 5,533 metric tonnes of carbon dioxide-equivalent (“MT CO₂e”) within San Luis Obispo County; 14,179 MT CO₂e within California; and 65,908 MT CO₂e within the United States.¹⁰³ The DEIR then finds that total GHG emissions within the County would not exceed the APCD thresholds of significance and would, therefore, not result in a significant impact.¹⁰⁴ The conclusion in the DEIR is invalid because it is unsupported.

The APCD recognizes that for the purpose of CEQA, all project GHG emissions, including those occurring outside of the County (*e.g.*, locomotives traveling to Long Beach in Los Angeles County and heavy-duty trucks traveling to and from Kern, Santa Barbara, Monterey, Ventura, and Los Angeles Counties) must be included in the Project’s emissions analysis and compared to the GHG significance threshold.¹⁰⁵ This approach is also consistent with County practice, as reflected in the Throughput Project EIR.¹⁰⁶

According to the DEIR, more than 90 percent of the GHG emissions associated with the Project would occur outside of San Luis Obispo County.¹⁰⁷ However, the DEIR fails to address these emissions. This deficiency in the DEIR contradicts prior County practice, as well as the recommendations of the APCD.

As shown by Dr. Pless in her comments, the Project will result in potentially significant and unaddressed climate change impacts. In particular, Dr. Pless calculates total Project GHG emissions to equal 65,908 MT CO₂e.¹⁰⁸ Accordingly, Project emissions exceed the APCD’s stationary source threshold of 10,000 MT CO₂e and are significant.¹⁰⁹

¹⁰² DEIR, at Table 4.3-15, p. 4.3-50.

¹⁰³ DEIR, at p. 4.3-50.

¹⁰⁴ DEIR, at p. 4.3-50.

¹⁰⁵ *See, e.g.*, Throughput Project, Tables 4.1-9, 4.1-15, and 4.1-18 and p. 4.1-45.

¹⁰⁶ *See ibid.*

¹⁰⁷ (1) - (5,533 MT CO₂e)/(65,908 MT CO₂e) = 0.916.

¹⁰⁸ *See* Pless Comments at p. 22.

¹⁰⁹ *See ibid.*

The DEIR's conclusion that the Project will not result in potentially significant climate change impacts is unsupported. Substantial evidence in the record shows that the Project will result in potentially significant, unaddressed emissions of GHGs. The County should prepare a revised DEIR which discloses this potentially significant impact and proposes measures that could avoid the impact, or reduce the impact to a level of insignificance.

VII. THE DEIR FAILS TO IDENTIFY AND REDUCE POTENTIALLY SIGNIFICANT PUBLIC HEALTH IMPACTS

The DEIR fails to identify and address potentially significant health impacts due to Valley Fever. Valley Fever, or coccidioidomycosis (short cocci), is an infectious disease caused by inhaling the spores of *Coccidioides ssp.*,¹¹⁰ a soil-dwelling fungus. Spores, or arthroconidia, are released into the air when infected soils are disturbed, *e.g.*, by construction activities, agricultural operations, dust storms, or during earthquakes. The disease is endemic (native and common) in the semiarid regions of the southwestern United States. San Luis Obispo County, including the Project site, is located within the established endemic range of Valley Fever and the disease has become an increasing concern for health officials in San Luis Obispo County.¹¹¹

Typical symptoms of Valley Fever include fatigue, fever, cough, headache, shortness of breath, rash, muscle aches, and joint pain. Symptoms of advanced Valley Fever include chronic pneumonia, meningitis, skin lesions, and bone or joint infections. Cases of Valley Fever in San Luis Obispo County have more than doubled over the past few years from 87 reported cases in 2009 to 225 cases in 2011.¹¹² In 2013, San Luis Obispo County experienced two major outbreaks at construction sites for solar facilities.¹¹³

¹¹⁰ Two species of *Coccidioides* are known to cause Valley Fever: *C. immitis*, which is typically found in California, and *C. posadasii*, which is typically found outside California. See Center for Disease Control, Coccidioidomycosis (Valley Fever), Information for Health Professionals; <http://www.cdc.gov/fungal/coccidioidomycosis/health-professionals.html>.

¹¹¹ See Pless Comments at pp.23-33.

