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2/8/16

Calaveras County Board of Supervisors 891 Mountain Ranch Road

San Andreas, CA 95249 (transmitted by email)

RE: CPC support for the 12/29/15 Techel appeal of the Planning Commission’s determination that hazardous material use at the proposed asphalt plant has no potential to significantly impact the environment.

Dear Supervisors:

My name is Tom Infusino, and I am submitting these comments on behalf of the Calaveras Planning Coalition. There are two aspects of the Techel appeal that we wish to support.

First, we strongly encourage the County to proceed with the proper CEQA process with regard to the proposed asphalt plant. Such a procedure will correct the weaknesses of the present haphazard review. Second, we also strongly encourage the County to use the “fair argument test” when applying Calaveras County Code, Section 17.42.035.

1. Following the proper CEQA process will solve problems with current process.
   1. An EIR is needed because the County will make a discretionary decision that may have a significant impact on the environment.

CEQA requires the preparation of an EIR when a proposed project may have a significant impact on the environment. (CEQA Guidelines, secs. 15063, subd. (b)(1)(A); 15064, subd. (f)(1).) There is, and has been, ample evidence in the record that the proposed asphalt plant may have a significant impact on the environment. This evidence includes the original and current assessments from the Environmental Management Department, the letter from the Health Officer, and the testimony of residents. (CEQA Guidelines, secs. 15064, subd. (f)(5)

and 15384, subd. (a).) When there are differences among experts as to the significance potential impacts on the environment, the agency must go ahead and prepare an EIR. (CEQA Guidelines, sec. 15064, subd. (g).) The asphalt plant does not fall into any of the exemptions from CEQA. (CEQA Guidelines, sec. 15061.) The applicants have not proposed a project with sufficient mitigation to allow the use of a mitigated negative declaration. (CEQA Guidelines, sec. 15064, subd. (f)(2).)

We note that if the County had started this EIR process when the project was first reviewed by the Planning Department back in April of 2015, we would probably have a draft EIR for public review by now. Instead, the project has languished in this haphazard “expedited” review process. We at the CPC hope that the next time such a project comes forward to Planning Department staff, they will not be pressured by a Supervisor to expedite their review, and they will not be obstructed by the contorted code interpretations of the Planning Director and the Planning Commission. Only then will the County’s prompt project processing actually be “business friendly.”

* 1. The County or some affiliate will be the lead agency for purposes of preparing the EIR.

To date, there has been confusion about who is in charge of this project review. Is it the County, the Planning Department, the County Air District, or the Environmental Management Department in charge? Generally speaking, the lead agency for preparing the EIR is the agency that will have the most responsibility for “supervising or approving the project as a whole.” The lead agency will usually “the agency with general governmental powers, such as a city or county.” (CEQA Guidelines, sec. 15051, subd. (b).) The County Air District will at least make a decision with regard to the Authority to Construct. The County Environmental Management Department may also make a decision regarding a hazardous material conditional use permit.

The first agency that must act is usually the lead agency. (CEQA Guidelines, sec. 15051, subd. (c).) If there is still some doubt, these agencies can agree among themselves which is the lead agency. (CEQA Guidelines, sec. 15051, subd. (d).) The lead agency is authorized to adopt mitigation for “any and all activities” of the project that would otherwise result in potentially significant impacts. (CEQA Guidelines, sec. 15041, subd. (a).)

* 1. Notices need to go to responsible agencies who can help identify the scope of the EIR.

CEQA requires notice to local, state, and regional agencies, and sometimes federal agencies with jurisdiction over resources that may be affected by the project. These agencies then identify the likely approvals that they will need to issue for the project, any impact analyses they recommend, any alternatives they recommend, and any mitigation measures that they recommend. This process is called scoping, because it helps to identify the scope of the issues to be covered in the EIR. Often, members of the public also participate in these scoping processes. (CEQA Guidelines, secs. 15082 and 15083.) As responsible agencies, they can only adopt mitigation over the parts of the project that they will carry out or approve. For example, the Central Valley Regional Water Quality Control Board may adopt mitigation measures to put into

its Waste Discharge Requirements, because that is the part of the project they approve. (CEQA Guidelines, sec. 15041, subd. (b).)

To date, the Board of Supervisors has struggled to identify if it will consider land use issues, air quality issues, and hazardous material use issues in its decisonmaking process and environmental review. The scoping process helps to clarify this.

* 1. Hire consultants to work with County staff to prepare the draft EIR.

A County may choose consultant to help prepare the draft EIR. This can help to ensure that there is some independence in the impact analysis and the conclusions. (CEQA Guidelines, sec. 15084, subds. (a) and (d)(2).) With the current process, there has been criticism of impact analyses produced by the financially interested applicants. Selecting an independent consultant can help to reduce that concern.

