

241064

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
July 7, 2016
Part of
Public Record

FINANCE DOCKET NO. 36036

VALERO REFINING COMPANY – CALIFORNIA

THE CITY OF BENICIA'S REPLY TO
VALERO'S PETITION FOR DECLARATORY ORDER

Steven G. Churchwell (Cal. State Bar No. 110346)
Robin R. Baral (Cal. State Bar No. 271882)
Churchwell White LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814

Counsel for the City of Benicia,
an interested party under 5 U.S.C. § 554

July 7, 2016

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
USE PERMIT PROJECT BACKGROUND	2
BENICIA’S REPLY TO VALERO’S PETITION.....	5
I. ICCTA does not preempt the Planning Commission’s denial of the Use Permit, expressly or as-applied in this case.	7
A. Transportation.	7
B. Rail Carrier.....	7
1. Cases involving common carriers and their agents.....	7
2. Cases involving local regulation of third-party, non-rail carriers.....	10
C. The Planning Commission Denial.	12
II. If the Benicia City Council approved the Project, could the City impose conditions or mitigation measures on Valero to reduce the environmental and public safety impacts caused by Valero’s Project that are related to UPR’s rail operations?	14
CONCLUSION.....	17

INTRODUCTION

The CITY OF BENICIA, a California municipal corporation (“Benicia”) and interested party pursuant to 5 U.S.C. § 554(c)(1), submits this reply to the Petition for Declaratory Order (the “Petition”), filed by Valero Refining Company – California, a Delaware corporation (“Valero”), on May 31, 2016, in connection with Valero’s use permit application and associated environmental review, currently on appeal before the Benicia City Council (the “Use Permit”).

Local governments are charged with using their police powers and land use authority to protect the public health and the environment. Benicia has a strong interest in preserving its land use authority and police powers to mitigate impacts related to Valero’s proposal to transfer and process crude oil by rail. In addition, recent derailments of trains carrying crude oil by rail have resulted in deaths, significant injuries and property damage. Benicia and other cities throughout the country are concerned about the potential for derailments and the resulting impacts.

Valero’s Petition asserts that the Interstate Commerce Commission Termination Act (“ICCTA”) preempts the Benicia Planning Commission’s denial of Valero’s Use Permit application. A broader question, however, also remains: to what extent may local governments impose conditions or mitigation measures on non-rail carriers, in connection with indirect environmental and public safety impacts caused by rail operations? Without waiving any claims, the Benicia City Council suspended its decision on the Use Permit to allow Valero time to seek guidance from the Surface Transportation Board (“Board”) on this broader issue.

Benicia’s reply therefore consists of two parts. The first part responds to the claims asserted in Valero’s Petition. Here, Benicia’s position is clear: the Board should reject the claim that ICCTA preempts the Benicia Planning Commission’s *denial* of Valero’s Use Permit application for the following reasons: (1) ICCTA does not preempt Benicia’s land use authority over non-rail carriers and, as-applied in this case, ICCTA does not preempt many of the Planning

Commission’s findings in support of its decision to deny the Use Permit. A finding otherwise would invade Benicia’s local land use authority over non-rail carriers.

The second part of Benicia’s reply asks this Board to provide guidance with respect to the Benicia City Council’s authority to mitigate environmental and public safety impacts related to rail transportation. Here, Benicia seeks this Board’s input on the extent to which Benicia *could conditionally approve* Valero’s Use Permit with conditions or mitigation measures that require Valero to mitigate impacts related to its crude-by-rail proposal. This Board’s input would provide a useful starting point for the Benicia City Council during its September 2016 hearing on the Use Permit appeal, as local residents, environmental groups and local agencies throughout Northern California have urged Benicia to impose conditions to address environmental impacts that, in some cases, would occur largely beyond Benicia’s city limits.

To reduce the legal fees and costs incurred by its taxpayers, Benicia joins Valero’s request for expedited consideration of the Petition by the Board. With regard to Part II of this reply, however, Benicia requests that the Board issue an advisory report only in this case.

USE PERMIT PROJECT BACKGROUND

In December of 2012, Valero applied to Benicia for a conditional use permit to construct facilities that would allow Valero to receive some of its crude oil by railcars.

Benicia considered the environmental impacts of the Use Permit project pursuant to the California Environmental Quality Act (“CEQA”). As the lead agency under CEQA, Benicia oversaw the environmental review of the Use Permit, which initially described the Use Permit, in part, to consist of the following (the “Project”):

- Installation of a single tank car unloading rack capable of offloading two parallel rows of 25 crude oil railcars.

- Construction of two parallel, offloading rail spurs to access the tank car unloading rack along with a parallel departure track to store tank cars in preparation for departure, for a total of 8,880 track-feet of new track on Refinery property.
- Installation of approximately 4,000 feet of 16-inch diameter crude oil pipeline and associated components and infrastructure between the offloading rack to the existing crude supply piping.
- Replacement and relocation of approximately 1,800 feet of tank farm dikes.
- Relocation of an existing firewater pipeline, compressor station, and underground infrastructure.
- Relocation of groundwater wells along Avenue “A.”
- Construction of a service road adjacent to the proposed unloading rack.

(Draft Environmental Impact Report, SCH # 2013052074 Use Permit Application 12PLN-00063 (the “DEIR”), attached to this reply in part as Exhibit A, pp. ES-4 and 1-2.)

The DEIR was revised in 2015 and recirculated for public comment (“Revised DEIR”).

The Revised DEIR included an update to the Project description, as follows:

Valero proposes to install, operate, and maintain new equipment, pipelines, and associated infrastructure as well as new and realigned segments of existing railroad track within the Refinery boundary to allow the Refinery to receive a portion of its crude oil feedstock deliveries by tank car. More specifically, the Project would allow Valero to accept up to 100 tank cars of crude oil a day in two 50-car trains. The trains would enter the Refinery on an existing rail spur that crosses Park Road. Crude oil unloaded from the tank cars would be pumped to an existing storage tank in the Refinery via a new crude offloading pipeline.

(Revised DEIR, p. 2-3, attached to this reply in part as Exhibit B.)

