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To: [Heather McLaughlin](#); [Lorie D. Tinfow](#); [Lisa Wolfe](#)
Cc: [Terry Mollica](#)
Subject: Request for Rehearing of Vote Cast 6/19/18 concerning the Industrial Safety Ordinance
Date: Thursday, June 28, 2018 2:17:03 PM

June 28, 2018

Re: Request for Rehearing of Vote Cast 6/19/18 concerning the Industrial Safety Ordinance

City Attorney, City Manager and City Clerk,

This email-letter constitutes a formal request pursuant to Benicia Municipal Code (“BMC”) section 1.44.050(A), I hereby request and make application for a rehearing of the decision and vote conducted by the City Council on June 19, 2018, regarding the two-step process in conjunction with the Industrial Safety Ordinance. Pursuant to BMC 1.44.050(D), the rehearing should be “scheduled for the next regular meeting which allows sufficient time for the giving of notice as required by BMC 1.44.090,” which in this case would be the next City Council hearing set for July 17, 2018.

Section 1.44.050(A) provides that “*any* council member” may make “application” within the time limits set forth in BMC section 1.44.060 for a rehearing by making the request to the City Clerk and setting for the “reasons for requesting rehearing.” Section 1.44.050(F) permits “any council member” to request a rehearing without submitting an “application” in order for the City Council to “to take any new or different action on an item of city policy or a purely legislative function or decision.” (BMC §1.44.050(F). Please consider this letter to be my written request for a rehearing and an explanation of the reasons for making this request.

BACKGROUND

As you know, on June 19, 2018, the City Council took up my May 2017 request to consider developing an Industrial Safety Ordinance. Prior to the June 19th public hearing on this question, I submitted an amended request, to wit:

Consider Council directing staff - with appropriate subject matter expertise (including outside of city staff) – review the draft Industrial Safety Ordinance and make recommendations to Council for future consideration for adoption of the Industrial Safety Ordinance

This request is being updated in light of the lapse of time of the original request [last] year in May [2017]. . . . In the meantime, a local group organized to advocate for council adoption of the Industrial Safety Ordinance (ISO). The group researched the existing regulatory authority of the state and conducted an expert panel representing the state regulators as well as officials from Contra Costa County.

The June 19th staff report did not acknowledge or reflect the amended request of reviewing the draft Industrial Ordinance. The amended question was not discussed in the staff report and there was no clarification from staff during the council meeting that the two recommended options did not include reviewing the draft ordinance. Instead, the entire staff discussion was the question of whether staff should prepare an Industrial Safety Ordinance modeled on the Contra Costa County safety ordinance for the City of Benicia as Agenda item 15(E).

Although the amended request specifically asked for review of the draft Industrial Safety Ordinance it did so as *the* action by council to direct staff to review the draft and report back to council within 90 days. The amended request set forth criteria for such a review. The staff report and subsequent staff discussion did not address this request for review of the draft ordinance.

The public presented extensive public evidence concerning the need for an Industrial Safety Ordinance and, in particular, the requirement to have “community-based” air quality monitors installed. Evidence was presented that since 2000, members of the community and the City had negotiated for the installation of such monitors and pursuant to settlements entered into with the Valero refinery in 2003, 2008 and 2010, but that despite these agreements – and even purchasing, setting up and testing air monitors but then mothballing them means that, in effect, no such monitors were ever installed. Although all five Council Members voiced support for installation of such air quality monitors, two Council Members proposed to defer action on an Industrial Safety Ordinance until November 2018. Council Member Campbell expressed the concern that if the refinery had not yet installed air quality monitors as had been approved by the Bay Area Air Quality Management District (“BAAQMD”) on June 8, 2018, he would vote in favor of adopting the Industrial Safety Ordinance. At the time, little was known about the air monitor plans that had been approved by BAAQMD just a few days before. Not only does the lack of knowledge about the Air District’s action cause concern, but it also is a testament to why the city needs the draft Industrial Safety Ordinance which would require that the city comment on and participate in the type, location and subsequent reports of the performance of the air monitors.

Council Member Schwartzman also expressed concern that Valero had not yet addressed backup power plans sufficient to avoid another incident like the discharge of toxic chemicals via “flaring,” as had occurred on May 5, 2017. Even without the backup power supply, the draft Industrial Ordinance provides for Best Management Practices (BMP) that would include “dialing down” activities when there is work being done on power supplies and other potential disrupting tasks. Throughout the hearing, representatives of Valero had declined to answer questions by the City Council Members concerning their preparedness for such further power outages, citing pending litigation with Pacific, Gas & Electric Company.

After taking extensive public comments on the draft Industrial Safety Ordinance, the City Council voted 3 to 2 to not direct staff to take further actions to review and analyze a draft Industrial Safety Ordinance until November 2018. Due to this decision, the City will not be prepared to vote for an Industrial Safety Ordinance if the refinery has not yet installed and made operational adequate air quality monitors by November 2018.

