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City Council
Action 11/18/2014

June 4, 2014

Heather McLaughlin
City Attorney
City of Benicia
250 East L Street
Benicia, CA 94510

Re: Mayor Patterson/Valero Project

Dear Ms. McLaughlin:

At your request, this opinion addresses whether Mayor Patterson is precluded by the common law conflict of interest doctrine from participating in the decision on the Valero Benicia Refinery's Crude by Rail project by virtue of her public comments pertaining to the project.

What follows is a detailed explanation of the applicable law and analysis of the relevant issues. It is necessarily lengthy. Ultimately, determination of legal bias is intensely fact based. To form our opinion we extrapolate how a court might view the facts presented here in light of how courts have assessed other situations involving a decisionmaker's activities outside public hearings. As a result, our conclusion cannot be free from doubt, which is why we have endeavored to provide the full explanation of the

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cases that form the basis of our conclusion. Taking into consideration just the publications that have been called to our attention, in our opinion, a court likely would find that Mayor Patterson's oft-expressed skepticism about transportation of crude oil by rail evidences an unacceptable probability of actual bias. The evidence is sufficient to warrant her preclusion from participation in the decision. As discussed below, should you and the Mayor reach a different conclusion regarding whether the evidence shows an unacceptable probability of bias, we recommend that she undertake steps to rehabilitate her role as a decisionmaker, which steps we describe at the conclusion of this opinion.

FACTS

Valero Benicia Refinery applied to the City for a use permit to implement its proposed Valero Benicia Refinery's Crude by Rail project ("project"). The City is currently preparing an Environmental Impact Report (EIR) pursuant to the California Environmental Quality Act ("CEQA"), California Public Resources Code Section 21000 *et seq.*

The purpose of the project is to install rail spur tracks and new transfer equipment – a railcar unloading rack, pipelines, and infrastructure -- that would enable the Refinery to receive a portion of its crude oil deliveries by railcar. The crude oil feedstocks shipped by railcar would originate at sites in North America. Union Pacific Railroad (UPRR) would transport these railcars using existing rail lines from sources in North America to Roseville, California, where the cars would be assembled into a train for shipment into the Refinery. The proposed Project would install a new railcar unloading rack within the Refinery and, in association with UPRR, construct or upgrade the existing Refinery rail infrastructure to accept up to 100 railcars of crude oil a day in two 50 railcar trains that would enter the Refinery on an existing rail spur crossing Park Road outside the southern boundary of the Refinery. The crude oil unloaded from the railcars would be pumped to the existing crude oil storage tanks in the Refinery via a new dedicated pipeline.

Valero intends for the crude oil delivered by rail to replace up to 70,000 barrels per day of the crude oil presently delivered by marine vessels. The amount of California crude oil delivered to the Refinery by pipeline would remain unchanged. Implementing the proposed Project could reduce the quantity of crude oil delivered by marine vessel by as

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much as 25,550,000 barrels a year. Based on a three-year baseline period from December 10, 2009 to December 9, 2012, annual marine vessel deliveries could be reduced by as much as 81 percent.

The City Council will be asked to consider certification of the EIR and approval of a use permit. The use permit is a quasi-judicial permit.

The City Attorney has provided me with a representative sampling of Mayor Patterson's written comments since mid-2013 regarding the proposed project. The Mayor may have made other comments, oral or written, aside from those listed below. I am informed that the allegations of bias that have been leveled against the Mayor stem from the communications provided and that these are representative of the Mayor's statements. The majority of the comments are contained in "E-Alerts" transmitted by electronic mail to an unidentified group of recipients.[1] They fall roughly into three categories: (1) emails alerting recipients about procedural developments in the project, (2) emails related to the substantive opinions of others related to the project or crude-by-rail generally and (3) her opinions regarding crude-by-rail. This opinion is based solely on the Mayor's comments that have been provided to me as follows:

1. "E-Alert" dated July 6, 2013, providing notice of an upcoming public forum.

