

AGENDA ITEM
CITY COUNCIL MEETING DATE – SEPTEMBER 20, 2016
BUSINESS ITEMS

DATE : September 13, 2016

TO : Interim City Manager

FROM : Community Development Director

SUBJECT : **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:

Since the Surface Transportation Board has not issued a Declaratory Order, it is recommended that the City Council consider the appeal of the Planning Commission's denial to certify the Final Environmental Impact Report (FEIR) and the denial of the Valero Crude By Rail (CBR) Use Permit, and then consider the following actions:

- A. Deny the appeal and deny the Use Permit by adopting the draft Resolution; or
- B. Approve the project by:
 - i. Adopting the draft Resolution certifying the Final Environmental Impact Report (FEIR), adopting the California Environmental Quality Act (CEQA) findings for the Project and adopt the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program and
 - ii. Upholding the appeal and adopting the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution; or
- C. 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
- D. Continue action on the project until the Surface Transportation Board issues a Declaratory Order on the project.

EXECUTIVE SUMMARY:

On February 29, 2016, Valero Refining Company filed an appeal of the Planning Commission's unanimous decision to deny certification of the FEIR and to deny the Use Permit for the Valero Crude by Rail Project. The appeal was filed in accordance with Chapter 1.44 of the Benicia Municipal Code. The appeal states that the Planning Commission's decision was based on grounds either preempted by federal law, contrary to governing law and/or not supported by substantial evidence in the record. The Council heard presentations and took public comment on March 15th, April 4th, 6th, 18th and 19th. On April 19, 2016, the City Council closed the public comment and continued the hearing on the appeal of the Crude By Rail project in response to Valero's request and in anticipation of Valero filing a petition with the Surface Transportation Board (STB). The City Council continued deliberation to September 20, 2016. As of the writing of this report, the Surface Transportation Board has not issued a Declaratory Order.

BUDGET INFORMATION:

As noted in previous reports, Valero is a large source of revenue for the City and the single largest private employer, employing more than 500 employees. The combined property, sales and utility user tax represent more than 20% of the City's general fund revenue. The proposed Project will allow the Refinery to remain competitive in the marketplace. In addition, the proposed Project will generate an estimated \$240,000 in building permit fees as part of the construction plan review and inspection process.

Budget implications beyond the above include the associated staff time and resources devoted to processing the Project. Costs for the environmental review consultants and outside counsel have been reimbursed by Valero. If a lawsuit arises out of the Council's action, Valero will pay for the cost of defense if the suit is brought by a third party. If a suit is brought by Valero, they are not required to pay for the cost of the City's defense. Although some third parties have commented they would help pay for the City's defense, there are no agreements to guarantee this expense would be covered.

ENVIRONMENTAL REVIEW:

An Initial Study that led to an Environmental Impact Report (EIR) was prepared for Valero's Crude By Rail Project to comply with the California Environmental Quality Act (CEQA). A Draft EIR (DEIR) was issued for the Project on June 17, 2014. In response to requests made in comments on the DEIR, the City issued a Revised DEIR on August 31, 2015, to consider potential impacts that could occur uprill of Roseville, California and to supplement the DEIR's evaluation of the potential consequences of upsets or accidents involving crude oil trains based

on new information that became available after the DEIR was published. The Final EIR was released on January 5, 2016. An appeal of the Planning Commission's decision on the EIR is being considered by the Council as part of this agenda item.

The EIR identified eight less-than-significant impacts with mitigation measures and eleven significant and unavoidable impacts.

BACKGROUND:

After five days of presentations and public comment, on April 19, 2016, the City Council closed the public comment and continued the hearing on the appeal of the EIR for the Crude By Rail project for City Council deliberation in response to Valero's request and in anticipation of Valero filing with the Surface Transportation Board. On May 31, 2016, Valero filed a Petition for Declaratory Order with the Surface Transportation Board. The Petition requested the Surface Transportation Board's order on the extent to which the Interstate Commerce Commission Termination Act, a federal law, preempts the City's ability to require an environmental impact report and condition the project. The Petition requested expedited consideration so that the decision of the Surface Transportation Board could be considered by the City Council at the September 20, 2016 meeting.

At the June 7, 2016 City Council meeting the Council directed the City Attorney to file a response to Valero's Petition. The City's position on preemption has not been as assertive as either Valero or the California Attorney General's but has rather taken the middle ground. A copy of the City's reply brief is attached. Copies of the other replies may be found on the City's website or the Surface Transportation Board's website.

