

**BIOFUELWATCH • CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE •
CENTER FOR BIOLOGICAL DIVERSITY • COMMUNITIES FOR A BETTER
ENVIRONMENT • COUNCILMEMBERS CLAUDIA JIMENEZ, EDUARDO
MARTINEZ, AND GAYLE MCLAUGHLIN • EXTINCTION REBELLION SAN
FRANCISCO BAY AREA • FRIENDS OF THE EARTH • INTERFAITH CLIMATE
ACTION NETWORK OF CONTRA COSTA COUNTY • NATURAL RESOURCES
DEFENSE COUNCIL • RODEO CITIZENS ASSOCIATION • SAN FRANCISCO
BAYKEEPER • STAND.EARTH • SUNFLOWER ALLIANCE • THE CLIMATE
CENTER • 350 CONTRA COSTA COUNTY**

April 7, 2022

*Re: Appeal of Planning Commission Certification for the Final Environmental Impact
Report for the Phillips 66 Rodeo Renewed Project*

To the Contra Costa County Board of Supervisors:

BiofuelWatch, California Environmental Justice Alliance, Center for Biological Diversity, Communities for a Better Environment, Richmond City Councilmembers Claudia Jimenez, Eduardo Martinez and Gayle McLaughlin, Extinction Rebellion San Francisco Bay Area, Friends of the Earth, Interfaith Climate Action Network of Contra Costa County, Natural Resources Defense Council, Rodeo Citizens Association, San Francisco Baykeeper, Stand.earth, Sunflower Alliance, The Climate Center, and 350 Contra Costa County (Appellants) hereby appeal the Contra Costa County Planning Commission's (Commission) certification of a deficient Final Environmental Impact Report (FEIR) for the Phillips 66 Rodeo Renewed Project (Project). The decision to certify the FEIR violated the requirements of the California Environmental Quality Act (CEQA), and was not supported by the evidence presented. This appeal is based on the arguments set forth in this appeal letter; the comments (Comments) submitted concerning the draft Environmental Impact Report (DEIR) (Attachment A); the attached technical supplement (Attachment B); attached additional supporting information (Attachment C); all associated documents in the administrative record; and arguments and information presented before the Planning Commission at its March 30, 2022 hearing.

As explained below, the FEIR suffers from multiple flaws. First, as described in the comments submitted by NRDC and others (Comments) (identified in the FEIR as Comment 36, or the NRDC comment), the FEIR fails to meet CEQA requirements for disclosure of information on issues critical to assessing these projects; and fails to define and consider appropriate mitigation for significant impacts. The FEIR reflects very few significant substantive changes in response to the Comments. Specific flaws in the FEIR response to the Comments are described in the attached Technical Supplement. Second, the FEIR rejects the comments made by both the Bay Area Air Quality Management District (BAAQMD) and the public calling for the related – and unpermitted – switch to processing soybean oil feedstock at Unit 250 be evaluated as part of the Project. Third, the FEIR does not fully respond to the Comments, as required by CEQA. Fourth, the FEIR presents critical information describing the Project for the first time, which deprives the public of the opportunity to comment on that

information. Fifth, neither the FEIR nor the staff report makes necessary findings concerning the evaluated project alternatives. And sixth, the FEIR purports to mitigate impacts but unlawfully postpones development of a mitigation plan until after the conclusion of the CEQA process; which also renders the statement of overriding considerations invalid.

Additionally, Appellants have identified changes that need to be made to ensure that the approval conditions pertaining to site cleanup are viable and effective. We support those cleanup conditions in principle, but have described in this appeal the need to adjust the currently very protracted timeline, and to regularly re-evaluate the proposed financial guarantee to ensure that it is sufficiently robust to cover the costly soil remediation of the Project site, where highly polluting refinery operations have been occurring for over a century.

For these reasons, Appellants request that the Board of Supervisors grant this appeal, reject certification of the FEIR, and instruct the Department of Conservation and Development (Department) and Commission to develop a revised DEIR that meets the requirements of CEQA be prepared and circulated for public comment.