¹¹² See *id.*

¹¹³ See *id.*

Dr. Pless concludes that soil disturbing activities during Project construction would expose workers and nearby residences to Valley Fever infection.¹¹⁴ Dr. Pless concludes that the risk of infection as a result of Project activities is potentially significant and unmitigated. In particular, Dr. Pless demonstrates in her comments that conventional dust control measures that the DEIR proposes to incorporate into the Project are not effective at controlling Valley Fever as they largely focus on visible dust.¹¹⁵

While dust exposure is one of the primary risk factors for contracting Valley Fever and dust-control measures are an important defense against infection, Dr. Pless notes that visible dust is only an indicator that *Coccidioides ssp.* spores may be airborne in a given area.¹¹⁶ Spores, whose size is well below the limits of human vision, may be present in air that appears relatively clear and dust free. Such ambient, airborne spores with their low settling rates can remain aloft for long periods and be carried hundreds of kilometers from their point of origin. Dr. Pless concludes that implementation of dust control measures only when visible dust is present will not provide sufficient protection for both site workers and the general public.¹¹⁷

The DEIR fails to identify the Project's potentially significant public health impacts by excluding from the analysis a discussion of Valley Fever. Substantial evidence in the record shows that the Project will result in potentially significant, unaddressed public health impacts due to potential Valley Fever infection. The County should prepare a revised DEIR which discloses this potentially significant impact and proposes measures that could avoid the impact, or reduce the impact to a level of insignificance.

VIII. THE HAZARDS IMPACTS ANALYSIS SECTION IN THE DEIR IS INADEQUATE

The CEQA Guidelines define the term "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *Ibid.*

¹¹⁷ *See ibid.*

significance.”¹¹⁸ It is established that the scope of the lead agency’s environmental impact analysis under CEQA must include impacts resulting from proposed industrial process changes, including any changes that are reasonably foreseeable from the proposed project.

In *Communities for a Better Environment v. South Coast Air Quality Management District*, the California Supreme Court considered ConocoPhillips’ proposal to produce ultra low sulfur diesel fuel at its refinery in Wilmington, Los Angeles.¹¹⁹ The project would require the increased operation of a cogeneration plant and boilers, resulting in increased emissions of air pollutants. The Court held that any such increase must be evaluated under CEQA, even though Chevron did not require the Air District’s approval to increase facility operations.¹²⁰ Similarly here, the County was required to analyze the potential hazards of transitioning the SMR to refining Bakken and North American tar sands crudes. The DEIR is inadequate because it fails to include this analysis.

The hazards impacts section in the DEIR is also inadequate because it is unsupported, contains major analytical errors, fails to identify and address potentially significant impacts to workers, and relies on outdated information. Finally, the hazards impacts section of the DEIR fails to meet CEQA’s requirements for format and substance because it is so convoluted and complex so as to be inaccessible to the average reader. The County is required to prepare a revised analysis which addresses the potentially significant impacts identified in these comments and presents the County’s analyses and conclusions in plain language.

A. The Hazards Impacts Section of the DEIR is Inadequate Because it is Unsupported

The DEIR purports to evaluate hazards associated with train derailments, rail crossing hazards, fires, explosions, and releases of hazardous materials from activities associated with the operation of the rail tank car unloading facilities.¹²¹ In particular, the DEIR addresses the release of flammable and toxic gases, the storage and transport of crude oil, natural gas, propane, butane and other gas liquids, and crude oil spills.¹²² The DEIR identifies the principal immediate

¹¹⁸ CEQA Guidelines, § 15382.

¹¹⁹ (2010) 48 Cal.4th 310, 318.

¹²⁰ *See id.* at pp. 327-28.

¹²¹ *See* DEIR at p. 4.7-1.

¹²² *See id.*

hazards to public health at an oil refinery to include: releases of flammable gas causing vapor cloud explosions or thermal impacts from fire and flame jets; releases of flammable gas causing vapor cloud explosions, thermal impacts or thermal and “overpressure impacts” from explosions and “boiling liquid expanding vapor explosions” (“BLEVEs”); releases of odorants causing toxic impacts; and release of crude oil causing subsequent fires and related impacts.¹²³ The study area in the DEIR includes the rail corridors in the County associated with the Project, the existing facilities and pipelines and alternatives, and the areas in the immediate vicinity of the Project that could be affected by an upset at the proposed unloading facility.¹²⁴ For the public safety analysis, the study area in the DEIR also includes current operations at the SMR, truck transportation of hazardous materials, crude oil pipelines and existing rail facilities, as well as additional transportation hazards associated with rail transport of crude to the SMR.¹²⁵

The DEIR suggests that none of the above-listed accident scenarios result in significant impacts. With respect to transport of crude by rail, the DEIR states: “as rail traffic would occur regardless of whether additional crude oil cars were added to the train, the transportation of crude oil would not increase the accident/trauma-related injuries and fatalities associated with rail accidents.”¹²⁶ With respect to transportation of hazardous materials on roadways, the DEIR states:

Crude oil transported to the Santa Maria Pump Station, as well as sulfur and coke transported by truck and rail, would primarily cause environmental impacts in the immediate vicinity of the spill. Crude oil and solid sulfur are not acutely hazardous materials. Coke is not a hazardous material. If crude oil was spilled, fire could occur along the transportation route at the accident location. ***Given the properties of crude oil, the likelihood of an explosion is virtually non-existent and consequently explosion scenarios are not addressed further in this document.*** Fire thermal impacts would be limited to the immediately vicinity of the spill site. ***Risk levels would be minimal due to the properties of crude oil and impacts would be associated primarily with environmental issues.***¹²⁷

¹²³ See DEIR at p. 4.7-8; see also *id.* at p. 4.7-21, Table 4.7.4.