Benicia evaluated the Project pursuant to CEQA and Benicia’s Zoning Ordinance. Under CEQA, Benicia must (1) identify and disclose all significant environmental impacts of the Project; (2) identify mitigation measures that will reduce or avoid the significant impacts of the Project; (3) adopt all feasible mitigation measures as conditions of Project approval; and (4) if

the Project includes any significant and unavoidable impacts, adopt a “statement of overriding considerations” finding that the Project’s benefits outweigh those unavoidable impacts. Under the Zoning Ordinance, Benicia cannot approve the Project if it would be detrimental to the “public health, safety, or welfare” of persons in the area, property, or the general welfare of the City.¹

Pursuant to CEQA, the EIR² examined (1) impacts that would result from construction and operation of Valero’s unloading rack, and (2) impacts that would result from the transportation of crude oil on Union Pacific Railroad (“UPR”) trains from North American oil fields to the Benicia refinery. Ultimately, the EIR concluded that the Project would have 11 significant impacts, all of which would result from UPR operations. Significant impacts included, for example, the increased risk of train derailments resulting in oil spills, fires, and/or explosions; increased air emissions from locomotive engines; and increased noise from trains along the UPR route.

As the EIR noted, there are a variety of mitigation measures that could physically reduce the environmental impacts from rail operations related to the Project. The Use Permit, for example, could limit the allowable number of crude oil deliveries to less than two trains per day; this would reduce all of the identified rail impacts by fifty percent. Or, the Use Permit could require Valero to purchase emissions offset credits in each affected air basin such that the Project would result in no net increase in air emissions; this would avoid significant air quality impacts related to rail operations. The EIR concluded, however, that these mitigation measures were infeasible because they would directly impact rail operations.

¹ Benicia Municipal Code § 17.104.060.

² The DEIR, Revised DEIR and Final EIR are referred to collectively herein as the “EIR”.

Valero's application received widespread opposition from individuals, public agencies³ and private organizations.⁴ As noted above, the Revised DEIR ultimately concluded that any attempt to mitigate impacts from rail operations by imposing conditions on the approval of Valero's unloading rack would be preempted by ICCTA. This conclusion became the subject of intense controversy and Project opponents have urged Benicia to deny the Project or, barring that, mitigate rail impacts by imposing permit conditions on Valero.

In January 2016, the Final Environmental Impact Report for the Use Permit project was released, which responded to hundreds of comments, collectively, from concerned agencies, organizations and individuals. On February 11, 2016, the Benicia Planning Commission concluded its public hearing and ultimately adopted Resolution No. 16-1, denying Valero's Use Permit project. (See Petition, Exhibit 4.)

BENICIA'S REPLY TO VALERO'S PETITION

The Board may, in its discretion, issue a declaratory order to "terminate a controversy or remove uncertainty."⁵ ICCTA, and established judicial precedents, clearly establish that Benicia cannot apply CEQA or its Zoning Ordinance as a means of directly regulating the transportation activities of rail carriers, such as UPR.⁶

Valero alleges in its Petition, however, that the Benicia Planning Commission's denial of Valero's Use Permit and its refusal to certify the EIR amount to unreasonable

³ Agencies who have expressed opposition to the project include the counties of Yolo, Solano, and Sutter; the cities of Davis and Sacramento; the Bay Area Air Quality Management District, the Sacramento Metropolitan Air Quality Management District, the Placer County Air Pollution Control District, and the Feather River Air Quality Management District; the Sacramento Area Council of Governments, the University of California at Davis, the California Public Utilities Commission, the California Department of Fish & Wildlife, the Office of the California Attorney General.

⁴ Organizations who have expressed opposition to the project include Yolano Climate Action, Martinez Environmental Group, San Francisco Bay Keeper, Cool Davis, 350 Sacramento, Benicians for a Safe and Healthy Community, the Natural Resources Defense Council, and Safe Fuel and Energy Resources California.

⁵ 5 U.S.C. § 554(e).

⁶ *City of Auburn v United States Government*, 154 F.3d 1025 (9th Cir. 1998), as amended (Oct. 20, 1998); *Green Mountain Railroad Corp. v Vermont*, 404 F.3d 638 (2nd Cir. 2005).

interference with transportation by a rail carrier, which ICCTA preempts. On the other hand, shortly before the Benicia City Council began its consideration of the Use Permit, the Council received a letter from the California Attorney General, Kamala D. Harris. The Attorney General's April 14, 2016 letter is attached to this reply as Exhibit C. In the letter, the Attorney General asserted that she "disagree[s] that the City is prohibited from considering the Project's eleven significant and unavoidable rail-related environmental impacts when exercising its local land use authority." (Exhibit C, p. 2)

Case law and previous Board decisions do not support Valero's expansive interpretation of ICCTA preemption.⁷ In addition, Benicia contends that the Attorney General's position is overbroad, as a project denial solely targeting the activities of a rail carrier could be found to discriminate against interstate commerce or be preempted by ICCTA. In the present case, however, Benicia contends that ICCTA does not expressly preempt Benicia's land use authority over Valero's facility and, as-applied in this case, the Planning Commission included valid grounds for denying the Use Permit to preclude a finding of preemption. Ultimately, Benicia and cities throughout California would benefit if this controversy over ICCTA preemption was clarified. In addition, as presented in Part II below, the subsequent controversy remains: to what extent could the Benicia City Council *conditionally approve* the Use Permit with mitigation measures or conditions of approval imposed on Valero, related to the indirect environmental and public safety impacts caused by rail operations?

⁷ The Board, however, has reviewed this issue in recent opinions, such as *SEA-3, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35853 (Mar. 17, 2015).

I. ICCTA does not preempt the Planning Commission’s denial of the Use Permit, expressly or as-applied in this case.

Valero’s Petition first requires the Board to determine whether the Planning Commission’s denial of Valero’s proposed Use Permit interferes with “transportation by rail carrier” as expressly defined and preempted by ICCTA.⁸

A. Transportation.

Valero’s proposed project clearly constitutes “transportation”, which ICCTA defines, in part, as “services related to [the] movement [of passengers and property], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange.”⁹

B. Rail Carrier.

In order for ICCTA to expressly preempt local regulation of transportation, a “rail carrier” must perform such transportation. Courts have extensively analyzed the definition of rail carrier under ICCTA. Here, the distinguishing feature is whether the transportation, transloading, storage or other activities are performed by a rail carrier, direct agents of the rail carrier or an unrelated third party.

1. Cases involving common carriers and their agents.

Courts have ruled in favor of ICCTA preemption over local land use regulation in cases where a rail carrier (or its direct agent) operates transloading, material transfer and processing facilities. In “*New York Susquehanna*,”¹⁰ the rail carrier acted as the transport company, transloader and processor; in “*Alexandria*,”¹¹ the rail carrier’s agent operated an ethanol

⁸ See 49 U.S.C.A. § 10501(a)-(b); see also 49 U.S.C.A. § 10102, defining “rail carrier” in part as “a person providing common carrier railroad transportation for compensation....”

