

**AGENDA ITEM
CITY COUNCIL MEETING DATE - MARCH 15, 2016
BUSINESS ITEM**

DATE : March 9, 2016

TO : City Council

FROM : Community Development Director

SUBJECT : **APPEAL OF THE PLANNING COMMISSION'S DECISION TO NOT CERTIFY THE FINAL ENVIRONMENTAL IMPACT REPORT (FEIR) AND TO DENY THE USE PERMIT FOR THE VALERO CRUDE BY RAIL PROJECT**

RECOMMENDATION:

Consider the appeal of the Planning Commission's unanimous denial to certify the Final Environmental Impact Report (FEIR) and the unanimous denial of the Valero Crude By Rail (CBR) Use Permit.

At the March 15, 2016 meeting, Staff recommends that the Council:

1. Confirm the future hearing dates of April 4, 6, and 19, if needed;
2. Hear the presentations by Staff and the Applicant and questions from the Council; and
3. Continue this item to April 4 for Staff follow up on Council questions and for public comment.

At the following meeting(s), staff recommends that the City Council open the public hearing, consider all appropriate documents and testimony, and then consider the following actions:

- A. Deny the appeal and uphold the Planning Commission's unanimous decision to deny certification of the EIR and to deny the Use Permit.
- B. Decline to certify the EIR and provide specific comments on the deficiencies of the EIR and direction on what needs to be improved in the EIR and remand back to staff with direction to return to Council with the EIR and Use Permit.
- C. Uphold the appeal and
 - i. Adopt the draft Resolution certifying the Final Environmental Impact Report, adopting CEQA findings for the Project and adopt the

- Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program and
- ii. Uphold the appeal and adopt the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution.

EXECUTIVE SUMMARY:

Staff concurs with the Planning Commission that there are significant and unavoidable impacts from the rail component of the CBR Project. However, it is staff's determination that the City is prohibited from regulating railroad operations due to federal preemption. Therefore the City is legally prohibited from denying certification of the FEIR or the Use Permit based on rail-related impacts.

When viewed separately from rail-related impacts, the Project's on-site impacts are mitigated to a less than significant level and all the findings can be made to approve the Use Permit.

On February 29, 2016, Valero Refining Company filed an appeal of the Planning Commission's unanimous decision to deny certification of the FEIR and to deny the Use Permit for the Valero Crude by Rail Project. The appeal was filed in accordance with Chapter 1.44 of the Benicia Municipal Code. The appeal states that the Planning Commission's decision was based on grounds either preempted by federal law, contrary to governing law and/or not supported by substantial evidence in the record.

BUDGET INFORMATION:

Valero is a large source of revenue for the City and the single largest private employer, employing more than 500 employees. The combined property, sales and utility user tax represent more than 20% of the City's general fund revenue. The proposed Project will allow the Refinery to remain competitive in the marketplace. In addition, the proposed Project will generate an estimated \$240,000 in building permit fees as part of the construction plan review and inspection process.

ENVIRONMENTAL ANALYSIS:

An Initial Study that led to an Environmental Impact Report (EIR) was prepared for this Project to comply with CEQA. A Draft EIR (DEIR) was issued for the Project on June 17, 2014. In response to requests made in comments on the DEIR, the City issued a Revised DEIR on August 31, 2015, to consider potential impacts that could occur uprail of Roseville, California and to supplement the DEIR's evaluation of the potential consequences of upsets or accidents involving crude oil trains based on new information that became available after the DEIR was published. The Final EIR was released on January 5, 2016.

The EIR identified eight less-than-significant impacts with mitigation measures and eleven significant and unavoidable impacts.

Please refer to the Environmental Analysis and Environmental Review sections of the attached Planning Commission February 8, 2016 staff report for a complete overview.

Procedural Issues

Public Comment

The complexity of this Project and the heightened public interest because of the nature of the Project lead to lengthy meetings at the Planning Commission. Unfortunately, this led to members of the public waiting around and being unable to speak at the first Planning Commission meeting. In order to make it more convenient for members of the public as well as the Council, Staff has noticed this hearing to allow for presentations by the Staff and consultants and by Valero at this meeting. Subsequent meetings will be used for comments by members of the public. Members of the public may watch the first meeting, if they so choose, either on Comcast Channel 27, AT&T U-Verse Channel 99 or via the City's streaming video¹.

