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Community Development Department
Planning Division

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CITY OF BENICIA
COMMUNITY DEVELOPMENT

APPEAL FORM

1. Project Information.

Address/location Valero Benicia Refinery, 3400 E. 2nd Street, Benicia, CA 94510

Project Name/Number Valero Crude-by-Rail Project / 12PLN-00063 / SCH #2013052074

Project Sponsor/Applicant Valero Refining Company - California

2. Type of Appeal. Indicate which type of decision you are appealing.

- ☐ Zoning Administrator
- ☐ Community Development Director
- ☐ Historic Preservation Review Commission
- ☒ Planning Commission

Hearing/Decision Date February 11, 2016

Decision Rendered Denial of Use Permit Application 12PLN-00063 and Declining to Certify Final Environmental Impact Report for the Valero Benicia Crude-by-Rail Project (SCH #2013052074)

3. Reason(s) for Appeal. State the reasons for the appeal, and the grounds on which the reasons are based. See separate "Appeal Information" handout. Please use a separate sheet of paper if necessary.

See attached letter to Lisa Wolfe, City Clerk, City of Benicia

4. Appellant Information.

Name Don Wilson, VP & General Manager Organization Valero Refining Company - California

Mailing address 3400 E. 2nd Street, Benicia, CA 94510

Phone (707) 745-7724 Phone (2)

E-mail Don.Wilson@valero.com Fax

5. Signature.

Appellant Don Wilson Date 2-26-16

For Staff Use: Appl. # 16-PLN-00009 Date Filed 2-29-16

Date Entered 2-29-16 Entered By DD Receipt # 1140484 Total Fees Paid $ 150.00

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Refer To File #: 290396-00017

February 29, 2016

Lisa Wolfe
City Clerk, City of Benicia
250 East L Street
Benicia, CA 94510

Re: Appeal of Planning Commission Resolution No. 16-1, Denying Use Permit Application 12PLN-00063 and Declining to Certify Final Environmental Impact Report for the Valero Benicia Crude-by-Rail Project (SCH #2013052074)

Dear Ms. Wolfe:

This letter is intended to supplement the appeal form submitted herewith by Valero Refining Company – California ("Valero"). On February 11, 2016, the City of Benicia Planning Commission denied the use permit application for construction and operation of a crude-by-rail unloading facility at Valero's Benicia, California refinery. Because of the denial, the Planning Commission failed to certify the Final Environmental Impact Report ("FEIR") that was prepared by the City. As briefly set forth in the appeal form submitted herewith, and as expounded herein, the Planning Commission's decision to deny Valero's application and not certify the FEIR was based upon grounds that are either preempted by federal law, contrary to governing federal, local and/or state law, and/or not supported by substantial evidence in the record. This appeal is timely, as it is being filed with the city clerk, in writing, during regular business hours, within 10 business days of the date of the final decision subject to appeal. (Benicia Mun. Code, §§ 1.44.040,1.44.060.)

Further, under the Benicia Municipal Code, the application need only "contain sufficient information to identify the party, its interests in the matter, and the reasons for requesting an appeal." (Benicia Mun. Code, §1.44.040, subd. (A).) Consistent with that obligation, Valero has identified the general basis for the appeal, and provided numerous examples. These examples, however, are not intended to be exhaustive. Therefore, Valero reserves the right to elaborate further upon the deficiencies in the Planning Commission's decision, and the propriety of issuing the use permit and certifying the FEIR.

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1. SUMMARY OF FEDERAL PREEMPTION, ITS APPLICATION TO VALERO'S PROJECT, AND THE OPPOSITION'S MISLEADING ARGUMENTS.