⁹ 49 U.S.C.A. § 10102.

¹⁰ *New York Susquehanna and Western Ry. Corp. v. Jackson* 500 F.3d 238 (3rd Cir. 2007).

¹¹ *Norfolk Southern Ry. Co. v. City of Alexandria* 608 F.3d 150 (4th Cir. 2010).

transloading facility; in “*Texas Central*,”¹² the rail carrier was substantially involved in the transloading operation; and in “*Padgett*,”¹³ a rail carrier proposed to operate a propane loading facility.

Together, the courts in *New York Susquehanna* and *Texas Central* have developed a clear, five-factor test for determining whether ancillary loading, storage and transloading activities should be legally construed as the activities of a rail carrier to warrant preemption of local regulation under ICCTA:

Whether a particular activity constitutes transportation by rail carrier under [49 U.S.C.A.] section 10501(b) is a case-by-case, fact-specific determination. [The factors] include: (1) whether the rail carrier holds out transloading as part of its business, (2) the degree of control retained by the rail carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing.¹⁴

As the precursor to *Texas Central*, the *New York Susquehanna* court found that transloading facilities were performed by a rail carrier where (i) the rail carrier constructed and maintained the facilities; (ii) the rail carrier was liable for the loading operations, and (iii) the rail carrier was paid to load the freight. In *Texas Central*, the court applied the same five-factor test and found, on balance, that three out of the five factors weighed in favor of finding that the transloading of frac sand was performed by the rail carrier and not the terminal facility.

Most recently, *Padgett* provides a clear illustration of how rail carriers have adapted to the *Texas Central* preemption test. In *Padgett*, the Grafton and Upton Railroad Company (“G&U”), terminated its then-existing agreements with propane companies and instead proposed to operate its own propane storage facility adjacent to its track. In applying the *Texas Central* test, the district court upheld the Board’s conclusion that “the facility [would] be an integral part

¹² *Texas Cent. Business Lines Corp. v. City of Midlothian* 669 F.3d 525 (5th Cir. 2012).

¹³ *Padgett v. Surface Transportation Bd.* 804 F.3d 103 (1st Cir. 2015).

¹⁴ *Texas Central, supra*, 669 F.3d 525, 530-1 [internal citations omitted].)

of G&U's operations as a rail carrier."¹⁵ As a result, the court ruled that ICCTA preempted the Town of Grafton's regulation of the propane storage facility.

Padgett follows from a 2006 district court case, "*Town of Milford*,"¹⁶ also involving G&U, and similar storage and transloading uses adjacent to the same line of track in *Padgett*. In *Town of Milford*, however, the Massachusetts District Court held that the Board lacked jurisdiction over the activities of a terminal railroad company, a non-rail carrier, which proposed to load steel for distribution by G&U.

Throughout all of the above cases, the distinguishing feature is whether transportation, transloading, storage or other activities encompassed by ICCTA are performed by a rail carrier or their direct agents.

In applying the *Texas Central* standard to the Use Permit at issue in this Petition, the first three factors clearly favor a finding by the Board that Valero's proposed activities are not being performed by a rail carrier. As noted in Valero's Use Permit application, Valero proposes to construct, maintain and operate the unloading activities along the proposed spur track and associated improvements. (*See* Petition, Exhibit 1, p. 7.) The Revised DEIR's project description confirms this. (Exhibit B, p. 2-3.) As to the remaining two factors, Valero has the burden of proving that contractual liability and financing tips in favor of UPR as the transfer operator. Regardless of this showing, however, the balance of factors here clearly weighs in favor of Valero as the party that would primarily facilitate the transfer of crude oil from UPR trains to Valero's facility. As a result, ICCTA does not expressly preempt Benicia's local land use authority over the Use Permit. On the other hand, had UPR proposed to acquire the easements, finance and construct the track improvements, perform the proposed transfer activities, maintain

¹⁵ *Padgett*, *supra*, 804 F.3d 103, 107.

¹⁶ *Grafton and Upton R. Co. v. Town of Milford* 417 F.Supp.2d 171 (D. Mass. 2006).

the spur track and assume liability for related spills, the Board would have a strong basis to find local regulation expressly preempted by ICCTA.

Lastly, Benicia notes that Valero’s Petition misconstrues the ruling from *Alexandria*.¹⁷ The *Alexandria* ruling did not amount to indirect regulation of a rail carrier, as Valero suggests. The court in that case expressly found that the city’s ordinance directly “regulated ‘transportation by a rail carrier...,’”¹⁸ and the court expressly found that the operator of the ethanol facility was an agent, subject to the control of the rail carrier.¹⁹ The rail carrier was therefore directly involved in operating the ethanol transloading facility, and the city’s ordinance thus directly regulated “‘transportation by a rail carrier...’” to warrant preemption under the exclusive jurisdiction provisions of ICCTA.²⁰

2. *Cases involving local regulation of third-party, non-rail carriers.*

Courts have declined to find preemption in cases involving local regulation of third parties. In “*West Palm Beach*,”²¹ the court held that ICCTA did not preempt local zoning and permitting of a materials handling facility operated by a lessee of railroad property. In *West Palm Beach*, a railroad leased its property in the City of West Palm Beach to Rinker Materials Corporation. Rinker used the rail yard as a transloading facility to distribute aggregates for the production of cement. The city issued cease and desist orders to the railroad and Rinker on the basis that the facility did not comply with the city’s zoning, and Rinker failed to obtain a business license. The railroad sued the city, seeking a declaration that ICCTA preempted the city’s zoning and business license ordinances to Rinker’s transloading operations.

¹⁷ Petition, p. 19-20; *Alexandria*, *supra*, 608 F.3d 150.)

¹⁸ *Id.* at 159.

¹⁹ *Id.* at 154.

²⁰ *Id.* at 159.

²¹ *Florida East Coast Ry. Co. v. City of West Palm Beach* 266 F.3d 1324 (11th Cir. 2001).

The court in *West Palm Beach* held that ICCTA did not preempt the city’s zoning ordinance. The court explained that “in no way does federal preemption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad.” (*Id.* at 1332.)