As proposed by staff, members of the public will be able to address the Council after any Council follow up questions are answered at the April 4 Council meeting.

Note that the Council's rules provide that Council meetings typically start at 7 PM and end by 11 P.M. In Staff's experience it is not productive to continue the meetings much past 11 P.M. As in the past, the Council may want to gauge around 9 P.M. during the April meetings to see how many speakers would like to speak that night.

Code of Conduct

The City Council has adopted a Code of Conduct for itself and its boards and commissions. The overarching theme of the Code of Conduct is respect. The Council conducts its hearings in a professional manner that invites public comment and asks that everyone treat each other professionally and refrain from abuse and personal attacks. The City welcomes public comment but asks that speakers avoid slander and personal attacks.

¹ The link to the streaming video is on the City's webpage: www.ci.benicia.ca.us Click on the "Government" tab and then on the Benicia TV tab on the left hand side of the page.

The Council also should remember to disclose any substantive information they have received outside of the meeting process.

Appeal Process

In accordance with Benicia Municipal Code (BMC) Chapter 1.44, Valero filed an appeal of the Planning Commission's decision on February 29, 2016.

Per BMC Section 1.44.040D, *[a]n appeal hearing shall consist of a new (i.e., de novo) hearing on the matter by the [City Council]. The appeal hearing shall be based on the following evidence:*

- 1. Any relevant evidence, including staff reports, etc., submitted at the time of the prior decision and at the appeal hearing, and*
- 2. Findings, if any, and decision of the [Planning Commission] whose decision is being appealed.*

BACKGROUND:

For a complete discussion of this Project, please see the attached Planning Commission report. This report provides a brief summary and information from the Planning Commission meetings.

In December 2012, the Valero Benicia Refinery (Refinery) submitted a Use Permit application for the proposed Crude by Rail (CBR) Project. The CBR Project would allow the Refinery access to additional North American-sourced crude oil for delivery to the Refinery by railroad. The Use Permit would allow the installation and modification of Refinery non-process equipment that would allow the Refinery to receive a portion of its crude oil deliveries by rail car, replacing equal quantities of crude currently being delivered to the Refinery by marine vessel. Valero intends to replace up to 70,000 barrels per day of the crude oil currently supplied to the Refinery by marine vessel with an equivalent amount of crude oil transported by railcars. The crude oil to be transported by railcars is expected to be of similar quality compared to existing crude oil imported by marine vessels. Crude delivered by rail would not displace crude delivered to the Refinery by pipeline.

The Project is a significant Project for the City, the Refinery, and communities near and far, and as such, it has generated a great deal of public interest. Moreover, the Project is intertwined with the complex legal issue of preemption. The Environmental Impact Report (EIR) is necessarily complex as well. In recognition of those facts, the City has conducted a public information and review process that went beyond the legal requirements to try to ensure that all interested persons had an opportunity to review and comment on the EIR and the Use Permit.

A special page for the Project was established on the City's website at the time that the Initial Study was prepared. All application materials are posted to the website along with, all official notices regarding the Project, the Initial Study, scoping comments received, the Draft EIR, Revised Draft EIR and Final EIR and related documents, public comments received during the course of the Project (Initial Study/Mitigated Negative Declaration, Draft EIR, Revised Draft EIR), as well as the minutes of all the Planning Commission hearings. Likewise, all documents regarding the appeal can also be found on the City's web site. All told, there have been nine public hearings in addition to the EIR scoping meeting that have been held to gain public input on this Project.

The City Council has received copies of the each CEQA document (Initial Study/Mitigated Negative Declaration, Draft EIR, Revised DEIR and the Final EIR) as they were published. Any public comment submitted over the course of the Project and other miscellaneous information such as transcripts of each Planning Commission meeting and Planning Commission meeting Power Point presentations are available on the City's website.

The most recent information pertaining to the appeal including the February 8, 2016 Planning Commission staff report, the Planning Commission draft meeting minutes and public comment submitted after the Planning Commission decision, and the appeal filed February 29, 2016, , are all attached to this report.