A. The Legal Scope of the Project Is Limited to the Unloading Facility.

A valid evaluation of Valero's permit application requires a clear understanding of the scope of the Project. Valero's application is ***only*** for a use permit for construction and operation of a train car unloading facility at Valero's Benicia refinery. The construction and operation of the unloading facility will have no significant environmental impacts, as overwhelmingly demonstrated by the FEIR for Valero's crude-by-rail Project. All of the public discussion about the Project has focused on the impacts of rail operations which, as your attorney clearly and correctly advised the Planning Commission, are legally irrelevant. Therefore, there are no grounds, environmental or otherwise, on which to deny Valero's application. While there was an attempt by certain Planning Commissioners to invoke at the very last minute one or two non-preempted grounds for denying the application, the Commissioners did not even attempt to explain their conclusions, or to support their conclusions with substantial evidence. Indeed, the conclusions are overwhelmingly contradicted by the evidence in the record. The City Council's hands are, in effect, tied by the law of federal preemption, a law that is meant for the common good, and not just for Union Pacific or for Valero.

B. Rail Operations Are by Law, and by Virtue of Expertise, Regulated *Exclusively* by the Federal Government.

The regulation of the rails by the federal government is strictly and scrupulously enforced; there is no agency in the United States better informed and better equipped than the Federal Railroad Administration. And yes, despite the strictest regulations that can be conceived by the human mind, accidents do happen and will happen in every significant area of human life and endeavor, though we are always striving to reduce life's risks as far as we can within the bounds of reason. Perfection is of course unattainable; it cannot be attained by the federal government, by the State of California, or by the City. We move people and goods around the country and around the world, by cars and trucks, by airplane and by rail, though we know the risks, precisely because of the good achieved by those modes of transportation.

C. The Opposition's Misleading Legal Arguments.

Some of the Project opponents have tried to mislead the City about preemption, relying on case authority that has nothing to do with the Project before the Council. The Council should reject this invitation to commit a serious legal error. In those cases, non-rail carriers asked that they be deemed by the court a rail carrier, or asked that non-rail operations be treated as rail operations in an effort to invoke federal preemption. The courts in those cases rejected such requests, as they were contrary to both the facts and the law. Unlike those cases, the ***only*** operations relevant to ***this*** Project are operations that are indisputably rail operations, performed by Union Pacific, which is indisputably a rail carrier. In other words, no one in this case has argued that Union Pacific is not a rail carrier, or that its operations are not rail operations. Therefore, the case authority relied upon by some of the opponents is simply irrelevant. What the Project opponents have asked you to do in this case is to try to regulate Union Pacific's rail operations by imposing conditions on the shipper's (Valero's) use permit. That the City may not do. That argument has already been rejected by the Surface

Transportation Board. (*Boston and Maine Corp. and Springfield Term. R.R. Co.–Petition for Declaratory Order*, FD 35749, slip op. at 5 (STB served July 19, 2013) [local zoning regulation of and prohibition on rail delivery to shipper's private track preempted because states may not "engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network"].)

D. There Is No Change to Refinery Emissions.

As for the argument that the Project will change refinery emissions, there is no basis in fact for the argument. As established by the FEIR, all crudes imported by Valero must be blended to within certain specific limits for processing. The ranges of those blended crudes will not change, and the Project opponents have not produced ***any*** evidence that the range will change, or that there will be any difference in refinery emissions. This Project merely facilitates delivery of North American crudes that Valero is already authorized to blend and refine as a result of the City's approval of the VIP Project in 2003 and 2008.

2. GENERAL PROJECT DESCRIPTION AND OVERVIEW.

The Project involves the installation of rail spur tracks, a tank car unloading rack, pumps, connecting pipelines, and related infrastructure at Valero's Benicia Refinery. The Project would enable the Benicia Refinery to receive up to 70,000 barrels per day of crude oil by tank car, replacing equal quantities of crude currently being delivered to the Refinery by marine vessel. The crude oil delivered by rail would not displace crude delivered to the Refinery by pipeline. There would be no modification to the Refinery's processing equipment. A fuller description of the Project is set forth in the June, 2014 Draft Environmental Impact Report ("DEIR"). As stated by the City in the DEIR, and again in the 2015 Revised DEIR, the Project has the following objectives:

1. Allow for the delivery of up to 70,000 barrels per day of North American-sourced crude oil by rail.
2. Replace marine vessel delivery with rail delivery of up to 70,000 barrels per day of crude oil.
3. Mitigate project-related impacts.
4. Implement the project without changing existing Refinery process equipment or Refinery process operations, other than operation of the project components.
5. Continue to meet requirements of existing rules and regulations pertaining to oil refining including the State of California Global Warming Solutions Act of 2006 (AB 32).