¹²⁴ See *id.*

¹²⁵ See *id.* at p. 4.7-24.

¹²⁶ See DEIR at p. 4.7-28.

¹²⁷ *Id.* at p. 4.7-37, emphasis added.

With respect to crude spills and fires from the crude oil storage tanks, the DEIR states:

Crude oil is processed and then stored in tanks that could spill and ignite, creating thermal radiation impacts. Thermal radiation impacts from crude oil tank fires could cause injury 220 feet away. The closest population to the crude oil tanks at the Refinery is industrial area 425 feet northeast of the crude oil storage facilities. The closest residence to the crude oil tanks, which is located within the industrial area, is 1,200 feet northeast of the tank storage area. The gas processing equipment and piping are within the Refinery, at least 1,700 feet from the Refinery fence line and the closest receptor on industrial property. ***Given the limited population and significant distance between these receptors and the Refinery, there would not be a significant risk level.***¹²⁸

With respect to transportation of hazardous materials by pipeline, the DEIR states:

Materials transported by pipeline could cause impacts if those materials are spilled. Crude oil transported from the Santa Maria Pump Station could cause primarily environmental issues in the immediate vicinity of the spill, which could include downstream areas if a spill drains into a creek area. Crude oil is not an acutely hazardous material. If crude oil was spilled, fire could occur along the transportation route at the accident location. ***Given the properties of crude oil, the likelihood of an explosion is virtually non-existent and consequently explosion scenarios are not addressed further in this document. Fire thermal impacts would be limited to the immediately vicinity of the spill site. Risk levels would be minimal due to the properties of crude oil and impacts would be associated primarily with environmental issues In general, unlike a gas release (which occurs much quicker), the lack of public impacts from crude oil spills is due to the possibility that most persons move out of the way of a spill and are not directly affected if it catches fire.***¹²⁹

¹²⁸ DEIR at p. 4.7-37, emphasis added.

¹²⁹ *Id.* at pp. 4.7-37-38, emphasis added.

The DEIR then concludes that potential hazards associated with the unloading facility are considered less than significant, and “given that the [new] trains on site would only be moving at speeds of around three miles per hour ... [the risk of accidents at road crossings] would be considered less than significant.”¹³⁰ For this reason, the DEIR does not require Phillips 66 to incorporate mitigation measures into the Project.¹³¹

The conclusion in the DEIR that the Project will not result in potentially significant hazards impacts is invalid because it is unsupported. As a preliminary matter, the DEIR and the supporting analyses do not address fire and explosion risk from the crude storage tanks.¹³² Accordingly, the DEIR’s conclusion that the crude oil storage tanks will not result in potentially significant impacts lacks basis. The DEIR’s conclusions regarding off-site rail accidents likewise lack basis as they are totally unsupported by technical analyses or explanation.¹³³

Second, substantial evidence – including the very technical analyses on which the DEIR relies – shows that the Project will, contrary to the DEIR, result in potentially significant, and potentially catastrophic, impacts. In particular, substantial evidence shows that if Bakken or tar sands crudes were imported to the SMR, the risks of fire and explosion would be potentially significant. Substantial evidence also shows that the hazards impacts of oil spills from pipelines are potentially significant, resulting in injury and fatalities to on-site personnel as well as persons located outside of the Project boundary. Significantly, the DEIR omits mention of the conclusion in the underlying analysis that persons located off-site could be killed in the event of an accidental release. Substantial evidence likewise shows that train accidents within the SMR boundary may result in potentially significant on-site and off-site impacts from pool fires and BLEVEs. Finally, substantial evidence shows that accidents involving unit trains carrying crude oils will result in potentially significant impacts, including environmental damage, release of significant quantities of air contaminants, significant impacts on public services and utilities (*e.g.*, fire fighters, emergency responders) injury and even death. The County is required to prepare a revised DEIR which identifies these

¹³⁰ *See id.* at p. 4.7-57.

¹³¹ *See id.* at p. 4.7-58.

¹³² *See, generally*, DEIR, Appendix H.

¹³³ *See, e.g.*, DEIR Table 4.7-12 and Figure 4.7-5; *see id.* at Appendix H at H-19 and H-20.

potentially significant impacts and proposes mitigation measures to reduce impacts to a less than significant level.