* 1. Following the CEQA process will help to avoid current confusion.

The current preliminary impact analyses have been fraught with confusion. Following the CEQA process will reduce these problems.

For example, there is some confusion regarding the range of operating days, and the amount of production on each day. The Project Description section of the EIR will specify the range of operating days, the range of production amounts, and the range of truck trips. (CEQA Guidelines, sec. 15124.)

For example, there is some confusion regarding the baseline conditions of the area around the proposed asphalt plant. The Environmental Setting section of the EIR will identify the current actual baseline level of truck traffic from the quarry on Silver Rapids Road. (CEQA Guidelines, sec. 15125.)

For example, there is a range of current opinions on the likely impacts of the proposed plant. The Impact Analysis section of the EIR will identify the range of those impacts. (CEQA Guidelines, secs. 15126 and 15126.2.)

For example, we have heard different ideas regarding the methods that may be used to reduce plant emissions of criteria air pollutants, plant odors, asphalt truck trips, noise, and other impacts. The EIR will discuss a range of alternatives and list mitigation measures to help reduce the impacts. (CEQA Guidelines, secs. 15126.4 and 15126.6.) The feasible mitigation measures can be converted into enforceable conditions of project approval or permit conditions.

For example, there has been concern that, even after all the agencies adopt their respective feasible permit conditions, there may still be significant residual impacts on health and the environment. The EIR will identify any significant and unavoidable project impacts. (CEQA Guidelines, sec. 15126.2, subd. (b).)

For example, there have been concerns expressed that the Planning Commission is making decisions without all the relevant information. As noted above, the EIR produces the essential information that is then used by the lead and responsible agencies to make their final decisions. In the end, the Board of Supervisors may find that the benefits of the project outweigh its harm to public health and the rest of the environment, and approve the project. (CEQA Guidelines, secs. 15092 and 15093.) On the other hand, the Board may find that the benefits of the project do not outweigh its harm to public health and the rest of the environment, and deny the project. (CEQA Guidelines, secs. 15042; 15192, subd. (a).) In making this decision, the County can rely upon the informed opinions of the experts it finds most reliable. (CEQA Guidelines, secs.

15091-15093, 15384, subd. (b).)

Thus, by properly following the CEQA process, and completing a broad and thorough EIR, the County will avoid the problems that have plagued the haphazard “expedited” review of the proposed asphalt plant.

1. Properly interpreting the County Code will lead the Board to call for a hazardous material use permit and environmental review.
   1. Properly apply the fair argument test to interpret the code.

As noted above, the fair argument test applies when determining if a project may have a significant impact on the environment, and therefore trigger the need for an EIR. As CEQA Guideline, Section 15064, subd. (f)(1) says:

“If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (*Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988). Said another way, if a lead agency is presented with a fair argument that a project may have a significant

effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68).”

Note, that when determining if a hazardous material use permit and environmental review is needed, Calaveras County Code, Section 17.42.035 states:

“The health officer shall review the plan or list to determine if the type, method of use or quantity of substance(s) is such that there may be a significant effect on the environment associated with the substances.”

Please note that the two code sections use almost the identical words to describe their tests. In part because this makes so much sense, we believe that this is not a coincidence.

If there is no possibility for a significant impact on public health or the rest of the environment under CEQA Guidelines, Section 15064, then there is no need for a hazardous material use

permit under County Code Section 17.42.035. On the other hand, if the project may have a significant impact on public health or the rest of the environment, then there is a need for a hazardous material use permit. By using the same words, and the same standards, for both tests, the County is employing a consistent means of protecting public health and the environment, and complying with state law.

Also remember that the CEQA test was around when the County adopted and amended the County Code section (1986 & 1993). Prior to those dates, the County had been applying the CEQA test to projects subject to County CEQA review. If the County wanted the County Code section interpreted a different way than CEQA, then the County would have used different words.

* 1. There is plenty of evidence that there may be a potentially significant impact on public health and the rest of the environment.

In making the determination under the fair argument test, the Board only looks to see if there is substantial evidence that there may be a significant impact. Other evidence to the contrary is not relevant. This is because the law leans toward protecting public health and the rest of the environment, by requiring the environmental review and the permit when there may be an impact.

As noted above, there is plenty of evidence that there may be a potentially significant impact on public health and the rest of the environment. Thus, by properly applying the code section to the asphalt plant, the Board of Supervisors must conclude that the asphalt plant needs a hazardous material use permit.

Sincerely,



Thomas P. Infusino, Facilitator Calaveras Planning Coalition