In “*Hi-Tech*,”²² the court upheld a Board decision and found that a solid waste disposal facility was transporting materials *to* the rail carrier, and as such, transfer operations were not being performed *by* the rail carrier. The court’s rationale in *Hi-Tech* and the underlying Board decision also formed the basis for the *Texas Central* test.

A case involving the Town of Babylon (“*Babylon*”)²³ is another example where courts have upheld local regulation of transloading, storage and processing facilities. In *Babylon*, a loading operator proposed to construct and operate a waste transfer facility, to handle the loading of construction debris onto rail cars on a rail yard leased by a railroad. The city’s zoning ordinance, however, prohibited the waste transfer facility at the proposed site. The loading operator nevertheless commenced construction, and the city served a stop work order, on the basis that the transloading facility was a prohibited use under the city’s zoning ordinance.

The railroad and loading operator filed suit, seeking to enjoin the city from enforcing its zoning ordinance against the waste transfer facility. The court held that the proposed waste transfer facility did not constitute “transportation by rail carrier” because the railroad did not own or operate the facility, and the loading operator was not acting as an agent of the railroad. ICCTA therefore did not preempt the city’s local regulation of the waste transfer facility.

The construction and operation of Valero’s proposed unloading rack falls within this line of cases. There is no indication that UPR will be involved in any aspect of the Project, other than

²² *Hi-Tech Trans, LLC v. New Jersey* 382 F.3d 295 (3rd Cir. 2004).

²³ *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011).

shipping the product to Valero’s facility. Valero contractors or employees (not UPR or its agents) would be responsible for constructing, operating and maintaining the Project, and for performing transloading of the product at Valero’s facility. (Exhibit B, p. 2-3.)

C. The Planning Commission Denial.

As-applied in this case, ICCTA does not preempt the Benicia Planning Commission’s denial of Valero’s Use Permit because the denial does not substantially interfere with UPR’s activities as a rail carrier.²⁴ The denial of the Use Permit directly affects Valero’s proposed operations at its facility; the only impact to UPR is to its potential profits as the rail carrier.

The Planning Commission’s denial addressed numerous potential impacts of the proposed Use Permit on the community. As noted throughout Valero’s Petition, however, the findings of the Benicia Planning Commission do include unfavorable views on transportation of crude oil by UPR, and the lack of feasible measures to mitigate the impacts and risks associated with rail transportation. Regardless of the Planning Commission’s findings regarding crude-by-rail transportation, the denial includes numerous findings that serve as valid bases for refusing to certify the EIR, and for denying the Project under Benicia’s local land use authority:

- The Project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property;
- The project's benefits such as the local employment and economic benefits were not thoroughly examined in the EIR and would not outweigh the significant effects on the environment;

²⁴ See also *SEA-3, Inc. – Petition for Declaratory Order*, STB Finance Docket 35853, *supra*, denying the petition of a non-rail carrier “because the law about the extent to which 49 U.S.C. § 10501(b) preemption applies to transload facilities is clear.”

- The EIR does not express the independent judgment of the City as required by CEQA;
- The Project is inconsistent with Benicia's General Plan.

(See Petition, Exhibit 4, Resolution No. 16-1)

In challenging the Planning Commission's denial on preemption grounds, Valero appears to be asking the Board to determine that ICCTA entirely preempts Benicia's local land use authority in connection with Valero's proposed Project. In this regard, Valero's Petition should be rejected as it would require the Board to make findings that extend far beyond *Hi-Tech, Texas Central* and other established precedents.²⁵

Alternatively, the Board could potentially find, as the Eleventh Circuit court once noted, that Benicia's "local regulations applied against a third-party [are] so intertwined with the provision of rail transportation services to the public so as to frustrate the objectives of federal railroad regulation."²⁶ In the context of Valero's Use Permit application, however, this rationale would more aptly apply if the Benicia Planning Commission had approved the Use Permit, certified the EIR, and adopted conditions of approval or mitigation measures that directly interfered with UPR's rail operations of a common carrier.²⁷

²⁵ Valero alleges that the Planning Commission's denial is akin to an attempted order by the Town of Winchester to prohibit all rail traffic through a cease and desist order. *Boston & Maine Corp. & Springfield Terminal R.R. Company - Petition for Declaratory Order*, STB Finance Docket No. 35749 (July 19, 2013) ("*Winchester*"). The cease and desist order in *Winchester*, however, is distinct from Valero's Use Permit application, which Benicia may approve or deny. As noted above, the Planning Commission may deny the proposed upgrades to Valero's facility due to issues at the facility, such as its location within the 100-year floodplain and the risk of contamination in the event of an oil spill on the property.

²⁶ *Florida East Coast Ry. Co.*, *supra*, 266 F.3d 1324, 1337, fn. 9.

²⁷ The Planning Commission's denial should not rise to the level of direct regulation of a rail carrier to warrant a preemption finding in this case. (See, e.g. *Florida East Coast Ry. Co. v. City of West Palm Beach*, *supra*, 266 F.3d 1324, 1338, fn 11, noting that "all regulation places constraints on [a rail carrier's] profit-maximizing behavior.")

II. If the Benicia City Council approved the Project, could the City impose conditions or mitigation measures on Valero to reduce the environmental and public safety impacts caused by Valero's Project that are related to UPR's rail operations?

As noted above, Valero's Use Permit application is currently on appeal before the Benicia City Council. Benicia asks the Board to provide advisory guidance on the authority of the Benicia City Council to condition its approval of Valero's Use Permit, to address indirect environmental and public safety impacts related to rail transportation.

ICCTA has been held to preempt the application of CEQA to the construction and/or operation of a rail line by a rail carrier.²⁸ In addition, a case is currently pending before the California Supreme Court analyzing CEQA's applicability to a project initiated by a rail agency with easement rights over the Northwest Pacific Railroad line.²⁹

The Petition before this Board, however, is more nuanced. Here, Valero is asking the Board to issue an order preempting Benicia's ability to deny Valero's Use Permit application. Benicia opposes Valero's preemption claims and, on the other hand, is asking the Board to provide guidance as to whether ICCTA would preempt CEQA mitigation measures or conditions of approval from being imposed on Valero, a non-rail carrier, in connection with the mitigation of indirect environmental and public safety impacts generated by the rail carrier (such as air emissions and public hazards from oil spills). No binding precedent seems to provide guidance to the Benicia City Council.

