

**AGENDA ITEM
CITY COUNCIL MEETING DATE – APRIL 4, 2016
BUSINESS ITEM**

DATE : March 25, 2016

TO : City Council

FROM : Community Development Director

SUBJECT : **REQUEST FOR CONTINUANCE AND PROCESS FOR APPEAL OF THE PLANNING COMMISSION'S DECISION TO NOT CERTIFY THE FINAL ENVIRONMENTAL IMPACT REPORT (FEIR) AND TO DENY THE USE PERMIT FOR THE VALERO CRUDE BY RAIL PROJECT**

Recommendation:

Open the public hearing and solicit public comment. After public testimony at this meeting:

1. Add an additional hearing date of April 18, 2016

At the following meeting(s), staff recommends that the City Council continue to take public comment, consider all appropriate documents and testimony, and then consider the following actions:

1. Consider and reject the applicant's request for continuance.
2. Deny the appeal and uphold the Planning Commission's unanimous decision to deny certification of the EIR and to deny the Use Permit; or
3. Decline to certify the EIR and provide specific comments on the deficiencies of the EIR and direction on what needs to be improved in the EIR and remand back to staff with direction to return to Council with the EIR and Use Permit; or
4. Uphold the appeal and
 - i. Adopt the draft Resolution certifying the Final Environmental Impact Report, adopting CEQA findings for the Project and adopt the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program and
 - ii. Uphold the appeal and adopt the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution included in the March 15, 2016 packet.

Executive Summary:

On March 15, 2016 the hearing for this item was opened and the Council heard presentations from the City including the Planning Commission and the applicant. The Council questioned Staff, the consultants, the Chair of the Planning Commission, and the applicant regarding the project. The applicant requested that the item be continued to allow them to request an opinion from the Surface Transportation Board (STB) regarding the issue of preemption. No public testimony was heard at the March 15th meeting.

BUDGET INFORMATION:

There is no budgetary impact if the request for continuance is denied. If the Council approves the request for continuance, there may be additional costs associated with potential re-noticing of the project, as well as additional staff time in reviewing any STB opinion, as well as additional staff time should updates or revisions to the EIR be necessary.

ENVIRONMENTAL ANALYSIS:

See the March 15, 2016 City Council staff report regarding the environmental analysis for the project. In regards to the applicant's request for continuance it does not affect the existing FEIR document. Should the project be continued for a substantial length of time, it is possible that new information could arise and the FEIR would possibly need additional studies and/or to be re-circulated.

DISCUSSION:

At the March 15, 2016 Council meeting, the applicant requested a continuance of their appeal to enable them to obtain an opinion from the Surface Transportation Board (STB). The requested option would address the issue of whether the City is preempted from imposing conditions on the project if those conditions impact rail operations. The applicant stated that they believed the response of the STB would provide additional information to the Council in making their determination. It is unclear how long the STB response would take, or if they would be willing to take the matter under consideration. An estimate is three to six months, but it could be longer. Information from the applicant is attached.

While it would be helpful to have the STB opinion it would not necessarily be a final determination. STB decisions could be appealed to court. In addition, there are not set time frames within which the STB must issue its opinion. Estimates for this opinion range from 3-6 months. It is expected that the STB would issue an opinion more quickly if it knew the Council were delaying action on the project in anticipation of the STB opinion. Considering the amount of public input on this project, it is highly likely that the STB would also receive a lot of public input. This could lengthen the time the STB would require to render an opinion.

If the STB takes a long time to render its opinion, the FEIR and its information may have to be refreshed to address new information. This could require additional studies, evaluation and recirculation. All of that would, of course, impact public participation in the process and require new review and comments.

However, if the Council would like to consider the opinion of the STB and that a decision on the EIR and Land Use Permit should be placed on hold until the STB makes its decision, staff recommends that the hearing be continued to a date certain. This not only reduces the required public noticing but also will help address concerns about the FEIR getting stale. Staff cautions against continuing the item past September.

Procedural Issues:

At the March 15th Council meeting, staff noted that Council would have to consider public comment before considering the request for continuance. This means that the Council has options regarding how to organize the process of public comment and the decisions before them at the April 4th meeting. These options are set forth below but staff recommends the Council take all public comment on the project and any continuance together.

Option 1. Continue Council questions to staff and the consultants, then proceed with public testimony on the EIR, Use Permit and request for continuance.

The public notice for the project stated that staff presentations and the Valero presentation would occur on March 15, 2016 and that public comment would not occur until April 4, 2016. Staff is therefore anticipating a large public turnout for the meeting of the 4th and in deference to the public in attendance staff is recommending that the Council defer asking questions of staff and the consultants, provide questions to staff in writing throughout the hearing process; and begin public comment of the meeting on April 4, 2016. Staff will then provide a written response to all of the Council queries after the public hearing is concluded. Prior to deliberating on the EIR and the Land Use Permit, the Council will first make a decision on the continuance.