Planning Commission's Review and Decision

The Planning Commission considered the proposed FEIR and Use Permit over a four-night public hearing, February 8, 9, 10 and 11, 2016. On February 11, 2016, the Planning Commission unanimously voted to deny certification of the FEIR and to deny the Use Permit. The Planning Commission's action is reflected in Resolution No. 16-1 and the meeting minutes attached to this report.

During the four nights and over 16 hours of public hearings for the FEIR and Use Permit approximately 80 members of public provided comments on the EIR, Use Permit and/or the Project in general. Approximately 80% of the commenters spoke against certification of the EIR and/or against approval of the Use Permit and approximately 18% of speakers encouraged the Commission's approval of the EIR or Use Permit. Opposing legal opinions on the role of preemption for this Project were presented by those opposed the Project and are included on line with other correspondence.

The Commission heard hours of public comment in addition to staff's presentation of the analysis of the Project. This included representatives from ESA, who prepared the EIR, technical experts who contributed to the EIR Air

Quality and Transportation sections, and legal discussions with the City's contract City Attorneys. In addition, City staff including representatives from the Planning Division, the Fire Chief, and the Public Works Director were all in attendance and available to the Commission.

During all the hearings the Commission was engaged and involved, asking questions of staff as well as the applicant. The Planning Commission unanimously decided to reject the Project based on various findings. Each of the Commission's findings from the February 11, 2016 meeting was clearly stated as detailed in Resolution No. 16-1, signed by Chair Dean (attached). Each finding is discussed in this staff report.

After much discussion, the Planning Commission ultimately decided to not support the City Staff's determination on preemption. This pivotal determination on the part of the Commission provided the basis for the majority of the Commission's findings for denying certification of the FEIR and denial of the Use Permit.

City staff has not altered their interpretation of the law in regard to the role of preemption for this Project. City staff has a legal and professional responsibility to inform the City Council that it is staff's determination that the City is prohibited from rejecting the FEIR based on rail related impacts, requiring mitigation for rail related impacts, or to deny the Use Permit due to rail related impacts. As noted in the EIR, the City and its legal team have evaluated the preemption issue and determined that the City is preempted from imposing mitigation measures which have the effect of regulating the rail aspects of the proposed Project.

Issues Raised in the Appeal

The February 29, 2016 appeal contends that the Planning Commission's decision to deny certification of the FEIR and to deny the Use Permit:

“...was based upon grounds that are either preempted by federal law, contrary to governing federal, local and /or state law, and/or not supported by substantial evidence in the record.”

The primary issues raised in the appeal and responded to in detail below are:

1. *The Planning Commission's findings are preempted by Federal law*
2. *The Planning Commission's findings are inconsistent with CEQA's requirements*
3. *The Planning Commission's findings are contrary to law and not supported by substantial evidence*

4. *The Planning Commission violated the law and the Benicia Code of Conduct*

In addition, the appeal outlines the scope of Valero's application for a Use Permit to construct and operate a train car unloading facility, the federal government's authority over the railroad, the opposition's "misleading" legal arguments, and the lack of increase to the refinery's emissions.

Staff will address the appellant's issues below.

1. The findings are preempted by Federal law

The appeal states that all the findings in the resolution with exception to findings 3, 4 and 14 are preempted by federal law. Federal preemption has been a major part of the proposed Project. The February 8, 2016 staff report to the Planning Commission outlined the role of preemption as determined by City staff. To paraphrase the appeal, the City is preempted from regulating any aspect of rail operations. The Interstate Commerce Commission Termination Act (ICCTA), preempts any attempt by state and local governments to regulate railroad operations directly or indirectly. As a result, the City may not deny certification of the FEIR, require mitigations for negative impacts related to rail operations, or deny the Use Permit on the grounds of negative impacts from rail related operations.

Staff concurs with the appellant that Commission's findings 2, 6, 7, 8, 10, 11, 12, and 13 are preempted by federal law due to their attempt to regulate railroad operations directly or indirectly, as stated below.

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

Staff opinion re: Finding 2: As was presented at the Planning Commission, after careful review of relevant case law, the City Attorney has determined that the City cannot legally impose mitigation measures to offset the significant and unavoidable impacts associated with rail operations.

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

Staff opinion re: Finding 6: Any attempt to reduce the size of trains delivering product to Valero is an attempt to regulate rail operations. Since rail

operations are governed by the federal government, the City is preempted from reducing the size of the trains. Non-rail impacts to traffic are less than significant.