2. "E-Alert" dated July 19, 2013 forwarding an opinion piece by Roger Straw encouraging preparation of an EIR for the project, indicating that surrounding communities should be involved and acknowledging Valero's economic contribution to Benicia.

3. "E-Alert" dated August 1, 2013 announcing that an EIR would be prepared for the project.

[1] At the bottom of each of the E-Alerts reviewed in connection with preparation of this opinion, Mayor Patterson includes the following language: "Posting material on this site does not indicate bias for future decision making. Use of words and terminology, notice about events, forums and public concerns is not dicta nor determinative for future decisions." The language goes on to say: "Mayor Patterson's opinions are in no way prejudicial for decision making as each item on council agendas are considered with an open mind and impartiality."

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4. "E-Alert" dated September 17, 2013 forwarding newspaper articles regarding preparation of an EIR for the project.

5. "E-Alert" dated September 24, 2013 forwarding a local news story reporting that recent rail work by Union Pacific is unrelated to the Valero project but instead to accommodate growth in automotive business. The article includes a discussion of the Valero Crude-by-Rail project and summarizes some of the arguments being made for and against the project.

6. "E-Alert" dated November 11, 2013 forwarding a newspaper article regarding a train derailment and explosion in Alabama.

7. "E-Alert" dated November 23, 2013 forwarding an opinion piece by Roger Straw (Mayor Patterson's former campaign manager) rebutting allegations that Mayor Patterson has demonstrated unacceptable bias concerning the project.

8. "E-Alert" dated January 21, 2014 forwarding an article entitled "Illinois Village Leads Charge for Tougher Oil Train Rules." The article discusses the role of Barrington, Illinois in pushing for tougher federal safety regulations on the nation's increasing oil train traffic.

9. "E-Alert" dated February 24, 2014 forwarding a Valero press release.

10. Facebook post dated February 24, 2014 incorporating a Valero press release.

11. Video clip – Mayor Patterson appears in a roughly half minute video clip on the San Francisco Chronicle website dated February 26, 2014, filmed in front of the Valero facility, in which she states that (a) the City's primary concern is public health, safety and welfare, (b) an EIR is currently in preparation to deal with those issues, (c) the City intends to vigilantly protect the safety of the community, (d) Valero is a major employer in Benicia and important to the local economy and that the process will be "mindful" of that fact, and (e) anticipating that the hearing will be "interesting."

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12. Op-Ed piece in the San Francisco Chronicle dated March 4, 2015. In this piece, Mayor Patterson urges Governor Brown to issue an executive order to assure that the State is prepared to deal with "the highly flammable and explosive Bakken crude oil from North Dakota coming by rail into California." In the article, Mayor Patterson states that "crude-by-rail shipments in unsafe tank cars pose imminent danger" to small rural communities. She urges the Governor to direct State agencies to assess the State's emergency response programs, and urges the Legislature to adopt legislation to enhance safety and improve coordination with federal agencies.

13. "E-Alert" dated March 10, 2014 forwarding an article about speakers at an open meeting organized by the opposition to the project.

14. OC Register March 19, 2014 editorial disagreeing with Mayor Patterson's Open Forum piece in the Chronicle, calling it a "rush to judgment."

15. "E-Alert" dated March 29, 2014, directed to unspecified email list forwarding a Sacramento Bee article about unpermitted crude oil transfers at a rail facility in Sacramento and noting that "there is a lack of agreement on the threat, level of protection, appropriate regulations – or not, and ability to respond to large events."

16. "E-Alert" dated April 28, 2014 reminding readers that comments on the draft EIR are due.

17. "E-Alert" dated May 27, 2014 in which Mayor Patterson defends her forwarding a series of detailed questions from Roger Straw to Congressman Mike Thompson pertaining to regulation of transport of crude oil by rail with specific reference to the Valero project and how potential accidents arising from the Valero project will be addressed. The E-Alert includes the text of a newspaper article focused on Congressman Thompson's involvement in rail safety issues, in which he is quoted as saying that the proposed Valero project

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"must be done right." In the article, Congressman Thompson does not state an opposition to the project but says that "I want to make sure it's done safely, so damage is minimal, if not nonexistent."