B. The DEIR Fails to Identify Potentially Significant Risks to Workers

A DEIR must identify and focus on the possible significant environmental impacts of a proposed project.¹³⁴ “An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light what is reasonably feasible.”¹³⁵ What is “reasonably feasible” is a function of “factors such as the magnitude of the project at issue, the severity of its likely environmental impacts . . .” and other factors.¹³⁶ The DEIR declines to identify and address risks to workers stating,

Occupational risk, which is governed by state and federal OSHAs is considered to be more voluntary and is generally judged according to more lenient standards of significance than those used for involuntary exposure.¹³⁷

Accordingly, the DEIR does not identify a significance threshold for worker impacts and does not identify or assess potential risks to workers as a result of the Project. These omissions render the DEIR inadequate.

Here, Project impacts to workers, including injury and fatality, are identified in the DEIR’s consultant’s technical analyses of Project hazards.¹³⁸ These impacts should have been addressed in the DEIR because the County is already in possession of data showing that Project impacts to workers are potentially significant.

The County is required to identify the Project’s possible significant environmental impacts in the DEIR. The County should prepare a revised DEIR which identifies and analyzes workers impacts, and proposes mitigation measures to reduce impacts to a less than significant level.

¹³⁴ See CEQA Guidelines, §§ 15126 subd. (a), 15126.2 subd. (a); Pub. Resources Code, § 21100, subd. (b)(1).

¹³⁵ CEQA Guidelines, § 15151.

¹³⁶ CEQA Guidelines, § 15204.

¹³⁷ DEIR at p. 4.7-55.

¹³⁸ See, generally, Appendix H.
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C. The DEIR Fails to Identify Potential Risk of Release Due To Corrosion of Refinery Equipment

Some cost-advantaged North American crudes that could be imported by rail have a chemical composition that may cause corrosion at high temperatures, such as occur in many refining units. Elevated concentrations of sulfur compounds in some of these crudes may also lead to increased corrosion. The DEIR does not analyze the potential for increased corrosion as a result of the reasonably foreseeable feedstock change at the SMR. Substantial evidence shows that a crude slate change could result in corrosion of SMR components, leading to significant accidental releases. The County should prepare a revised DEIR which discloses and analyzes the significant environmental and public health impacts for accidental, but foreseeable, releases and proposes measures that could avoid the impacts or reduce the impacts to a level of insignificance.

D. The Hazards Section of the DEIR Relies on Outdated Information

The DEIR fails to exhibit the requisite level of investigation with respect to hazards because it relies on outdated information. A lead agency may not rely on scientifically outdated information in assessing the significance of project impacts.¹³⁹

The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context.¹⁴⁰

The DEIR states that given the properties of crude oil, the likelihood of an explosion is virtually non-existent, consequently explosion scenarios are not further addressed in the DEIR.¹⁴¹ The DEIR fails to address current information regarding the hazards of transporting Bakken crude by rail. This is a significant omission in the County's analysis.

¹³⁹ See *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm.* (2001) 91 Cal.App.4th at 1367.

¹⁴⁰ *Ibid.*

¹⁴¹ DEIR at p. 4.7-37.

In the past year, rail transport of crude oil has been involved in four major explosions, causing damage, prolonged emission of air contaminants, and, in some cases, severe injuries and fatalities.¹⁴² In July 2013, an oil-train derailment and ensuing explosion and fire in Lac-Mégantic, Quebec left 47 people dead. Similar accidents occurred in Alabama and North Dakota and, most recently, in New Brunswick, Ottawa. The Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a safety alert to notify the general public, emergency responders and shippers and carriers that recent derailments and resulting fires indicate that the type of crude oil being transported from the Bakken region may be more flammable than traditional heavy crude oil.¹⁴³ The PHMSA is investigating whether Bakken crude might contain large amount of gases and related liquids such as butane, propane and ethane.¹⁴⁴

The DEIR fails to disclose and address the observed and documented hazards unique to transporting Bakken crudes by rail. The County is required to prepare a revised DEIR which discusses recent data on the potential hazards of transporting advantaged crudes by rail. The County should also require Phillips 66 to provide an updated analysis of Project hazards and include that analysis in the revised DEIR.

E. The Hazards Impacts Section of the DEIR is Inadequate Because It is Unintelligible

EIRs must be “organized and written in a manner that will be meaningful and useful to decision makers and to the public.”¹⁴⁵ For this reason, the CEQA Guidelines instruct that EIRs follow a “clear format” and be written in “plain

¹⁴² See Russell Gold & Lynn Cook, *Cities Grapple With Oil-Train Safety*, Wall Street Journal, Vo. CCLXIII NO.12, Jan. 15, 2014, attached as **Attachment 5**; Steve Almasy, *North Dakota train collision ignites oil cars; fire to burn out*, CNN US, Dec. 30, 2013, attached as **Attachment 6**; *Evacuation lifted for Casselton, ND following fiery train derailment*, Fox News, Dec. 31, 2013, available at <http://www.foxnews.com/us/2013/12/31/no-injuries-reported-in-fiery-north-dakota-train-derailment/> (last accessed, Jan. 24, 2014), attached as **Attachment 7**.

