

ASIAN PACIFIC ENVIRONMENTAL NETWORK • BIOFUEL WATCH • CENTER FOR BIOLOGICAL DIVERSITY • COMMUNITIES FOR A BETTER ENVIRONMENT • COUNCILMEMBERS CLAUDIA JIMENEZ, EDUARDO MARTINEZ, AND GAYLE MCLAUGHLIN • FRIENDS OF THE EARTH • INTERFAITH CLIMATE ACTION NETWORK OF CONTRA COSTA COUNTY • NATURAL RESOURCES DEFENSE COUNCIL • RODEO CITIZENS ASSOCIATION • SAN FRANCISCO BAYKEEPER • THE CLIMATE CENTER • SUNFLOWER ALLIANCE • 350 CONTRA COSTA COUNTY

March 24, 2022

Re: Appeal of Planning Commission Certification for the Final Environmental Impact Report for the Martinez Refinery Renewable Fuels Project

To the Contra Costa County Board of Supervisors:

Asian Pacific Environmental Network, Biofuel Watch, Center for Biological Diversity, Communities for a Better Environment, Richmond City Councilmembers Claudia Jimenez, Eduardo Martinez and Gayle McLaughlin, Friends of the Earth, Interfaith Climate Action Network of Contra Costa County, Natural Resources Defense Council, Rodeo Citizens Association, San Francisco Baykeeper, The Climate Center, Sunflower Alliance, 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 Martinez Refinery Renewable Fuels 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); all associated documents in the administrative record; and arguments and information presented before the Planning Commission at its March 23, 2022 hearing.

The decision to certify the FEIR and approve the Project suffers from multiple flaws. First, for the reasons set forth in the Comments, the FEIR fails to meet basic 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 no significant substantive changes in response to the Comments. Second, the FEIR fails to comply with the CEQA requirement to respond to public comments. As discussed in more detail below, the Response fails to provide any substantive response at all to numerous major issues raised in the Comments; and provides a wholly inadequate response with respect to many others. Third, the FEIR presents critical information describing the Project for the first time, so as to deprive the public of the opportunity to comment on that information. And fourth, the Statement of

Overriding Considerations unlawfully purports to override significant impacts that could have been feasibly mitigated.

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 decision 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 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 Comments list in detail the aspects of the proposed technology that must be disclosed in order to adequately evaluate its impacts (Comments at 4-9), but the Response provides only limited partial information. It is only in the Response that the EIR even identifies the proposed HEFA technology by name (Response at 3-37); and it still does not describe essential aspects of its deployment as the basis for the Project.
- *Improper baseline.* The baseline from which the FEIR calculates impacts is continued operation of the Marathon Martinez refinery (Refinery). This baseline is

fictitious, as the Refinery has not operated for nearly two years. The Response fails to address the substantial data specific to the Refinery's operation and reasons for its closure – which, as demonstrated through Commenters' methodical analysis, is quite evidently connected to Marathon's intentional consolidation of operations.

Comments at 12-20. The highly general information in the Response concerning overall demand for petroleum products (Response at 3-5 – 9) rebuts none of this – since if such demand actually supported the Refinery's re-opening, that re-opening would have happened already. Marathon's continued maintenance of permits also signifies nothing (see Comment at 12). The inadequacy of the Response concerning the project baseline is further described in the attached technical supplement. The inaccurate baseline skews all other analysis in the FEIR. If the baseline or “no project” scenario is non-operation of the refinery, then the purported decreases in impacts from crude oil refining are actually increases over and above the alternative of non-operation.

- *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 34-37. While the Response purports to address these problems in the Master Response (O12-70, Response at 3-98), it does not actually do so. The fact that the flares are regulated (Response at 3-42) does not relieve the County of the obligation to disclose and properly mitigate their impacts; and is cold comfort to local citizens subjected to increased risks and pollution. The FEIR also continues to exclude any disclosure or analysis of acute short-term episodic air emissions, key to disclosing flaring impact. Comments at 57-58. 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).
- *Failure to account for 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 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 20-34. Commenters cited to the CEQA analysis performed by the California Air Resources Board (CARB) in support of the low carbon fuel standard (LCFS) which specifically directed agencies to review relevant project-specific impacts – making the purported rebuttal in the Response that CARB has “previously evaluated” land use impacts (Response at 3-27) entirely beside the point. Commenters further expressly acknowledged that Marathon may be “unable to specify the exact amount of each

feedstock that will be used” (Comments at 24), making all the statements in the Response that marathon cannot specify “exact” feedstock quantities a red herring. Marathon may not have exact numbers, but Commenters presented available information from which the County could readily have grounded estimates. The suggestion that the needed analysis is too complex or difficult in the context of the DEIR is likewise a red herring, as Commenters pointed out that the calculation formula has already been developed for the LCFS – it just needs to be applied at scale to the Project. Comments at 30.