APPLICABLE LEGAL STANDARDS

When the City Council applies existing law/policy to a specific set of facts, the Council is acting in its administrative or quasi-judicial capacity. In all other instances, the Council acts in its legislative capacity (e.g., adopting an ordinance or establishing a budget). Individual legal rights are at stake in a manner distinct from the general public when the Council acts in its quasi-judicial capacity and therefore special procedural considerations are warranted.

In any quasi-judicial proceeding, the City must afford all parties due process. See *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482. "Due process" consists of providing interested persons reasonable notice of the public hearing, a meaningful opportunity to be heard before a decision is made, and an unbiased tribunal. The City's zoning code and hearing procedures attend to the notice and opportunity-to-be-heard requirements.[2] It is that last part, the unbiased tribunal, which is implicated in this situation.

The courts have long recognized that "an individual has the right to a tribunal which meets standards of impartiality. Biased decision makers are impermissible and even the probability of unfairness is to be avoided." *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170 (internal citations and quotations omitted). There are various types of bias; the one at issue here is whether the Mayor has already made up her mind about the project, thereby precluding her from being an impartial decisionmaker. *Rosenblit*

[2]A fair hearing on a project application results in a decision supported by substantial evidence in the record and based only on the evidence in the record. Such evidence-based analysis promotes rational decisions, which are a hallmark of impartiality. Limiting the consideration to evidence in the record provides interested parties of differing viewpoint each an opportunity to challenge evidence presented to decisionmakers, which is fair and another hallmark of an impartial hearing.

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v. Review Board (1991) 231 Cal. App. 3d 1434, 1448 (reviewing tribunal violated employee's due process rights because it was predisposed to the outcome prior to the conduct of the hearing).

When individual councilmembers make comments that suggest a position on an application outside of a public hearing, their impartiality is compromised. Even the appearance of bias may impair the City's ability to provide an impartial tribunal to satisfy due process if potentially biased councilmembers participate in a decision. Legal bias is not determined by probing into individual councilmembers' minds to see if they really can be fair or whether they have made a decision for legally acceptable reasons. Obviously, it would be impractical to have to prove what someone really thinks. Instead, legal bias is determined by evaluating evidence and circumstances to see if there is an unacceptable probability of bias in favor or against a project before hearing the evidence. This is a more objective evaluation, regardless of how actually impartial a councilmember may be. Evidence of a probability of bias often comes in the form of public officials' comments on a project outside of a public hearing that a reasonable person might believe indicates a predisposition on a matter.

THE CASES ADDRESSING BIAS

There have not been a great many cases addressing this issue. Discussed below is a Supreme Court case that recognizes that elected officials are entitled (almost obligated) to address issues of broad public concern and should be able to do so without being later barred from decisionmaking. Crude by rail transport is a matter of public concern, especially in Benicia; no one could argue credibly otherwise. However, when applied to situations involving specific quasi-judicial decisions, the Courts of Appeal have found evidence of actual bias inconsistent with the obligation to provide an impartial tribunal to meet the standards of due process. Notably, a case out of Los Angeles directly dealt with a circumstance where a decisionmaker was alerting a group of people to an upcoming public hearing on a project. It is the case closest factually to the situation here.

In *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, the Court of Appeal offers some insight into the type of bias at issue here. In that case, a Los Angeles planning commissioner also served as president of the homeowners' association in the

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community where he lived. He authored an article in the HOA's newsletter that expressed concern over a project's environmental impacts, describing the project as "a threat to wildlife corridor." He also introduced a speaker at an association meeting who spoke in opposition to the project. The court held that the fact that the commissioner had expressed such concerns as a member of the HOA "gave rise to an unacceptable probability of actual bias and was sufficient to preclude [him] from serving as a 'reasonably impartial, noninvolved reviewer'" when the matter was heard by the Los Angeles Planning Commission. Note that he did not say he was against the project, only that as proposed it threatened a wildlife corridor.

