RESOLUTION NO. 16- 150

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BENICIA DENYING A USE PERMIT FOR THE VALERO CRUDE BY RAIL PROJECT AT 3400 EAST SECOND STREET (12PLN-00063)

WHEREAS, on December 21, 2012, Valero Refinery requested use permit approval for the Valero Crude by Rail (CBR) Project at 3400 East Second Street; and

WHEREAS, the City of Benicia, as the Lead Agency, prepared an Initial Study/Mitigated Negative Declaration to determine if the Valero CBR Project could have a significant impact on the environment, in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et seq.), the Guidelines for the Implementation of the California Environmental Quality Act (14 CCR Section 15000 et seq.), and the City of Benicia California Environmental Quality Act (CEQA) Guidelines pursuant thereto; and

WHEREAS, the Initial Study/Mitigated Negative Declaration was circulated for a 30-day comment period between May 30, 2013 through July 1, 2013; and

WHEREAS, a Draft Environmental Impact Report (Draft EIR) was prepared for the Valero CBR Project and circulated for a 90-day comment period between June 17, 2014 through September 15, 2014; and

WHEREAS, a Notice of Completion of the Draft EIR was filed with the Office of Planning and Research (OPR) on June 17, 2014, and a public notice of the availability of the Draft EIR was published in the Benicia Herald and Vallejo Time Herald on June 17, 2014; and

WHEREAS, copies of the Draft EIR were provided to the State Clearinghouse (State Clearinghouse No. 2013052074) and to those public agencies that have jurisdiction by law with respect to the Project, and a Notice of Availability to other interested persons and agencies, and the comments of such persons and agencies were sought for a 90-day comment period between the dates of June 17 through September 15, 2014; and

WHEREAS, the Planning Commission held a public hearing and accepted testimony on the Draft EIR on July 10, 2014, August 14, 2014 and September 11, 2014, and the City accepted written comments on the Draft EIR through September 15, 2014; and

WHEREAS, a Revised DEIR was prepared for the Valero CBR Project and circulated for a 60-day comment period between August 31, 2015 through

October 30, 2015; and

WHEREAS, a Notice of Completion of the Revised Draft EIR was filed with OPR on August 31, 2015, and a public notice of the availability of the Revised Draft EIR was published in the Benicia Herald and Vallejo Times Herald on August 31, 2015; and

WHEREAS, copies of the Revised Draft EIR were provided to the State Clearinghouse (State Clearinghouse No. 2013052074) and to those public agencies that have jurisdiction by law with respect to the Project, and a Notice of Availability to other interested persons and agencies, and the comments of such persons and agencies were sought for a 60-day comment period between the dates of August 31, 2015 through October 30, 2015; and

WHEREAS, the Planning Commission held a public hearing and accepted testimony on the Revised Draft EIR on September 29, 2015, September 30, 2015, October 1, 2015 and October 8, 2015, and the City accepted written comments on the Revised Draft EIR through October 30, 2015; and

WHEREAS, 287 written communications were received regarding the Draft EIR, 3,822 written communications were received regarding the Revised Draft EIR and these are included, along with responses, in the Final EIR; and

WHEREAS, the Final EIR document consisting of the Initial Study/Mitigated Negative Declaration, Draft EIR, Revised Draft EIR and the Response to Comments; and said Response to Comments incorporated all written comments received, all oral comments made at the Planning Commission public hearings, the responses to those written and oral comments, and the necessary corrections to the Draft EIR; and

WHEREAS, the Response to Comments document was circulated for public information and provided to the Planning Commission on January 5, 2016; and

WHEREAS, agencies and persons commenting on the Draft EIR and Revised Draft EIR were provided with copies of the Response to Comments document or the City's proposed responses to their specific comments on January 5, 2016; and

WHEREAS, a Mitigation Monitoring and Reporting Program was prepared to ensure that the mitigation measures identified in the EIR are implemented; and

WHEREAS, the various documents and other materials related to the

Project constitute the Record of Proceedings upon which the City bases its findings and decisions contained herein. Those documents and materials are located in the offices of the custodian of records for the documents and materials, who is the Community Development Director, City Hall, 250 East L Street, Benicia, California; and

WHEREAS, the Planning Commission held public hearings on February 8, 9, 10 and 11, 2016, at which it considered and discussed the Final EIR, the Mitigation Monitoring and Reporting Program, the staff report, and the proposed use permit with conditions of approval for the CBR Project, and heard testimony from members of the public regarding the documents and the proposed use permit; and