During the Use Permit proceedings, Benicia staff, through its special counsel, has consistently reiterated four main points of guidance:

²⁸ See e.g., *City of Encinitas v North San Diego County Transit Development Bd.*, 2002 WL 34681621; *Desertxpress Enterprises LLC – Petition for Declaratory Order* STB Finance Docket No. 34914 (June 27, 2007) [finding that ICCTA preempts CEQA as applied to the construction of a high-speed rail line between Victorville and Las Vegas]; see also *California High-Speed Rail Authority – Petition for Declaratory Order*, STB Finance Docket No. 35861 (May 5, 2016).

²⁹ *Friends of the Eel River v. North Coast R.R. Authority* (2014) 230 Cal.App.4th 85, cert. granted, 339 P.3d 329 (U.S. Dec. 10, 2014) (No. S222472).

1. Under CEQA, Project impacts must be analyzed and feasible mitigation measures must be imposed in connection with Valero's facility and onsite activities;
2. Under CEQA, Project impacts related to rail operations (such as locomotive emissions) must be analyzed and disclosed to the public;
3. ICCTA preempts Benicia's ability to require mitigation of rail impacts as a condition of approving Valero's project;
4. ICCTA preempts Benicia's ability to deny Valero's Project solely on the basis of potential impacts related to UPR's rail operations.

Valero's Petition addresses Point 4. Benicia's reply responds to Point 4 (in Part I, above), and seeks the Board's guidance and clarification in connection with Point 3 (in this Part II).

With regard to Point 4, the Benicia Planning Commission issued sufficient findings to warrant denial of the Use Permit on grounds unrelated to rail operations. Although bases exist for the Board to determine that some of the findings of the Benicia Planning Commission targeted rail operations, the effect of such findings by the Board should not affect the outcome of the Planning Commission denial.

In addition, returning this matter to the Planning Commission would impose a huge burden on the volunteer Benicia residents serving on the Commission, who already have held 10 public hearings on the Use Permit. The Benicia City Council has already held six public hearings on the Use Permit appeal. Because the Benicia City Council's appeal hearings are *de novo*, there is no reason for the Board to find that some of the Planning Commission's findings may be invalid. Rather, guidance should be provided to the Benicia City Council, to clarify the findings,

conditions of approval and mitigation measures that the Benicia City Council could make in connection with its determination on the Use Permit appeal.³⁰

With regard to Point 3, an advisory report by the Board could reduce uncertainty, while allowing Valero's *de novo* appeal to the Benicia City Council to proceed, so that a final determination on the Use Permit can ideally be made in September 2016, as proposed by Valero and continued by the Benicia City Council. In issuing an advisory opinion, however, the Board should not be tasked with identifying all of the specific findings or mitigation measures in support of which the Benicia City Council could conditionally approve the Use Permit in a manner that accords with ICCTA.

Instead, the Benicia City Council would appreciate the Board's guidance in examining the scope of ICCTA preemption, as identified in Point 3 above, in more detail:

First, this Board could issue guidance confirming that ICCTA preempts the Benicia City Council from imposing mitigation measures or conditions of approval of the Use Permit that would directly regulate the activities of UPR.

Second, the Board could issue guidance as to whether the Benicia City Council could impose mitigation measures or conditions of approval on Valero, to alleviate indirect impacts related to the Project that are caused by the activities of UPR in delivering crude oil by rail. For example: (1) Can Valero be required to purchase offsets or credits to reduce indirect air quality impacts from rail operations related to the Project? (2) Would ICCTA preempt the Benicia City

³⁰ Such guidance should be advisory only, as a declaratory order in this instance would raise significant procedural challenges to all interested parties. If, for example, Benicia, Valero or any other interested party chose to appeal an order by the Board in this case, an appeal would need to be filed by a petition for review to the Ninth Circuit Court of Appeals within 60 days after the Board's entry of the order. (28 U.S.C.A § 2321(a); 28 U.S.C.A § 2344.) Judicial review of the Board's order, however, would be highly disfavored because the Benicia Planning Commission is not the final decision-making body for the Use Permit. (*See* Benicia Municipal Code ("B.M.C.") § 17.104.080, which provides that "[a] use permit or variance shall become effective at the end of the appeal period, unless appealed to the city council in the case of a decision by the planning commission"; B.M.C. § 1.44.040 further provides that "[a]n appeal hearing shall consist of a new (i.e., *de novo*) hearing on the matter by the person or body specified"; *see also Miller v. F.C.C.* 66 F.3d 1140 (11th Cir. 1995), in which the court dismissed a petition for review that did not raise an actual controversy.)

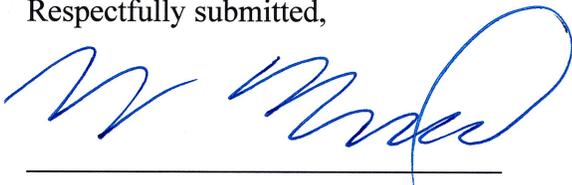
Council from requiring Valero to establish a fund, to address indirect impacts of its Project by remediating potential public hazards from oil spills within Solano County?

CONCLUSION

The Benicia Planning Commission lawfully based its denial of the Use Permit on its valid exercise of police powers and land use authority, to regulate the Valero facility and Valero's operations as a non-rail carrier.

To the extent that the Benicia City Council may act in the future to conditionally approve Valero's Use Permit, Benicia respectfully requests that the Board provide guidance on the extent to which ICCTA preempts Benicia's ability to impose conditions on Valero that are designed to avoid or mitigate indirect impacts of the Project related to rail operations. Further, because the Benicia City Council has continued its hearing on the Use Permit appeal to September 20, 2016, to allow for the Board to provide guidance, Benicia requests expedited consideration of this matter.

Respectfully submitted,



Steven G. Churchwell
Robin R. Baral
Churchwell White LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814
(916) 468-0950

Counsel for the City of Benicia

July 7, 2016

EXHIBIT A
DEIR Project Description

VALERO BENICIA CRUDE BY RAIL PROJECT

Draft Environmental Impact Report
SCH # 2013052074
Use Permit Application 12PLN-00063

Prepared for
City of Benicia

June 2014



Ancillary facilities affected by the Project would include crude oil offloading pumps and pipeline and associated infrastructure, spill containment structures, a firewater pipeline, groundwater wells, and a service road.

ES-4 Project Description

Overview

The purpose of the Project is to install new equipment, pipelines, and infrastructure to allow the Refinery to receive a portion of its crude oil feedstock deliveries by tank car.