¹⁴³ Pipeline and Hazardous Materials Safety Administration, *Safety Alert: Preliminary Guidance from Operation Classification*, available at <http://www.phmsa.dot.gov/portal/site/PHMSA/menuitem.6f23687cf7b00b0f22e4c6962d9c8789/?vgnextoid=c6efec1c60f23410VgnVCM100000d2c97898RCRD&vgnextchannel=d248724dd7d6c010VgnVCM10000080e8a8c0RCRD&vgnextfmt=print> (last accessed Jan. 21, 2014).

¹⁴⁴ Gold & Cook, Wall Street Journal, *Cities Grapple With Oil-Train Safety*, Jan. 15, 2014.

¹⁴⁵ Pub. Resources Code, § 21003 subd. (b).
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language.”¹⁴⁶ The hazards impacts section of the DEIR fails to meet CEQA’s basic requirements for format and content because it is unintelligible.

First, the DEIR fails to rely on a significance threshold that can be understood by decisionmakers and the general public, obscuring the Project’s potentially significant impacts on the environment. In particular, the DEIR rejects the County’s significance threshold, defining a significant risk to include “a risk of explosion or release of hazardous substances (*e.g.* oil, pesticides, chemicals, radiation) or exposure of people to hazardous substances, or create any other health hazard or potential hazard.”¹⁴⁷ Instead, the DEIR opts for a quantitative, risk-based criteria which deems a risk significant if it is “within the amber or red regions of the Santa Barbara County Safety Criteria.”¹⁴⁸ The Santa Barbara County Safety Criteria is nowhere articulated in the DEIR and the information that is provided in the DEIR does not assist the public or decisionmakers in understanding how this threshold is being applied to assess Project impacts.¹⁴⁹

The DEIR also fails to support its selection of the quantitative, risk-based criteria with substantial evidence. In particular, the DEIR states that the risk-based criteria was selected because “San Luis Obispo County does not have a process to address risk of upset and CEQA thresholds.”¹⁵⁰ This claim is contradicted by the DEIR which defines the County’s significance threshold to include “a risk of explosion or ***release of hazardous substances*** (*e.g.* oil, pesticides, chemicals, radiation)”¹⁵¹

Second, the DEIR fails to apply the significance thresholds that are identified in the DEIR to the impacts that are addressed in the County’s draft analysis. In addition, the County’s draft conclusions regarding the significance of Project impacts are scattered throughout the hazards impacts section of the DEIR, precluding a clear articulation of the DEIR’s logic – *i.e.* environmental setting, the

¹⁴⁶ See CEQA Guidelines, §§ 15006, subd. (q), (r), 15120, 15140.

¹⁴⁷ See DEIR at p. 4.7-55, internal quotations omitted.

¹⁴⁸ See DEIR at p. 4.7-55.

¹⁴⁹ See, *e.g.* DEIR, at p. 4.7-55, “The thresholds provide specific zones (*i.e.*, green, amber, and red) on a risk profile curve to guide the determination of significance or insignificance based on the estimated probability and consequence of an accident. In general, risk levels in the green area would be less than significant and therefore acceptable, while risk levels in the amber and red zones would be significant. Risk profiles plot the frequency of an event against the consequence in terms of fatalities or injuries; frequent events with high consequence have the highest risk level.”

¹⁵⁰ See DEIR at p. 4.7-55.

¹⁵¹ See *ibid*, emphasis added.

change to the physical environment as a result of the Project, articulation of significance threshold for each impact that is studied, and conclusion regarding the significance of the change as a result of the Project with respect to each impact studied.

Third, the hazardous impacts analysis relies on technical analyses that cannot be understood by the average reader. The analyses provided in Appendix H are inaccessible to the general public and the DEIR fails to provide a roadmap for the analysis. The County is required to prepare an EIR that is written in plain language.

The County should prepare a revised DEIR which includes an adequate hazards impacts analysis. As described above, the current analysis is not meaningful or useful for the public or decisionmakers and is, therefore, inadequate under CEQA. The revised hazards impacts section should also address the Project's potentially significant impacts consistent with these comments.

