

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST DISTRICT
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
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Th12a

Prepared April 12, 2021 for April 15, 2021 Hearing

To: Commissioners and Interested Persons

From: Susan Craig, Central Coast District Manager
Alexandra McCoy, Coastal Planner

**Subject: Additional hearing materials for Th12a
CDP Appeal Number A-3-SLO-21-0017 (Phillips 66 Remediation)**

This package includes additional materials related to the above-referenced hearing item as follows:

Additional correspondence received in the time since the staff report was distributed

Subject: Fw: Public Comment on April 2021 Agenda Item Thursday 12a - Appeal No. A-3-SLO-21-0017 (Phillips 66 Remediation, Arroyo Grande)
Date: Sunday, April 4, 2021 at 11:57:06 PM Pacific Daylight Time
From: CentralCoast@Coastal
To: McCoy, Alexandra@Coastal
Category: Purple category

From: JACK ALLEN <uclajack@verizon.net>
Sent: Friday, April 2, 2021 2:42 PM
To: CentralCoast@Coastal <CentralCoast@coastal.ca.gov>
Subject: Public Comment on April 2021 Agenda Item Thursday 12a - Appeal No. A-3-SLO-21-0017 (Phillips 66 Remediation, Arroyo Grande)

Dear Coastal Commissioners,

As property owners in Arroyo Grande, We support the Staff Recommendation that there is No Substantial Issue. The last thing the Coast needs is vehicle access to the Oceano Dunes. The Dunes were a great recreational area for families using the beach until the County allowed vehicular access to them. We agree with the Staff that as long as the public has access to the beach from the site, there is nothing that justifies expanding that access to vehicles.

Respectfully,

JACK and DIANE ALLEN

Subject: Fw: Public Comment on April 2021 Agenda Item Thursday 12a - Appeal No. A-3-SLO-21-0017 (Phillips 66 Remediation, Arroyo Grande)
Date: Monday, April 5, 2021 at 7:10:24 AM Pacific Daylight Time
From: CentralCoast@Coastal
To: McCoy, Alexandra@Coastal
Category: Purple category

From: Laurance Shindeman <donlorenzo42@gmail.com>
Sent: Sunday, April 4, 2021 6:07 PM
To: CentralCoast@Coastal <CentralCoast@coastal.ca.gov>
Subject: Public Comment on April 2021 Agenda Item Thursday 12a - Appeal No. A-3-SLO-21-0017 (Phillips 66 Remediation, Arroyo Grande)

As to providing access through the refinery I concur with your findings.

I think the muppets say it best. Enough with these off roaders. No means no.

<https://youtu.be/75aGG27dGUA>

“Those who can make you believe absurdities, can make you commit atrocities.”...Voltaire

Subject: Appeal No. A-3-SLO-21-0017 (Phillips 66 Company Remediation Project)
Date: Thursday, April 8, 2021 at 1:59:22 PM Pacific Daylight Time
From: Paul Beard
To: McCoy, Alexandra@Coastal
Category: Purple category
Attachments: Letter to Coastal Commission April 8 2021.pdf

Hi Alexandra:

Attached please find a letter regarding the pending appeal. Please include as part of the record for this appeal.

Thank you,

Paul Beard II
Partner

FisherBroyles, LLP

4470 W. Sunset Blvd., Suite 93165 / Los Angeles, CA 90027

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April 8, 2021

VIA EMAIL

Alexandra McCoy
California Coastal Commission
Email: alexandra.mccoy@coastal.ca.gov

Re: Appeal No. A-3-SLO-21-0017 (Phillips 66 Company Remediation Project)

Dear Alexandra,

We represent Phillips 66 Company (“Phillips 66”) in the pending appeal of Minor Use Permit DRC2020-00035 (hereinafter, “Remediation Permit”).

We have reviewed the Staff Report for this appeal. While we support the staff’s ultimate recommendation, we wish to make one factual correction for the record. The second paragraph in Section 2.A. (page 4) states that “the Applicant historically utilized a portion of the site as a disposal area.” While Phillips 66 is the Applicant here, Phillips 66 did not utilize the referenced portion of the site as a landfill or for any other purpose. Based on the historical evidence available, Phillips 66 believes that the initial owner and operator of the site, Unocal, utilized the referenced portion of the site for landfill purposes.