The Project would allow Valero to accept up to 100 tank cars of crude oil a day in two 50-car trains. The trains would enter the Refinery on an existing rail spur that crosses Park Road. The crude oil unloaded from the tank cars would be pumped to the existing crude oil storage tanks in the Refinery via a new crude offloading pipeline, connected to existing piping located within the Refinery. Valero would ask UPRR to schedule Valero's trains so that none of them cross Park Road during the commute hours of 6:00 AM to 9:00 AM and 4:00 PM to 6:00 PM. Valero would operate the Project components 24 hours per day, 7 days per week, and 365 days per year.

Based on Valero's plans, the crude oil delivered by rail would displace up to 70,000 barrels per day of the crude oil that is presently delivered by marine vessels. Crude oil delivered to the Refinery by tank car would not displace crude oil delivered to the Refinery by pipeline.

The crude oil to arrive by tank car would originate at sites in North America and be shipped by UPRR. UPRR would transport tank cars on existing rail lines from sources in North America to Roseville, California, where the cars would be assembled into a train for shipment into the Refinery. Valero would own or lease the tank cars that would be used to transport crude oil from Roseville to Benicia. Under regulations adopted by the Pipeline and Hazardous Materials Safety Administration (PHMSA), crude oil shipped by rail must be shipped in tank cars built to the "DOT-111" specification. In 2011, the Association of American Railroads voluntarily imposed more stringent standards on the design of DOT-111 tank cars. Tank cars that meet these new standards are generally known by the number "1232," and are referred to herein as "1232 Tank cars." All DOT-111 tank cars ordered after October 1, 2011 must meet the standards for 1232 Tank cars. DOT-111 tank cars ordered before 2011 that do not meet the standards for 1232 Tank cars are commonly known as "legacy" DOT-111 tank cars. Valero has committed that, when the PHMSA regulations call for use of a DOT-111 car, Valero would use 1232 Tank cars rather than legacy DOT-111 cars. See Section 3.4.1.3, in the *Project Description* for further discussion of tank cars. UPRR owns and operates the locomotives that would be used to transport the tank cars from Roseville to Benicia.

The Project would not involve any changes to the existing Refinery operations or process equipment, other than the construction and operation of the Project components. The Project would not increase the amount of crude oil that can be processed at the refinery, or the amounts of petroleum products that can be produced. The Project does not propose any change to the Bay

Area Air Quality Management District (BAAQMD) operating permit regarding the Refinery's crude oil processing rate. The Project does not propose changes to the emissions limits in the current BAAQMD permits, although the Project does require approval of an Authority to Construct from the BAAQMD.

Project Components

The Project would consist of the following primary components:

- Installation of a single tank car unloading rack capable of offloading two parallel rows of 25 crude oil railcars.
- Construction of two parallel, offloading rail spurs to access the tank car unloading rack along with a parallel departure track to store tank cars in preparation for departure, for a total of 8,880 track-feet of new track on Refinery property.
- Installation of approximately 4,000 feet of 16-inch diameter crude oil pipeline and associated components and infrastructure between the offloading rack to the existing crude supply piping.
- Replacement and relocation of approximately 1,800 feet of tank farm dikes.
- Relocation of an existing firewater pipeline, compressor station, and underground infrastructure.
- Relocation of groundwater wells along Avenue "A."
- Construction of a service road adjacent to the proposed unloading rack.

The Refinery proposes to begin construction in 2014 and to commence operations in late-2014 or early 2015. Construction is expected to take approximately 25 weeks. The Project would require twenty additional employees or contractors.

ES-5 Alternatives

No Project Alternative

Under the No Project alternative, the Project would not be constructed, which would prevent crude oil from being transported to the Refinery via tank car. The Refinery's existing facilities at the site of the proposed unloading racks and spurs would remain and the Refinery would continue to use marine vessels to import crude oil. The amount of California crude oil delivered to the Refinery by pipeline would remain unchanged. Air emissions (both criteria pollutants and greenhouse gases) from marine vessels that transport crude oil would remain unchanged, because there would be no reduction in marine vessel trips.

EXHIBIT B

Revised DEIR Project Description

VALERO BENICIA CRUDE BY RAIL PROJECT

Revised Draft Environmental Impact Report
SCH # 2013052074
Use Permit Application 12PLN-00063

Prepared for
City of Benicia

August 2015



3. Mitigate project-related impacts.
4. Implement the Project without changing existing Refinery process equipment or Refinery process operations, other than operation of the Project components.
5. Continue to meet requirements of existing rules and regulations pertaining to oil refining including the State of California Global Warming Solutions Act of 2006 (AB 32).

2.1.3 DEIR ES-3, Project Setting and Location

The Refinery is located at 3400 East Second Street, an industrial area in the eastern portion of the City of Benicia, in Solano County. The Refinery lies in a general north-south orientation near and west of Interstate 680. The Refinery is located along the northern edge of the Suisun Bay below a low range of coastal hills. See Figure ES-1, *Regional Location*. To the west of East Second Street is open space, and the closest residential areas are approximately 3,000 feet to the south and west of the Refinery, and approximately 2,100 feet to the northwest. Refinery operations occupy approximately 330 acres of Valero's 880 acre property.

The Refinery dock is located on the Carquinez Strait between the Benicia-Martinez Bridge and the Port of Benicia wharf. The Refinery's marine terminal and pipeline to the Refinery provide access for receiving and shipping bulk cargoes (including crude) by marine vessel. The existing Union Pacific Railroad (UPRR) rail line provides rail access for the Refinery and for the Benicia Industrial Park, which is located east and north of the Refinery. See Figure ES-2, *Valero Refinery Boundary*. Presently, the Refinery uses tank cars to receive chemicals used in refining and to ship refined products from the Refinery.

The Project site is located in the northeastern portion of the Refinery property, between the eastern side of the lower tank farm and the fence adjacent to Sulphur Springs Creek. See Figure ES-3, *Site Plan*. Existing facilities within the Project site include siding track and a liquid spill containment area (including an associated containment berm).

2.1.4 DEIR ES-4, Project Description

Valero proposes to install, operate, and maintain new equipment, pipelines, and associated infrastructure as well as new and realigned segments of existing railroad track within the Refinery boundary to allow the Refinery to receive a portion of its crude oil feedstock deliveries by tank car. More specifically, the Project would allow Valero to accept up to 100 tank cars of crude oil a day in two 50-car trains. The trains would enter the Refinery on an existing rail spur that crosses Park Road. Crude oil unloaded from the tank cars would be pumped to an existing storage tank in the Refinery via a new crude offloading pipeline. The amount of crude oil delivered by railcar would offset the amount of crude oil delivered by marine vessels. See generally ERM, 2012, ERM, 2013, Valero, 2013a, and Valero, 2013b.

