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TRANSMITTED VIA TELECOPY AND PERSONAL DELIVERY

Contra Costa County Board of Supervisors
Community Development Department
651 Pine Street, 4th Floor - North Wing
Martinez, CA 94553

RE: NOTICE OF APPEAL OF PLANNING COMMISSION APPROVAL OF
CONOCOPHILLIPS RODEO REFINERY EXPANSION PROJECT (FILE #LP052048)

Dear Members of the Board of Supervisors:

The Attorney General of the State of California appeals the decision of the Planning Commission on May 8, 2007 to approve the ConocoPhillips Rodeo Refinery Expansion Project ("Project"). The Attorney General has an interest in this matter pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (See Cal. Const., art. V, § 13; Cal. Gov. Code, §§12511, 12600-12; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974)). This appeal is brought on behalf of the Attorney General on behalf of the People and not on behalf of any other California agency or office.

The Final Environmental Impact Report ("FEIR") for the Project estimates that the Project will emit approximately 1.25 million metric tons of carbon dioxide (the greenhouse gas that is the primary cause of global warming) per year. Of this amount, the FEIR indicates that approximately 62,590 tons per year would be from the proposed expansion of the capacity to refine and produce gasoline, diesel and jet fuel by 30% (FEIR, pp. 2-6), while the vast majority of the carbon dioxide emissions -- 1.17 million metric tons -- would be from operation of the proposed hydrogen plant (FEIR, pp. 2-6; DEIR, pp. 3-5). The FEIR also indicates that 19,049 metric tons of carbon dioxide emissions will result from generation of electricity that will be used for the Project by Pacific Gas & Electric. (FEIR, pp. 2-6).

While the County should be commended for addressing the climate change issue in its FEIR, because of the failure to properly evaluate and mitigate global warming impacts, the Board of Supervisors ("Board") should not approve the Project at this time. The Planning Commission's approval violates the California Environmental Quality Act, Public Resources Code § 21000, *et seq.* ("CEQA"), because the County has failed to address the significance of the

Project's contribution to cumulative global warming impacts and therefore has failed even to evaluate any specific mitigation measures to address those impacts. The County's approach of avoiding the requirements related to mitigation simply by refusing to make a significance finding would substantially undercut "[t]he fundamental purpose of CEQA," which is to ensure that environmental considerations play a significant role in governmental decision making. (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 797.)

Because this Project standing alone will produce a large, quantifiable increase in annual greenhouse gas ("GHG") emissions, and because any increase in GHG emissions may make it more difficult for the State to achieve the GHG reductions required by Assembly Bill 32 (Public Resources Code §38500 et seq., the Global Warming Solutions Act) ("AB 32"), the Project will have a significant cumulative impact on global warming. Accordingly, under CEQA, the County may not approve the Project until alternatives and mitigation measures to avoid or reduce the global warming impacts of the Project are discussed in an EIR, and the County adopts all feasible alternatives and mitigation measures that would substantially lessen the Project's global warming impacts.

The serious threats from global warming to the state's resources and the health and safety of its residents, and California's actions to address these threats, are discussed in the Attorney General's letter to the Planning Commission dated May 8, 2007 (copy attached), are incorporated by reference, and will not be repeated here.

APPROVAL OF THIS PROJECT FAILS TO COMPLY WITH THE REQUIREMENTS OF CEQA FOR THE FOLLOWING REASONS:

(1) "Determining whether a project may have a significant effect plays a critical role in the CEQA process." Cal. Code Regs., tit. 14, §15064(a); see also §15126.2(a). The lead agency is responsible for determining what constitutes a significant effect. Public Resources Code §§ 21082.2 and 21080(d) and (e) and Cal. Code Regs., tit. 14 §15064(a). The County improperly concluded that it is not possible to draw conclusions about the significance of the Project's impacts on global warming. Under CEQA, the County is required to determine, using the best available information, and based on substantial evidence in light of the whole record, whether or not the global warming impacts of the project are significant. *Id.*

(2) The County failed to determine whether the predicted 1.25 million metric tons of carbon dioxide emissions per year from the Project constitutes a significant cumulative effect on the environment under CEQA. CEQA provides that the effects of a project are "cumulatively considerable" when "the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Public Resources Code §21083(b) and Cal.Code Regs., tit. 14, §§15064(h) and 15065.

The Project's emission of 1.25 million metric tons of GHG per year and the contribution of these emissions to global warming effects, considered in the context of existing and projected

cumulative effects, must be considered “cumulatively considerable” based on the following:

- o AB 32 requires reduction of GHG emissions in the State to 1990 levels by 2020; it is estimated that this requires a 25% reduction from current levels and a reduction from the projected 2020 emissions by 174 million metric tons per year^{1/};
- o at the same time that the State is obligated to achieve the GHG reductions required by AB 32, this Project would cause a very large increase in the State’s GHG emissions (of at least 1.25 million metric tons per year);
- o the California Air Resources Board (“CARB”) in the report “Proposed Early Actions to Mitigate Climate Change in California” (April 2007) has identified several measures that the State must pursue to achieve the GHG reductions required by AB 32. One of the “early action measures” identified will achieve GHG reductions of 1-2 million tons; some of the identified measures underway for 2007 - 2009 will achieve reductions of only 0.1 million metric tons of carbon dioxide equivalent (or 100,000 tons) per year, while other measures are identified that will achieve reductions of 1 million, .5 million and .7 million tons per year. CARB has identified these as reductions that are important to achieve compliance with AB 32. Some of these reductions are substantially less than the new emissions that would result from this Project. Stated another way, the new GHG emissions from this Project would entirely wipe out the benefits from several of the categories of GHG reductions identified in CARB’s report. When the State is pursuing the reductions identified above in an effort to comply with AB 32, the 1.25 million tons of new GHG emissions from the Project must be considered significant;
- o if the Project is carried out without recognizing its significant cumulative impact on global warming and adopting mitigation measures to reduce the Project’s GHG emissions, it will be more difficult for the State to achieve the statewide GHG reductions required by AB 32. This will place a greater burden on other sources of emissions (and may result in greater cost to achieve the required reductions);
- o emission of 1.25 million metric tons of GHG per year from the Project, considered in the context of existing cumulative GHG emissions and the likelihood of additional future emissions, may interfere with California’s ability to achieve the GHG reduction requirements of AB 32.