Very truly yours,



Paul J. Beard II
Counsel for Phillips 66 Company

CALIFORNIA COASTAL COMMISSION

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Th12a

A-3-SLO-21-0017 (PHILLIPS 66 REMEDIATION PROJECT)

APRIL 15, 2021 HEARING

CORRESPONDENCE

March 17, 2021

VIA EMAIL

Brian O'Neill & Alexandra McCoy
California Coastal Commission
Emails: Brian.O'Neill@coastal.ca.gov; alexandra.mccoy@coastal.ca.gov

Re: Appeal No. A-3-SLO-21-0017 (Phillips 66 Company Remediation Project)

Dear Brian and Alexandra,

We represent Phillips 66 Company ("Phillips 66") in the pending appeal of Minor Use Permit DRC2020-00035 (hereinafter, "Remediation Permit"). The purpose of this letter is to address a question you have raised concerning Phillips 66's compliance with Condition No. 17 of another permit, Development Plan / Coastal Development Permit No. DRC 2008-00146, which was approved by the County of San Luis Obispo in 2013 (hereinafter, the "Throughput Increase Permit"). As explained below, the Throughput Increase Permit does not provide a basis for finding "substantial issue" with respect to the Remediation Permit.

I.

Background on Throughput Increase Permit and Condition No. 17

Prior to 2013, the Santa Maria Refinery ("SMR") was authorized to process crude throughput up to a maximum of 44,500 barrels per day. That authorization is reflected in a 1990 permit issued to the refinery's prior owner, Unocal, Inc. (hereinafter referred to as the "Unocal permit"). Phillips 66 continues to exercise the Unocal permit and expects to do so.

In 2008, Phillips 66 applied to the County for a permit to increase the refinery's throughput maximum by 10%, from 44,500 barrels per day (bpd) to 48,950 bpd. In 2013, the County approved the Throughput Increase Permit. The permit aligned with the San Luis Obispo County Air Pollution Control District's permit authorizing Phillips 66 to increase the 12-month rolling average of throughput from 16,220,600 bpy to 17,855,750 bpy. While the permit is based on a daily maximum and APCD's permit is based on a twelve-month rolling average, the volume caps are the same.

The Throughput Increase Permit contains a number of conditions, including Condition No. 17. That condition states:

Prior to issuance of the Notice to Proceed authorizing an increase in Refinery throughput, the applicant shall comply with Section 23.04.420—Coastal Access Required. Construction of improvements associated with vertical public access (if required) shall occur within 10 years of the effective date of this permit (including any required Coastal Development Permit to authorize such construction) or at the time of any subsequent use permit approved at the project site, whichever occurs first. The approximate location of the vertical access required by this condition of approval shall be located within or immediately adjacent to the existing maintenance road as show in Exhibit D—Project Graphic (Coastal Access Location Map 1 and 2).

On April 2, 2015, Phillips 66 recorded an offer to dedicate (“OTD”) an access easement in two segments: one segment runs from the first public road to the eastern side of railroad tracks owned and operated by Union Pacific (“UP”), and the second segment runs from the western side of the railroad tracks to the shore.¹ UP has made clear it will not allow public access across its tracks. Nor can UP be compelled to allow such access.

Neither the County nor any other entity has accepted the OTD. Further, at no time has the County required construction of either segment of the OTD easement.

II.

Condition No. 17 Does Not Affect the Appeal of the Remediation Permit

¹ Phillips 66 agreed to make the offer, despite its belief that doing so was not required to satisfy this permit condition or even to obtain the Throughput Increase Permit. Section 23.04.420(c) of the CZLUO specifically mandates that access must not be required where it “would be inconsistent with public safety ... or the protection of fragile coastal resources.” Any access to the shore would be bisected by railroad tracks that cannot be safely or legally crossed. Further, the western side of the tracks—to the shore—is Mapped ESHA. Thus, public access would be illegal, unsafe, and inconsistent with the protection of fragile coastal resources. In addition, because the increased processing of crude as authorized by the Throughput Increase Permit had no adverse effects on existing public access, an offer to dedicate public access could not constitutionally be mandated under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (requiring an “essential nexus” between property taken from applicant and the project’s adverse public impacts). Nevertheless, to obtain the Throughput Increase Permit, Phillips 66 acquiesced and recorded an OTD.