Environmental review of the impacts of the Project began in 2012, an extraordinary fact in itself, one that is indicative of the time, energy, resources and expense devoted to the environmental review of the Project. Normally, environmental review for a Project must be completed within one year. (Pub. Resources Code, § 21151.5.) In this case, the environmental review process was significantly prolonged, in large part, because of misleading arguments and allegations employed by some Project opponents, nearly all of which were focused on the impacts of rail operations, which are legally irrelevant because of federal preemption.

3. THE PLANNING COMMISSION'S DECISION WAS IN ERROR OR AN ABUSE OF DISCRETION BECAUSE ITS FINDINGS ARE CONTRARY TO LAW AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Findings Fail to Provide the Necessary Specificity.

The findings adopted by the Planning Commission are in error or an abuse of discretion as a matter of law because they fail to provide the necessary specificity to bridge the analytical gap between the evidence, findings and final action. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) For example, the statement that the "EIR does not express the independent judgment of the City as required by CEQA" fails to explain what evidence – there is none – the statement is based on. The same is also true for the statement that "[t]he application's objectives are not the City's objectives and the City objectives were never stated or evaluated." The Planning Commission's resolution is unfortunately littered with similar statements, all of which are insufficiently specific, and therefore fail to satisfy the requirements of the law. (See *Sierra Club v. California Coastal Com.* (2003) 107 Cal.App.4th 1030 [post hoc rationalizations are not permitted; agency must bridge analytical gap between evidence, findings, and final action before denying], depublished by 35 Cal.4th 839; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92; *Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at p. 515.) For this reason, the Planning Commission's decision was in error or an abuse of discretion.

B. The Findings Are Inconsistent with CEQA's Requirements.

Furthermore, a number of the findings adopted by the Planning Commission are in error or an abuse of discretion because they are simply irrelevant or contrary to CEQA. For example, contrary to finding 4 of Resolution No. 16-1, CEQA does not require an environmental impact report to discuss or evaluate the City's need for the Project. Further, contrary to finding 7, CEQA does not require an environmental impact report to "thoroughly examine" the Project's benefits with respect to local employment and economic benefits. Rather, CEQA requires only "[a] ***general description*** of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities." (Cal. Code Regs., tit. 14, § 15124, subd. (c), emphasis added.) This is because "[a]n economic or social change by itself shall not be considered a significant effect on the environment." (Cal. Code Regs., tit. 14, § 15382.) Thus, while the economic and employment benefits of a Project may be included in an environmental impact report, an environmental impact report is not required to "thoroughly analyze" such issues. Instead, as explained by the CEQA Guidelines, economic or social information "may be included in an EIR," or may be "added to the record in some other manner" if necessary to determine whether an alternative is feasible or whether there is an adequate basis for a statement of overriding considerations. (Cal. Code Regs., tit. 14, §§ 15131, 15093, subd. (a).) In this case, the City's environmental document provided a "general description" of the Project's economic characteristics, consistent with the requirements of CEQA. (See, e.g., DEIR at pp. 3-1 to 3-2, 5-2 to 5-3.) And, as previously demonstrated by Valero, a statement of overriding considerations is not required by CEQA in this case because, as correctly stated in the FEIR, the only significant unmitigated Project-related environmental impacts result from rail operations, which are legally irrelevant because the regulation of rail impacts is preempted by federal law. Finally, contrary to finding 3, CEQA requires the Project

objectives to include the applicant's objectives. (Cal. Code Regs., tit. 14, § 15124, subd. (b) ["The statement of objectives should include the underlying purpose of the project."].)