EXHIBIT C

California Attorney General's April 14, 2016, Letter to Benicia

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, 15TH FLOOR
SACRAMENTO, CA 95814

Telephone: (916) 445-5077
E-Mail: Scott.Lichtig@doj.ca.gov

April 14, 2016

Via U.S. and Electronic Mail

Amy Million
Community Development Department
City of Benicia
250 East L Street
Benicia, CA 94510

RE: **Valero Appeal of Planning Commission Denial of Use Permit for Valero Benicia
Crude-by-Rail Project**

Dear Ms. Million:

Attorney General Kamala D. Harris submits the following comments regarding Valero Refining Company's ("Valero") appeal of the Benicia Planning Commission's denial of a Use Permit for its Crude-by-Rail Project ("Project").¹ This Office previously submitted comments on the Project's draft Environmental Impact Report (EIR), urging the City to correct several deficiencies in its analysis of environmental impacts flowing from an increased demand in rail services to the Project facility, including public-safety risks specific to crude-by-rail operations.

In its appeal of the Planning Commission's decision to deny the Use Permit, Valero has asserted that the Interstate Commerce Commission Termination Act (ICCTA) prohibits the City from taking those same rail-related impacts and public-safety risks into account in determining whether to approve or deny the Project. We disagree. For the many reasons set forth below, ICCTA does not preempt or constrain the City's discretionary decision-making authority where, as here, the City is exercising that authority with respect to a project undertaken by an oil company that is not subject to the jurisdiction of the Surface Transportation Board (STB).

The Project proposes improvements to Valero's Benicia refinery that, if approved, will draw up to 100 tank-cars of crude oil per day, on interstate rail lines. With this and other projects like it, California is faced with a dramatic increase in the amount of fossil fuels transported by rail into the State for domestic processing and/or shipment abroad, including highly flammable crude oils from North Dakota and coal from Utah. As the Final EIR recognizes, these rail shipments will have significant and unavoidable impacts on California's

¹ The Attorney General submits these comments pursuant to her independent power and duty to protect the environment and natural resources of the State. See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 1415.

citizens and environment, including adverse impacts on air quality and the potential for an accident causing death or severe personal injury. Indeed, several crude-by-rail crashes have resulted in catastrophic consequences, including one derailment in downtown Lac-Mégantic, Canada, that killed 47 people.

As indicated in the Attorney General's previous letter, where, as here, a local agency is vested with discretionary authority to determine whether to approve a project within its jurisdiction,² California law requires the agency to analyze and disclose the full scope of the project's foreseeable environmental impacts. This requirement ensures that the agency is fully informed of the consequences of its action, and thus that any discretionary action is ultimately in the public interest. This legal duty is not circumscribed by ICCTA for this Project. In fact, for Benicia to turn a blind eye to the most serious of the Project's environmental impacts, merely because they flow from federally-regulated rail operations, would be contrary to both state and federal law.

Background

This Office submitted comments on the Draft EIR in 2014, in which we asserted, among other things, that the City had failed to properly analyze the Project's foreseeable impacts on public safety and the environment, including impacts both related and unrelated to rail transportation. The City subsequently revised the Draft EIR, correcting many of the noted deficiencies in its analysis of rail-related impacts.³ Pursuant to this revised analysis, the City found eleven significant and unavoidable impacts caused by the transport of crude oil to the refinery, including significant and unavoidable impacts to air quality, biological resources, and greenhouse gas emissions. The City also analyzed the risks to public health and safety presented by the transport of hazardous materials and found that they, too, presented a significant and unavoidable impact.

Due to these impacts, City Staff has concluded that the Project's benefits do not outweigh its significant and unavoidable environmental impacts. Nonetheless, City Staff also argues that federal preemption prohibits Benicia from considering the Project's rail-related impacts in determining whether to approve the Project. Specifically, City Staff has asserted that Benicia is "legally prohibited" from denying the Project based on the rail-related impacts disclosed in the Revised Draft EIR. Valero agrees with City Staff, asserting, "the City Council's hands are, in effect, tied by the law of federal preemption."

We disagree that the City is prohibited from considering the Project's eleven significant and unavoidable rail-related environmental impacts when exercising its local land use authority. Where, as here, an oil company proposes a project that is not subject to STB regulation and over

² Neither the City nor Valero assert that the Project is not subject to the City's discretionary permitting authority.

³ To the extent that the Final EIR has not addressed the deficiencies outlined in this Office's previous comment letter, we reiterate the objections to the adequacy of the City's analysis.

which a public agency retains discretionary permitting authority, it would be a prejudicial abuse of discretion for that agency not to consider all of the project's foreseeable impacts in exercising its authority.

Discussion

While ICCTA may preempt certain local permitting authority over activities constituting "transportation by rail carrier," ICCTA does not preempt the City's permitting authority over this Project: an oil company's proposal to construct a new service road, 4,000 feet of pipeline, tank-car unloading racks, and new private rail tracks at the refinery, and to replace and relocate tank farm and underground infrastructure.

CEQA Background and Statutory Overview

The purpose of CEQA (Pub. Res. Code, § 21000 et seq.) is to ensure that, when a public entity takes a discretionary action such as approval of Valero's Use Permit, it considers the foreseeable environmental impacts before taking that action. (§§ 21000, 21001, subd. (d); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) Accordingly, a public agency with discretionary authority to approve a project must publicly disclose the project's potentially significant direct and indirect environmental impacts, and – if feasible – impose measures to mitigate or lessen those impacts.⁴ (§§ 21002, 21002.1.) This process yields a final assessment of the project's environmental impacts, and on the basis of that information, and all other available information regarding the costs and benefits of the project, the agency exercises its discretionary authority to issue a decision. A failure to include all of a project's potential environmental impacts in the CEQA analysis, or to disregard that information in making a decision like the one regarding Valero's Use Permit, not only would defeat the purpose of CEQA, but would be an abuse of discretion. (See *Kings Cnty. Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, *reh'g denied and opinion modified* (July 20, 1990) ["A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."]; *Assoc. of Irrigated Residents v. Cnty. of Madera* (2003) 107 Cal.App.4th 1383, 1391.) Importantly, CEQA does not dictate a particular project outcome: A lead agency may approve a project, even if that project will have significant environmental impacts. (Pub. Res. Code, § 21002.1(c); Guidelines, §§ 15043 and 15093.)