A. Phillips 66 Complied with Condition No. 17

As described above, Phillips 66 satisfied the requirement contained in Condition No. 17 in 2015. Because the UP tracks bisect the SMR property, Phillips 66 could not make an offer dedicating “vertical access”² as defined in the CZLUO—i.e., “from the first public road to the shore.” It offered the most it legally and physically could: an easement in two bisected segments.

Under these unique circumstances, the County concluded that the OTD “satisfies the requirements of Condition 17 of the CDP and Section 23.04.420 of the County Code.” (See March 15, 2015, letter from County to Coastal Commission (Exhibit A), p. 2). Initially, Coastal Commission staff objected that the OTD did not offer “vertical access” as defined in the CZLUO (i.e., from the first public road to the shore). (See March 9, 2015, letter from Coastal Commission to County and Phillips 66 (Exhibit B)). But, following the County’s explanation that dedication of vertical access was infeasible under the circumstances, Coastal Commission staff accepted the OTD of an easement in two segments, as recorded by Phillips 66. (See March 25, 2015, letter from Coastal Commission to County (Exhibit C)).

You have expressed the view that Phillips 66 may be out of compliance with Condition No. 17, because it has not constructed improvements to the OTD easement. We have carefully re-analyzed the sequence of events surrounding adoption and imposition of the condition, as well as the language of section 23.04.420 of the CZLUO and the condition itself. Respectfully, we believe you are misreading the condition.

The condition states that “[c]onstruction of improvements associated with vertical public access (*if required*) shall occur” within a certain timeframe (emphasis added). The clause—“if required”—is susceptible of two interpretations, neither of which compels construction of improvements: Either (1) construction—*if construction is required*—must be completed by 2023 or by the date of approval of a subsequent use permit, or (2) construction must be completed within that timeframe, *where vertical access is required*. Here, the County has not required construction of any improvements associated with the OTD; the County deemed the OTD itself sufficient to satisfy Condition No. 17. Further, “vertical access,” as defined in section 23.04.420(a) of the CZLUO, was not required to satisfy Condition No. 17, because it was legally and physically impossible to do so given the bisecting railroad tracks. Instead, an easement in two segments was deemed adequate to satisfy the dedication requirement.

² Section 23.04.420(a) of the CZLUO defines “vertical access” as “access from the first public road to the shore.”

The open-ended nature of the requirement contained in Condition No. 17 must be understood in its historical context. Shortly before the Planning Commission hearing on the Throughput Increase project in 2012, the Planning Department staff presented Phillips 66 with a proposed condition requiring “vertical access.” Phillips 66 strongly objected because, as explained above, vertical access from the first public road to the shore was legally and physically impossible, lacked the constitutionally required nexus to the Throughput Increase project’s public impacts, and ran afoul of section 23.04.420(c)’s exemptions dictating that access cannot be required where it “would be inconsistent with public safety ... or the protection of fragile coastal resources.” The issue was discussed at length at the December 13, 2012, hearing of the Planning Commission, which ultimately approved the Throughput Increase project with the open-ended language in Condition No. 17.

It was understood by all that the County and Phillips 66 would engage in further discussions to determine *whether* access and/or construction would or could be required, including in light of section 23.04.420(c)’s exemptions. The Planning Commission’s approval was appealed by a third party to the Board of Supervisors and then to the Coastal Commission, but those proceedings did not include any further evidence or discussion on the applicability of the section 23.04.420(c) exemptions. Both appeals were denied, and Condition No. 17 remained unchanged.

The clause, “if required,” in Condition No. 17 effectively deferred resolution of questions about the applicability of the section 23.04.420(c) exemptions and about what, if any, access or construction would or could be required. It left those questions to the sound discretion of the County, which, in 2015, accepted Phillips 66’s OTD as full satisfaction of Condition No. 17, without objection from the Commission. Needless to say, the open-ended language of Condition No. 17 cannot be modified or collaterally attacked at this late stage.

Because Phillips 66 has fully satisfied Condition No. 17, as confirmed by the County and the Coastal Commission in 2015, Condition No. 17 cannot be the basis for finding “substantial issue” with the Remediation Permit.