C. The Findings Are Preempted by Federal Law.

There are numerous findings in Resolution No. 16-1 that are preempted by federal law. As was demonstrated by Valero and Union Pacific by means of their various submittals, and as correctly acknowledged by City staff and the City's attorneys, federal preemption under the ICCTA is extremely broad, and prohibits the City from denying a use permit application or any necessary environmental authorization on the basis of railroad impacts, whether such impacts are direct or indirect. (See *Boston and Maine Corp. and Springfield Term. R.R. Co.–Petition for Declaratory Order*, FD 35749, slip op. at 5 (STB served July 19, 2013) [local zoning regulation of and prohibition on rail delivery to shipper's private track preempted because states may not "engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network"]; *Norfolk Southern Railway Corporation v. City of Alexandria* (4th Cir. 2010) 608 F.3d 150 [holding ordinance preempted when it placed limits on what products could be hauled through the City, which routes the traffic could be moved, and days and times for hauling].) This prohibition applies equally when the stated finding is a pretext for railroad impacts. (See *AT&T Wireless Services of Cal., LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F.Supp.2d 1148, 1160 [court rejected stated "aesthetic concerns" and "possible decline in property values" because they were a pretext for radio frequency emissions, which was preempted from consideration under federal law]; *California RSA No. 4 v. Madera County* (E.D. Cal. 2003) 332 F.Supp.2d 1291, 1306-1311 [concluding that stated grounds could not support denial of permit application because they were a pretext for impacts that were preempted from consideration under federal law].) The City of Benicia's Code of Conduct requires the Planning Commission to respect federal law. (See City of Benicia Code of Conduct at p. 2 ["Members shall comply with the laws of the federal government, the State of California and the City of Benicia in the performance of their public duties."].) Contrary to the clear scope of preemption, the Planning Commission stated as part of its CEQA findings (using the numerals used for the findings):

1. "The EIR does not express the independent judgment of the City as required by CEQA."[1]

2. "Staff's interpretation of preemption is too broad and the EIR should consider including mitigation measures to offset the significant and unavoidable impacts associated with rail operations, such as air pollution emissions, improved rail car requirements, additional funding for emergency responders and degasifying the oil before transport."

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[1] As demonstrated by the transcript of the Planning Commission hearing, this finding was premised on impacts from railroad operations. Thus, although it does not specifically identify railroad operations or railroad associated impacts, it is an unlawful pretextual justification that cannot as a matter of law support the denial determination. (*AT&T Wireless Services of Cal., LLC v. City of Carlsbad*, *supra*, 308 F.Supp.2d at p. 1160; *California RSA No. 4 v. Madera County*, *supra*, 332 F.Supp.2d at pp. 1306-1311.) This is also true with respect to findings 5, 7, 8, 9, 10, and 13.

5. "The project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property."

6. "The size of the project is too big and would result in traffic and train backups which would negatively affect access to businesses in Benicia Industrial Park."

7. "The project's benefits such as the local employment and economic benefits were not thoroughly examined in the EIR and would not outweigh the significant effects on the environment."

8. "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."

9. "The traffic, air quality, and greenhouse gas emissions analyses are insufficient."

10. "The EIR does not evaluate a sufficient number of project alternatives that are feasible."

11. "The EIR does not evaluate mitigations to uprail communities and how each potential mitigation is or is not preempted."

12. "The EIR's infeasibility determinations are incorrect for Alternative 1 (1, 50-car train) and Alternative 3 (off-site terminal)."

13. The response to comments in the FEIR are inadequate with respect to the comments submitted by Sacramento Area Council of Governments, California Attorney General, and Bay Area Air Quality Management District.

As the findings themselves demonstrate, not only are they preempted by federal law, but they are no more than unexplained conclusions inadequate for *Topanga* purposes, and unsupported by substantial evidence.

Numerous other statements made by the Planning Commission in support of its denial of the user permit violate the federal law that governs the Commission's discretion:

- "The project is inconsistent with the General Plan including Goals 2.5, 4.8, and 4.9 due to the direct and indirect impacts of the proposed project which will not maintain the City's health, safety and quality of life. The negative impacts of the project such as impacts to the traffic in the industrial park, freeway, the community's ability to travel in and out of the industrial park and economic impacts to adjacent business would not maintain the City's health, safety, and quality of life."
- "The potential for negative environmental impacts would dissuade businesses from staying in the Benicia Industrial Park and dissuade new businesses from locating in the Benicia Industrial Park."