To date, a response from the Surface Transportation Board has not been received. In response to a call from the City Attorney, counsel for the Surface Transportation Board stated that they understood the City's timing but that they could not guarantee a response in time to meet the City Council meeting and could not provide an estimate of when or if a response would be provided. No new information has been presented that would require an amendment to the EIR or the re-opening of public comment.

DISCUSSION:

Below are questions presented by the City Council followed by Staff's responses. The councilperson that asked the question is indicated by their initials in parenthesis after each question. The questions include those asked of the applicant, the public and staff and are grouped into the following topics:

- Air Quality
- Mitigation Measures
- Preemption / Surface Transportation Board
- Rail Operations

Air Quality:

Question 1. A representative from Communities for a Better Environment indicated that refining tar sands oil would dramatically increase the refinery's emissions of carbon dioxide. Is this accurate? (MH)

Response: No, this is not accurate. The Benicia Refinery is subject to the California Air Resources Board's Cap-and-Trade regulation. Cap-and-Trade is a key element of California's climate plan. Refinery GHGs that result from stationary source combustion, process emissions, catalyst regeneration, or flares and destructive devices are subject to Cap-and-Trade. This regulation caps the amount of GHG emissions that can be released by the Refinery and requires that refinery-wide GHG emissions must decrease by 3 percent annually from 2015 to 2020. Consequently, the project's dramatic increase in refinery carbon dioxide emissions claimed by the commenter is simply not allowed under Cap-and-Trade.

Mitigation Measures:

Question 1. What off-site mitigation measures has Phillips 66 voluntarily agreed to with the San Luis Obispo (SLO)/Santa Maria project? (MH) What is the status of the Phillips 66 Rail Extension project in Santa Maria? (AS)

Response: According to SLO County Staff, Phillips 66 voluntarily agreed to two mitigation measures:

1. Limiting the API gravity of the crude they receive. Note: This eliminates their ability to bring in Bakken crude oil; and
2. Working with Cal Fire and provide funding for training for emergency response. Note: This is not a new concept as Phillips 66 has an ongoing agreement with Cal Fire to provide these services.

The Phillips 66 project has not had a final decision. The next hearing on the project is scheduled for September 22, 2016 before the San Luis Obispo County Planning Commission.

Question 2. Are there reasonable mitigation measures that can be implemented by the City or Valero to address any of the identified traffic issues? (MH)

Response: Table 2-1 of the DEIR is a summary of impacts and mitigation measures. Five potential impacts were identified for transportation and traffic (pp. 2-8 – 2-9). Four out of the five potential impacts were determined to be less than significant; therefore, no mitigation measures are required. This includes impacts to local intersections and the I-680 mainline. For example: Impact 4.11-1 “The Project would not cause intersection operations to degrade to worse than LOS D, would not cause a substantial increase in traffic volumes at intersections already operating at LOS F with the Project, would not cause a substantial increase in average vehicle delay [at] train crossings, and would not cause an increase in the queue length caused by trains crossing Park Road that substantially impedes other traffic (such as traffic on the I-680 mainline, or at an adjacent upstream intersection wherein traffic not destined over the Park Road crossing is unable to continue along the travel way).”

The ongoing impact of past and present projects also was considered in the cumulative effects analysis (p. 5-20 of the DEIR and p. 2-166 of the Revised DEIR), and Project impacts were determined to be less than cumulatively significant. Because the impacts of the Project would be less than significant and because the Project’s contribution to existing adverse cumulative conditions would not be cumulatively considerable, there is no CEQA basis to require the project to implement mitigation measures.

Regarding measures that the City could implement to address traffic issues, such as backups from the Park Road crossing onto the I-680 northbound off-ramp, the off-ramp is more than 1,000 feet long, and there is a rather steep side slope on the right side of the ramp and a trestle extending over Bayshore Road from the top of the slope; there also is a steep side slope that develops on the left side of the ramp as you approach Bayshore Road. While theoretically possible to widen the ramp to accommodate a second lane, the design would be complex given the existing physical constraints. Regardless of the physical constraints and the resulting design complexities, a backup on the off-ramp is an existing condition and was considered in the analysis as part of the baseline scenario. As shown in Figure 3-1 of the traffic study (DEIR Appendix I), the backup of vehicles from the Park Road crossing would be shorter with project train crossings than with baseline train crossings. That would be the case because the crossing duration would be shorter under project conditions (8.3 minutes versus 11.8 minutes) because queueing distance within the Refinery would be increased by the project and so would avoid the switching-

related crossings that can block Park Road under existing conditions.