B. Phillips 66 Has Abandoned the Throughput Increase Permit

We firmly believe we have fully complied with Condition No. 17. However, even if a deferred obligation existed to construct improvements by a date certain, Phillips 66 would no longer be required to construct those improvements. On January 15, 2021, Phillips 66 formally informed the County that the Throughput

Increase Permit has been abandoned and discontinued.³ The CZLUO does not require satisfaction of deferred or ongoing permit conditions, when the life of the permit has ended. (CZLUO § 23.02.052(a)(3) (authorizing abandonment or discontinuance of a permit, at which point the permit—“including any conditions of approval”—are no longer “valid and in force”); *id.* § 23.02.034(c)(3) (only violation of a condition while permit is being used constitutes violation of CZLUO, with the only penalty being permit revocation)).

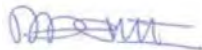
As a consequence of Phillips 66’s abandonment of the Throughput Increase Permit, any deferred obligation to construct improvements—if it exists, which Phillips 66 believes it does not—is no longer in force and effect. Thus, it cannot be the basis for finding “substantial issues” with the Remediation Permit.

Conclusion

Condition No. 17 of the Throughput Increase Permit does not provide a basis for appealing the Remediation Permit. The County deemed the condition satisfied in 2015, with no objection from the Commission. Further, the County has not required construction of improvements, which would be infeasible in light of the railroad tracks that bisect the OTD easement. In any event, Phillips 66 abandoned the Throughput Increase Permit two months ago—and, with it, any ongoing or deferred obligations associated therewith.

The Remediation Permit authorizes important, environmentally beneficial work that has no connection to the Throughput Increase Permit, its conditions, or public access generally. The work consists of grading and removal of approximately 14,520 cubic yards of refinery trash, nonhazardous debris, hydrocarbon waste, asbestos-containing material, and domestic waste. To allow that work to proceed without further delay, we urge staff to recommend “no substantial issue” with respect to the Remediation Permit.

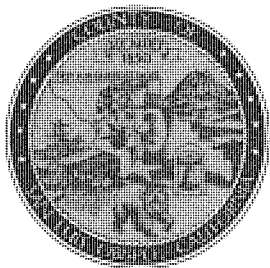
Very truly yours,



Paul J. Beard II
Counsel for Phillips 66 Company

³ Phillips 66 has not abandoned the original Unocal permit, which it expects to continue to exercise. But Phillips 66 has only sporadically used the Throughput Increase Permit in the last several years—and not at all since as early as January 1, 2020.

EXHIBIT A



RITA L. NEAL
COUNTY COUNSEL

OFFICE OF THE

COUNTY COUNSEL

COUNTY OF SAN LUIS OBISPO
COUNTY GOVERNMENT CENTER, ROOM D320
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WHITNEY G. McDONALD
ERICA STUCKEY
DAVID STOTLAND
DEBRA K. BARRIGER
BENJAMIN DORE

March 23, 2015

VIA EMAIL 03/23/15
& REGULAR U.S. MAIL 03/24/15

Jessica Reed
Senior Legal Analyst
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219
Email: Jessica.Reed@coastal.ca.gov

Re: Coastal Public Access Easement
Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

Dear Ms. Reed:

Thank you for your review of the revised draft Irrevocable Offer to Dedicate Vertical Public Access Easement and Declaration of Restrictions (OTD) associated with the above-referenced Coastal Development Permit (CDP), and for your letter dated March 9, 2015. The County Department of Planning and Building and the Office of the County Counsel (collectively referenced herein as "County") have carefully considered the concerns raised in that letter and would like to make the following observations.

We believe the OTD, as currently drafted, does meet the requirements of Condition 17 of the CDP and Section 23.04.420 of the County Code. Condition 17 states:

Prior to issuance of the Notice to Proceed authorizing an increase in Refinery throughput, the applicant shall comply with Section 23.04.420 – Coastal Access Required. Construction of improvements associated with vertical public access (if required) shall occur within 10 years of the effective date of this permit (including any required Coastal Development Permit to authorize such construction) or at the time of any subsequent use permit

Jessica Reed

March 23, 2015

Re: Coastal Public Access Easement

Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

approved at the project site, whichever occurs first. The approximate location of the vertical access required by this condition of approval shall be located within or immediately adjacent to the existing maintenance road as shown in Exhibit D – Project Graphic (Coastal Access Location Map 1 and 2).