IX. MITIGATION MEASURES PROPOSED IN THE DEIR ARE INADEQUATE

In enacting CEQA, the Legislature declared that it is “the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”¹⁵² An EIR is inadequate unless it includes “a detailed statement setting forth . . . mitigation measures proposed to minimize [the project’s] significant effects on the environment.”¹⁵³ CEQA requires lead agencies to incorporate all feasible mitigation measures into a project to reduce the project’s potentially significant impacts to a level of insignificance.¹⁵⁴ Finally, CEQA requires the lead agency to find, based on substantial evidence, “that the mitigation measures are required in or incorporated into the project; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency.”¹⁵⁵

¹⁵² See Pub. Resources Code, § 21002.

¹⁵³ See Pub. Resources Code, § 21100 subd. (b)(3); see also CEQA Guidelines, §§ 15126 subd. (e).

¹⁵⁴ See Pub. Resources Code, § 21081 subd. (a)(1)-(3); CEQA Guidelines, §§ 15002 subd. (a)(3), 15021 subd. (a)(2), 15091 subd. (a)(1).

¹⁵⁵ See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260, internal quotations omitted.

The courts and the California Resources Agency have also imposed several parameters for the adequacy of mitigation measures. We address some of the relevant criteria here. First, the lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project's impacts to a less than significant level.¹⁵⁶ Deferral is impermissible where an agency "simply requires a project applicant to obtain a . . . report and then comply with any recommendations that may be made in the report."¹⁵⁷ Second, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁵⁸ Third, "[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments."¹⁵⁹ Fourth, mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.¹⁶⁰

As explained in the following paragraphs, the DEIR fails to incorporate feasible mitigation measure into the Project. The DEIR also impermissibly defers the formulation of mitigation measures for the Project's potentially significant operational emissions of diesel particulates and ozone precursors. Other measures proposed in the DEIR fail to meet CEQA's requirements and should be revised consistent with these comments.

A. Mitigation Measure AQ-2 is Feasible and the County is Required to Incorporate Mitigation Measure AQ-2 Into the Project

The DEIR concludes that "the emissions from the rail spur and associated importation of crude oil by rail would exceed the SLOAPCD [San Luis Obispo County Air Pollution Control District] thresholds for operations" for ROGs and NOx.¹⁶¹ The DEIR further finds that with the implementation of mitigation

¹⁵⁶ See CEQA Guidelines, § 15126.4 subd. (a)(1)(B); see also *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

¹⁵⁷ *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

¹⁵⁸ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

¹⁵⁹ CEQA Guidelines, § 15126.4 subd. (a)(2).

¹⁶⁰ *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61,79.

¹⁶¹ DEIR at p. 4.3-45.
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measure AQ-2 and the application of ROG and NO_x offsite reductions, impacts would be less than significant with mitigation. However, the DEIR also states that the County could be preempted by Federal law from mitigating rail emissions outside of the SMR and, therefore, may not have the authority to require offsite ROG and NO_x reductions for the Union Pacific mainline emissions within the County.¹⁶²

In relevant part, Mitigation Measure AQ-2 provides:

[L]ocomotive emissions shall be mitigated to the extent feasible through the contracting arrangement that increase the use of Tier 1 and better locomotives. If emissions of ROG+NO_x with the above mitigations still exceed the thresholds, the Applicant shall secure SLOCAPCD-approved off-site reductions in ROG + NO_x emissions to ensure that project-related ROG + NO_x emissions within SLO County do not exceed the SLOCAPCD thresholds for the life of the project.

Prior to issuance of Notice to Proceed, the Applicant shall implement a program, including training and procedures, to limit all locomotive onsite idling to no more than 15 consecutive minutes except when idling is required for safety purposes.

To summarize, Mitigation Measure AQ-2 requires Phillips 66 to contract with Union Pacific to arrange for the use of Tier 1 and better locomotives and implement a program to limit onsite idling of locomotives. We discuss each requirement in turn.

1. Use of Tier 1 and Better Locomotives

The DEIR does not identify why the County's regulatory authority may be preempted, however, information in the Project file suggests that the DEIR may be referring to the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). The ICCTA grants the Surface Transportation Board ("STB") exclusive jurisdiction over interstate transportation by rail carrier and facilities that are an integral part of the railroad's interstate operations.¹⁶³ The STB lacks jurisdiction

¹⁶² See *ibid.*

¹⁶³ See 49 U.S.C. § 10501 subd. (b); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (2010) 561 U.S. 89; *Flynn v. Burlington Northern Santa Fe Corp.*, (2000) 98 F.Supp.2d 1186, 1189.)
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over activities proposed on non-railroad owned land and railroad activities that are not integral to a railroad's interstate operations, such as manufacturing facilities and truck transfer facilities.¹⁶⁴

Even where the STB has jurisdiction, State and local regulation is not preempted where the regulation carries the force of federal law, such as a state regulation promulgated pursuant to the Clean Air Act or the Clean Water Act and which was approved by the U.S. Environmental Protection Agency ("EPA").¹⁶⁵ State and local regulations are also not preempted where the regulation is one of general application, having a remote or incidental effect on rail transportation, and does not unreasonably burden rail transportation.¹⁶⁶ Whether a state or local regulation unreasonably burdens interstate commerce is a question of fact.¹⁶⁷ "The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation"¹⁶⁸

