



March 9, 2017

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

Re: Phillips 66 Appeal - DENY

Dear Honorable Supervisors:

The following comments are submitted by the Environmental Defense Center (“EDC”) on behalf of the Sierra Club, Stand.earth, Surfrider Foundation-San Luis Obispo Chapter, Center for Biological Diversity, and EDC, urging the San Luis Obispo County Board of Supervisors (“Board”) to reject Phillips 66’s appeal of the Planning Commission’s denial of the Rail Spur Extension Project (“Project”). The Board’s consideration of the appeal is “de novo.”¹ Accordingly, our organizations urge the Board to: (I) deny certification of the Final Environmental Impact Report (“FEIR”) for the Project; and (II) deny the application for the Project.²

As noted in this letter, the Project cannot be approved because the FEIR is inadequate, and because the Project is inconsistent with San Luis Obispo County’s (“County”) Local Coastal Program (“LCP”).³ In particular, the Project must be denied because it would destroy environmentally sensitive habitat area (“ESHA”), degrade air quality, and cause unacceptable threats to public health and safety, agriculture, water quality and archaeological resources.

EDC is a non-profit, public interest law firm that protects and enhances the environment in Santa Barbara, Ventura, and San Luis Obispo Counties through education, advocacy and legal action. The Sierra Club, a national nonprofit organization with roughly 146,000 members in California, is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to

¹ See Coastal Zone Land Use Ordinance (“CZLUO”) Section 23.01.042.

² If the Board denies the Project, there is no need to certify the FEIR. See CEQA Guidelines § 15270.

³ Our clients are submitting additional comments under separate cover addressing other concerns about the Project and the FEIR.

educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Stand.earth is a citizen-powered organization dedicated to creating a world where respect for people and the environment come first. The Surfrider Foundation is a non-profit organization whose mission includes the protection and enjoyment of ocean, waves and beaches through a powerful activist network. The Center for Biological Diversity is a non-profit environmental organization with over 900,000 members and online activists throughout California and the United States dedicated to the protection of native species and their habitats through science, law, and creative media. All of our clients have members who live, visit, work, and recreate in the area that would be affected by the Project.

Our clients are concerned about the environmental impacts associated with modification of the existing rail spur at the Santa Maria Refinery in order to allow for the transportation and unloading of large amounts of crude oil via train. Not only is the proposed Project site located in a very sensitive ecological area surrounded by valuable agricultural land and recreational resources, but the mainline track that would be used to transport the oil runs through many communities as well as ecologically sensitive and agriculturally valuable areas. All of these coastal areas will be negatively impacted by the increased potential for spills, fires, and air pollution resulting from the Project. As discussed in detail below, if approved the Project will remove and disrupt numerous acres of important sensitive habitat and native vegetation, displace current agricultural uses, and increase toxic air emissions known to cause cancer and harm human health.

Accordingly, the Appeal and Project must be denied.

I. The FEIR Is Inadequate and Cannot Be Certified

As discussed in the attached letter from EDC to the Planning Commission dated February 2, 2016, the FEIR cannot be certified because, *inter alia*, it fails to adequately analyze the Project's consistency with the County's LCP policies pertaining to biological resources, agricultural resources, air quality, safety and fire, visual aesthetics, energy and industrial land use, archaeological resources, open space and odors. This analysis is required by CEQA because disclosure of land use inconsistencies is critical to the determination as to whether a proposed project can be approved.⁴ In this case, the omission and inadequate analysis is especially critical because the Project as proposed violates many longstanding policies of the County's LCP.

⁴ CEQA Guidelines § 15125(d); *see also* CEQA Guidelines Appendix G, § X(b) (the EIR should evaluate whether a project would “[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect”); *see also Napa Citizens for Honest Gov't v. Napa Cnty. Bd. of Supervisors*, 91 Cal. App. 4th 342, 360-61 (2001), *as modified* (Aug. 7, 2001), *as modified on denial of reh'g* (Sept. 4, 2001) (“[W]hile there is no requirement that an EIR itself be consistent with the relevant general plan, it must identify and discuss any inconsistencies between a proposed project and the governing general plan. (CEQA Guidelines, § 15125, subd. (d).) The failure to provide enough information to permit informed decision-making is fatal.”).