WHEREAS, the Planning Commission adopted Resolution No. 16-1 and denied certification of the Final EIR and denied the use permit for the CBR Project on February 11, 2016; and

WHEREAS, on February 29, 2016, Valero Refinery filed a timely appeal of the Planning Commission decision stating that the denial was based on grounds either preempted by federal law, contrary to governing law and/or not supported by substantial evidence in the record; and

WHEREAS, the City Council heard public comment on the appeal and closed the public hearing; and

WHEREAS, the City Council continued its deliberation on the appeal to September 20, 2016 to allow the Surface Transportation Board to weigh in on the issue of preemption; and

WHEREAS, a decision but not a declaratory order by the Surface Transportation Board was received by the City on September 20, 2016; and

WHEREAS, the issue of the City's ability to regulate the public health and safety impacts from the rail operations uprail and locally remains uncertain in light of the federal and state authorities lack of clear guidance or regulations; and

WHEREAS, per Section 15270 of the CEQA Guidelines, CEQA does not apply to projects that a public agency disapproves.

NOW, THEREFORE, BE IT RESOLVED THAT the City Council of the City of Benicia does hereby find that based on the Valero Crude by Rail Project application, the staff report, and related documents, and information presented at the public hearings:

1. That the Surface Transportation Board has provided guidance and not a declaratory order, and such guidance states that the City has the police power to protect public health and safety so long as it does "not discriminate against rail carriers or unreasonably burden interstate commerce". The whole of the record including the Environmental Impact Report provides sufficient information to fulfill its function as an informational document for the City Council as the decisionmakers.

2. That while the City recognizes the preemption issue, the Council wants to acknowledge the potential impacts from the proposed Project and the listed impacts that implicate the preemption argument are included only for information to the public and the legislatures, State and Federal:
    A. The Project's impacts from rail operations would be detrimental to the public health, safety and welfare of persons residing and working in and along the rail corridor from the oil fields to the Refinery, and detrimental to properties and improvements in the same locations.
    B. Current regulations are inadequate to protect people who live and work along the rail corridor from the oil fields to the Refinery, from the risk of release, fire and/or explosion caused by derailment of a tank car carrying highly volatile Bakken crude oil or other similar crude oil.
    C. Public testimony provides that the number of train cars and frequency of the cars will block traffic on Park Road if offloading of the rail cards is delayed. This will back up traffic on Park Road as well as on to the freeway off-ramp which causes an unacceptable and unmitigated risk of traffic accidents. The applicant and Union Pacific Railroad (UPRR) have stated that trains will not be dispatched until it is clear there is room for the next train; but the City does not appear to have the ability to condition the dispatching of the trains to ensure that trains are not prematurely dispatched, this could result in unavoidable impacts to traffic and safety within the Industrial Park, which is not in accord with Benicia Municipal Code (BMC) Section 17.04.030B, in that the Project has the potential to result in an inharmonious and harmful land use within the Industrial Park.
    D. The BAAQMD staff recommends a mitigation measure to require the use of Tier 4 locomotives or equivalent to reduce air quality impacts by mitigating impacts in each air basin to the maximum extent feasible by reducing emissions or contributing to new or existing programs in each applicable Air District. It is unclear, however, whether the City can use its regulatory authority over

Valero to require that locomotives traveling to and from the Refinery meet Tier 4 standards.

E. No conditions, agreements, or understandings with Union Pacific or Valero can ensure that the trains meet a particular schedule. The scheduling of unit trains is non-binding which can create a worst-case scenario where a unit train immediately precedes or follows another train within 8-16 minutes during peak travel times. This can significantly impede traffic and also reduce deceleration space for drivers approaching the I-680/Bayshore Road off-ramp.