The Coastal Access Location Maps 1 and 2 (enclosed herewith for ease of reference) were attached to the County Planning Commission staff report dated December 13, 2012. Map 1 is an aerial photo showing the outline of the applicant's property and a large red circle showing the general area intended to provide access to the coast. Map 2 is an enlarged aerial photo of the area within the large red circle with black lines encompassing the existing dirt maintenance road from the entrance of the refinery to the edge of the applicant's property. That map depicts the approximate location of the required vertical access, as referenced in Condition 17. It also shows the railroad tracks owned and operated by Union Pacific Railroad ("Union Pacific"), which bisect the subject area.

During the hearings before the County Planning Commission and the Board of Supervisors, representatives of the applicant, Phillips 66 ("Phillips"), notified the County and the public that access could not be granted across the railroad tracks. While Phillips's existing dirt maintenance road does cross the tracks, that road is only allowed to be used by Phillips for maintenance purposes.¹ Neither Union Pacific nor the California Public Utilities Commission ("CPUC") has permitted the public to cross the tracks at that location. The County understood this at the time it approved the CDP subject to Condition 17. (See video of December 13, 2012 Planning Commission meeting at 01:29:56-01:32:22, 01:35:30-01:36:48, 01:47:45-01:55:00; see also video of February 26, 2013 Board of Supervisors meeting at 06:15:25-48.)

Accordingly, the OTD does not include an offer to dedicate land over the railroad tracks for public access purposes. Instead, it includes a 10-foot wide path within the area depicted in Map 2 that leads up to and the then from Union Pacific's property to the edge of Phillips's property bordering the California State Park. The County believes that this OTD satisfies the requirements of Condition 17 and Section 23.04.420 of the County Code.

Although Map 2 referenced in Condition 17 shows a continuous road from the refinery entrance to the State Park border, the map represents an "approximate location" of the required access. The depiction of that area in Map A was intended to give some guidelines for location of the easement within a previously disturbed area. It was not intended to require Phillips to

¹ According to testimony by Phillips representatives at the Board of Supervisors, Phillips must provide advanced notice to Union Pacific before it crosses the tracks. (See video of the February 26, 2013, Board of Supervisors meeting at 06:11:14-35.)

Jessica Reed

March 23, 2015

Re: Coastal Public Access Easement

Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

acquire any additional property from Union Pacific. Rather, the condition aims to obtain compliance with Section 23.04.420 by requiring Phillips to assure the opportunity for access to the public in the future. (See 23.04.420.g. (“...the method and form of such access guarantee shall be approved by County Counsel, and shall be recorded in the office of the County Recorder, identifying the precise location and *area to be set aside* for public access.”).) The OTD as it is currently drafted offers public access to the maximum extent possible at this time. Any deviations from Map 2 that are reflected in the easement area described in the OTD would be deemed to be in substantial conformity with the approved CDP as allowed by Section 23.02.038 of the County Code.

Consistent with 23.04.420, the access easement will not be opened to the public until a public agency or private association agrees to accept responsibility for maintenance and liability and until legal access may be obtained across the railroad tracks. As discussed in your March 9th letter, options for fulfilling these requirements are being explored in the Environmental Impact Report prepared for Phillips’s Rail Spur Project. In the meantime, the OTD sets the area aside for future public access. The County believes this meets the intent of Condition 17.

Thank you for your thorough review of the OTD and for your continued examination of these issues. If I may be of any further assistance, please do not hesitate to contact me.

Very truly yours,

RITA L. NEAL
County Counsel



By: Whitney McDonald
Deputy County Counsel

WM:lj
1461ljtr.docx

cc: Rob Fitzroy
Kristin Kopp
Jocelyn Thompson, Esq.
Paul J. Beard, II, Esq.