Commission Finding 7: “The Project's benefits such as the local employment and economic benefits were not thoroughly examined in the EIR and would not outweigh the significant effects on the environment.”

Staff opinion re: Finding 7: Although the EIR did look at potential economic benefits, an EIR evaluates the environmental impacts of a given Project. Furthermore, since all the significant and unavoidable effects from this Project are rail related, and as such preempted, they cannot be considered in a statement of overriding considerations. Staff concurs with the Planning Commission that the benefits of the Project do not outweigh the negative effects. However, the City is preempted from imposing mitigations or from declining to certify the FEIR on the basis of rail impacts.

Commission Finding 8: “The Project could potentially have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait.”

Staff opinion re: Finding 8: The FEIR called out specific mitigation measures applied to the onsite Project that are not rail related that address potential impacts on Sulphur Springs Creek. The City is preempted from requiring mitigation for any rail related impacts in the marsh area between the Benicia Industrial Park and the Carquinez Strait. All on-site impacts will be mitigated to a less than significant level.

Commission Finding 10: “The EIR does not evaluate a sufficient number of Project alternatives that are feasible.”

Staff opinion re Finding 10: Staff believes the appellant is referring to the Commission's discussion regarding expanding the number of alternatives examined to include multiple alternative sites. Per CEQA 15126.6:

“An EIR need not consider every conceivable alternative to a Project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation.”

The EIR evaluated feasible Project alternatives as required under CEQA, including the “no-Project” alternative as required by CEQA. While the alternatives included an off-site location and reduced number of rail cars, the

City determined that we are preempted from regulating rail operations, including a reduction in the number of rail cars or specifying terminal locations.

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

Staff opinion re: Finding 11: As discussed, the federal government regulates rail operations. The City is preempted from requiring mitigation measures or conditions of approval related to impacts from rail operations.

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

Staff opinion re: Finding 12: This again hinges on the preemption issue. The City is preempted from requiring changes to rail operations, such as requiring fewer of rail cars, or requiring changes to the terminal location.

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

- a. Sacramento Area Council of Government: unfunded obligations on communities related to first responders, no evidence of mitigation measures to address transporting crude by rail, no evidence that mitigation measures for the significant and unavoidable impacts are infeasible due to preemption; and insufficient evaluation of potential alternatives including how preemption is applicable.
- b. State of California Attorney General: insufficient evaluation of air quality impacts and an overly broad interpretation of trade secrets.
- c. Bay Area Air Quality Management District (BAAQMD): insufficient consideration of the their recommended mitigation measures for offsetting rail impacts, the analysis does not accurately characterize air emissions or health impacts, including an insufficient evaluation of PM2.5."

Staff opinion re: Finding 13: Preemption does not allow mitigation measures to be imposed for the rail related impacts, including uprail air quality impacts. The California Attorney General's comment regarding trade secrets and the BAAQMD comment regarding analysis of PM 2.5 are not preemption issues and will be addressed later in this report.

While staff agrees with the appellant that some of the findings in the Planning Commission's decision were preempted by federal law, not all are so clearly identified as such. Findings 1, 5 and 9 may be adopted and still comply with

federal law and the ICCTA. However, as with any finding, it is required that the finding be based on substantial evidence including on the basis of the application, plans, materials and testimony submitted.

The appellant states that findings 1, 5, and 9 are not only preempted by federal law but also contrary to law and not supported by substantial evidence. Staff's response to this issue is provided in 3. *The findings are contrary to law and not supported by substantial evidence* later in this report.

2. The findings are inconsistent with CEQA's requirements

The appeal states that findings 3, 4 and 7 are not required under CEQA. Article 9 of the CEQA Guidelines outlines the required content of an EIR (Sections 15120-15132). This includes general requirements such as the table of contents, summary, and Project description as well as the more specific requirements related to the evaluation of significant environmental impacts, mitigation measures, alternatives and cumulative impacts. It also provides guidance on optional discussions such as economic and social effects.

Commission Finding 3 states *"the application's objectives are not the City's objectives and the City's objectives were never stated or evaluated."*

Commission Finding 4 states *"the EIR never discussed or evaluated the City's need for the Project."*

Staff Opinion Finding 3 and 4: CEQA does not require the City to evaluate its own objectives for a Project nor does it require the EIR to evaluate the City's need for the Project. Section 15124 (b) requires a statement of objectives sought by the Project be included in the Project description. The statement objectives are required to help the Lead Agency develop a reasonable range of alternatives to evaluate in the EIR and ultimately findings and statement of overriding considerations.

