

BEFORE THE
SURFACE TRANSPORTATION BOARD

241071

FINANCE DOCKET NO. 36036

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REPLY BY SAFE FUEL AND ENERGY RESOURCES CALIFORNIA TO
PETITION FOR DECLARATORY ORDER

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INTRODUCTION

Valero Refining Company seeks an order from the Surface Transportation Board (“Board”) that the City of Benicia Planning Commission’s (“City”) denial of its application for a use permit and certification of the environmental impact report (“EIR”) prepared pursuant to California law¹ for its refinery expansion (Project) is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”).² Part of the Project is a Public Record.

Safe Fuel and Energy Resources California (“SAFER California”) actively participated in the City’s proceedings for the Project and submits this reply to Valero’s Petition for Declaratory Order (“Petition”).

Valero argues that the Board should declare that the ICCTA prohibits the City from even *considering* the refinery expansion’s rail-related impacts when determining whether to approve or deny the use permit. Valero is wrong.

First, Valero is not a rail carrier. Therefore, the Board has no jurisdiction in this case. Second, even if the Board had jurisdiction over a non-rail carrier, the City relied on numerous findings *unrelated* to rail impacts when it denied the use permit and certification of the EIR. Thus, any decision by the Board would be moot as to whether the City can deny the use permit and EIR. Finally, Valero’s argument is nonsensical; it would mean that a local government cannot exercise its regulatory authority over a non-rail carrier facility that receives goods by rail, even if its regulatory action would not interfere with transportation by rail carriers. This overreach and sweeping effect is contrary to the decisions of courts and the Board,

¹ California Environmental Quality Act (“CEQA”), Cal. Pub. Resources Code, §§ 21000 et seq.

² 49 U.S.C. §§ 10101-16106.

impedes the application of state law and impedes local government's exercise of traditional police powers to protect the health and safety of their citizenry. Thus, the Board should deny Valero's Petition.

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BACKGROUND

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In 2012, Valero submitted a use permit application to the City to expand its refinery. The Project includes constructing a new service road, 4,000 feet of pipeline, a tank car unloading rack and new private rail tracks at the refinery, and replacing and relocating a tank farm and underground infrastructure at the refinery.³ The refinery expansion would then allow Valero to import, via Union Pacific Railroad ("UPRR"), up to 100 tank cars of crude oil per day.

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The EIR prepared for the refinery expansion recognizes that the effects of the refinery expansion, the new shipments of crude oil by rail, would cause 11 significant and unavoidable environmental and public health and safety impacts. These include increased air pollution, increased greenhouse gas emissions, damage to biological resources, and impacts from transporting hazardous materials, including the potential for accidents resulting in severe injury and death. The City concluded that the refinery expansion's benefits do not outweigh these significant and unavoidable impacts. Nevertheless, Valero argued (and City staff agreed) that the ICCTA prohibited the City from considering these impacts in determining whether to approve or deny the application for a use permit.

The City Planning Commission disagreed with Valero and City staff. On February 11, 2016, the Planning Commission unanimously denied the use permit

³ It is undisputed that the City has permitting authority over the Project.

and certification of the EIR based on the refinery expansion's inconsistencies with the City's General Plan, numerous flaws in the EIR's analyses and numerous undisclosed significant, unmitigated impacts from both non-rail refinery operation impacts and rail operation impacts. That is, the City Planning Commission denied the Project for reasons related to rail transportation and reasons unrelated to rail transportation.

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On February 29, 2016, Valero appealed the Planning Commission's decision to the City Council. Valero's appeal largely relies on its argument that the City cannot consider rail operation impacts, despite the City having numerous separate non-rail grounds on which it denied the use permit and certification of the EIR. On April 19, 2016, Valero requested that the City Council continue its appeal hearing so that Valero could seek a declaratory order from the Board. The City Council granted Valero's request until September 20, 2016. On May 31, 2016, Valero filed its Petition with the Board seeking an order that the City cannot consider rail-related impacts when it denies the use permit and certification of the EIR.