REASONS FOR REHEARING

This request for rehearing is supported by four reasons that justify further action by the City Counsel. The reasons are enumerated below.

<!--[if !supportLists]-->A. <!--[endif]-->Staff Had Not Adequately Prepared The Council For The Hearing

At the May 23, 2017 City Council meeting, I initiated the two-step process request to the Council to discuss consideration of adopting an Industrial Safety Ordinance. At the time, City Council directed staff

to agendaize the item for discussion.

Yet, nothing substantive was done by staff in the period of over a year afterward. The long time from my May 2017 request to finally getting a hearing in June 2018 was in part in context of the exigencies of other city business and is not a reflection on staff or Council's interest. When the City Manager briefed me on the plans for March Council retreat, I was advised that the matter could be discussed during the May "retreat." Because the retreat was not a formal public hearing of the City Council the request for the Industrial Safety Ordinance was not part of the "priority list". In other words, how could the Council render a decision about the ordinance without a public hearing? But the June 19th Staff Report then notes that the request for the Industrial Safety Ordinance was not part of the Council's priorities and therefore was not supported by staff.

The Staff Report contained almost no meaningful information concerning what actions or

costs would be necessary to actually move toward the adoption of an Industrial Safety Ordinance. Although a thorough draft of the Industrial Safety Ordinance prepared by members of the community was included in the packet, the staff had not reviewed it and was unprepared to comment even preliminarily.

The Staff Report presented only two options to the City Council, one of which was to do nothing but “monitor” the Solano County CUPA’s administration of Program 4 for the implementation of the Program Safety Management (“PSM”) required by State regulations adopted October 1, 2017 [and incorporated by reference in the draft Industrial Safety Ordinance]. Of course, while this “monitoring” option purported to address the PSM program embraced by the Industrial Safety Ordinance, it did not at all address the issue of air quality monitors that were a critical part of the proposed Industrial Safety Ordinance. All members of the City Council agreed that air quality monitors were important issue for the City.

“Option 1” proposed to “direct staff to *draft* an Industrial Safety Ordinance to bring to Council for adoption,” but the Staff Report contained no substantial information about the necessary actions, consultants, staff work or costs involved with this option. Although the Staff Report acknowledged that there would be “staff time and possible consultant fees” the costs of which were expected to be “significant and likely include employing and training additional staff,” no attempt was made in the Staff Report to quantify any such costs. Embarrassingly, while acknowledging that “refinery regulation is a special expertise not held by City staff,” they went on advise that “the CUPA has *jurisdictional authority* for refinery regulation.” The staff’s presentation and Staff Report were woefully inadequate to advise the City Council about the prospects for an Industrial Safety Ordinance.

<!--[if !supportLists]-->B. <!--[endif]-->Failure to Address Past Settlement Agreements and Obligations Regarding Air Quality Monitoring

Evidence was presented by members of the community about settlement agreements reached with Valero in 2003, 2008 and 2010 which required the installation of air quality monitors both at the “fence line” and in the community, but that despite years of negotiations and agreements, (as noted, purchase, installation and testing but then mothballed) there are no such monitors. Indeed, compliance with such agreements was an express condition of the land use permits issued to Valero at the time. Since Valero did not comply with these settlement agreements, it has literally violated the terms of its use permits. Yet, astoundingly, the Staff Report made no mention of this important history and presented no discussion whatsoever as to whether Valero had fulfilled its commitments to the City and community concerning ambient air quality monitors.

Expert and non-expert evidence was presented as to the need for a high-quality air monitoring system to protect the community as well as Valero's failure to comply with its commitments for over nearly a twenty-year period. The City Council should have been advised and taken into consideration Valero's failure to comply with these agreements as well as its non-compliance with the conditions of approval in rendering its decision, but the Staff Report failed to address these points at all.

**<!--[if !supportLists]-->C. <!--[endif]-->New
Evidence Exists The Necessity Of “Fence Line”
As Well As Community-Based Air Quality
Monitors That Is Not Adequately Addressed By
The Planned BAAQMD Monitors**

Although acknowledging its lack of “special expertise” concerning “refinery regulation,” the Staff Report reports that “Valero is now required to meet upcoming deadlines for implementing air monitoring in Benicia and has submitted their air monitoring plan to Bay Area Air Quality Management District and is awaiting their response.” The Staff Report briefly describes BAAQMD and California Air Resources Board (“CARB”) monitoring programs and declares that both agencies have made “significant advances in required air monitoring for refineries.” However, the evidence presented during the hearing showed that the CARB and BAAQMD monitor programs were not adequate to protect the community.