To be clear, this appeal is not presented as a referendum on the merits of the Project. CEQA is a tool to aid government in making decisions about whether a project will have significant impacts; and, if so, whether those impacts have been mitigated as necessary. As of now, that tool is not being used properly under the law. The proposed Project at issue here is unprecedented in scope, and proposes a refining technology – hydrotreating esters and fatty acids (HEFA) – that is newly emerging in California on a large scale. A determination whether large-scale deployment of HEFA technology is an appropriate or feasible path for California, and whether its purported benefits outweigh its impacts, cannot be responsibly made without the thorough vetting of all relevant impacts that CEQA requires. We ask that the Board of Supervisors step in to ensure that review takes place.

I. The Decision to Certify the FEIR is Contrary to Law and Not Supported by Substantial Evidence

The Comments documented numerous and basic ways in which the DEIR failed to meet CEQA’s requirements for disclosure and development of mitigation. Nothing provided in the Response or the FEIR adequately explains, excuses, or addresses that failure.

The following is a summary of some key issues left unaddressed in any meaningful way by the FEIR and Response:

- *Failure to provide an adequate project description.* Fundamental to CEQA is the requirement that a project be described in sufficient detail to permit informed decisionmaking. “An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal.App.4th 713, 730 (1994), quoting *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977). The DEIR provided essentially no information about the technology proposed to be deployed in the Project – which technology, as described elsewhere in the Comments, is being proposed at an unprecedented scale in the two Bay Area refinery conversions, and has

the potential for numerous harmful direct and indirect environmental impacts. The Response provides only partial information, insufficient to satisfy CEQA. In particular, the Response failed to adequately address information in the Comment identifying an undisclosed debottlenecking impact of the Project that would increase its impacts.¹ Comment at 11-14. (Although the Response provides additional information, as noted below, its late disclosure forecloses effective public comment on it.)

- *Improper baseline.* The baseline from which the FEIR calculates impacts is continued operation of the Phillips 66 Rodeo refinery (Refinery) at historic levels of production. As explained in the Comment, this baseline is not consistent with available facts, which demonstrate severe and increasing constraints on the Refinery's access to crude feedstock. Comment at 14-24. As explained in the attached Technical Supplement, the response in the FEIR falls short of addressing this concern.² The inaccurate baseline skews all other analysis in the FEIR. If the baseline or "no project" scenario is diminished throughput at the Refinery, then the purported decreases in impacts from crude oil refining have not been assessed accurately.
- *Failure to account for potentially increased operational upsets.* Commenters presented extensive evidence – supported by both their technical consultant and peer-reviewed analysis – that HEFA biofuel processing can lead to increased process upsets as a result of, among other things, higher processing temperatures and gumming and fouling of refinery equipment that results from repurposing crude oil refining equipment to run lipid feedstocks. These upsets can cause worker and public hazards and increased flaring. Comments at 37-42. As explained in the Technical Supplement, the FEIR did not fully address these additional risks.³ We note as well that notwithstanding the FEIR's emphasis on existing regulation, the FEIR does not attach a flare minimization plan (per BAAQMD regulation 12-12-404.2). The inadequacy of the Response concerning operational upsets is further described in the attached technical supplement.
- *Failure to account for the impact of massive food system oil consumption.* The Project would consume on a colossal scale, unprecedented in California, oils that are either directly used as food products (soybean oil) or indirectly used in the food system (corn oil used in animal feed). Commenters extensively documented – based on peer-reviewed science - the environmental impacts risks from this massive disruption in the food system, including and especially the risk that soybean oil demand and associated price spikes (which are already happening as a result of existing biofuel projects) will incentivize production of palm oil and associated deforestation. Comments at 24-37. Nothing in the Response refutes these facts or the cited scientific sources. Commenters presented available information from which the

¹ Catalytic reforming units retained in the project to process gasoline blend stocks coproduce hydrogen (FEIR at 3-44, 4-3, DEIR at Table 3-3) yet the resultant biofuel processing impacts are not disclosed in the EIR. See Technical Supplement by Greg Karras (Attachment B) Section 2.

² *Id.* Section 1.

³ *Id.* Section 4.

County could readily have grounded estimates of likely volumes of feedstocks the Project will consume, but the FEIS offers only a conclusory dismissal of feedstock estimation as “speculative.” FEIR at 3-32.