The fifth impact (Impact 4.11-4: Emergency Access) was determined to be less than significant with implementation of Mitigation Measure 4.11-4 (finalize the City of Benicia Fire Department/Valero Benicia Refinery Fire Department Operation Aid Agreement). On December 18, 2015, an Operational Aid Agreement, which meets all of the recommendations of Mitigation Measure 4.11-4, was executed. It includes enforceable actions that would reduce impacts to emergency access to a less-than-significant level. Mitigation Measure 4.11-4 is no longer required, and an updated Mitigation Monitoring and Reporting Program was attached to the staff report for the February 8, 2016 Planning Commission Meeting. The signed Operational Aid Agreement was included as Appendix B of the Final EIR.

Question 4. What opportunity does Valero have to pre-treat the crude oil to reduce volatility prior to shipment by rail? (AS)

Response: Valero has stated that they obtain oil for processing from various sources in an open market in an opportunistic fashion. They receive the oil from another party and do not have the opportunity to pre-treat it prior to shipment to the Refinery.

Preemption / Surface Transportation Board:

Question 1. What is staff's response to the Yolo County Board of Supervisors' assertion that Federal Preemption doesn't apply when it comes to a city's land use authority? (MH)

Response: Although the City's land use authority is broad, it is not without limits. The City's land use authority is derived from the California Constitution. Cal. Const. Art. XI, Section 7 "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Both state and federal law may preempt the City's actions. In the case of railroads, the federal government has preempted the City's ability to regulate the railroads. The City is limited and may only make Use Permit findings as they relate to the aspects of the Project that do not involve the railroad. Findings not related to rail operations under the authority of Union Pacific Railroad would have to be made in order to deny the proposed Project. Findings related to rail impacts cannot be used as a reason to deny the project.

Per Benicia Municipal Code (BMC) 17.104.060, the City cannot approve a project that will be “detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of such use, nor detrimental to properties or improvements in the vicinity or to the general welfare of the city.” However, the Interstate Commerce Commission Termination Act (ICCTA), among other laws, preempts this requirement to the extent that it would require the City to deny Valero’s application based on the health and safety risks of rail operations. The ICCTA broadly preempts local permitting or “preclearance” requirements that “could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [Surface Transportation Board] has authorized.” (*Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 330 (2014).) If the City were to deny Valero’s application for the proposed Project based on health and safety risks posed by rail operations, the effect would be to preclude Union Pacific operations that have been authorized by the Surface Transportation Board. (Planning Commission February 8, 2016 Staff Report pp. 36-37)

Question 2. If the decision is made to approve Valero's request for continuance, will individuals and organizations other than Valero be able to submit questions/information to the Surface Transportation Board? Will the City provide any information to the Surface Transportation Board? (MH)

Response: Upon Valero’s submittal of a petition for a Declaratory Order proceeding, the Surface Transportation Board allowed interested parties an opportunity to respond to the petition. On June 6, 2016, Benicians for a Safe and Healthy Community requested an extension to the comment period. The Surface Transportation Board approved the extension to July 8, 2016. At the June 7, 2016 City Council meeting the Council directed the City Attorney to file a response to Valero’s Petition. A copy of the City’s reply brief is attached. For an overview of the Surface Transportation Board petition process refer to the memorandum (attached) from the City’s Contract Attorney, Brad Hogin of Woodruff, Spradlin & Smart dated April 8, 2016.

Rail Operations:

Question 1. If it will take 12 hours to unload a 50 car train, and assuming some periodic unexpected delays, will the second 50 car train be waiting outside of the refinery? If so, will this result in any traffic issues? (MH)

Response: The spur off the mainline track that serves the Refinery (and the Benicia Industrial Park) consists of a single track. Therefore, only one train at a time could be on the track between Park Road and the mainline, a distance of over 3,500 feet. According to Valero, it is Valero's understanding that the second 50-car train will wait at Roseville. (see DEIR Section 3.4.2.1 Tank Car Transport and Unloading). When one train is unloading, the second train will be held in Roseville until Union Pacific Railroad receives notice from Valero as to when Valero will be ready to receive the second train.