F. The Project would have eleven significant adverse environmental impacts from rail operations, listed below. Possible mitigation measures for the significant and unavoidable impacts as noted below may not qualify as legally infeasible per Public Resource Code §21081(a)(3) and State CEQA Guidelines §15091(a)(3). Mitigation measures that do not impact "transportation by rail carriers" could be applied to Valero that would not unduly impact UPRR. Potential mitigation measures suggested by various commentators including, but not limited to, the Attorney General and BAAQMD have suggested mitigation measures that would reduce or avoid these impacts. Despite the guidance from the Surface Transportation Board, it remains unclear, what, if any, mitigation measures would be preempted by ICCTA.

    a. Air Quality: Impact 4.1-1 (locomotive emission-related conflict with implementation of applicable air quality plans); Impact 4.1-1b (locomotive-related contribution to existing or projected air quality violation(s)), Impact 4.1-2 (cumulatively considerable locomotive-related net increase in criteria pollutant and ozone precursor emissions), Impact 4.1-5 (locomotive emission-related contribution to an existing or projected air quality violation uprail from the Roseville Yard), and Impact 4.1-7 (cumulatively considerable locomotive emission-related net increases in ozone precursor emissions in uprail air districts). (Use of Tier 4 engines or fund mitigation programs.)
    b. Biological Resources: Impact 4.2-10 (train collision-related impacts to candidate, sensitive or special-status wildlife species or migratory birds, including injury or mortality). (Provide first responder training and equipment and supplies to wildlife rescue facilities.)
    c. GHG Emissions: Impact 4.6-1 (locomotive-generated direct and indirect GHG emissions) and Impact 4.6-2

(locomotive emissions-related conflict with Executive Order S-3-05). (See above.)

d. Hazards and Hazardous Materials: Impact 4.7-2 (reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment posing a significant hazard to the public or the environment at points along the North American freight rail lines), Impact 4.7-6 (train derailments and rail car unloading accidents that lead to hazardous materials spills, fires, and explosions thereby resulting in substantial adverse secondary effects, including to Biological Resources, Cultural Resources, Geology and Soils, and Hydrology and Water Quality), and Impact 4.79 (exposure of people or structures to significant risk, injury, or loss from wildland fire if a train derails in a fire hazard severity zone and a resulting fire or explosion causes a wildland fire). (See above plus provide mitigation fund.)

3. That the Council finds the following grounds for denial of the use permit set forth below in sections 4, 5, and 6 each provide an independent basis for denial of the use permit pursuant to Section 17.104.060 of the Benicia Municipal Code.

4. That the proposed location of the use is not in accord with the objectives of the General Plan and the Benicia Municipal Code and the purposes of the district in which the Crude By Rail site is located as set forth below.
   A. The Project's impacts from operation of the unloading rack, in and of themselves, considered separately from impacts from rail operations, would be detrimental to the public health, safety and welfare of persons residing and working in the adjacent neighborhood, and detrimental to properties and improvements in the vicinity.
   B. The Project's impacts from rail operations would be detrimental to the public health, safety and welfare of persons residing and working in the adjacent neighborhood and the Refinery, and detrimental to properties and improvements in the same locations.
   C. The Project's benefits do not outweigh the Project's eleven significant adverse environmental impacts as identified in the EIR and the City is preempted from providing mitigation measures.
   D. Neither the guidance from the Surface Transportation Board to the City nor any other applicable legal authority has clarified the

extent to which the City can impose conditions of approval, and/or mitigations measures under the California Environmental Quality Act, on Valero that are designed to mitigate the impacts from Union Pacific's rail operations. Given the significance of the rail impacts, and in the absence of clear legal authority as to permissible conditions and mitigations measures, the City can neither conditionally approve the Project nor determine whether mitigations measures are feasible or infeasible as required by CEQA.

E. Current regulations are inadequate to protect residents of Benicia, and people who live and work in Benicia from the risk of release, fire and/or explosion caused by derailment of a tank car carrying highly volatile Bakken crude oil or other similar crude oil.

F. While oil & gas refining is an allowed use, it is unclear from the scale of this Project how traffic impacts will be mitigated.

G. The Project could potentially have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait due to a potential spill and risk of accident or upset during operation of the unloading rack. The unloading rack is owned and operated by Valero, is located on Valero's property, and is proposed to be constructed adjacent to Sulphur Springs Creek and the marsh area. There are insufficient mitigation measures that have been applied to protect these areas and it does not appear that there is adequate space to require additional mitigation measures. The risk of potential impacts to the creek is not in accord with the overarching goal of the General Plan, which is sustainability. Further, because of the Project's potential to impact the creek, it would not be in accord with Goal 3.22.1 of the General Plan, "Avoid development that will degrade existing lakes and streams."