It is difficult to see how the County's authority could be federally preempted in this case. The STB does not have jurisdiction over the Project. Moreover, a permit condition requiring *Phillips 66* to source feedstock via Tier 1 and cleaner locomotives does not regulate Union Pacific's interstate operations. State regulation of in-state actors, which may impact contractual arrangements in interstate commerce, does not burden interstate commerce.¹⁶⁹

Federal preemption is not triggered here because the proposed rail spur extension is not subject to STB jurisdiction. Phillips 66 proposes to construct a rail spur extension, rail car unloading facilities and related structures wholly within the Santa Maria Refinery, at the terminus of an existing rail spur. These activities are not subject to STB jurisdiction because they are proposed on land not owned by Union Pacific. The Project is also neither integral nor accessory to Union Pacific's interstate operations. The crude that will be offloaded at the Santa Maria Refinery will be processed at the Santa Maria Refinery. No crude would be transported out

¹⁶⁴ See *Nicholson v. I.C.C.* 711 F.2d 364, 367-68 (D.C. Cir. 1983).

¹⁶⁵ *Association of American Railroads*, *supra*, 622 F.3d at 1098; *Flynn*, *supra*, 98 F.Supp.2d at 1189.

¹⁶⁶ *Association of American Railroads*, *supra*, 622 F.3d 1094 at 1097.

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 1097, internal quotations omitted.

¹⁶⁹ *Rocky Mountain Farmers Union v. Corey* (2013 9th Cir.)730 F.3d 1070,1103.

of the refinery by rail.¹⁷⁰ Finally, the DEIR identifies no federal statute or regulation prohibiting or restricting Union Pacific from using Tier 1 and cleaner locomotives.

The County is required to incorporate all feasible mitigation measures into the Project.¹⁷¹ A mitigation measure requiring Phillips 66 to source feedstock via Tier 1 and cleaner locomotives is legally feasible. The DEIR provides no evidence that the measure is infeasible for any other reason. Accordingly, the County is required to incorporate the requirement into the Project.

2. Limits on Locomotive Idling

The ICCTA preempts state and local regulation of emissions from idling trains.¹⁷² However, Phillips 66 may enter into a voluntary agreement with Union Pacific to limit locomotive idling and the County is authorized to direct Phillips 66 to endeavor to enter into such an agreement. Voluntary agreements between local jurisdiction and railroads to reduce emissions from trains are feasible and have precedent in California. In fact, Union Pacific is party to a voluntary statewide agreement with the California Air Resources Board which includes an idling-reduction program.¹⁷³ The agreement applies to rail yards in California and requires Union Pacific to equip virtually all intrastate locomotives based in California with automatic idling-reduction devices that limit idling to no more than 15 consecutive minutes.¹⁷⁴

The County is required to incorporate all feasible mitigation measures into the Project.¹⁷⁵ A mitigation measure requiring Phillips 66 to endeavor to enter into a contractual agreement with Union Pacific to limit onsite idling of locomotives is legally feasible. The DEIR provides no evidence that the measure is infeasible for

¹⁷⁰ See DEIR, at p. ES-5.

¹⁷¹ See Pub. Resources Code, § 21081 subd. (a)(1)-(3); CEQA Guidelines, §§ 15002 subd. (a)(3), 15021 subd. (a)(2), 15091 subd. (a)(1).

¹⁷² *Association of American Railroads v. South Coast Air Quality Management District* (9th Cir. 2010) 622 F.3d 1094, 1097.

¹⁷³ See ARB/Railroad Statewide Agreement Particulate Emissions Reductions Program at California Rail Yards, June 2005, available at <http://www.arb.ca.gov/railyard/ryagreement/ryagreement.htm> (last accessed Jan. 23, 2014).

¹⁷⁴ *Id* at C.1(a)-(b).

¹⁷⁵ See Pub. Resources Code, § 21081 subd. (a)(1)-(3); CEQA Guidelines, §§ 15002 subd. (a)(3), 15021 subd. (a)(2), 15091 subd. (a)(1).

any other reason. Accordingly, the County is required to incorporate the requirement into the Project.

