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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:

On behalf of Greka Energy, we appreciate the opportunity to comment on the October 17, 2008 revisions to the proposed Ordinance of the Board of Supervisors of the County of Santa Barbara Amending Chapter 25 of the County Code, For Purposes of Regulating High Risk Petroleum Production Operations ("the October 17 Revision"). We previously supplied our comments on the original Ordinance presented to the Board at its October 14 meeting ("the Original Ordinance") in our October 9, 2008 letter. To the extent the October 17 Revision contains the same language as the Original Ordinance, our comments to the Original Ordinance continue to apply.

We urge the Board not to adopt the proposed Ordinance in its current form, but rather to make the revisions suggested below so that litigation challenging the Ordinance may be avoided.

We request that this letter be included in the administrative record regarding consideration of the proposed Ordinance.

The Provisions Regarding Appeals Remain Internally Inconsistent

The appeal provisions in the October 17 Revision remain vague and inconsistent.

First, the word "Such" should be deleted from the beginning of the third sentence in Section 25-16; otherwise, "[s]uch appeals" in this sentence would logically refer only to appeals to the Director of Planning and Development, the subject of the immediately preceding sentence. We do not believe this is the County's intent.

Second, Section 25-16 allows appeals to the Director of Planning and Development only in the case of decisions under Sections 25-43(c) and (h). But the proposed revisions to Sections 25-43(e) and 25-43(g) also provide for appeals in the same manner as under Section 25-43(c). The October 17 Revision thereby renders Section 25-16 inconsistent with Section 25-43(e) and (g).

Third, the phrase "this determination" in Section 25-43(c) remains vague. "This determination" would appear to refer back to "the determination of the facility being a High Risk Operation," the phrase used in Section 25-43(b), which means that all that is appealable is the High Risk Operation determination. Yet the remainder of Section 25-43(c) also references appeals of the findings as to cause and the approved remediation plan, as contained in Sections 25-43(b)(2) and (3). The scope of what may be appealed is therefore vague and internally inconsistent.

The Provision Regarding Cross-Remediation Plans Remain Unconstitutional

In the October 17 Revision, Section 25-43(e) continues to authorize 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 certain specified instances. While we appreciate the County's attempt to revise the language of Section 25-43(e), the revised provision continues to violate a High Risk Operator's constitutional rights.

The proposed Ordinance should go no further than remediating High Risk Operations. The standards for High Risk Operations are clearly set forth in the definition of that term in Section 25-4. As set forth in Section 25-43(a), the goal of the section is to remediate High Risk Operations "and bring the facility and the operator within normal, safe operating standards and protect the public safety, health and environment." Yet the proposed Ordinance attempts to go beyond regulation of High Risk Operations via the concept of High Risk Operators, and thereby allows serious penalties to be attached to *non*-High Risk Operations. To the extent the proposed Ordinance would apply to non-High Risk Operations, it is contrary to the clearly stated goal of the section, as stated in Section 25-43(a), and violates the constitutional rights of operators and others associated with non-High Risk Operations.

The October 17 Revision attempts to limit a countywide remediation plan for all facilities of a High Risk Operator "only in cases where it is determined that the Operator is operating more than one facility in such a manner that indicates common risk factors, management practices or failures, safety procedures, operational or logistical errors, training deficiencies or other Operator caused problems are likely to exist at multiple facilities." The problem is that this language is so broad and vague that it provides no determinable limit to countywide remediation plans.

First of all, none of the specified categories — (1) "common risk factors"; (2) "management practices or failures"; (3) "safety procedures"; (4) "operational or logistical errors"; (5) "training deficiencies"; and (6) "other Operator caused problems" — are defined in the Ordinance. The abject breadth of these concepts, singularly and collectively, makes it impossible for anyone to determine in advance how they will be applied and, thus, when a "High Risk Operator" will be subjected to a countywide remediation plan.

Second, under the definition contained in Section 25-4, a "High Risk Operator" must necessarily own or operate *two or more* High Risk Operations in the County at the same time. Whatever circumstances led to such *two or more* facilities being designated as High Risk Operations would *necessarily* exhibit "common risk factors, management practices or failures, safety procedures, operational or logistical errors, training deficiencies or other Operator caused problems are likely to exist *at multiple facilities.*" For example, focusing on the latter item only, surely *any* facility that is designated a High Risk Operation will suffer from *some* "Operator caused problems." Necessarily, then, the operator of two or more High Risk Operations will demonstrate "Operator caused problems . . . at multiple facilities." The proposed limitations in Section 25-43(e) are, in reality, not limitations at all.

The operator of Facilities A, B, C, D, E, and F in the County may be declared to be a High Risk Operator and have *all six facilities* be subjected to a countywide remediation plan (1) even though *only* Facilities A and B are High Risk Operations; but (2) Facilities A and B demonstrate "Operator caused problems . . . at multiple facilities." And this may be the result even though there are *no* operational problems at Facilities C through F. The ability to apply remediation plans to Non-High Risk Operations violates the due process rights of the owner and operator of Facilities C through F. It would also constitute a taking insofar as there is no nexus between the particular facility and the particular problem(s) that led to Facilities A and B being declared High Risk Operations.