- "There is no provision for clean-up in case of a spill or accident and local jurisdictions, including Benicia would bear the economic burden of such a clean-up."
- "In addition, the design of the unloading rack, its location in the 100-year flood zone, and the size of the facility creates issues with traffic and emergency access."
- "The project would limit access for emergency response; especially access to Sulphur Springs Creek including the potential for rail cars to fall into Sulphur Springs Creek."
- "The Planning Commission finds that the project would be inconsistent with the General Plan in that it would place Benicia residents and uprail communities at risk."
- "There is not sufficient technology currently available to make the rail cars safe."
- "In addition, the project creates significant environmental concerns surrounding the project's impact on Sulphur Springs Creek and the bay, potential increases in the cost of insurance coverage for the community, liability risks for property damages and cleanup costs associated with on-site and off-site impacts of the transport of crude by rail."
- "As set forth above, the finding cannot be made for the Project due to the potential significant on- and off-site impacts associated with the project and the associated rail operations, the need for further evaluation of the environmental impacts, the economic purposes of the project and the conflicting interpretations of preemption."

Accordingly, because all of the above findings are based either directly or indirectly on rail operations, they represent an error or abuse of discretion by the decision-making body.

D. The Findings Are Not Supported by Substantial Evidence.

As noted above, in addition to the litany of issues identified herein, the findings made by the Planning Commission are not supported by substantial evidence. Below is a recitation of numerous CEQA findings made by the Planning Commission in support of the denial, followed by a partial list of the many sections of the DEIR, Revised DEIR, FEIR, and transcripts, demonstrating the lack of substantial evidence:

1. "The EIR does not express the independent judgment of the City as required by CEQA."[2] (DEIR at pp. 1-2 to 1-3; Revised DEIR at pp. 1-1 to 1-5; FEIR at pp. 2-1 to 2-2, 3.8-2 to 3.8-26.)

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[2] Contrary to this unsupported finding, the City acted consistent with CEQA in preparing the environmental document. (See Cal. Code Regs., tit. 14, § 15084, subd. (d) [authorizing the lead agency, a third party, a consultant, the applicant, or the applicant's consultant to prepare the draft environmental document]; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 999.) Moreover, the City confirmed that the environmental document reflected its independent judgment when it issued the draft environmental document in 2014. (Cal. Code Regs., tit. 14, § 15084, subd. (e).) Finally, as it is undisputed that the City staff reviewed the draft environmental document, made modifications, and retained a consultant who conducted a

3. "The application's objectives are not the City's objectives and the City's objectives were never stated or evaluated." (DEIR at pp. 1-2 to 1-4; FEIR at pp. 1-4 to 1-8.)

4. "The EIR never discussed or evaluated the City's need for the project." (FEIR at pp. 1-4 to 1-8, 3.8-4 to 3.8-14.)

5. "The project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property." (DEIR at pp. 4.8-6, 4.8-13 to 4.8-14, 4.8-19; see also 2015 FEMA Flood Control maps Panel 634 and Panel 653.)

6. "The size of the project is too big and would result in traffic and train backups which would negatively affect access to businesses in Benicia Industrial Park." (DEIR at pp. 4.11-1, 4.11-4 to 4.11-13; FEIR at pp. 2.4-17 to 2.4-19; see also citations in response to No 9, below, re traffic.)

7. "The project's benefits such as the local employment and economic benefits were not thoroughly examined in the EIR and would not outweigh the significant effects on the environment." (DEIR at p. 3-25; see also citations in response to No. 11, below, regarding preemption; see also Attachment 11 to Final Valero CBR Planning Commission Staff Report 020816; see also Andrew Change Letter to Amy Million dated February 11, 2016.)

8. "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." (DEIR at pp. 5-17 to 5-18.)