H. On-site impacts such as the potential (however small) for derailments cannot be adequately addressed due to the lack of federal and state regulations. Trains are subject to federal regulations; however, such regulations have not kept pace with the changing environment and are not protective of public health and safety. Measures such as new technology, reduced track speeds and more frequent inspections have not prevented serious accidents.

I. Relying on North Dakota Industrial Commission's Order No. 25417 is insufficient protection from the risk of accidents since the Order only requires conditioning of the crude and not stabilization. Stabilization would remove more of the dissolved explosive gases from the crude oil.

J. Although the FEIR relied on the most current information available to the City and the Bay Area Air Quality Management District (BAAQMD)'s Google Earth tools, BAAQMD states that the information is outdated and incorrect. Use of updated tools may indicate significant health risks to sensitive receptors that would require appropriate mitigation measures. Further analysis of potential increased fugitive emissions during unloading and storage should be evaluated for air quality impacts in the City due to the potentially higher volatile organic compound content in lighter crude.

K. Mitigation measures should be applied to Valero to reduce air quality impacts from emissions. Mitigations measures could be adopted to apply to Valero and not Union Pacific Railroad by requiring Valero to implement an offsite mitigation program for their projects in the air basins or fund existing projects or programs.

L. Sensitive receptors are located nearby the Site and include children at schools and day cares. The higher breathing rate of children may expose them to unacceptable cancer risks.

M. The Project is not in conformance with the following City of Benicia's General Plan (1999) goals and policies:

- GOAL 2.6: Attract and retain a balance of different kinds of industrial uses to Benicia.
  POLICY 2.6.2: Other land uses should not adversely affect existing industrial and commercial land uses.

- GOAL 4.1: Make community health and safety a high priority for Benicia.
  POLICY 4.1.1: Strive to protect and enhance the safety and health of Benicians when making planning and policy decisions.

- GOAL 4.7: Ensure that existing and future neighborhoods are safe from risks to public health that could result from exposure to hazardous materials.

- Goal 4.8: Protect sensitive receptors from hazards.
  POLICY 4.8.1 Evaluate potential hazards and environmental risks to sensitive receptors before approving development.

- Goal 4.16: Require hazardous materials and hazardous waste management handling and disposal procedures that are protective of human health and the environment.

5. That the proposed location of the conditional use and the proposed conditions under which it would be operated or maintained are not consistent with the general plan and will be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of such use, and detrimental to properties or improvements in the vicinity or to the general welfare of the city in that the potential (however small) for a catastrophic explosion during the unloading of the tank cars on Valero's tracks on Valero's property is detrimental to the health, safety and welfare of the Industrial Park and the greater community, and detrimental to properties and improvements in the vicinity and the general welfare of the city.

6. That the proposed conditional use will not comply with the provisions of this title, including any specific condition required for the proposed conditional use in the district in which it would be located, in that the Project's site development features (proximity to existing oil tanks and Sulphur Springs Creek) and design is not located and operated in a manner that is compatible with uses on adjoining properties and in the surrounding area, as detailed in Findings 3, 4, and 5, above.

   The City Council cannot require adequate conditions for the Project which will mitigate the public health and safety impacts from traffic, potential derailments, oil spill, and explosion, among other impacts.

BE IT FURTHER RESOLVED THAT based on the above findings, the City Council denies the appeal of Valero of the Planning Commission's decision and denies the use permit for the Crude By Rail Project.

BE IT FURTHER RESOLVED THAT the denial is with prejudice in accordance with Benicia Municipal Code section 17.124.030.

BE IT FURTHER RESOLVED THAT Benicia's representatives in Congress and the State Legislature shall be contacted by the Interim City Manager on behalf of the Council to urge that they take action to provide clear guidance on the question of preemption and to enact appropriate legislation to provide the appropriate tool and protection to local governments to enable them to protect public health and safety.

BE IT FURTHER RESOLVED THAT if the City is sued by Valero, that the City Attorney is directed to contact the various organizations in opposition to the Project to solicit funds to help defend the City.

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On motion of Council Member **Schwartzman** and seconded by Council Member **Strawbridge**, the above Resolution was adopted by the City Council of the City of Benicia at a regular meeting of said Council held on the 4th day of October, 2016, and adopted by the following vote.

Ayes: **Council Members Campbell, Hughes, Schwartzman, Strawbridge, and Mayor Patterson**

Noes: **None**

Absent: **None**

Elizabeth Patterson, Mayor

Attest:

Lisa Wolfe, City Clerk

10-13-16

Date