ARGUMENT

I. The Board Should Not Institute a Proceeding and Should Dismiss Valero's Petition Because Valero is Not a Rail Carrier

The Board may issue a declaratory order to eliminate controversy or remove uncertainty related to its subject matter jurisdiction. 5 U.S.C. § 554(e); 49 U.S.C. § 721. Where the law is clear, the Board may decline to institute a declaratory proceeding. *14500 Ltd.—Pet. for Declaratory Order*, FD 35788, slip op. at 2 (STB served June 5, 2014). Here, it is clear that the Board has no jurisdiction because

Valero is not a rail carrier. Therefore, the Board should decline to institute a proceeding and should dismiss Valero’s petition.

The ICCTA gives the Board exclusive jurisdiction over “transportation by rail carrier.” 49 U.S.C. § 10501(b). Thus, “to be subject to the Board’s jurisdiction and qualify for federal preemption..., the activities at issue must be ‘transportation **and must be performed by, or under the auspices of, a ‘rail carrier.’**” *SEA-3, Inc.—Petition for Declaratory Order*, FD No. 34192, slip op. at 5 (STB served March 17, 2015) (“*SEA-3*”) (emphasis added). Whether an activity is “transportation by rail carrier” “is a case-by-case, fact-specific determination.” *Id.*, citing *Diana Del Grosso—Pet. for Declaratory Order*, FD 35652, slip op. at 5 (STB served Dec. 5, 2014). The ICCTA defines “rail carrier” as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). 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.” *SEA-3* at 5.⁴

⁴ Citing *Town of Milford, Mass.—Pet. for Declaratory Order*, FD 34444, slip op. at 3-4 (STB served Aug. 12, 2004) (no Board jurisdiction over non-carrier operating a rail yard where it transloaded steel pursuant to an agreement with the rail carrier, but the transloading services were not being offered as part of common carrier services offered to the public), *High Tech Trans, LLC—Pet. for Declaratory Order—Newark, N.J.*, FD 34192, slip op. at 7 (STB served Aug. 14, 2003) (no Board jurisdiction over truck-to-truck transloading prior to commodities being delivered by rail), and *Town of Babylon & Pinelawn Cemetery—Pet. for Declaratory Order*, FD 350257, slip op. at 5 (STB served Feb. 1, 2008) (no Board jurisdiction over activities of a non-carrier transloader offering its own services directly to customers); **compare to** *Green Mountain R.R. v. Vermont* (2d 2005) 404 F.3d 638, 642 (transloading and temporary storage of materials by a rail carrier qualified for preemption); *Lone Star Steel Co. v. McGee* (5th Cir. 1967) 380 F.2d 640, 647 and *Ass’n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co.* (1992) 8 I.C.C. 2d 280, 290-295 (an agent undertaking obligations of a common carrier (i.e., performing services as part of the total rail service contracted for by a

It is undisputed that Valero is not a rail carrier, Valero is not acting as an agent for UPRR, and UPRR cannot exert control over Valero's operations. Rather, Valero — not UPRR — is the refinery-expansion applicant and would build, own and control its refinery facilities.⁵

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The undisputed facts here show that Valero is not a rail carrier, and would not be performing transportation-related activities on behalf of UPRR (or any other rail carrier) at its refinery facilities. Thus, the Board has no jurisdiction over this matter, the Board should not open a declaratory proceeding and the Petition should be dismissed.

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II. A Board Order is Unnecessary Because the City Denied the Use Permit Based Partly on Non-Rail Impacts and Can Uphold the Denial Without Considering Rail-Related Impacts

Even if the Board had jurisdiction in this case, it need not consider Valero's Petition because the City also denied the use permit for reasons unrelated to any rail-related impacts. Thus, an order by the Board in this case would be moot as to whether the City can uphold its denial of the use permit in response to Valero's appeal.

member of the public) also holds itself out to the public as being a common carrier by rail, and is therefore subject to federal regulation).