9. "The traffic, air quality, and greenhouse gas emissions analyses are insufficient." (DEIR at pp. 2-1 to 2-9, 4.1-1 to 4.1-26, 4.6-1 to 4.6-14; Revised DEIR at pp. 2-53 to 2-62; FEIR at pp. 2.5-278 to 2.5-300, 2.5-344 to 2.5-345; see also Planning Commission Transcript of 2/11/16 at 51:24 – 53:24, 54:4 - 67:19, 124:5 - 134:7; see also citations to Response to No. 6, above, and No. 14, below.)

10. "The EIR does not evaluate a sufficient number of project alternatives that are feasible." (DEIR at pp. 4.9-1 to 4.9-11, 5-3 to 5-11, 6-1 to 6-10; Revised DEIR at pp. 2-126 to 2-127.)

11. "The EIR does not evaluate mitigations to uprail communities and how each potential mitigation is or is not preempted." (Revised DEIR at pp. 2-8 to 2-13; see also Planning Commission Transcript 2/8/16 at 30:13 - 38:8, 39:4-9; Planning Commission Transcript 2/11/16 at 4:11 - 27:23, 28:6 - 28:24, 29:1 - 46:21, 49:7 - 49:14.)

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comprehensive peer review, the assertion that the FEIR does not reflect the City's independent judgment is belied by the undisputed facts. (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 369.)

12. "The EIR's infeasibility determinations are incorrect for Alternative 1 (1, 50-car train) and Alternative 3 (off-site terminal)." (DEIR at pp. 4.9-1 to 4.9-11, 5-3 to 5-11, 5-19, 6-1 to 6-10; Revised DEIR at pp. 2-126 to 2-127.)

13. "The response to comments in the FEIR are found to be inadequate, non- responsive and dismissive including, but not limited to, the following specific comment letters:

    a. Sacramento Area Council of Government: unfunded obligations on communities related to first responders, no evidence of mitigation measures to address transporting crude by rail, no evidence that mitigation measures for the significant and unavoidable impacts are infeasible due to preemption; and insufficient evaluation of potential alternatives including how preemption is applicable." (FEIR at pp. 2.4-28 to 2.4-41, 2.4-102 to 2.4-103.)

    b. "State of California Attorney General: insufficient evaluation of air quality impacts and an overly broad interpretation of trade secrets." (FEIR at pp. 2.4-104 to 2.4-118.)

    c. "Bay Area Air Quality Management District: insufficient consideration of the their recommended mitigation measures for offsetting rail impacts, the analysis does not accurately characterize air emissions or health impacts, including an insufficient evaluation of PM2.5." (FEIR at pp. 2.4-96 to 2.4-101.)

14. "The EIR does not disclose all information necessary for complete evaluation of the air quality impacts of the project including the makeup of the crude oil associated with this project, which is based on an overly-broad interpretation of what constitutes trade secrets." (DEIR at pp. 1-4 to 1-6, 2-1 to 2-9, 4.1-1 to 4.1-26, 5-1, 5-5 to 5-14, Appendix D; Revised DEIR at pp. 2-25 to 2-42; FEIR at pp. 2.4-104 to 2.4-118; Planning Commission Transcript 2/11/16 at 101:20 - 102:23, 124:5 - 134:7.)

Also set forth below is a recitation of numerous use permit findings made by the Planning Commission in support of the denial, followed by numerous citations to the DEIR, Revised DEIR, and/or FEIR, and thereby demonstrating the lack of substantial evidence:

- "The project is inconsistent with the General Plan including Goals 2.5, 4.8, and 4.9 due to the direct and indirect impacts of the proposed project which will not maintain the City's health, safety and quality of life. The negative impacts of the project such as impacts to the traffic in the industrial park, freeway, the community's ability to travel in and out of the industrial park and economic impacts to adjacent business would not maintain the City's health, safety, and quality of life." (DEIR at pp. 4.9-1 to 4.9-11, 5-3 to 5-4, 5-19; Revised DEIR at pp. 2-126 to 2-127.)
- "The potential for negative environmental impacts would dissuade businesses from staying in the Benicia Industrial Park and dissuade new businesses from

locating in the Benicia Industrial Park." (There is no evidence to support this conclusory statement.)

