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TRANSMITTED VIA EMAIL (cao@co.santa-barbara.ca.us)
AND OVERNIGHT COURIER

Mr. Michael F. Brown
Clerk of the Board of Supervisors
105 East Anapamu Street, Room 407
Santa Barbara, CA 93101

Re: Amendments to Chapter 25 of the County Code of Santa Barbara; County of Santa Barbara, Legislative File ID 08-00917

Dear Mr. Brown:

This firm is pleased to submit these comments on behalf of Greka Energy. We understand your Board will consider amendments to Chapter 25 of the County Code of Santa Barbara for the purposes of regulating high risk petroleum production operations and operators at its meeting on October 14. Please include this letter in the administrative record for these amendments. While the goals of such legislation are laudable, we urge you not to adopt the provisions as currently crafted since without further refinement, the proposed legislation will likely just lead to litigation challenging the legislation, its scope and the authority of your Board to regulate petroleum operations in the vague, ambiguous, overreaching and unconstitutional way these amendments are currently crafted. Accordingly, we urge your Board to delay adopting or considering these amendments at this time and request the opportunity to meet with your staff and others to refine the proposed amendments further.

The Definition of "High Risk Operator" Is Impermissibly Vague and Ambiguous

The proposed Ordinance fails to provide a clear definition of what a "High Risk Operator" is. Accordingly, those potentially subject to the Ordinance cannot adequately determine when, and under what circumstances, the Ordinance will be applied.

The proposed definition of "High Risk Operator" in Sec. 25-4 refers to the owner of a *singular* "petroleum production, processing or storage facility fitting the definition of High Risk Operation, as designated by Section 25-43(e)." High Risk Operation is not defined in Sec. 25-43(e); rather, the definition of High Risk Operation is contained in Sec. 25-4. Section 25-43(e) does give the Petroleum Administrator the authority to declare the owner or operator of *two or more* facilities which meet the definition of High Risk Operation to be declared a High Risk Operator. Thus, contrary to Sec. 25-4, an owner/operator cannot be a High Risk Operator unless it owns or operates *two or more* High Risk Operations. There is a conflict between Sec. 25-4 and Sec. 25-43(e) as to whether a High Risk Operator must own or operate *two or more* High Risk

Operations (as Sec. 25-43(e) provides), or may be the owner/operator of a *single* High Risk Operation (as Sec. 25-4 provides).

This lack of clarity is compounded further by Sec. 25-43(h), which allows a shut-down order when the *singular* owner of a High Risk Operation fails to post a bond or fails to achieve the goals and guidelines of a remediation plan, not only of the "High Risk Operation[s]" but also of all other operations in the County owned or co-operated by "the High Risk Operator." This language appears to equate the *singular* owner of a High Risk Operation with a High Risk Operator, again contrary to Sec. 25-43(e).

The Appeal Procedure Is Unclear and Internally Inconsistent

Two separate appeal bodies are provided for in the Ordinance, but the Ordinance is unclear when appeals are to be made to which appeal body. Such lack of clarity renders the Ordinance fatally flawed and therefore incapable of application.

According to Sec. 25-16, all appeals from decisions, interpretations, or acts of the Petroleum Administrator are to be filed with Board of Appeals, *except* (1) appeals under Sec. 25-43(c); and (2) appeals Sec. 25-43(h). The latter two appeals *only* are to be filed to the Director of Planning and Development. Section 25-16 makes no provision for appeals from the Director of Planning and Development to the Board of Appeals, or vice versa; the two appeal tracks are separate and distinct.

The first type of appeal to the Director of Planning and Development is a determination under Sec. 25-43(c) that the facility is a High Risk Operation, and (perhaps) the Petroleum Administrator's findings as to cause and remediation plan made under Sec. 25-43(b). (We say "perhaps" because the meaning of "this Determination" in Sec. 25-43(c) in unclear.) Section 25-43(c) provides for a three-level appeal of such decisions. The first level appeal is to the Petroleum Administrator – of the decision made by the Petroleum Administrator. There are serious due process and fair-hearing violations when the appellate body is the same as the decision maker. The second level appeal is to the Director of Planning and Development. The third level appeal is from any decision of the Director of Planning and Development, which "may be appealed pursuant to Sections 25-16, 25-17 and 25-18. . ." However, because there is *no appeal provided for* in Sections 25-16, 25-17, or 25-18 from decisions of the Director of Planning and Development, the third level appeal is meaningless, or at least inconsistent with the earlier Sections.