The City's objectives are set through its policies and regulations in documents such as the General Plan, Climate Action Plan and Benicia Municipal Code. The Project and its objectives are evaluated in relation to the City's policies or "objectives" in the EIR through the evaluation conducted in the various environmental resource or issue areas. For example, in the Land Use and Planning section of the EIR it includes an evaluation of the proposed Project with the City's General Plan, Benicia Waterfront Special Area plan and other regional plans. The Energy and Greenhouse Gas Emissions sections of the EIR also evaluate the Project in relation to the City's objectives and policies in the Benicia Climate Action Plan.

Commission Finding 7: states *"the Project's benefits such as the local*

employment and economic benefits were not thoroughly examined in the EIR and would not outweigh the significant effects on the environment.”

Staff opinion re: Finding 7: Per CEQA 15124 (c), a general description of the Project's technical, economic and environmental characteristics is required. Economic or social information may be included in an EIR if the lead agency decides to do so (CEQA Section 15131). If this information is included, the economic or social effects of a Project shall not be treated as significant effects on the environment. The focus of the analysis shall be on the physical changes. With that said, the economic or social effects of a Project may be used to determine the significance of a physical changes caused by the Project.

For the proposed Project, the non-rail related physical change caused by the Project is the construction of the unloading rack and associated infrastructure. As such, the EIR considers the economic impacts of this change by identifying the Projects economic growth in regard to the physical changes; i.e. the number of construction jobs, and new employees or contractors (DEIR p. 5-2).

3. The findings are contrary to law and not supported by substantial evidence

The appeal states that the findings adopted by the Planning Commission are in error or an abuse of discretion because they fail to provide the necessary specificity and are not supported by substantial evidence. Specifically, the appeal refers to all the findings (with the exception of finding 2) as “not supported by substantial evidence”.

In general, the basis for the remaining findings can be found in the administrative record for the Project, including the comments and questions posed by the Commissioners during the public hearings.

Of the 13 findings identified in the appeal as not supported by substantial evidence, there are 3 findings which are not preempted by federal law and are required by CEQA. Those findings are described in detail below; in addition to finding 14, which challenges the interpretation of “trade secrets” under CEQA.

Commission Finding 1: states *“the EIR does not express the independent judgment of the City as required by CEQA.”*

Staff opinion re: Finding 1: During the course of the public hearing, the Commission provided various reasons for their concern including questioning the City's independent analysis of the Project. The Commission questioned staff's concurrence with Valero on issue of preemption; expressed concern regarding the responses to comments provided in the Final EIR being dismissive of statements; and stated that the City is required to evaluate its own objectives and need for the Project.

It is standard practice for a City to use consultants in the preparation of an EIR. The consultants are hired by the City and serve as an extension of staff. For this Project, the City contracted with ESA to complete the environmental review. As part of that process, the applicant is responsible for paying all contract costs. The applicant also prepared some of the technical studies. Valero hired consultants such as Fehr & Peers for the traffic study and ERM for the air emissions and health risk assessment. ESA conducted an independent analysis of those studies and all other studies prepared by other City consultants such as MRS and Dr. Barkan for the rail transportation risk analysis reports. City staff reviewed, commented and edited all documents. The peer review of these studies by ESA and the City ensures that the City's independent analysis and judgment is maintained.

The City's legal position on preemption was developed independent of Valero's interpretation and not in agreement with Valero's position. Although the City and Valero agree that preemption does have a role in this Project, there is disagreement as to the extent of its role. During the EIR process, the City determined it was necessary to revise and recirculate portions of the DEIR to address uprail impacts and to supplement the DEIR's evaluation of the potential consequences of upsets or accidents involving crude oil trains based on new information that became available after the DEIR was published.

Valero submitted correspondence on January 30, 2015 stating that they did not agree with the City's interpretation on preemption and that they find that preemption also applied to Valero's facility in addition to the Union Pacific Railroad operations. The City maintains that they have the authority to regulate onsite development and impacts as long as they do not directly or indirectly regulate rail operation.