- *Improper deferment of odor mitigation plan.* The FEIR continues to unlawfully delay addressing potential odors from the project – whose impacts may be considerable depending on what feedstocks are used. CEQA plainly prohibits deferring development of mitigation until after the CEQA process is complete – the point of CEQA is to disclose and allow the public to vet essential mitigation measures. “Formulation of mitigation measures shall not be deferred until some future time.” CEQA Guidelines § 15126.4(a)(1)(B). Yet despite changes made to proposed Mitigation Measure AQ-2, the County continues to propose that the measure be developed after the completion of the CEQA process, completed only “prior to operation of the Project.” Response at 3-73. This approach is unlawful and must be corrected.
- *Failure to account for cumulative impacts.* As pointed out in the Comments, the County ignored the elephant in the room when evaluating cumulative impacts. Focused on comparisons to geographically proximate but mostly unrelated projects, it failed to account meaningfully for the fact that the Project is happening in tandem with the nearby Marathon renewable fuels project. These two projects together (added to the dozens of smaller listed projects already in operation or planned) would result in a massive disruption of food crop markets, with resultant land use consequences. Comments at 72-85. The Response fails to address these issues at all, save repeated assertions that addressing cumulative feedstock impacts would be “speculative.” Response at 3-25 - 26. Furthermore, since filing the Comments, experts have additionally indicated the cumulative impacts of projects like the Martinez Project and Phillips 66 Rodeo Renewed Project bear a great risk of causing tens of thousands of hectares of deforestation—thus negating any potential climate benefit asserted.⁴
- *Inconsistency with California climate pathways.* The Comments presented detailed analysis, backed up by studies developed for CARB and other state agencies, that the volume of biofuels the Project would produce – particularly in combination with the Rodeo Renewed project – would represent an oversupply of renewable diesel that exceeds the supply anticipated in analysis of California’s climate pathways. In particular, the Comments identified in depth a risk that the heightened production of renewable diesel contemplated by the Project could actually cause a net increase in greenhouse gas emissions by increasing exports of petroleum distillates. Comments Appendix C Section 2. As explained in the Technical Supplement, the emission shifting analysis was largely ignored in the Response.⁵

⁴ C. Malins and C. Sandford, Animal, vegetable or mineral (oil)? Exploring the potential impacts of new renewable diesel capacity on oil and fat markets in the United States. Cerulogy, ed. International Council on Clean Transportation, Jan. 2022. <https://theicct.org/wp-content/uploads/2022/01/impact-renewable-diesel-us-jan22.pdf> (Attachment C).

⁵ Technical Supplement Section 3.

- *Failure to adequately mitigate transportation risk impacts.* The Comments provided detailed concerns with regard to marine impacts, concerns which were dismissed by the County under the assumption that non-petroleum feedstocks will react to cleanup methodologies identically to petroleum. FEIR 3-605 (Responses 160, 162), 3-608 (Responses 171, 172), 3-611 (Response 183), 3-613 (Response 187). No support is offered for the assumption that petroleum and non-petroleum **feedstocks** react similarly in marine environments, nor is there any evidence offered that current assets will respond to spills of non-petroleum feedstocks. To put it plainly, there is no guarantee that a large spill of vegetable oil will even be responded to, let alone cleaned up effectively, and there is no analysis of what such a cleanup would entail or the damage such a spill could cause. This impact is recognized as significant and unavoidable, but common-sense mitigation such as committing to response and cleanup of spills of non-petroleum feedstocks at every point along their transportation pathways is not included in the FEIR.

This list is not a complete catalogue of all of the deficiencies of the FEIR. It is merely intended to illustrate that enormously important issues raised by Commenters remain unaddressed in the FEIR. The County's overall response to the issues raised by Commenters has been to offer justifications (where it responds to the comments at all) but not remedy. The County made very few changes to the FEIR in response to the Comments; and where it did make changes (for instance, regarding the odor mitigation measure), it did not fix the problem. This appeal should be granted with orders to the Department and Commission to fully address the issues raised by Commenters, including development of mitigation as necessary.