However, the Valero “Plan” for these monitors was not presented during the hearing and had not been reviewed by staff or the Council in advance of the hearing. The “*Air Monitoring Plan for the Valero Refinery in Benicia, California*” (“the Plan”) apparently submitted to and approved by BAAQMD contains many significant shortfalls. The Plan (which is enclosed) proposes only four (4) air monitors (and 5 “reflectors”) along the southwest and eastern “fence line” of the refinery, which are plainly inadequate. The rationale is that “over the course of a year” winds blow in that direction “less than about 7% of the time.” However, by definition, that means that measurements will not be taken to protect populations to the west and northwest despite the Plan’s acknowledgement that pollutants are predictably released in that direction a significant part of the time. Moreover, although the Plan recommends that “alkanes, 1,3-butadiene, other organics, and ammonia should be considered for measurements,” the system described in the Plan will *not* monitor for these pollutants. Also, the Plan states that the instruments are expected to be operative ninety (90%) percent of the time, leaving no monitors in place ten percent (10%) of the time.

Yet, after the conclusion of the hearing, on Saturday, June 23, 2018, I participated and several others participated in a conference sponsored by Airwatch Bay Area (“Airwatch”) in which

expert reports about the limits of air quality monitoring systems was discussed at length. At the conference, the so-called “fence line” monitors – such as those apparently approved by the BAAQMD plan – were reported to only be about 1% effective at detecting hazardous waste releases. By contrast, the “community monitors” that would have been required under the propose Industrial Safety Ordinance were considered to be 25% effective.

Rehearing on the request to direct staff with certain criteria stated earlier to have the draft Industrial Safety Ordinance *reviewed* should be allowed so that new expert and non-expert evidence can be presented on this important subject. The BAAQMD monitoring program will not be sufficient in quality, quality or location to fully protect the community. Time is of the essence.

**<!--[if !supportLists]-->D. <!--[endif]-->The
Decision To Defer Decision Pending Installation
Of BAAQMD Monitors Is Uncertain And Vague
And Does Not Present A Viable Plan**

Prior to the final vote on the Industrial Safety Ordinance, two of the Council Members suggested that they would reconsider their votes if Valero had not installed fence line monitors according to the plan approved by BAAQMD in early June, 2018. However, Valero’s own correspondence had indicated that such monitors would be installed within one (1) year of approval. No representative indicated that compliance with the plan could be accomplished within 5 months. More importantly, the Council’s decision only had the effect of deferring *any* action of any kind for 5 months. Instead, the Council should have authorized and directed staff to commence the actions necessary to study whether the BAAQMD-approved plan would be adequate to protect the community. The Council also should have directed staff to evaluate the draft proposed Industrial Safety Ordinance so that the ordinance can be more adequately consider should monitors not be installed by November, 2018.

The Council did not allocate any resources toward determining whether the BAAQMD plan should have been approved or objected to by the City. Without any review or comment by the City, BAAQMD apparently approved the plan without any consideration as to whether it was adequate for the purposes of protecting the City. Yet, Valero’s Air Monitoring Plan submitted to BAAQMD plainly shows significant releases of benzene over major portions of the City, including downtown, over several months of the year. Moreover, the BAAQMD-approved Plan only calls for four (4) “fence line” air quality monitors (and five (5) non-monitor “reflectors”) on the southwest and eastern sides of the refinery, not on the west side when significant populations reside.

As a result, the Council's decision effectively deferred any consideration of whether the BAAQMD required monitor systems could realistically be installed prior to November 2018, or whether such monitors would be of sufficient quality to protect the public interests. As a result, should Valero simply ignore the City once again, the City will be no closer to making any decisions of any kind in November, 2018, and will find itself in the same predicament that it is in today, which is more than a full year after it voted to place the issue on the agenda. Without taking *any* steps toward preparation, the current course of action will force the City Council to *begin* the study of these issues only after Valero has again failed to comply. That will further delay any decision for far too long.

Moreover, the delay will do nothing to advance Council Member Schwartzman's expressed concern about the complete failure to Valero to address the emergency backup power problem that led directly to the incident in May of 2017. With each additional day that passes, the community faces the risk of another power outage, which Valero has acknowledged it is unprepared for. The *only* response to such an outage will plainly be another *flaring* incident in which hundreds of thousands of toxic chemicals will again be released upon the community. The delay in taking any action just puts the community in greater jeopardy of such releases without taking any action to eliminate or mitigate such risks. Should such an unspeakable incident repeat itself during the Diablo Winds period starting in October and prior to November, 2018, I, for one, do not wish to have to explain to the community -- or, worse yet, a jury -- why the City Council took no action to avoid such dangers despite over a year and a half of advance knowledge of the risks.

For these reasons, I respectfully request that the City Clerk place this application on the agenda for rehearing consideration of the Industrial Safety Ordinance at the next available public hearing. I also urge each of my fellow Council Members to join with me in making this request not later than the deadline of **July 3, 2018**.

Respectfully submitted

cc: City Council [by way of city attorney]

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"Cities (and counties) have the capability of providing something for everybody, only because, and only when, they are created by everybody." [*Jane Jacobs*](#)