

CALIFORNIA COASTAL COMMISSION

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March 10, 2017

San Luis Obispo County
Board of Supervisors
1055 Monterey St., Room D430
San Luis Obispo, CA 93401

Re: **Phillips 66 Santa Maria Refinery Rail Spur Extension Project**

Dear Honorable Supervisors:

Thank you for considering the following input from California Coastal Commission (Commission) staff on the proposed Phillips 66 Santa Maria Refinery Rail Spur Extension Project. Commission staff previously provided input to the San Luis Obispo County Planning Commission in a letter dated February 3, 2016, supporting the Department of Planning and Building's staff report and recommendation of denial based on the project's inconsistency with a number of the key policies and standards of the San Luis Obispo County's certified Local Coastal Program. We are writing today to convey our support for the proposed resolution denying the appeals of Jeff Edwards and Phillips 66, affirming the decision of the Planning Commission, and denying the application of Phillips 66 for a development plan and coastal development permit. We are also writing to comment on one of the primary points raised by Phillips 66 in its appeal.

As you are likely aware, the County's final decision on this project may be appealed to the Commission under Coastal Act section 30603(a) for a variety of reasons, including because the project is located between the first public road and the sea, is not the principally permitted use on this parcel, and is a "major energy facility" as defined in the Commission's regulations.¹ As such, Commission staff has reached out several times to County Department of Planning and Building staff over the course of its review of this project to provide technical input and help facilitate communication and interagency coordination. These efforts are summarized in the correspondence from Commission staff to the County that is included as part of the public record on the project CEQA document and as Attachment 11 to the agenda documents provided to you for your March 13, 2017 special meeting.

¹ Coastal Act Section 30107 defines "energy facility" as "any public or private processing, producing, generating, storing, transmitting, or recovering facility for electricity, natural gas, petroleum, coal, or other source of energy. 14 Cal. Admin. Code Section 13012(a) defines, in relevant part, "major energy facilities" as those energy facilities "that cost more than one hundred thousand dollars (\$100,000)..." Section 30603(a)(5) allows appeals of any local government action on a major energy facility – so either an approval or a denial of such facility could be appealed to the Commission.

Phillips 66 has raised a variety of issues in its appeal to you of the Planning Commission's decision. While some of these issues are focused on project design details or technical aspects of its environmental impact evaluation, one of them is centered on the County's interpretation of one of the key policies in its Local Coastal Program – the policy on environmentally sensitive habitat area (ESHA) and the definition of “Unmapped ESHA” included in Coastal Zone Land Use Ordinance (CZLUO) section 23.11.030. While Commission staff has yet to fully evaluate the merits of Phillips 66's other points of appeal and the County staff's response to them, we have considered the interpretation it has put forward regarding the definition of “Unmapped ESHA” and do not think that its interpretation is consistent with the plain language of the LCP nor with the Coastal Act more generally.

Phillips 66's interpretation of the LCP would have the effect of requiring that County planning staff, at an initial stage in project review, make the only, final, and unreviewable determination of whether a project site contained “Unmapped ESHA.” The Planning Commission, the Board of Supervisors, and the Commission would be unable to review or revise that decision made by County planning staff at the time an application is accepted, regardless of what additional information regarding the presence or absence of ESHA is put forward throughout the County's processing of the application. Phillips 66's interpretation of CZLUO section 23.11.030² would effectively exclude public and stakeholder participation and oversight from such decisions and would eliminate the ability of the elected or appointed decision-making bodies (such as the Planning Commission, Board of Supervisors, and Commission) that are tasked with approving or denying such development from considering one of the most fundamental questions about a project site – whether it contains ESHA. This process would not be consistent with how the Coastal Act has been envisioned and implemented since its inception nor with the legal, administrative, and procedural practices of the County's Department of Planning and Building.

Similar to the process of implementing the Coastal Act carried out by Commission staff, the County's process for evaluating coastal development permits requires a transparent, stepwise, public process that allows for input regarding many aspects of a project, including whether ESHA exists on site. This process includes staff bringing forward - with public notices, public input, and an agendaized hearing - recommendations to an elected or appointed decision making body that must weigh all of the evidence developed throughout the public process before determining whether to approve, approve with conditions, or deny a proposed project.

² Environmentally Sensitive Habitat Area (Unmapped ESHA). A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development. They include, but are not limited to, known wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats that may not be mapped as Land Use Element combining designations. The existence of Unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information. Unmapped ESHA includes but is not limited to:

- a. Areas containing features or natural resources when identified by the County or County approved expert as having equivalent characteristics and natural function as mapped other environmental sensitive habitat areas;
- b. Areas previously known to the County from environmental experts, documents or recognized studies as containing ESHA resources;
- c. Other areas commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection.