In the *Nasha* case, the applicant proposed to construct five three-story homes on five lots and obtained design review approval from the City's Planning Director. The approval was appealed by project neighbors to the Los Angeles Planning Commission. The HOA newsletter article was published before the Commission heard the appeal. At the Planning Commission hearing, the commissioner was joined by two other commissioners who voted 3-1 to uphold the appeal and thus deny the project. The Applicant challenged the hearing and the vote, arguing that the commissioner's article provided evidence of bias against the project which should have prevented his participation in the matter. The Court of Appeal agreed.

The Court of Appeal first noted that standards of fairness before a local board such as a planning commission cannot be as strict as they would be in a judicial proceeding because local decision makers, especially in a small city, are likely to know some or all of the parties to the proceeding. Nevertheless, a project applicant is entitled to a *reasonably impartial, noninvolved reviewer*. The Court held that in order to prevail on a claim of bias violating fair hearing requirements the petitioner must establish with concrete facts an unacceptable probability of actual bias on the part of the decision makers: "[b]ias and prejudice are never implied and must be established by clear averments."

The Court found that the HOA newsletter article alone constituted the concrete fact necessary to prove an "an unacceptable probability of actual bias." The article was printed in the court's decision and the italics were added by the court to signify the troubling language:

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> "**Multiview Drive Project Threat To Wildlife Corridor** [¶] A proposed project taking five legal lots totaling 3.8 acres for five proposed large homes with swimming pools served by a common driveway off Multiview Drive is winding its way through the Planning process.... [¶] After wildlife leaves Briar Summit heading eastward they must either head south towards Mt. Olympus or north to the slopes above Universal City. *The Multiview Drive site is an absolutely crucial habitat corridor.* Please contact Paul Edelman with the Conservancy at 310/ ... or Mark Hennessy who lives adjacent to the project at 323/ ... if you have any questions."

Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal.App.4th 470, 484. It did not matter to the court that the article was unsigned when it appeared in the newsletter. The offending portion is broad; thus the courts have signified a relatively low bar with respect to what evidence establishes the unacceptable probability. Because three votes were required to pass a motion upholding an appeal, without the biased commissioner's vote the motion would have failed. Therefore, the court found that the commissioner's vote prejudiced the applicant.

The evidence was more plentiful in *Clark v. City of Hermosa Beach*. In that case, a city councilmember was found to be biased in connection with a vote denying a condominium project where he (1) prior to being elected to the city council had opposed a prior iteration of the project and had appealed the project approval from the planning commission to the city council; (2) resided in an apartment in proximity to the project site; and (3) had demonstrated hostility to the project applicants by urinating on their property and periodically making loud noises in the immediate vicinity of the applicants' property disrupting their quiet enjoyment. The court found that the combined effect of these factors was sufficient evidence to warrant a conclusion that the councilmember could not be an impartial decisionmaker and that the council's decision was tainted by his participation. The *Clark* case is on the other end of the spectrum from *Nasha* in terms of the quantum of evidence relied on by the court in reaching a decision. However, it is useful note that the courts evaluate all types of indications when determining whether evidence shows an unacceptable probability of actual bias.

In *Mennig v. City Council* (1978) 86 Cal.App.3d 341, the Court of Appeal acknowledges that the human habit of seeking vindication may create the facts leading to

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an unacceptable probability of bias. The police chief and city council had engaged in a heated running dispute over the administration of the police department. The city council then fired the police chief. The police chief subsequently appealed his termination to the civil service commission, which found none of the charges against him were supported by substantial evidence and recommended he be disciplined but reinstated. The city council disapproved of the commission's findings and refused to reinstate the police chief.

The court in *Mennig* found the city council was not an independent tribunal. "The test of the ability of the administrative body to act is whether in light of the particular facts 'experience teaches that the probability of actual bias on the part of the ... decisionmaker is too high to be constitutionally tolerable.' [citations omitted] At that point in the proceedings, the members of the city council, if not fighting for their collective political lives, were nevertheless impelled to seek vindication. They in fact did so in their resolution increasing the penalty against Mennig by recording as true facts to which they had testified which the commission had found to be unsubstantiated." *Mennig*, 86 Cal.App.3d at 350.