Option 2. Take initial public comment only on the request for continuance, and act on the request prior to hearing public comment on the EIR and Use Permit.

If the Council decides to first allow comment only on the request for continuance, then take action on the request for continuance; every member of the public who speaks during the period for comment on the request for continuance only, would also have the opportunity to speak on the EIR and Use permit, when the Council heard testimony on those topics.

While staff understands the importance of deciding on the question of continuance in a timely manner, we do not believe it is possible to separate comment on the request for continuance from the EIR and Use Permit, as the comment is regarding one application. Since staff anticipates public comment requiring more than one meeting, it may not be appropriate to limit the comment on the 4th to just the matter of the continuance. Therefore staff recommends that comment on the request for continuance, the EIR and the Use permit be heard together.

Option 3. The Council could decide to continue to question staff prior to taking public comment and then take comment on the request for continuance only.

The above options are not mutually exclusive, but for the reasons stated above, staff does not recommend this option.

Questions of Union Pacific Railroad (UPRR) and the applicant will be handled by the respective parties prior to the close of the public hearing.

Public Comment:

This project has generated a large amount of public interest, and staff would like to describe more fully the process going forward so as to give the public clear information and the opportunity to speak on the project.

Although it does not seem possible to come up with a completely "fair" way to hear speakers, and since having speakers sign up ahead of time did not work as well as hoped at the Planning Commission Meeting, staff recommends that the Council use an approach similar to the approached used by the San Luis Obsipo County Planning Commission for the Phillips 66 hearing. Under this approach, elected officials and agency representatives such as state elected representatives or their staff, mayors, council members, board of supervisors members and their staff would be allowed to speak first. After these people speak, the general public including spokespersons for various groups may speak.

As a reminder, speakers are only permitted to speak once during the hearing even though the hearing may last several meetings. If a speaker cannot say all they need to say within the 5 minute time, speakers are reminded that they may submit comments in writing up to the date of the Council's decision. Under the Council's rules of procedure, speakers are not permitted to give their time to another speaker. Spokespersons may be designated to represent those with similar views. A spokesperson has up to 15 minutes to speak. Please note that the purpose of the spokesperson is to represent the group and not to have each

member of the group speak as well. Speakers are also requested to avoid repeating the comments of other speakers. To maintain civility and decorum, the audience is requested to refrain from booing and cheering speakers. This also helps others from feeling intimidated if they want to express a different viewpoint. What seemed to work well at the Planning Commission was for audience members to raise their hand when agreeing with a speaker.

Note that the Council's rules provide that Council meetings typically start at 7 PM and end by 11 P.M. In Staff's experience it is not productive to continue the meetings much past 11 P.M. As in the past, the Council may want to gauge around 9 P.M. during the April meetings to see how many speakers would like to speak that night.

Code of Conduct

The City Council has adopted a Code of Conduct for itself and its boards and commissions. The overarching theme of the Code of Conduct is respect. The Council conducts its hearings in a professional manner that invites public comment and asks that everyone treat each other professionally and refrain from abuse and personal attacks. The City welcomes public comment but asks that speakers avoid slander and personal attacks.

Council Review:

The Council's consideration of the appeal of the Planning Commission's decision is de novo. This means that the Council can consider new information not presented to the Planning Commission but also that the Council should consider the Planning Commission's decision. Benicia Municipal Code Section 1.44.040 (D) states:

"D. An appeal hearing shall consist of a new (i.e., de novo) hearing on the matter by the person or body specified in BMC [1.44.100](#). The appeal hearing shall be based on the following evidence:

1. Any relevant evidence, including staff reports, etc., submitted at the time of the prior decision and at the appeal hearing, and
2. Findings, if any, and decision of the person or body whose decision is being appealed."

In deciding whether to grant or deny the appeal, the Council must determine if Valero has met the burden of showing that the FEIR and Use Permit should be approved. See Benicia Municipal Code Section 1.44.040 (E).

Conclusion:

Staff's recommendation for the Valero Crude by Rail Project FEIR and Use permit has not altered. See the March 15, 2016 staff report, with attachments for a full discussion of the project. Staff recommends that the request for continuance be denied for the reasons stated in this report.

Procedurally, staff recommends that the Council open the public comment period and take comment on the EIR, the Use Permit and the request for continuance together. Then direct staff to track Council questions as they occur during the public hearing and to respond to those questions in full at the conclusion of public comment.

Attachments:

- Letter from Valero's attorney, March 28, 2016
- Valero's PowerPoint
- Public comments received March 16 – 25, 2016
- Link to March 15, 2016 Council Report:
https://docs.google.com/gview?url=https%3A%2F%2Fs3.amazonaws.com%2Fgranicus_production_attachments%2Fbenicia%2F90fd64a30dbec1e5bb2b94e7c97.pdf&embedded=true