- "There is no provision for clean-up in case of a spill or accident and local jurisdictions, including Benicia would bear the economic burden of such a clean-up." (DEIR at pp. 4.7-1 to 4.7-28; see also Planning Commission Transcript 2/11/16 at 97:18 - 100:24; see also UPRR Letter on Insurance [available on the City's website under "Public Comments Submitted February 9-10, 2016" at pp. 36-39].)
- "In addition, the design of the unloading rack, its location in the 100-year flood zone, and the size of the facility creates issues with traffic and emergency access." (See citations in Response to Nos. 5 and 6, above; Planning Commission Transcript 2/11/16 at 68:11 - 76:7.)
- "The project would limit access for emergency response; especially access to Sulphur Springs Creek including the potential for rail cars to fall into Sulphur Springs Creek." (Planning Commission Transcript 2/11/16 at 68:11 - 76:7.)
- "The Planning Commission finds that the project would be inconsistent with the General Plan in that it would place Benicia residents and uprail communities at risk." (See citations in Response to first bullet point, above.)
- "There is not sufficient technology currently available to make the rail cars safe." (DEIR at pp. 4.7-1 to 4.7-28; see also citations in Response to No. 11, above.)
- "In addition, the project creates significant environmental concerns surrounding the project's impact on Sulphur Springs Creek and the bay, potential increases in the cost of insurance coverage for the community, liability risks for property damages and cleanup costs associated with on-site and off-site impacts of the transport of crude by rail." (See citations in Response to No. 11, above; see also Planning Commission Transcript 2/11/16 at 97:18 - 100:24.)
- "As set forth above, the finding cannot be made for the Project due to the potential significant on- and off-site impacts associated with the project and the associated rail operations, the need for further evaluation of the environmental impacts, the economic purposes of the project and the conflicting interpretations of preemption." (See citations in Response to No. 11, above.)

Accordingly, because none of the above findings is supported by substantial evidence, they represent an error or abuse of discretion by the decision-making body.

E. The Planning Commission Violated the Law by Failing to Provide an Opportunity to Address Issues Raised for the First Time After the Public Hearing Was Closed.

As stated on the very first page of the Benicia Code of Conduct, "[t]he residents ***and businesses*** of Benicia are entitled to have fair, ethical and accountable local government, which has earned the public's fully confidence for integrity." However, Valero was not treated fairly by the Planning Commission when, after the close of public comment, the Commission proceeded to raise a host of issues for the very first time, never giving Valero any opportunity to respond, and then based its denial of the use permit application and FEIR on said issues. This unfortunate event not only runs afoul of the Benicia Code of Conduct, but it also is contrary to the City's obligations under state and federal law. (*Clark v. City of Hermosa Beach* (1996) 48

Cal.App.4th 1152, 1173; *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 275; *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159-160.) Accordingly, for this reason alone the Planning Commission's decision was in error or an abuse of discretion.

4. CONCLUSION.

The environmental review of Valero's Project has been exhaustive, and it is beyond dispute that there has been ample opportunity for public comment throughout this process. Despite this thorough review, and City staff's detailed analysis, the Planning Commission denied Valero's application citing grounds, including primarily pre-empted grounds, that were not supported by substantial evidence and/or represent a clear abuse of discretion. Accordingly, Valero appeals the Planning Commission's denial and requests that the City Council approve Valero's use permit application and certify the FEIR.

As noted above, consistent with the obligation under Benicia Municipal Code, section 1.44.040(A), Valero has identified the general basis for the appeal, and in addition has voluntarily provided numerous examples. These examples, however, are not intended to be exhaustive, and Valero reserves the right to elaborate further upon the deficiencies in the Planning Commission's decision both before and at the appeal hearing on this matter.

Very truly yours,

John J. Flynn III
of Nossaman LLP

JJF:rrg