II. The Project Cannot Be Approved Because It Violates the County's LCP.

In addition to an inadequate EIR, which precludes approval of the Project, the Project violates many policies of the County's LCP and thus must be denied. The Coastal Act is clear: a project in the Coastal Zone may not be approved unless it is consistent with the applicable LCP.⁵ The proposed Project is inconsistent with numerous County LCP policies, as identified in the Policy Compliance Summary contained in the Staff Report, the Planning Commission's Findings for Denial and comments submitted by the public.⁶ According to the Staff Report, the Project is inconsistent with an astonishing thirty-one County policies, many of them protecting public health and safety.

A. The Project would Significantly Disrupt ESHA.

According to the FEIR, the Project would displace 20.88 acres of ESHA and pose oil spill threats to waterbodies and ESHA along the mainline and on and near the Project site. (FEIR at G-68) This impact not only creates an issue under the California Environmental Quality Act ("CEQA"), but also violates the Coastal Act and LCP. As noted in the Planning Commission Findings and Policy Compliance Summary, the Project is inconsistent with the following County policies protecting ESHA:

- Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats
- Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats
- Coastal Plan Policies: Environmentally Sensitive Habitat Area Policy 36, Protection of Dune Vegetation
- CZLUO Section 23.07.170 (Environmentally Sensitive Habitats)
- Framework for Planning Combining Designations, Sensitive Resource Areas General Objective 1
- Framework for Planning: Strategic Growth Goal 1 Preserve Resources

Under the Coastal Act, ESHA "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Pub. Res. Code § 30240; see also *Sierra Club v. California Coastal Com.*, 12 Cal. App. 4th 602, 611 (1993); *Bolsa Chica Land Trust v. Superior Court*, 71 Cal. App. 4th 493, 506 (1999). ESHA is broadly defined as "any area in which 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 be easily disturbed or degraded by human activities and developments." Pub. Res. Code § 30107.5. The County's LCP must be implemented and interpreted in compliance with this policy.

⁵ Cal. Pub. Res. Code §§ 30600.5(c); 30604(b).

⁶ The staff report states that the findings "could be amended at the Board's discretion." (Staff report at p. 17) It is important to note, however, that the Board's discretion is limited and the findings must be supported by substantial evidence, which must be based in fact and "does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly erroneous or inaccurate." CEQA Guidelines § 15384.

In fact, the County's LCP was subject to an extensive Periodic Review and Amendment process due, in part, to the failure of the County to protect unmapped ESHA as required by the Coastal Act.⁷ At the culmination of this multi-year process, the Coastal Commission agreed to certify the County's Amended LCP based on two important revisions:

- A clarification that ESHA determinations are not limited to areas mapped in the LCP, and include "unmapped ESHA" consistent with the definition of ESHA in the Coastal Act; and
- Biological reports and consultations are required prior to filing a complete application for development to ensure adequate identification of ESHA. This process must include consultation with the Coastal Commission.

In accordance with these requirements, as currently embodied in the County's LCP and CZLUO, the FEIR, Staff recommendation and Planning Commission Findings all determined that the Project site contains ESHA and therefore the Project cannot be approved.

In its appeal, Phillips argues that the County's ESHA determination violates the CZLUO because it was made after the Project application was accepted. (Appeal at pp. 1, 8-9) Phillips asserts that once an application is accepted, the County is forever barred from finding that a project site contains ESHA.⁸ However, Phillips repeatedly asked the Planning Commission to change the Staff's recommended ESHA determination, thus acknowledging that the County retains the discretion to make an ESHA determination during the administrative review process.

Although the County's CZLUO does allow an initial determination of unmapped ESHA when an application is accepted, such determination must be based on the best available information:

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:

⁷ See discussion in attached letter from EDC to the Planning Commission regarding the Project site's ESHA protections (May 13, 2016).

⁸ This argument belies the function of an EIR and administrative review and would circumvent these legally required processes. A land use agency such as the County cannot make a determination without first conducting full environmental review and considering all evidence submitted during the public review process. To limit such discretion would violate the County's police power.

- 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.⁹

CZLUO Section 23.07.170 (Environmentally Sensitive Habitats) sets forth the following requirements to ensure that the County's determination is based on best available information:

a. **Application content.** A land use permit application for a project on a site located within or adjacent to an Environmentally Sensitive Habitat shall also include a report by a biologist approved by the Environmental Coordinator that:

(1) Evaluates the impact the development may have on the habitat, and whether the development will be consistent with the biological continuance of the habitat. For those environmentally sensitive habitat areas which are only seasonally occupied, or where the presence of the species can best be determined during a certain season (e.g., an anadromous fish species or annual wildflower species), the field investigation(s) must be conducted during the appropriate time to maximize detection of the subject species. The report shall identify possible impacts, their significance, measures to avoid possible impacts, mitigation measures required to reduce impacts to less than significant levels when impacts cannot be avoided, measures for the restoration of damaged habitats and long-term protection of the habitats, and a program for monitoring and evaluating the effectiveness of such measures.