Question 2. One of the speakers at the 4/6 meeting indicated that "many railroad companies were planning on reducing the minimum number of railroad employees on a train from 2 to 1. Is this accurate? Does Union Pacific Railroad plan on moving in this direction? (MH)

Response: On March 15, 2016 the Federal Railroad Administration (FRA) issued a Notice of Proposed Rulemaking that would establish a minimum requirement of two crewmembers for all railroad operations, with exceptions for those operations that FRA believes do not pose significant safety risks to railroad employees, the general public, and the environment by using fewer than two-person crews. This proposed rule also would establish minimum requirements for the roles and responsibilities of the second train crewmember on a moving train. Paragraph (c) of Section 218.125 contains the proposed requirement that two crewmembers are always necessary when the train contains certain quantities and types of hazardous materials, including 20 or more loaded freight cars, freight cars loaded with bulk packages, or intermodal portable tank loads containing certain types of hazardous materials, such as crude oil. The deadline for written comments on the proposed rule was May 16, 2016. (81 FR 13917)

Question 3. What is currently being transported by rail through Benicia? Is crude currently being transported? (MH/AS)

Response: The Valero Benicia Refinery currently does not transport crude by rail. The Refinery uses rail transport to import chemicals used in refining and to export refinery products such as asphalt, petroleum

coke, and liquefied petroleum gas. (DEIR p. 3-10; DEIR Section 4.7.2.3, Local Setting; RDEIR Section 2.12.2.3) Staff requested additional information on what other companies transport through Benicia, but as of the writing of this report, has not received a response.

Question 4: What are the total number of derailments over the past 3 years in the City of Benicia? (AS)

Response: Staff requested this information, but as of the writing of this report, has not received a response.

CONCLUSION:

The City Council is charged with considering any relevant evidence, including staff reports, environmental documents, public comment, etc., submitted up through the time of the appeal hearing.

In consideration that the Surface Transportation Board has not issued a Declaratory Order, it is recommended that the City Council consider the appeal of the Planning Commission's denial to certify the Final Environmental Impact Report (FEIR) and the denial of the Valero Crude By Rail (CBR) Use Permit, and then consider the following actions:

- A. Deny the appeal and deny the Use Permit by adopting the draft Resolution; or
- B. Approve the project by:
 - i. Adopting the draft Resolution certifying the Final Environmental Impact Report (FEIR), adopting CEQA findings for the Project and adopt the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program and
 - ii. Upholding the appeal and adopting the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution.
- C. 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

D. Continue action on the project until the Surface Transportation Board issues a Declaratory Order on the project.

If the Council wishes to approve the Project, the Council must first take action on the Environmental Impact Report (EIR). If the Council certifies the EIR, the Council may then act to approve the Project. If the Council fails to certify the EIR, the Council may not approve the Use Permit.

If the Council declines to certify the EIR, the Council should provide staff with specific comments on the deficiencies of the EIR and/or direction on what needs to be improved in the EIR. The Council would then remand the EIR to staff to correct the specific deficiencies.

The City has no ability to reject the EIR or the Use Permit due to rail related impacts. As noted in the EIR, the City staff and its legal team have evaluated the preemption issue and determined that the City is preempted from imposing mitigation measures which have the effect of regulating the rail aspects of the proposed Project. Similarly, the City is preempted from conditioning the Use Permit in such a way that impacts the rail aspects of the Project.

Staff believes that the FEIR is complete and adequate under CEQA. In addition, despite the fact that the EIR identified eleven substantial and unavoidable effects of the Project, federal law preempts the City from regulating railroad operations. Thus preemption prevents denying certification of the FEIR, requiring mitigation measures that effectively regulate rail operations, or denying the Use Permit based on rail-related impacts.

Should the Council determine that it is able to make the findings to deny the Use Permit based on on-site impacts, staff has included a draft Resolution denying the Use Permit for Council consideration.

As outlined in the Planning Commission February 8, 2016 staff report, when viewed separately from rail-related impacts, the Project's on-site impacts are mitigated to a less than significant level and all the findings can be made to approve the Use Permit.

Therefore, staff must recommend that the City Council overturn the Planning Commission's denial and certify the FEIR and approve the Use Permit.

Attachments:

- Draft EIR Resolution
 - Exhibit A: Statement of Overriding Considerations
 - Exhibit B: Mitigation Monitoring and Reporting Program dated January 2016

- Draft Use Permit Resolution – Project Approval
- Draft Use Permit Resolution – Project Denial
- Valero Submittal, clarification and rebuttal letter from Don Cuffel, September 13, 2016
- Valero Submittal, setback clarification letter from Arcadis, September 13, 2016
- Brad Hugin of Woodruff, Spradlin & Smart, Surface Transportation Board Overview Memo dated April 8, 2016.
- Valero's request to the Surface Transportation Board for a Declaratory Order dated May 31, 2016
- City of Benicia's response letter to the Surface Transportation Board dated July 7, 2016

*Note: The City's website contains prior staff reports and additional public comments.