⁵ See, e.g. **Exhibit A**: Letter from Raymond Atkins to Cynthia Brown re: STB Finance Docket No. 36036, June 17, 2016, p. 3 (“The project is being conducted under the auspices of Valero and not Union Pacific...”); see also **Exhibit B**: Valero Benicia Crude by Rail Project Revised Draft Environmental Impact Report, August 2015, p. 2-3 (“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”), p. 2-5, Figure ES-2 (the Project would be constructed entirely within Valero's refinery boundary), p. 2-8 (Valero would own or lease the tank cars), p. 2-21 (UPRR would deliver tank cars to the refinery property and then “UPRR would turn over operation of the trains to Valero for offloading”); see also **Exhibit C**: Valero Crude by Rail Project Final Environmental Impact Report, January 2016, p. 2.5-31 (“1) Valero would own and operate the unloading facilities, 2) in constructing and operating the facilities, Valero would not be acting as an agent of UPRR, and 3) UPRR would not control the operation of the unloading facilities”).

The City Planning Commission adopted Resolution No. 16-1 (PC) containing 15 findings for denying certification of the EIR and the use permit for the refinery expansion.⁶ The Resolution identifies numerous flaws in the EIR's analyses and numerous undisclosed significant, unmitigated impacts from both non-rail refinery operation impacts and rail operation impacts. The Resolution also finds that the location of the refinery expansion would be inconsistent with the City's General Plan.

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Notably, 13 of the City's 15 findings are either unrelated to rail operation, or are related to both non-rail and rail operations.⁷ Valero mischaracterizes these findings when it states that "the EIR/Permit Denials were based *substantially* on findings with respect to rail transportation impacts and the absence of rail transportation mitigation." Petition at 2, 14 (emphasis added). In fact, if the couple of findings, and parts of findings, that are related to rail transportation were removed from the Resolution, the City would still have 13 findings unrelated to rail operation to deny the use permit. Thus, this Board process is moot as to whether the City can uphold its denial of the use permit.

For example, Benicia Municipal Code section 17.104.060 prohibits the City from issuing a use permit if a project would be "detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of use" or "detrimental to properties or improvements in the vicinity or to the

⁶ **Exhibit D:** Planning Commission Resolution No. 16-1 (PC).

⁷ See **Exhibit D:** Findings 1, 3, 4, 5, 7, 8, 9, 10 and 14 are unrelated to rail impacts. Findings 6, 12, 13 and General Plan Finding 1 are related to both rail and non-rail operations. Indeed, Findings 2 and 11 are the only findings wholly related to rail impacts and mitigation.

general welfare of the city.” In this case, the City found that the Project conflicts with the City’s General Plan because:

the proposed location of the conditional use and the proposed conditions under which it would be operated or maintained ... would be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of the use, or to the general welfare of the city, *as well as uprail communities*.⁸

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Even if the last italicized clause of the finding – the only part related to the refinery operation – was removed, the City still has a valid basis to uphold its denial of the refinery expansion.

Further, CEQA requires a local agency with discretionary authority to approve a project within its jurisdiction to consider the full scope of the project’s foreseeable direct and indirect environmental impacts. Cal. Pub. Resources Code §§ 21000, 21001(d); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393. This requirement ensures that the agency is fully informed of the consequences of its action. Disregarding some of a project’s environmental impacts when determining whether to approve a project defeats the purpose of CEQA and constitutes an abuse of discretion. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712; *Assoc. of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391.

Accordingly, the City found, for example, that “[t]he EIR does not express the independent judgment of the City as required by CEQA”⁹ and “[t]he EIR does not

⁸ *Id.*, General Plan Finding 1 (emphasis added).