Commission Finding 5 states "the Project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property."

Staff opinion re Finding 5: The DEIR evaluated the impacts of the on-site development within the 100-year floodplain and found them to be less than significant. As stated on p. 11-44:

"Due to the proposed Project being within a 100-year flood zone, proposed Project components would be required to include in the design criteria flood hazard mitigation measures in accordance with the City of Benicia Floodplain Management Policy (City of Benicia, 1999). The flood hazard mitigation measures incorporated into the design criteria for the proposed Project would comply with construction standards established by

the California Building Code. Further, the proposed Project elements are not habitable structures for human occupancy. Thus, no flood damage to these facilities would be expected. Additionally, construction of new unloading facilities and industry rail track within the mapped 100-year flood hazard zone would be unlikely to displace floodwaters, raise flood elevations, create new flooding impacts (e.g., by causing flooding of existing facilities or structures that previously would not have been inundated), and/or exacerbate existing flooding problems (e.g., by increasing the severity or frequency of flooding relative to pre-Project conditions). Therefore, it is unlikely that the proposed Project would substantially displace or redirect flood flows. The impact would be less than significant."

Commission Finding 9 states "the traffic, air quality, and greenhouse gas emissions analyses are insufficient." The Planning Commission provided various reasons for this general statement during their deliberation. Reasons presented include, but are not limited to, the lack of mitigation measures for uprail impacts, air and greenhouse gas emissions analysis comparing marine vessels to railcars, and references to the three letters submitted by the California Department of Transportation (Caltrans) dated January 15, 21, and 25, 2016 and the February 8, 2016 letter from the Bay Area Air Quality Management District (BAAQMD).

Staff opinion re: Finding 9: CEQA Section 15151 provides standards for the adequacy of an EIR which states:

"An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed Project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure."

Staff has recommended certification of the EIR based on its compliance with CEQA, including Section 15151. Although there have been opposing statements regarding some of the analysis and conclusions in the EIR, there has been no substantial evidence presented to the City which renders the EIR insufficient. The letters submitted by Caltrans expressed concern about the potential for increase in traffic queues resulting in a backup on the mainline of I-680/Bayshore Road off-ramp. CalTrans did not supply any analysis for review and

consideration.

The recommendation in the BAAQMD letter is for the City to evaluate a potential mitigation measure requiring the Project to implement an offsite mitigation program to lessen the significant air quality impacts identified within each air district. While BAAQMD letter does accurately point out that the Phillips 66 EIR for their crude by rail Project, prepared by San Luis Obispo County, does identify mitigation measures, the BAAQMD does not include the fact that the EIR is for a different Project, that the stated mitigation measures would be preempted, and that the EIR has yet to be acted upon, and therefore cannot be referred to as a precedent.

Commission Finding 14 states, "the EIR does not disclose all information necessary for complete evaluation of the air quality impacts of the Project including the makeup of the crude oil associated with this Project, which is based on an overly-broad interpretation of what constitutes trade secrets."

Staff opinion re: Finding 14: Per CEQA Section 15120 (d):

"no document prepared pursuant to this article that is available for public examination shall include a "trade secret" as defined in Section 6254.7 of the Government Code..."

Section 6254.7 states trade secrets are:

"as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern who are using it to fabricate, produce, or compound an article of trade or a service having commercial value and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it."

The average weight and sulfur content of the crude oil blends processed at the Refinery remain the same if the Project were approved as they are now. Because of the refinery's unique configuration, permit conditions and operational constraints, Valero must blend crude feedstocks to a narrow range of weight and sulfur content before they can be processed.

Because the specific type and amount of individual crudes that Valero will be receiving is a trade secret, and in part unpredictable from day to day, it is not

possible to perform an analysis using the this information. Because of this, the EIR consistently evaluated the worst-case scenario in order to fully disclose all potential environmental impacts.

This resulted in assuming the most volatile crudes for the purpose of analysis the hazards and risk associated with the transportation of crude by rail and assuming the impacts that both the lightest and heaviest, sweetest and most sour crudes would have on the processing operations at the Refinery.