While in *Mennig* the Court of Appeal found a reasonable likelihood that the circumstances would cause a decisionmaker to seek vindication of the decision to fire the Police Chief, in another case the Court found that a councilmember's decision to appeal a decision did not preclude him from participating in the decision on appeal. In *Breakzone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205, a city councilmember filed an appeal of a planning commission decision on the intensification of a billiard facility in accordance with a procedure that expressly allowed such appeals. The applicant contended that by doing so, the councilmember evidenced sufficient bias against its application as to warrant his disqualification. The grounds set forth in the councilmember's appeal were that the matter was of substantial importance and should be considered by the city council. The court held that the filing of the appeal did not constitute impermissible bias. What persuaded the court was that the councilmember/appellant did not express a specific objection to the proposal or signify that he had made up his mind. In other words, the filing of the appeal itself was not of sufficient evidentiary value to demonstrate an unacceptable probability of actual bias

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because it did not reflect any hostility to the project or a predisposition as to how the councilmember would vote.

An older decision by the California Supreme Court provides support for Mayor Patterson's contention that expression of her views does not prejudice her ability to participate in the upcoming hearing on Valero's project application. In that case a developer applied to the Fairfield City Council for a planned unit development permit to allow construction of a shopping center. The council scheduled a hearing to consider the adequacy of an environmental impact report on the proposed development and to determine whether to grant the permit. At the outset of the hearing, the attorney representing the developer requested that the mayor and one councilmember disqualify themselves from participation. The developer filed two declarations in support of this request. One stated that before the hearing the mayor had told the developer that he was opposed to the shopping center. The other stated that the councilmember spoke against the shopping center at two meetings of the city planning commission, and in response to an audience question at a candidate's night meeting, reiterating his opposition.

The decision, *City of Fairfield v. Superior Court* (1975) 14 Cal. 3d 768, largely focuses on whether the mayor and the councilmember could be deposed about the mental deliberations that led to their decision to vote against the project. However, the court noted that in a city of Fairfield's size, the council's decision on the location and construction of a shopping center could significantly influence the nature and direction of future economic growth: "The construction of that center will increase both the city's revenue and its expenditures; will affect the value not only of neighboring property, but of alternative shopping center sites and of existing businesses; will give employment but may also aggravate traffic and pollution problems. These topics are matters of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the desirability of the shopping center with each other and with their elected representatives." *Id.* at p. 780.

Accordingly, the court stated that "[a] councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance." *Id.* at p. 780. The court appears to qualify this conclusion, however, by noting that most of the comments at issue occurred in the context of a

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political campaign, where candidates should have the freedom to express their views about matters of importance in the community. The decision does not discuss the concept of common law bias. The *Nasha* decision discussed above does not discuss or distinguish *Fairfield*. However, the court of appeal in *Clark* interprets *Fairfield* narrowly to countenance *general* comments about policy, as distinguished from comments about a specific project:

> Of course, a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. (See City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 780-781 [122 Cal.Rptr. 543, 537 P.2d 375].) Here, Benz's conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, Benz's personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker.

One important distinguishing factor is that both *Nasha* and *Clark* involved small projects. Like the one in Benicia, the project at issue in *Fairfield* had community-wide significance.

In sum, common law conflict of interest will exist where there is concrete evidence that a decisionmaker has by words, actions or otherwise demonstrated that he or she has demonstrated an unacceptable probability of bias prior to conduct of the public hearing on a project.

ANALYSIS

The issue presented is whether Mayor Patterson's various comments on the subject of the project constitute an unacceptable probability of bias as to disqualify her from participation in the decision on the application.

Mayor Patterson has in several different forums publicly expressed her concern about the hazards of transporting crude oil by rail; in particular, she has

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1. Called attention to catastrophic accidents involving transport of crude oil by rail;

2. Argued that current laws and regulations are inadequate to deal with the burgeoning practice of transporting crude oil by rail and urged the Governor to initiate tougher regulations to protect safety;

3. Alerted residents to meetings and forums addressing the project, including some opposing the project.

The Mayor's public statements are directed towards educating and alerting the community to the perceived dangers of the transportation of crude oil by rail and seeking to generate a heightened level of awareness of this growing practice.