⁹ *Id.*, Finding 1.

evaluate a sufficient number of project alternatives that are feasible.”¹⁰ Also, “[t]he project is located in the 100-year floodplain, which would increase the hazards related to an accidental spill on the property.”¹¹ In addition, “[t]he project could potentially have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait. The City also found that the EIR’s air quality and greenhouse gas emissions analyses to be “insufficient.”¹³ Finally, for example, the City found that:

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[t]he EIR does not disclose all information necessary for complete evaluation of the air quality impacts of the project including the makeup of the crude oil associated with this project, which is based on an overly-broad interpretation of what constitutes trade secrets.¹⁴

Each and every one of these findings, among others, can be made independently from rail-related impacts and provides a basis for the City to uphold its denial of the use permit and EIR.

During Valero’s City Council appeal process, the City obtained further evidence of numerous significant, unmitigated impacts wholly unrelated to rail operations that are clearly outside the bounds of the ICCTA. This additional evidence provides further support for the City’s denial of the use permit and EIR. For example, the refinery expansion would cause significant, unmitigated air pollution and public health impacts from operational emissions at Valero’s

¹⁰ *Id.*, Finding 10.

¹¹ *Id.*, Finding 5.

¹² *Id.*, Finding 8.

¹³ *Id.*, Finding 9.

¹⁴ *Id.*, Finding 14.

unloading rack and the refinery's crude storage tanks.¹⁵ Also, for example, the refinery expansion would cause significant, unmitigated public health and safety impacts from the unloading and storage of highly volatile, hazardous crude oil.²⁴¹¹⁰⁷¹

Thus, even if the Board had jurisdiction in this case (which it does not), there is no need to consider Valero's Petition because the Project's significant, unmitigated non-rail-related impacts alone provide sufficient grounds for the City to uphold its denial of the use permit and EIR.

Notably, denial based on non-rail-related impacts would have the same effect on rail transportation as denial based on rail-related impacts. Either way, if Valero does not receive a use permit for its refinery expansion, UPRR can continue its existing operations as usual and Valero can continue to receive rail service from UPRR as usual. Thus, Valero's argument that the City can only consider non-rail-related impacts when denying the Project, because considering rail-related impacts would indirectly regulate rail operations, is nonsensical and a red herring.

III. The ICCTA Does Not Preempt the City's Consideration of Rail-Related Impacts When Denying the Project

Even if the refinery expansion would only result in significant, unmitigated impacts from rail operations, the City can still deny Valero's use permit and certification of the EIR. Valero argues that,

the EIR/Permit Denials are preempted by the ICCTA because the Planning Commission is indirectly regulating rail transportation, denying Valero the

¹⁵ See **Exhibit E**: Letter from Rachael Koss to Benicia City Council re: Valero Crude by Rail Project, April 19, 2016, Attachment A (Comments of Dr. Phyllis Fox).

¹⁶ See **Exhibit F**: Letter from Rachael Koss to Benicia City Council re: Valero Crude by Rail Project, April 18, 2016, Attachment A (Comments of Dr. Phyllis Fox).

right to receive rail common carrier service and preventing UPRR from providing such service and unreasonably burdening interstate commerce.

Petition at 2-3. Valero is wrong. There is nothing in the ICCTA that prohibits the City from *considering* rail-related impacts when determining whether to approve or deny the refinery expansion.¹⁷ Rather, the City can and must consider the Project’s reasonably foreseeable direct and indirect impacts in reaching its decision.¹⁸

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A. *Considering Rail-Related Impacts Would Not Manage, Govern, Prevent, Interfere With, Burden or Discriminate Against UPRR’s Operations*

Preemption under the ICCTA applies only to state or local laws of general application that have the effect of managing or governing rail transportation. Laws that have “a more remote or incidental effect on rail transportation” are not preempted. *Florida East Coast Railway Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331. Courts have held that the ICCTA categorically preempts a state or local law that denies a railroad the ability to conduct its operations or proceed with activities the Board has authorized, or regulates matters directly regulated by the Board. *People v. Burlington N. Santa Fe Railroad* (2012)

¹⁷ In contrast to the ICCTA, some federal laws expressly prohibit state or local governments from considering issues in fields heavily regulated by the federal government. For example, the Telecommunications Act prohibits consideration of the environmental effects of radio waves when regulating wireless facilities. 47 U.S.C. § 332(c)(7)(B)(iv) (“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”).