(2) *Is complete, current, and meets established standards for report content and assessment methodology. Report standards shall be consistent with CEQA guidelines, and incorporate the recommendations of the California Coastal Commission, California Department of Fish and Game, U.S. Fish and Wildlife Service, Marine Mammals Commission, and National Marine Fisheries Service, as appropriate.*

(3) Evaluates development proposed adjacent to environmentally sensitive habitats to identify significant negative impacts from noise, sediment and other potential disturbances that may become evident during project review.

⁹ CZLUO Section 23.11.030, *emphasis added*.

(4) Identifies the biological constraints that need to be addressed in designing development that would first avoid, then minimize impacts to ESHA. These identified constraints will be used by the County to evaluate, and require implementation of project design alternatives that result in impacts to ESHA being avoided and unavoidable impacts minimized. This shall also include assessment of impacts that may result from the application of fire safety requirements.

(5) Verifies that applicable setbacks from the habitat area required by Sections 23.07.170 to 23.07.178 are adequate to protect the habitat or recommends greater, more appropriate setbacks.

(6) Critically evaluate “after-the-fact” permit applications where un-permitted development has illegally encroached into setback areas before off-site mitigation is considered. Evaluate all options of restoring and enhancing the pre-existing on-site habitat values. Off-site mitigation consisting of replacing the area of disturbance with like habitat at a minimum of 3:1 ratio shall be an additional requirement to offset the temporary impacts of the violation and address the potential for restoration efforts to fail.¹⁰

The information at the time the application was accepted clearly identified the presence of ESHA. As noted in the Staff Report, the County’s own Initial Study, prepared on July 8, 2013, predated application acceptance and disclosed that the Project would result in potentially significant impacts to Biological Resources due to the fact that the Project would result in a loss of unique or special status species or their habitats; reduce the extent, diversity or quality of native or other important vegetation; interfere with the movement of resident or migratory fish or wildlife species, or factors, which could hinder the normal activities of wildlife; and conflict with any regional plans or policies to protect sensitive species, or regulations of the California Department of Fish & Wildlife or U.S. Fish & Wildlife Service.¹¹

The Initial Study listed several sensitive plant and animal species and their habitats. Information was obtained from the Natural Diversity Database as well as surveys at the Project site.¹² Included in this analysis was a list of sensitive species “observed within the proposed area of disturbance for the rail spur extension.”¹³ The Study concluded that:

Due to the area’s special environmental qualities, areas west of the railroad have been designated as within the County’s SRA combining designation *and are also considered ESHA* due to the potential value of the Terrestrial Habitat (TH) at that location. *Additional areas within the project site that contain habitat and/or qualities consistent with those found in an SRA, TH, or ESHA designation would*

¹⁰ CZLUO Section 23.07.170, *emphasis added*.

¹¹ Initial Study at pp. 1, 9.

¹² *Id.* at p. 10.

¹³ *Id.*

also be considered Environmentally Sensitive Habitat Area. Special requirements will apply to these areas relating to the protection of sensitive biological resources, which are intended to preserve and protect rare and endangered plants and wildlife and the habitat in which they reside.¹⁴

The Initial Study further found that the Project would:

result in the removal of a large amount of on-site vegetation, including areas that may qualify as ESHA. Appropriate habitat characteristics for certain sensitive wildlife and plant species exist at the project site and are likely to support candidate or listed special status species. Construction and development activities associated with the rail extension have the potential to disrupt these sensitive species and/or damage or destroy suitable habitat areas.¹⁵

This information, *which was available before the application was accepted*, confirmed that the Project site included areas meeting the definition of ESHA.

In addition, Phillips' own biological consultant prepared two studies – a Wildlife and Habitat Assessment Report (June 17, 2013) and a Botanical Assessment report (June 13, 2016) - that predated application acceptance and identified several species and habitats that met the definition of ESHA.