The County cannot legally regulate non-High Risk Operations based on the premise of guilt by association, and the language contained in the October 17 Revision fails to solve this underlying problem. The Ordinance should be limited to remediating High Risk Operations, exactly as the goal stated in Section 25-43(a) states.

<u>The Provision Regarding Cross-Shut Down Orders Remains Unconstitutional</u>

Section 25-43(h) of the October 17 Revision still allows the Petroleum Administrator to issue a shut-down order for non-High Risk Operations co-owned or co-operated by a High Risk Operator.

While the County *attempted* in Section 25-43(e) to place some limits on the ability to apply a remediation plan to a non-High Risk Operation, the County has not even *attempted* to place any limits in Section 25-43(h) on the ability to apply a shut-down to non-High Risk Operations. While we disagree that the proposed limiting language in Section 25-43(e) accomplishes its objective (as discussed above), surely the County recognizes that applying a shut-down order to non-High Risk Operations is more severe than applying a remediation plan to such operations. We do not understand why the County attempted to limit the former but not the latter. At the very least, the limiting language of Section 25-43(e) should apply equally to shut-down orders under Section 25-43(h).

Thus, in the hypothetical above, *all six facilities* would be subject to a shut-down order even where *only* Facilities A and B are determined to be High Risk Operations. And this same result would follow willy-nilly in any number of circumstances; for example: (1) if there were a failure to achieve the goals of a remediation plan applicable *only* to Facilities A and B because the County decided (under Section 25-43(e)) *not* to apply the remediation plan to Facilities C through F, the non-High Risk Operations; (2) if the County *had* applied the remediation plan to Facilities C through F (under Section 25-43(e)), but the operator successfully appealed the application of the remediation plan to such non-High Risk Operations; and (3) if there were a failure to achieve the goals of a remediation plan applicable *only* to facilities A through D, where the County decided also to apply the remediation plan to Facilities C and D under Section 25-43(e), but not to Facilities E and F.

The Proposed Ordinance also fails to specify the duration of a shut-down order. If the County issues a shut-down order as to any facility based on a particular perceived problem or violation, the shut-down order should be lifted when the problem or violation has been resolved. Otherwise, a shut-down order could be misused for purposes unrelated to those that led to the issuance in the first place, and such an order would bear no reasonable relation to any legitimate government objective once the triggering problem has been properly resolved.

There is a serious disconnect between the legitimate desire to regulate High Risk Operations and the impermissible attempt to leverage those regulations by applying them to non-High Risk Operations. Again, 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 Risk Operations in the County such that the failure to accomplish the former permits a shut-down order of the latter. The owner's right to substantive and procedural due process would clearly be violated.

As well, a shut-down order applied to non-High Risk Operations would also constitute a temporary or permanent taking under the Fifth Amendment and the California constitution of the operator's property and business as to such non-High Risk Operations. The rights taken would

be not only those of the owner and operator but also those of royalty owners and others with an economic interest in such operations.

How the October 17 Revision May Be Revised to Eliminate Its Unconstitutionality

We provide this guidance as a roadmap to further revising the October 17 Revision to solve the problems outlined above.

1. Section 25-16. Change the phrase "in the case of decision under Section 25-43(c) and (h)" in the second sentence to "in the case of decisions under Sections 25-43(c), (e), (g), and (h)." Delete the word "Such" in the third sentence.

2. Section 25-43(c). Change the beginning of the first sentence to read: "The Owner or Operator of any facility determined to be a High Risk Operation may appeal the applicability of the definition to the operation, the factual determination regarding the cause of the problems causing the high risk, or the efficacy and reasonableness of the proposed remediation to the Petroleum Administrator . . ." Add "to the Board of Appeals" after "may be further appealed" in the third sentence.

3. Section 25-43(e). Change the phrase "all petroleum facilities" to "all High Risk Operations" in the first sentence and delete the last two sentence.

4. Section 25-43(h). Change the phrase "the High Risk Operation[s] or any and all other petroleum operations located in the County that are co-owned or co-operated by the High Risk Operator" to "the High Risk Operations" in the first sentence and change "effected" to "affected" in the second sentence. Alternatively, and at the very least if Section 25-43(e) is not amended as suggested above, delete "at the discretion of the Petroleum Administrator" in the first sentence and insert a new sentence: "A shut-down order under this section shall be ordered only as to those facilities which, after an inspection by the County, are determined to be subject to a remediation plan under Section 25-43(e)." In addition, and in either case, add a new sentence after the first sentence as follows: "A shut-down order issued under this section shall be lifted when the particular problem or violation which led to issuance of the shut-down order as to that facility has been resolved by the owner or operator."

Sincerely,

Michael M. Berger

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