Scope of Preemption Under ICCTA

Because the Project applicant Valero is not a rail carrier and not acting pursuant to STB authorization, ICCTA simply has no application to Valero and its proposed refinery upgrades. ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers," and therefore

⁴ The fact that the agency may lack authority to impose a particular mitigation measure, as where that authority is preempted, does not relieve the agency of the obligation to analyze and consider that impact when deciding whether to approve a project. (*Ctr. for Bio. Diversity v. S. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal.4th 310, 325.)

preempts state or local regulation only if the activity at issue is performed by a rail carrier. (See 49 U.S.C. § 10501(b)(1); *New York & Atlantic Railway Co. v. Surface Transportation Board* (2nd Cir. 2011) 635 F.3d 66, 72). But Valero is not a “rail carrier” constructing a project subject to STB’s exclusive jurisdiction; it is an oil company engaged in a project entirely removed from STB’s regulation. (See 49 U.S.C. § 10102(5); *Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, NJ*, FD No. 34192 (S.T.B. served Aug. 14, 2003) 2003 WL 21952136 at *4.) Federal preemption does not apply because Valero’s Project involves constructing ancillary refinery infrastructure over which Union Pacific, the actual rail carrier, will maintain no ownership or operational control and over which the STB has no jurisdiction. (*Sea-3, Inc.-Petition for Declaratory Order*, FD No. 34192 (S.T.B. served March 17, 2015) 2015 WL 1215490 at *4. [“The Board’s jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations.”])

The scope of ICCTA’s preemption is broad, but not unlimited: Preemption applies only to state or local laws that may reasonably be said to have the effect of ‘manag[ing]’ or govern[ing]’ rail transportation,” while allowing continued application of state laws that have “a more remote or incidental effect on rail transportation.” (*Fla. E. Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331.) Courts have interpreted the plain language of ICCTA’s preemption provision to categorically preempt a state or local law if that law operates either (1) to deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, or (2) to regulate matters directly regulated by the STB, including the construction, operation, and abandonment of rail lines. (*People v. Burlington N. Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1528.) State actions that do not fall into one of these categories may be preempted as applied only when they would have the effect of preventing or unreasonably interfering with railroad transportation. (*Ibid.*)

Both Valero and City Staff incorrectly argue that the City’s denial of Valero’s Use Permit will somehow impermissibly interfere with Union Pacific’s rail operations. However, applying ICCTA’s preemption analysis, the City’s denial of Valero’s Use Permit is not categorically preempted, because it would neither (1) deny Union Pacific the ability to conduct its operations or proceed with activities the STB has authorized; nor (2) regulate matters directly regulated by the STB. The City’s action with respect to Valero’s Project does not “regulate” Union Pacific or interfere with STB-authorized activities or STB-regulated operations.

Nor is the City’s action preempted “as applied” to Valero’s Project, because it does not have the impermissible “effect of preventing or unreasonably interfering with” Union Pacific’s railroad operations. (*Burlington, supra*, 209 Cal.App.4th at p. 1528.) While the City’s denial of Valero’s Use Permit may diminish any prospective economic advantage Union Pacific may have enjoyed if Valero’s Project were constructed, this is, at best, “a more remote or incidental effect on rail transportation.” (*Fla. E. Coast Ry. Co., supra*, 266 F.3d at p. 1331 see also *Cal. Div. of Labor Stnds. Enforcement v. Dillingham Constr. N.A.* (1997) 519 U.S. 316, 334 [no preemption where statute “alters the incentives, but does not dictate the choices” of the federally regulated entity].) Union Pacific has no vested right in the completion of Valero’s Project, and denial of

Amy E. Million
April 14, 2016
Page 5

Valero's Project would not prevent or unreasonably interfere with Union Pacific's rail operations.

Conclusion

Under federal law, the City retains its authority to take discretionary action to approve or deny Valero's Project. In exercising that authority, state law requires the City to analyze and disclose the Project's direct and indirect environmental impacts, and thus to be fully informed of the consequences of its action. The City has done that here, and its action has not interfered with federally regulated activities. Valero's assertion that the Planning Commission's action was illegal is without merit.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Stt Lichtig", written over a horizontal line.

SCOTT J. LICHTIG
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am employed by Churchwell White LLP and my business address is 1414 K Street, 3rd Floor, Sacramento, CA 95814. On this day I caused to be served the following document(s):

**THE CITY OF BENICIA'S REPLY TO
VALERO'S PETITION FOR DECLARATORY ORDER**

By United States Mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses set forth below and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepared.

Justin J. Marks
Kevin M. Sheys
John J. Flynn III
Benjamin Z. Rubin
Nossaman LLP
1666 K Street, NW, Suite 500
Washington, DC 20006
Telephone: 202.887.1400

On Behalf of Valero Refining Company-
California

Elizabeth Bourbon
Rita Diane Sinclair
Valero Companies
One Valero Way
San Antonio, TX 78249

Raymond Atkins
1501 K Street, NW
Washington, DC 20005
Telephone: 202.736.8417

On Behalf of Union Pacific Railroad
Company

Theodore Kalcik
Canadian National Railway Company
601 Pennsylvania Ave., NW, Ste. 500, North
Bldg.
Washington, DC 20004
Telephone: 202.347.7840

On Behalf of Canadian National Railway
Company

Rachel Koss
Adams Broadwell Joseph & Cardoza
601 Gateway Blvd., Ste 1000
South San Francisco, CA 94080
Telephone: 650.589.1660
Facsimile: 650.589.5062
Rkoss@adamsbroadwell.com

On Behalf of Safe Fuel and Energy Resources
California

James McDonald
247 Pebble Beach Loop
Pittsburg, CA 94565
Telephone: 925.222.7814
Jbmd56@pyahoo.com

On Behalf of James Brian McDonald

Jaclyn Prange
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
Telephone: 415.795.6100
Facsimile: 415.795.4790

On Behalf of Benicians for a Safe and Healthy
Community; Center for Biological Diversity;
Communities for a Better Environment;
Natural Resources Defense Council; San
Francisco Baykeeper; Sierra Club; and
STAND

Peter J. Shudtz
Csx Corporation
1331 Pennsylvania Ave., NW, Ste. 560
Washington, DC 20004
Telephone: 202.783.8124

On Behalf of Csx Transportation, Inc.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 7, 2016 at Sacramento, California.


CHRISTINA M. PRITCHARD