There was other “best available information” at the time the application was filed that showed the existence of ESHA at the Project site, including the *Manual of California Vegetation*, California Native Plant Society's *Inventory of Rare and Endangered Plants*, California Department of Fish and Game's 1986 *Preliminary Descriptions of Terrestrial Natural Communities of California*, and other scientific reports.¹⁶

Even if this information did not identify the presence of ESHA, Phillips cannot bind the County to the information provided with its application because the company did not comply with the requirements of the CZLUO. Perhaps most egregiously, Phillips did not submit information that “incorporate[d] the recommendations of the California Coastal Commission, California Department of Fish and Game, U.S. Fish and Wildlife Service, Marine Mammals Commission, and National Marine Fisheries Service, as appropriate.”¹⁷ In addition, Phillips' reports did not address “whether the development will be consistent with the biological continuance of the habitat” as required pursuant by CZLUO Section 23.07.170(a)(1). The reports also did not address the potential to “first avoid” the habitat impacts as required pursuant to CZLUO Section 23.07.170(a)(4). The reports identified “Resource Protection Measures” but did not include buffers for the sensitive habitats, and hence the reports fail to identify the required setbacks pursuant to CZLUO Sections 23.07.170(a)(5) (citing to Section 23.05.034(c)

¹⁴ *Id.* at p. 11, *emphasis added*.

¹⁵ *Id.*, *emphasis added*.

¹⁶ See EDC letter to Planning Commission re ESHA, *supra*.

¹⁷ CZLUO Section 23.07.170(a)(2).

and the requirement for 100-foot ESHA buffers) and 23.07.178. Accordingly, Phillips failed to comply with the CZLUO when it sought application acceptance in 2013. Therefore, Phillips cannot impose a cut-off date that did not include this required information.

Finally, the County's CZLUO cannot be implemented in a manner that violates CEQA or the Coastal Act. As noted in the March 13, 2017, Staff Report, both the EIR and Coastal Commission consultation processes were necessary to follow up on the information presented in the Initial Study and application and effectuate a determination as whether ESHA was present at the Project site. (Staff Report at pp. 8-10) The Staff Report points out that Phillips itself requested an expedited process that did not comply with CZLUO § 23.07.170(a). (Staff Report at p. 8) Phillips cannot omit critical information in its application and then come back and attempt to prevent the County from considering such information.

Phillips attempts to downplay the Project's impacts to ESHA by offering compensatory restoration. (Phillips Appeal at pp. 15-16) This approach, however, violates the Coastal Act requirement that ESHA must be protected in place. (Pub. Res. Code § 30240(a).) Sensitive habitats cannot be destroyed in one area in exchange for restoration elsewhere. This issue was addressed in the *Bolsa Chica Land Trust* case, in which the court held that:

[T]he language of section 30240 does not permit a process by which the habitat values of an ESHA can be isolated and then recreated in another location. Rather, a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA. Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA and by carefully controlling the manner uses in the area around the ESHA are developed.”

71 Cal. App. 4th at 507, emphasis in original, citing *Sierra Club, supra*, 12 Cal.App.4th at p. 611. Accordingly, Phillips' attempt to circumvent the strict requirements of the Coastal Act must be rejected. The Project must be denied because it would destroy more than twenty acres of protected ESHA.

B. The Project would Significantly Impact Agricultural Land and Resources.

As discussed in the FEIR, the Project has the potential to result in oil spills and fires that could cause significant impacts to agricultural land and resources along the mainline rail routes. (FEIR at G-2, G-3 – 4, G-6, and G-14) Although trains would utilize an existing transportation corridor that is currently used to transport oil and other hazardous materials through the County, the FEIR acknowledges that the Project would increase the overall probability and consequences of a crude oil spill. (FEIR at G-2, G-3 – 4, G-6, and G-14)

In addition, the Project would result in the disturbance of approximately 22.3 acres of Farmland of Statewide Importance in areas currently used for grazing and with the potential for more intensive agricultural use such as strawberries. (FEIR at 4.2-33 – 34) Due to the adverse impacts the Project would have on these areas currently used for agriculture, and with the potential for more intensive agricultural use, the Project is inconsistent with Coastal Plan Chapter 7, Agricultural Policy 1; Coastal Plan Chapter 9, Policy 6; Area Plan Chapter 6; Framework for Planning Strategic Growth Goal 1; Framework for Planning Strategic Growth Goal 1 Objective 3(d); Framework for Planning Strategic Growth Goal 1 Objective 4; and Framework for Planning: Land Use Goal 2 Preserve Agriculture.