- *Improper deferment of odor mitigation plan.* The FEIR continues to unlawfully delay addressing potential odors from the project – which 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, “[d]uring the construction phase of the Project.” Response at 3-58. 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 Martinez Project is happening in tandem with the much larger and nearby Phillips 66 Rodeo Renewed project, which purports to be the largest of its kind in the world. 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 65-77. The Response fails to address these issues at all, save a conclusory assertion that the FEIR reflects an “appropriate level of generality.” Response at 3-33. 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.¹
- *Inconsistency with California climate pathways.* The Comments presented detailed analysis, backed up by data and 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 - an oversupply of renewable diesel that exceeds the supply anticipated in analysis of California’s climate pathways. Comments at 44-58, 72-75. This entire analysis was ignored in the Response.
- *Failure to adequately mitigate transportation risk impacts.* The Comments provided detailed concerns with regard to marine impacts, concerns which were dismissed by

¹ 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>.

the County under the assumption that non-petroleum feedstocks will react to cleanup methodologies identically to petroleum. O12-127, 138. While support is offered for the assumption that petroleum and non-petroleum finished diesel products react similarly, 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. While the County's response states that Marathon will update the Northern California Blanket Oil Spill Response Plan to include non-petroleum feedstocks, no such commitment is made in the DEIR at the cites provided, and no legal requirement to respond exists. Requiring such response from non-Project assets is outside of the County's jurisdiction, and so should be required of Project assets as a mitigation measure specific to this project.

This list is not a complete catalogue of all of the deficiencies of the FEIS. 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 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. The Comments were extraordinarily thorough and detailed. Commenters presented hundreds of pages of careful analysis, backed up by technical reports and supported by extensive citation of peer reviewed studies and other materials, all provided to the Department to aid its review. In the Response, the Department simply ignores large swaths of that analysis.

A great many comments simply receive no substantive response at all. Although the Response dutifully catalogues by number each point made by Commenters and purports to address it, this superficially meticulous approach cannot disguise the fact that the Response neglects to actually address a great many such points. The Response contains a “Master Response,” which is a narrative discussion concerning some of the major comment topics (baseline, cumulative impacts, land use impacts, alternatives, public safety). When addressing Commenters’ specific catalogued points, the Response frequently provides only a single sentence cross-referencing to a section of the Master Response – yet in a great number of cases the Master Response does not actually talk about the point at all.

The discussion in the previous sections provides two particularly important examples of this flawed approach. Commenters provided detailed analysis of (among many other things) the potential problem of biofuel oversupply as it concerns California’s climate goals (44-48, 72-75); and the problem of runaway reactions and corrosion of equipment as potential contributors to process upsets (Comments at 35). Both analyses were supported by extensive discussion and explanation in the attached technical reports (which cite in turn to peer-reviewed literature). The Response cross-references in both cases to the Master Response (O12-85 cross-referencing Master Response 4; O12-70 cross-referencing Master Response 5), but in neither case does the cross-referenced section directly address the comment. Additionally, with respect to the oversupply point, large portions of Commenters’ meticulous quantitative analysis are simply dismissed with “comment noted” (O12-86-88).

In many other cases, the response falls far short in level of detail to the thoughtful and thorough critique provided by Commenters and/or relies upon conclusory assertions as to why the comment should be summarily dismissed without response. For instance, Commenters’ concerns with the EIR’s failure to adequately evaluate cumulative impacts (Comments at 65-77) are dismissed with the summary assertion that the FEIR’s high level of generality is appropriate (Response 3-33). Although the Comments had pointed out that the list of nearby projects used to assess cumulative impacts included many that are irrelevant to determining the Project’s actual cumulative impacts (Comments at 63-64, referencing the inclusion of a self-storage unit development and conversion of a billboard to digital format), the Response persists in referencing these projects as “similar,” without further explanation.

These problems are pervasive in the Response. To ensure compliance with CEQA, the Board of Supervisors should grant this appeal and order the Department and Commission to thoroughly respond to each substantive comment presented, as mandated by CEQA Guidelines § 15008(c).

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

The FEIR evaluates two alternatives in addition to the no project alternative: a green hydrogen 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 throughput. The staff report specifies that the project is “anticipated to process approximately” 48,000 barrels per day (bpd) of feedstock; but nothing in the approval conditions limits throughput to that amount. This is a fatal flaw in the CEQA process. The FEIR analyzed the impact of 48,000 bpd, yet nothing constrains the Project from processing more feedstock than that, with attendant greater impacts.

Given these foundational failures to comply with CEQA, the FEIR and proposed approval conditions as presented should be rejected, with orders that the Department make findings among the alternatives evaluated based upon evidence in the record. Furthermore, findings regarding throughput volume must be reflected in a condition of approval that actually governs throughput.

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

While the Response is overall sketchy on detail, in a few places it provides for the first time, information describing the Project. This is most notably true with respect to the proposed technology, HEFA, that the Project will deploy. Commenters, through their technical expert, independently discerned and identified HEFA as the Project technology, and in doing so described its many risks and challenges. Comments at 34-52. However, as noted above, the DEIR did not even name HEFA as the proposed technology, much less describe it. The Comments identified the many aspects of HEFA technology that should have been disclosed and addressed. Comments at 5-9. While the Response does not by any means disclose all of the requested information on HEFA, it does specify for the first time that HEFA will be the technology relied upon by the Project.

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 the basic nature of a proposed project only in the FEIR, when opportunity for meaningful public comment has passed. For this reason, the DEIR should be revised to include a thorough description of HEFA technology, containing the components outlined in the Comment, and ordered recirculated in response to this appeal.

V. 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 (including safety impacts and land use impacts), much less mitigate them. And as noted above, the 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.

VI. Conclusion

For the foregoing reasons, 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 so as to comply fully with CEQA; and that they address through thorough disclosure and analysis all issues raised in the Comments.

Respectfully submitted,

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