II. The FEIR Improperly Rejected the Direction of BAAQMD, and the Request of Commenters, to Include Modified Unit 250 in the Project Analysis.

The Comments explained that diesel hydrotreater Unit 250 at the Refinery has been recently converted from petroleum distillate to soybean oil processing without a Clean Air Act permit; and pointed out that this conversion should have been included as part of the Project for purposes of CEQA review. Comment at 5. BAAQMD, which is currently investigating the unpermitted conversion, agreed in its comment on the DEIR, asking that the County "please include Unit 250's throughput of 12,000 bpd of renewable fuel in the Project's emission calculations" unless it can provide documentation that BAAQMD permits issued to Phillips 66 include that unit. FEIR at 3-69. The Response references the fact that Title V operating permit includes Unit 250 – but BAAQMD's investigation documents make clear that the question pertains to whether the permit documents include Unit 250 as a renewable feedstock processing unit, not simply whether the unit itself is referenced in the permit. Accordingly, the DEIR should be recirculated with the Unit 250 emissions included as part of the Project.

III. The FEIR Fails to Comply with the CEQA Requirement to Respond to Public Comments

A key component of CEQA analysis is a considered and thorough response to public comments raising significant environmental issues, where appropriate making changes to the EIR based on them. CEQA Guidelines § 15008. CEQA sets a high bar for the substance of responses, which must fully address each question raised. In particular, the major environmental issues raised when the lead agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice. The level of detail contained in the response, however, may correspond to the level of detail provided in the comment (i.e., responses to general comments may be general).Id. at 15008(c).

That bar has not been met here. As detailed in the Technical Supplement, the Response fails to address a number of key issues raised in the Comments. These include, most notably, questions pertaining to the "emission shifting" impact of the Project affecting the greenhouse gas emissions analysis, and potential debottlenecking impact of certain Project components.

IV. The County Has Made No Findings Concerning Choice of Alternatives and Throughput Volumes

The FEIR evaluates three alternatives in addition to the no project alternative: a terminal-only alternative, a no temporary increase in crude oil alternative, and the reduced feedstock alternative, with the latter identified as the "environmentally superior" alternative. Yet nowhere in either the FEIR or the staff report does the Department identify which is the preferred alternative, and support that finding with facts and documentation. There is simply no finding at all, much less a finding supported by substantial evidence.

Compounding the problem is that the conditions of approval nowhere specify a limit on production rates. The staff report specifies that "up to 80,000 barrels per day" of feedstock "could arrive" at the Refinery (staff report at 7); but nothing in the approval conditions limits throughput – and attendant impacts – to that amount. Similarly, the EIR analyzed biofuel production and shipping of 67,000 barrels per day;⁶ yet nothing in the conditions limits the refinery to that amount. Additionally, it analyzed "temporary" project impacts from refining 105,000 barrels per day of crude and gas oil;⁷ but again, nothing constrains the Project from processing more feedstock than that. This is a fatal flaw in the CEQA process. Nothing constrains the Project from processing at a larger rate, with larger impacts, than what was analyzed.

Given these foundational failures to comply with CEQA, the FEIR and approval conditions as presented should be rejected, with orders that the Department make findings among

⁶ See FEIR at 4.2, Revised Table ES-1.

⁷ See FEIR at 4-3, Revised Table ES-2.

the alternatives evaluated based upon evidence in the record; and that its finding regarding throughput volume be reflected in a condition of approval governing throughput.

V. New Information Describing the Project Provided in the Response Must be Recirculated to Allow for Public Comment

On several topics, the Response provides for the first time information describing the Project and its key potential impacts. This is most notably true with respect to public safety risks associated with repurposing crude oil processing equipment for processing renewable diesel feedstocks. As explained in the Technical Supplement, the FEIR responds to commenters' concerns with dozens of new assertions and 18 newly-identified technical references.

This disclosure constitutes essential information that the public as a whole (not just Commenters via their consultant) should have had disclosed to them in the DEIR. It is not sufficient, for purposes of CEQA, to present critical information describing a key potential impact only in the FEIR, when opportunity for meaningful public comment has passed. For this reason, the DEIR should be revised to include any information newly disclosed in the FEIR and Response, and ordered recirculated in response to this appeal.