C. The Project is Inconsistent with the County’s Industrial Air Pollution Standards.

The County’s LCP requires consistency with the Air Pollution Control District’s (“APCD”) programs and regulations. (Coastal Plan Chapter 13, Policy 1) As identified in the Staff Report, the Project is inconsistent with several Air Quality policies, including Framework for Planning Strategic Growth Goal 1, Objective 2, which requires the County to “preserve, protect and improve the air quality of the County” by taking certain actions, including “[s]eeking to exceed or at least maintain the minimum state and federal ambient air quality standards . . . [m]itigating to the extent feasible, potential adverse air quality impacts from new development using the best available technology . . . [and] [e]ncouraging the use of alternative energy sources such as solar, wind, and wave technology to reduce the use of non-renewable resources.” This inconsistency is based on exceedances of APCD thresholds for toxic air emissions, NOx, ROG, DPM, and GHG emissions.

Therefore, the Project cannot be approved because it violates the County’s APCD programs and regulations designed to protect public health and the environment.

D. The Project is Inconsistent with the County’s Land Use Policies

The Project is inconsistent with Framework for Planning Land Use Goal 4 because the Project would result in air pollution emissions including particulate matter that would threaten public health. (FEIR at G-6)

The Project is also inconsistent with the language in Area Plan Chapter 6 for Industrial uses on the Union Oil Site. (FEIR at G-78) Under this policy, expansion of the Santa Maria Refinery facility is only envisioned to support offshore oil development. However, the proposed Project’s expansion is for onshore oil. In addition, expansion into the “desirable buffer” is also inconsistent with this policy. (FEIR at G-78)

The Project is inconsistent with Framework for Planning Land Use Element Strategic Growth Goal 1 due to the potential for oil spills affecting various land uses.

Additionally, the Project is inconsistent with the Framework for Planning Strategic Growth Goal 1, Objective 5 because the Project would encourage long-distance rail haul and related use of energy, so would not conserve energy resources.

Finally, the Project is inconsistent with Framework for Planning Goal 1 Objective 3 because the Project fails to “preserve urban and rural open space as an irreplaceable resource for future generations.”

These many land use conflicts require denial of the Project.

E. The Project is Inconsistent with County Policies Protecting Archaeological Resources.

As noted in the Staff Report, the Project is inconsistent with Coastal Plan Chapter 12, Policy 1, because an oil spill along the mainline could significantly impact archaeological sites. (See FEIR at G-21)

F. The Project is Inconsistent with County Policies Protecting Public Safety.

The FEIR finds the Project potentially inconsistent with CZLUO section 23.05.086 for the mainline because “[t]he transportation of crude by rail would have to meet the fire safety standard of the Federal Railroad Administration (FRA) and other DOT agencies.” (FEIR at G-61 – 62) Although the Project includes a preliminary Fire Safety Plan, the Plan lacks specific details required pursuant to the CZLUO, including information related to fuel reduction/defensible space, turnaround requirements for fire trucks, and the locations of all water sources and flammable or combustible liquids or gases. Additionally, there is no assurance that chemicals will not be released into the environment. Thus, the Project is inconsistent with the CZLUO Sections 23.05.082 and 23.06.108.

G. The Project is Inconsistent with County Policies Protecting Coastal Streams and Groundwater.

The Project may cause an oil spill which could impair water quality and groundwater in the County along the mainline. (FEIR at G-17) As a result the Project is inconsistent with Coastal Plan Chapter 6 Environmentally Sensitive Habitats, Coastal Streams Policy 20 and Coastal Plan Chapter 9, Policy 1.

H. The Project Violates County Policies Protecting Visual Resources.

Project will impact scenic vistas of sensitive habitats, and will result in major vegetation removal. Thus, the Project is inconsistent with Coastal Plan Chapter 10, Policy 1 and Policy 5.

I. The Project Will Result in Noxious Odors in Violation of the CZLUO.

According to the FEIR, the Project may result in oil spills and or accidental releases. Since these spills and releases may result in subsequent odors, the Project is not consistent with CZLUO Section 23.06.084.

Conclusion

For the foregoing reasons, the FEIR must not be certified and the Project must be denied. Thank you for your consideration.

Sincerely,



Linda Krop
Chief Counsel

Attachments

A: EDC letter to Planning Commission, February 2, 2016

B: EDC letter to Planning Commission, May 13, 2016