EXHIBIT B

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
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March 9, 2015

VIA EMAIL and US MAIL

Whitney McDonald
Deputy County Counsel
San Luis Obispo County
1055 Monterey St., Suite D320

Kristen Kopp
Phillips 66
2555 Willow Rd.
Arroyo Grande, CA 93420

Re: Coastal Public Access Easement.
Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

Dear Ms. McDonald and Ms. Kopp:

Thank you for forwarding the revised draft Irrevocable Offer to Dedicate Vertical Public Access Easement and Declaration of Restrictions (OTD) with exhibits, associated with the above-referenced permit. We received the revised OTD on February 13, 2015. Thank you for making the requested revisions to the OTD and Exhibit C legal and graphic.

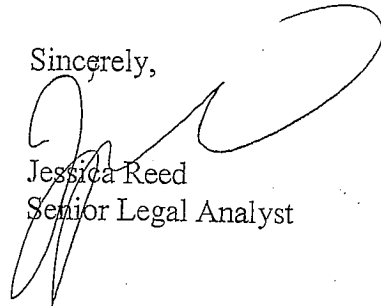
As it stands, Phillips 66 OTD does not meet the requirements of condition 17 of the permit, which requires compliance with Section 23.04.240 of the San Luis Obispo County Code, which requires "access from the first public road to the shore." This OTD offers access from a road to a railroad track and from the shore to a railroad track, in contrast to the language of the condition and Exhibit D to the staff report, which requires the access to be located within or immediately adjacent to the existing maintenance road, which does run from the public road to at least the western boundary of Phillips 66's property.

In her letter of January 23, 2015, Ms. Kopp states that Phillips 66 believes that exemptions to the public access requirements are appropriate on the basis of public safety concerns and fragile coastal resources, and also because Union Pacific Railroad (UPRR) does not consent to the use of its property for public access. However, as noted in the October 2014, *Phillips 66 Company Rail Spur Extension And Crude Unloading Project Revised Public Draft Environmental Impact Report And Vertical Coastal Access Project Assessment (RDEIR)*, "the California Public Utilities Commission (CPUC) has exclusive jurisdiction over railroad crossings in California (Public Utilities Code §§1201-1202)." As such, it appears that consent by UPRR is not required to allow use of the "at-grade" crossing at the Santa Maria Refinery site. This is acknowledged in the August 6, 2013, letter from Melissa Greenidge, attorney for UPRR, which notes that "should the County or Phillips 66 wish to pursue a public crossing for coastal access, it must file an application with the CPUC."

Further, the RDEIR also presents an access option that may not require a change in the "private crossing" designation of the railroad crossing at the refinery site or additional authorization from the CPUC. This option, docent-led access along the refinery maintenance road, appears to be a viable means of meeting the coastal access requirements of condition 17 while also addressing

the concerns of UPRR as well as the public safety issues raised in Ms. Kopp's letter. Other options may also exist that would allow similar compliance with this condition to be achieved. All such options should be fully evaluated prior to the consideration of exemptions to the County's requirement that a new coastal access opportunity be developed at the Santa Maria Refinery location.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jessica Reed', is written over the typed name. The signature is stylized with a large, sweeping loop at the end.

Jessica Reed
Senior Legal Analyst

EXHIBIT C

CALIFORNIA COASTAL COMMISSION

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March 25, 2015

VIA EMAIL and US MAIL

Whitney McDonald
Deputy County Counsel
San Luis Obispo County
1055 Monterey St., Room D320
San Luis Obispo CA 93408

Re: Coastal Public Access Easement
Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

Dear Ms. McDonald:

Thank you for your letter of March 23, 2015 with regard to the Irrevocable Offer to Dedicate Vertical Public Access Easement and Declaration of Restrictions (OTD), imposed by the San Luis Obispo County Board of Supervisors as Condition 17 of the above-referenced permit in order to find the requested development consistent with the County's public access policies. Based upon the representations in your letter, and pursuant to Title 14 of the California Code of Regulations section 13574, the Executive Director has no further objections to the draft OTD received in the Coastal Commission's offices on February 13, 2015.

Please provide a copy of the recorded OTD, along with an updated preliminary report which shows that the offer appears in the chain of title free of prior liens and encumbrances, to me in our San Francisco office.

Please let me know if you have any questions or concerns. Thank you for your assistance with this matter.

Sincerely,


Jessica Reed
Senior Legal Analyst

cc: Paul Beard (by email)