The Mayor has not so much stated her opposition to crude by rail as she has advocated for tougher safety rules governing the activity. Nor has she directly stated whether she opposes the project. Her various comments could be interpreted to suggest that she intends to scrutinize the EIR carefully to assure that it includes sufficient mitigation measures to protect the community against accidents. The Mayor's acknowledgement of the importance of the Valero Refinery to the local economy suggests that the Mayor has not formed a fixed opinion against the project so much as is educating herself and the community about the necessity of strict precautionary measures.

The Mayor asserts that she is simply disseminating information in order to contribute to an informed citizenry. The disclaimer that she incorporates at the bottom of each E-Alert states this purpose. While the disclaimer is self-serving and would not itself outweigh other evidence showing bias, it does corroborate her stated goal of keeping residents informed. Indeed, her E-Alerts are not limited to the project, but include other matters as well, suggesting that the Mayor sees herself as a purveyor of information to the community. The community-wide significance of the Valero refinery and of this project is undeniable; hence the Mayor's statements may be entitled to protection under the reasoning in the *Fairfield* decision. However, the more recent bias cases suggest that *Fairfield* may be limited to general issues and possibly further limited to statements made in the context of election campaigns.

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A court may view the E-Alert regarding the opponents' public meeting to be akin to the introduction of the project opponent at the HOA meeting that the Court of Appeal found unacceptable in the *Nasha* case. A court may view the her OpEd piece, which on its own perfectly acceptable, to be unacceptable in context of a pending application in the same manner the Court of Appeal held the newsletter article unacceptable in the *Nasha* case. Indeed, the Mayor's forceful case for better regulation may cause her to review the project EIR with an eye toward vindicating her position, a circumstance which the Court of Appeal in *Mennig* found unacceptable.

Some in the community argue that the Mayor's public statements reflect her opposition to the practice of transporting crude oil by rail generally and constitute a strategy to heighten public awareness for the purpose of fomenting opposition to the project among City residents when it comes before the City decisionmaking bodies for consideration. The Mayor has made no secret of her grave concerns about the practice. It is a matter of perspective whether the expression of those concerns are part of an ongoing dialogue about this hot and important topic or whether they are signals to and encouragement of potential project opponents. In our view, the Mayor is certainly engaging in the discussion of crude by rail transport in a broader context than the pending Valero application. Nevertheless, the timing of the application subjects her actions to scrutiny with respect to their collateral effect, if any, on the City's satisfaction of its obligation to provide an impartial tribunal.

This is a close case. The evidence I have reviewed can be interpreted to suggest a probability of bias on the part of the Mayor. Candidly, no lawyer could tell you with certainty that these facts compel the Mayor to recuse herself from the Valero decision, only a judge can do that. The uncertainty dictates that we provide you the safest course which is for the Mayor to recuse herself. Having said that, should that advice not be followed, we suggest that the Mayor be advised to take the following steps to resolve any ambiguity about her role as a decisionmaker and her intent with respect to the community discourse: (1) refrain from further public comment on the subject of crude by rail generally and the Valero project in particular; (2) make a public statement at the outset of the hearing disclaiming any prejudgment of the matter and committing to review the evidence with an open mind; and (3) in that statement explain that her

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communications to the community were intended to be informational and not reflective of a fixed view of how she intended to vote on the project.

Finally, we would like to mention briefly the potential consequences of a decision tainted with the participation of a biased member. Ordinarily, the vote of the biased member would be discarded, in which case the outcome might or might not change, depending on the vote count. However, if the biased member proactively influences the votes of other members during the deliberations, it is possible that a court could deem the decision sufficiently tainted to warrant invalidation and remand for a new hearing without the participation of the biased member.

Please let me know if we can be of further assistance.

Very truly yours,

Jenkins & Hogin LLP

By: Michael Jenkins