VI. The Statement of Overriding Considerations is Inadequate

The law is clear that, while a government body may choose to override significant impacts that cannot be feasibly mitigated, it may not use a statement of overriding considerations as a basis for project approval in place of feasible mitigation measures. *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368, citing Public Resources Code § 21081 (“A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible. . . . CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible.”).

Here, the FEIR fails to even identify and address significant categories of impacts, much less mitigate them. And as noted above, FEIR and staff report did not specifically address the alternative of reduced throughput, and the feasibility of reducing impacts in that manner. Additionally, the mitigation proposed for odors, as described above, is inadequate and unlawful, because it is not being fully defined until after the conclusion of the CEQA process. For this reason alone, the Statement of Overriding Considerations presented by staff is legally inadequate to support approval of the Project.

VII. The Provisions Regarding Site Cleanup Need to be Strengthened to Ensure Effectiveness

We support in principle the County's inclusion of a requirement in the Conditions of Approval that the Project applicant “investigate soil conditions at the site and, where necessary, clean-up [sic] and restore the site to a condition suitable for commercial and industrial land uses.” Staff report at 18. As discussed in the Comment, the Refinery is almost certainly heavily

contaminated, having been home to refining operations since before the turn of the 20th Century. Comments at 88-90. However, Appellants appeal the condition as written, as there are several ways in which it must be strengthened in order to ensure effective implementation.

First, the timeline on which Phillips 66 is allowed to conduct the soil investigation and remove unused equipment is excessively long and unsupported by evidence. There is no reason it should take 15 years to complete it (staff report at 20) – indeed, there is no guarantee the Project will still be operating at that time; or that, in a rapidly changing energy economy, Phillips 66 will remain a functioning economic entity. The County should determine a reasonable timeline for completing this investigation based on usual industry practice. Similarly, there is no explanation or evidence provided to support giving Phillips 66 20 years to remove portions of the Refinery that will not be used for the Project. There is no reason not to require such removal concurrent with, or immediately following, completion of the Project. Additionally, the soil investigation should be completed after such removal, to address any contamination that may be either inaccessible while the unused equipment remains on the site, or caused by the process of removal.

Additionally in this regard, we note that the condition does not expressly specify that the work plan include, or be amended following completion of the soil investigation to include, remediation of soil contamination – it references only timelines for demolishing and removing equipment. Staff report at 19. That deficiency needs to be rectified as well.

Second, the corporate financial guarantee requirements need to be amended to ensure that the cleanup will be paid for. In the current version, there is no requirement that the corporate guarantee be adjusted upon completion of the soil remediation study – which will determine in substantial part the cost of the cleanup. Although the corporate guarantee is required to be updated within 30 days of any work plan amendment (staff report at 22), there is no requirement, as noted, that the work plan be amended upon completion of the soil investigation. Hence, the actual – and almost certainly large – costs of soil remediation will not be factored into calculation of the corporate guarantee.

Third, the County should revisit the corporate guarantee annually, to ensure that economic circumstances and corporate financial health have not diminished the validity of the guarantee. The oil industry is volatile and changing as the national and state economies shift toward renewable energy, making it important that that guarantee be subject to continuing reassessment of its viability. The County should require external security (insurance or letters of credit) upon any sign of diminished strength of the corporate guarantee.

Finally, the County should reconsider its limitation of cleanup levels to “commercial and industrial uses.” Prior to the soil investigation, it cannot be known the level of cleanup that is possible at the Refinery. The County should set the cleanup level so as to provide the Rodeo community with the broadest possible latitude in repurposing the Refinery site.

VIII. Conclusion

Recirculation of a draft EIR is required when the draft was “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded,” CEQA Guidelines § 15088.5(a)(4), a standard that is met here. For the reasons stated above, Appellants respectfully request that the Board of Supervisors grant this appeal, reject the certification of the FEIR and approval of the Project, and remand to the Department and the Commission with orders that the DEIR be revised and recirculated so as to comply fully with CEQA; and that they address through thorough disclosure and analysis all issues raised in the Comments and this Appeal.

Respectfully submitted,

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