Although this process has been developed and implemented in such a way for a variety of reasons, one of the most vital is to help maximize the opportunity for technical input and the best available information to be integrated into the decision making process. For example, it is not uncommon for essential information to be provided during the various public comment opportunities provided through the CEQA process or during the public hearings that take place as part of local government and state agency decision making processes. To insert words into and interpret the “Unmapped ESHA” definition as Phillips 66 has done in its October 19, 2016 appeal would force “the Department to make an Unmapped ESHA determination for that property—*but only* at or before the time of application acceptance” [emphasis in original]. Such an interpretation would mean that public and stakeholder participation would be nearly non-existent, the opportunities for receiving and considering the best available information would be effectively minimized, and neither the Planning Commission nor the Board of Supervisors would have the authority to modify the original determination made by County Department of Planning and Building staff.

Such flaws in this interpretation are demonstrated by considering the early submittal and review timeline of this project. The County’s Initial Study, one of the very first steps in the CEQA process and often the first notification that the public, stakeholders and interested parties have of a project’s existence and details, was released just days before the County accepted Phillip 66’s application. An interpretation that would compel the County planning staff to make a final determination on “Unmapped ESHA” at that stage would have allowed virtually no opportunity for the public, interested parties, and stakeholders to provide additional information to aid in the County planning staff’s review, would have unreasonably bound that staff to only consider the information provided by the applicant, and may inappropriately bias the outcome of the determination. Such a process would be at odds with the intention and our implementation of the Coastal Act.

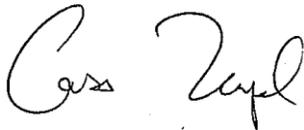
Phillips 66’s interpretation of the CZLUO requires the implied insertion of the word “final” before “determination.” The appropriate interpretation of the definition should instead be based on a plain reading of only the available language of the CZLUO. A plain reading of the CZLUO requires County Department of Planning and Building staff to make a determination regarding the existence of ESHA at or before the time of application acceptance, which it did here by discussing the existence of ESHA on site in the Initial Study. But this determination can and should be assessed, reviewed, and analyzed by the appropriate decision-making bodies, after review of all of the evidence associated with a project proposal. Nothing in the CZLUO prohibits this later review; CZLUO section 23.11.030 does not state that the County’s determination at the time of application acceptance is final or unreviewable by the appropriate decision-making bodies. In other words, that a determination is made by County planning staff about the existence of “Unmapped ESHA” at the time of application acceptance does not limit the authority of elected and appointed decision making bodies to also make subsequent, more final determinations based on further analysis and consideration of the best information available to them at the time their review is carried out.

In addition to being consistent with the plain language of the CZLUO as well as the general requirements of the LCP and Coastal Act to maximize public participation in the decision-making process, this interpretation is also responsive to the concern raised by Phillips 66 in its

appeal that “property owners understand the limitations on potential development prior to investing years and millions of dollars on a development proposal.” A determination made by the County on the existence of “Unmapped ESHA” at the time of application acceptance can certainly help an applicant understand a property’s limitations on potential development, even if that determination is not final. However, such determinations cannot prevent applicants from continuing to spend money and effort pursuing development in challenging locations. In many cases, despite early identification of the constraints to development on a property, a property owner decides to continue the pursuit of that development regardless. In fact, the current project provides just such an example. As the project record shows, the County’s Initial Study was released prior to the time Phillips 66’s application was accepted and that study was clear about the existence of ESHA on the project site and in the project footprint. The Initial Study did not state that the project site and footprint were devoid of rare and/or sensitive species and habitats; it instead called out several such resources by name. Phillips 66 was therefore provided with an early and accurate warning by the County of the site’s constraints and limitations. Contrary to the statements made in its appeal, this information about the existence of ESHA on its property was provided to Phillips 66 before its application was accepted (the Initial Study was released on July 8, 2013 and its application was accepted four days later on July 12, 2013). Phillips 66 nevertheless made the decision to move forward in pursuit of its project despite this information.

Thank you for your consideration of the comments included above. We respectfully request that you reject Phillips 66’s interpretation of the CZLUO’s definition of “Unmapped ESHA” and adopt the resolution denying the appeals of Jeff Edwards and Phillips 66, affirming the decision of the Planning Commission and denying the application of Phillips 66 for development plan and coastal development permit.

Sincerely,

A handwritten signature in black ink, appearing to read "Cassidy Teufel". The signature is written in a cursive, flowing style.

CASSIDY TEUFEL
Senior Environmental Scientist
Energy, Ocean Resources and Federal Consistency Division