(3) The County failed to identify and discuss in the EIR potential alternatives and mitigation

1. The estimate of 174 million tons reduction is from the Climate Action Team Report to Governor Schwarzeneger and the California Legislature (March 2006), p. 64, Table 5-5. The Climate Action Team members are the California Environmental Protection Agency, Business, Transportation and Housing Agency, California Department of Food and Agriculture, State and Consumer Services Agency, Air Resources Board, Department of Forestry and Fire Protection, California Energy Commission, Department of Water Resources, Integrated Waste Management Board, and the Public Utilities Commission.

measures that would reduce the Project's significant cumulative global warming impacts as required by CEQA. Public Resources Code §§21001(g), 21002.1, 21061 and 21081 and Cal. Code Regs., tit. 14, §§15121(a), 15126.4, 15126.6 and 15130(b)(5).

(4) The County failed to comply with the mandate of CEQA in Public Resources Code §§ 21081, 21002 and 21002.1(b) and Cal. Code Regs., tit. 14, §15021(a)(2), that lead agencies shall not approve projects that will have significant effects on the environment unless changes or alterations have been required in, or incorporated into, the project which mitigate or avoid those significant effects. There certainly are feasible alternatives or mitigation measures that would reduce the Project's cumulative effect on global warming. The following is a non-exhaustive list of alternatives and mitigation measures that appear feasible and, at a minimum, must be evaluated by the County but were not:

- o reduce the Project's GHG emissions by using renewable energy (solar or wind) to provide the electricity needed for the Project;
- o implement energy efficiency programs to reduce electricity use in the existing refinery operations and thereby decrease carbon dioxide emissions;
- o require that the hydrogen plant use new renewable energy sources, at least in part. The California Hydrogen Blueprint Plan, Volume 2 (Cal/EPA May 2005) requires that hydrogen for use in vehicles should be produced using 20% new renewable sources by 2010 and this percent should increase annually;
- o the DEIR indicates the hydrogen plant will be built with excess capacity to service future needs; rather than approve excess capacity to produce hydrogen using fossil fuels, the County should require ConocoPhillips to use new renewable energy sources to meet those future needs;
- o reduce GHG emissions from vehicles operated by the applicant;
- o reduce emissions of greenhouse gases other than carbon dioxide (such as nitrous oxide, methane and/or sulfur hexafluoride) from the existing refinery operations;
- o mitigate for GHG emissions for which it is not otherwise feasible to mitigate or avoid by adopting a carbon sequestration plan, which could range from something simple such as planting trees (reforestation) to a sophisticated carbon capture facility;
- o offset GHG emissions for which it is not otherwise feasible to mitigate or avoid by acquiring carbon credits or participating in other market "cap and trade" systems;

Approval of the Project violates CEQA because the County has not made findings as required by Public Resources Code §§21081 and 21081.5, based on substantial evidence in the record, that the alternatives and mitigation measures identified above are not feasible.

(5) The County added a section to the FEIR entitled “Greenhouse Gases” that purports to address global warming/climate change impacts of the Project. The discussion is not only inadequate; it was incorporated into the FEIR without providing for public review of this relevant and significant new information, as required by CEQA. See Cal.Code Regs, tit. 14, §15088.5.

(6) The County failed to comply with CEQA’s requirement (in Public Resources Code §§ 21100(b), 21005, and 21061 and Cal.Code Regs, tit. 14, §§15144, 15146 and 15151) to accurately describe and disclose the expected environmental effects of the project. The estimate of the Project’s GHG emissions in the FEIR considers only carbon dioxide emissions and fails to account for emissions of other GHG, such as nitrous oxides, methane and sulfur hexafluoride. The “global warming potential” of nitrous oxide is 296 times that of carbon dioxide, and for methane it is 23 times that of carbon dioxide.^{2/} Sulfur hexafluoride has an extremely high global warming potential 22,200 times that of carbon dioxide. *Id.* (For the sake of uniformity, GHG emissions are often expressed as the “carbon-dioxide equivalent”). Therefore, the FEIR does not fully, accurately, or reasonably disclose the Project’s GHG emissions and could significantly underestimate those emissions, and therefore the Project’s effects on the environment.

The grounds for this appeal identified above are explained in more detail in the attached letter to the Planning Commission dated May 8, 2007, which is incorporated fully into this appeal. For the reasons stated above and in the letter to the Planning Commission, we request that the Board not approve the Project at this time.

Please send us notice of all hearings on this Project and a copy of any notice filed under Public Resources Code §21152. Thank you for your attention to this matter.

Sincerely,

/Sandra Goldberg/

JAMIE JEFFERSON
SANDRA GOLDBERG
Deputy Attorney General

For EDMUND G. BROWN, JR.
Attorney General

Attachments: Attorney General comment letter, May 8, 2007
Appeal Fee of \$125

2. Emissions of Greenhouse Gases in the United States 2005 (Energy Information Administration, U.S. Department of Energy), p. 6, Table 4.