The second type of appeal to the Director of Planning and Development is a shut down order issued under Section 25-43(h). Section 25-43(h) provides, in turn, that any such decision of the Director of Planning and Development "may be appealed to the Board of Appeals pursuant to Sections 25-16, 25-17 and 25-18." Once again, there *are no provisions* in Sections 25-16, 25-

17, or 25-18 allowing for an appeal from a decision of the Director of Planning and Development to the Board of Appeals. This provision of Sec. 25-43(h) is thus either meaningless or inconsistent with the earlier sections.

Finally, there are serious due process and fair hearing violations inherent in the Board of Appeals process, whose members are appointed by, and serve at the will of, the Petroleum Administrator; yet these same decision makers are designated to hear and decide appeals from specified decisions of the Petroleum Administrator. Worse still, under Sec. 25-17, the Petroleum Administrator is an "ex-officio member" of the Board of Appeals which must review his or her decisions.

The Moving Target Remediation Provision Is Improper

Under Sec. 25-43(g), a remediation plan "may be amended from time to time as necessary to achieve the purposes of this section". No further guidance is provided.

This provision improperly allows the remediation plan to be a moving target. It interferes with an operator's ability to know in advance, and adequately plan for and implement procedures to satisfy a remediation plan. In addition, there are no provisions for appellate review of revisions to a remediation plan, which would violate the constitutional rights of an owner/operator who is subjected to such a revised plan.

The Provision Regarding Cross-Remediation Plans Violates Due Process

Section 25-43(e) authorizes the Petroleum Administrator to order a remediation plan for "all petroleum facilities located in the County and under the control of the High Risk Operator." In addition to the definitional problems regarding High Risk Operators (noted above), this provision would constitute a violation of a High Risk Operator's right to substantive and procedural due process.

The operator of Facilities A, B, C and D in the County may be declared to be a High Risk Operator if Facilities A and B meet the definition of High Risk Operations. Under Sec. 25-43(e), the Petroleum Administrator presumably may order a remediation plan for not only Facilities A and B, but for Facilities C and D as well. This is improper.

First, under Sec. 25-43(b)(3), a remediation plan is to remediate the "causative problems" which led to a particular facility being determined to be a High Risk Operation. But, in the hypothetical, there are no such causative problems as to Facilities C and D, which have *not* been designated as High Risk Operations. Hence, a remediation plan which includes Facilities C and D makes no sense under the County's own Ordinance.

Second, the owner of Facilities C and D is provided no process for contesting or appealing any determinations made as to those Facilities. Only the owner/operator of a facility determined to be a High Risk Operation has appeal rights under Sec. 25-43(c), which would not apply to Facilities C and D. It is like holding an innocent sibling responsible for the acts of another sibling. These provisions would create an unlawful taking of the rights of royalty owners and others in addition to the rights of the owner and operator of these facilities. Without some nexus between a particular facility and a particular problem, the Ordinance effects an unconstitutional taking.

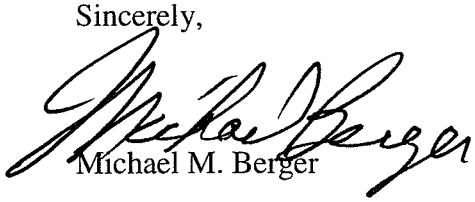
The Provision Regarding Cross-Shut Down Orders Are Unconstitutional

For similar reasons, the Petroleum Administrator's authority under Sec. 25-43(h) to issue a shut-down order for non-High Risk Operations co-owned or co-operated by a High Risk Operator violates the operator's constitutional rights.

There is no reasonable relationship between the failure to post a bond as to a High Risk Operation and the continued operation of other non-High Operations such that the failure to accomplish the former permits a shut-down order of the latter. Similarly, failure to achieve the guidelines of an approved remediation for High Risk Operations is not reasonably related to the continued operation of non-High Risk Operations. The owner's right to substantive and procedural due process would clearly be violated.

A shut-down order applied to a non-High Risk Operation would also constitute a temporary or permanent taking under the Fifth Amendment of the operator's property and business as to such non-High Risk Operations, as well as an unreasonable seizure under the Fourth Amendment. Violations of equivalent California constitutional provisions would also exist. The rights taken here would be not only those of the owner and operator but also those of royalty owners and others with an economic ownership in the operations.

Sincerely,



Michael M. Berger

MMB:bar

cc: Michael Ghizzoni, Esq., Chief Deputy Counsel (transmitted via email (Mghizzoni@co.santa-barbara.ca.us), facsimile (805/568-2982) and overnight courier)