B. Mitigation Measure WR-1(a) Is Impermissibly Vague

The DEIR concludes that Project demolition, grading and construction could result in incidental spills of petroleum products or other contaminants that could adversely affect water quality.¹⁷⁶ The DEIR also finds that incidental spills of oil and other petroleum products during Project operations and, in particular, during rail car unloading could also occur.¹⁷⁷ The DEIR then concludes that the Project could result in potentially significant impacts to water quality because onsite soils are excessively drained, with a high capacity to vertically transmit water.¹⁷⁸ The DEIR proposes Mitigation Measure WR-1(a) as one among several measures to reduce potential spill impacts.¹⁷⁹

Mitigation Measure WR-1(a) provides:

During construction and operations, oil spills shall be contained and cleaned according to measures outlined in the California Stormwater Quality Association Best Management Practice Handbook.¹⁸⁰

The measure is inadequate as drafted because it fails to specify the performance standards capable of reducing Project impacts to water quality to a level of insignificance.

A public agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁸¹ Mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.¹⁸² Here, Mitigation Measure WR-1(a) fails to identify the best management practices that

¹⁷⁶ See DEIR at p. 4.13-10.

¹⁷⁷ See *ibid.*

¹⁷⁸ See DEIR at p. 4.13-11.

¹⁷⁹ See *ibid.*

¹⁸⁰ See *ibid.*

¹⁸¹ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

¹⁸² *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

should be incorporated into the Project and is therefore impermissibly vague. Additionally, the public and decisionmakers are precluded from evaluating the efficacy of Mitigation Measure WR-1(a) because the referenced standards are not incorporated into the DEIR or the DEIR appendices.

Mitigation Measure WR-1(a) should be revised to include a listing of the best management practices that should be incorporated into the Project to reduce impacts to a less than significant level. Absent this information, the County lacks the substantial evidence to conclude that Project impacts to water quality have been reduced to a less than significant level.

C. Mitigation Measure AQ-2(a) Impermissibly Defers the Formulation of Mitigation Measures

The lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards capable of mitigating the project's impacts to a less than significant level.¹⁸³ Deferral is impermissible where an agency "simply requires a project applicant to obtain a . . . report and then comply with any recommendations that may be made in the report."¹⁸⁴ Mitigation Measure AQ-2(a) impermissibly defers the formulation of mitigation measures.

In relevant part, Mitigation Measure AQ-2(a) states:

Prior to issuance of Notice to Proceed, the Applicant *shall investigate methods for reducing the onsite emissions*, both from fugitive components and from locomotives.¹⁸⁵

As drafted, AQ-2(a) fails to ensure that the Project's air quality impacts will be reduced to a less than significant level, fails to specify specific performance standards, and is unenforceable. The measure should be revised to specify the methods that will be implemented to reduce Project emissions to a less than significant level and require Phillips 66 to incorporate the methods into the Project.

¹⁸³ See CEQA Guidelines, § 15126.4 subd. (a)(1)(B); see also *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

¹⁸⁴ *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

¹⁸⁵ DEIR at p. 4.3-43 (emphasis added).
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D. Mitigation Measures AQ-2(a) and AQ-3 Preclude a County Finding That The Measures Will Be Incorporated Into the Project

CEQA requires the lead agency to find, based on substantial evidence, “that the mitigation measures are required in or incorporated into the project; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency.”¹⁸⁶ Mitigation Measures AQ-2(a) and AQ-3 each require Phillips 66 to secure APCD-approved off-site reductions to ensure that operational emissions of ROG and NO_x and diesel particulate matter, respectively, are reduced to a less than significant level.¹⁸⁷ Each measure provides:

Coordination with the SLOCAPCD should begin at least six (6) months prior to issuance of operational permits for the Project to allow time for . . . SLOCAPCD to review and approve the off-site mitigation approach.¹⁸⁸

As drafted, Mitigation Measures AQ-2(a) and AQ-3 preclude the County from making the required finding that the relevant mitigation will be adopted by the other agency. In particular, the measures do not require APCD’s approval of a mitigation approach before the County approves the Project and includes no enforcement provision. The measures should be revised to require APCD to approve offsite mitigation prior to County issuance of a Notice to Proceed to the Applicant and require implementation of the approved mitigation approach. Absent such requirements, the County would lack the substantial evidence to conclude that Mitigation Measures AQ-2(a) and AQ-3 can and should be adopted by the APCD.

E. Mitigation Measures AQ-6 Fails to Specify Performance Standards

A lead agency may not defer the formulation of mitigation measures until a future time, unless the EIR also specifies the specific performance standards

¹⁸⁶ See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260, internal quotations omitted.

¹⁸⁷ See DEIR at pp. 4.3-43, 4.3-46.

¹⁸⁸ See *ibid.*

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X. CONCLUSION

We thank the County for this opportunity to comment on the DEIR and urge the County to prepare and circulate a revised DEIR which includes a complete Project description, identifies the Project's potentially significant impacts, and requires Phillips 66 to incorporate all feasible mitigation measures into the Project to reduce impacts to a less than significant level.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Elizabeth Klebaner', with a large, sweeping flourish at the top.

Elizabeth Klebaner

EK:clv
Attach.