4 The Planning Commission violated the law and the Benicia Code of Conduct

The appellant states that the Planning Commission violated the law by failing to provide an opportunity to address issues raised for the first time after the public hearing was closed. The appeal cites the Benicia Code of Conduct's provision for a *fair, ethical and accountable local government*, stating that Valero was not treated fairly when the Planning Commission raised new issues and taking action based on those issues without giving Valero the opportunity to respond. The appeal refers to a "host of issues" presented by the Commission during their deliberation. However, the appellant does not provide any specifics on what those "host of issues" are. Without specifics, staff has no response to this issue.

The appeal also states that the Planning Commission did not adhere to the Benicia Code of Conduct in regard to compliance with the laws of the federal government, the State of California, and the City of Benicia in the performance of the Commission's public duties. The Planning Commission is required to follow their rules and procedures which were first adopted in 2008 and updated in 2015. Included in these rules and procedures is an outline for conducting a public hearing. The Planning Commission conducted the public hearing in accordance with the their rules and procedures which allows the applicant 15 minutes to present their Project before the opening of public comment and 5 minutes to speak upon the conclusion of public comment. The Planning Commission is then required to deliberate and take action in an open forum. All of these procedures were followed.

Regarding compliance with the federal law, the majority of the findings the Planning Commission made in regard to the EIR and the all the findings for the Use Permit did not comply with the federal law due to preemption. Based on the City's interpretation of preemption, the Planning Commission did not follow the Benicia Code of Conduct in this regard.

CONCLUSION:

The City Council is charged with considering any relevant evidence, including staff reports, environmental documents, public comment, etc., submitted up through the time of the appeal hearing.

At the March 15, 2016 meeting, staff recommends that the City Council do the following:

1. Select and approve subsequent meetings dates to complete the public hearing for this Project;
2. Hear the presentations by Staff and the applicant; and
3. Continue to the public hearing to the selected date when public comment can be heard.

At the following meeting(s), staff recommends that the City Council open the public hearing, consider all appropriate documents and testimony, and then consider the following actions:

- A. Deny the appeal and uphold the Planning Commission's unanimous decision to deny certification of the EIR and to deny the Use Permit.
- B. Decline to certify the EIR and provide specific comments on the deficiencies of the EIR and direction on what needs to be improved in the EIR and remand back to staff with direction to return to Council with the EIR and Use Permit.
- C. Uphold the appeal and
 - i. Adopt the draft Resolution certifying the Final Environmental Impact Report, adopting CEQA findings for the Project and adopt the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program and
 - ii. Uphold the appeal and adopt the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution.

If the Council wishes to approve the Project, the Council must first take action on the Environmental Impact Report (EIR). If the Council certifies the EIR, the Council may then act to approve the Project. If the Council fails to certify the EIR, the Council may not approve the Use Permit.

If the Council declines to certify the EIR, the Council should provide staff with specific comments on the deficiencies of the EIR and/or direction on what needs to be improved in the EIR. The Council would then remand the EIR to staff to correct the specific deficiencies.

The City has no ability to reject the EIR or the Use Permit due to rail related impacts. As noted in the EIR, the City staff and its legal team have evaluated the preemption issue and determined that the City is preempted from imposing mitigation measures which have the effect of regulating the rail aspects of the proposed Project. Similarly, the City is preempted from conditioning the Use Permit in such a way that impacts the rail aspects of the Project.

Staff believes that the FEIR is complete and adequate under CEQA. In addition, despite the fact that the EIR identified eleven substantial and unavoidable effects of the Project, federal law preempts the City from regulating railroad operations. Thus preemption prevents denying certification of the FEIR, requiring mitigation measures that effectively regulate rail operations, or denying the Use Permit based on rail-related impacts.

As outlined in the Planning Commission report, when viewed separately from rail-related impacts, the Project's on-site impacts are mitigated to a less than significant level and all the findings can be made to approve the Use Permit.

Therefore staff must recommend that the City Council overturn the Planning Commission's denial and certify the FEIR and approve the Use Permit.

Attachments:

- Draft EIR Resolution
- Draft Use Permit
- Valero's Appeal filed February 29, 2016
- Planning Commission Resolution No. 16-1
- Planning Commission February 8, 2016 Agenda Item (Due to the large size of Attachment 12, it is not included in this packet, but can be located on the City's website)
- Planning Commission Draft Minutes February 8-11, 2016
- Public Comments (submitted February 12- March 8, 2016)