¹⁸ The CEQA Guidelines require that “[a]ll phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.” 14 Cal. Code Regs. § 15126. Further, “[d]irect and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects.” *Id.* § 152126.2. “Indirect or secondary effects” are those “which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 15358(a)(2).

209 Cal.App.4th 1513, 1528. State or local actions that fall outside of these categories may be preempted “as applied” only if they would have the effect of preventing or unreasonably interfering with rail transportation. *Id.* Importantly, a preemption analysis concerns the *effect* of local regulation on rail transportation, not the intent of local government.¹⁹

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In a preemption analysis, courts begin with the presumption that actions taken by a local government pursuant to its police powers to protect the health and safety of its citizenry are not superseded by federal law unless that is Congress’ clear purpose. *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230; *Oxygenated Fuels Assn. v. Davis* (9th Cir. 2003) 331 F.3d 665, 673; *Florida East Coast Railway Co.*, 266 F.3d at 1327-29. “[B]ecause ‘everything is related to everything else,’...understanding the nuances of congressional intent is particularly important” for preemption analysis. *Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 643, quoting *California Division of Labor Standards Enforcement v. Dillingham Const. N.A., Inc.* (1997) 519 U.S. 316, 335. The ICCTA’s legislative history shows that Congress intended that the “States retain the police powers reserved by the Constitution.” H.R. Rep. No. 104-311, p. 96, reprinted in 1995 U.S.C.C.A.N. 793, 808. Accordingly, courts have found that the ICCTA allows the exercise of local police power to protect health and safety if it does not unreasonably burden or

¹⁹ See *Florida East Coast Railway, Co.*, 266 F.3d at 1339, fn. 12 (“That the City hoped FEC would move its railroad operations elsewhere is not relevant to our analysis; in evaluating whether the local regulation is pre-empted by the federal law, we focus on the federal statute (including its mandate and purposes) and determine the extent to which the actual effects of the local regulation interfere with the intended functioning of the federal law.”) (citing *Teper v. Miller* (11th Cir. 1996) 82 F.3d 989, 995 (“[I]t is the *effect* of the state law that matters in determining preemption, not its intent or purpose.” (emphasis in original))).

discriminate against rail operations. *Florida East Coast Railway Co.*, 266 F.3d at 1327-29; *Association of American Railroads v. South Coast Air Quality Management District* (9th Cir. 2010) 622 F.3d 1094, 1097. 241071

The City's consideration of rail-related impacts prior to denying Valero's application for a use permit is not preempted by the ICCTA categorically or as applied." Valero, a non-rail carrier, seeks a permit for a refinery expansion intended solely to benefit Valero's business and refinery operations, and which is entirely removed from the Board's jurisdiction. The Project is not part of UPRR's operations, UPRR is not the applicant for Valero's refinery expansion and UPRR will not own or control the refinery.

Denying Valero's application for a use permit (based on either rail-related or non-rail impacts) does not prevent, unreasonably interfere with, unreasonably burden or discriminate against UPRR's operations. UPRR can continue to conduct its operations and Board-authorized activities as usual on its existing rail line that provides access to Valero's refinery and the adjacent industrial park.²⁰ Valero can also continue using "tank cars to receive chemicals used in refining and to ship refined products from the Refinery."²¹ Indeed, denying the use permit would "have no effect on the Refinery's existing ability to process crude oil received via other existing, approved mechanisms such as by marine vessel or pipeline."²² The ICCTA does not entitle UPRR to obtain new business from Valero (and the ICCTA does not entitle Valero to expand its refinery).

²⁰ **Exhibit B**, p. 2-3.

²¹ *Id.*

²² *Id.*, p. 2-8.

Nothing in the ICCTA prohibits the City from exercising its land use authority in this case. The City's use permit and CEQA review processes do not regulate rail transportation either directly or indirectly. The City's laws do not target rail carriers or rail transportation. The City's laws do not burden operations in any way. Rather, they are generally applicable laws directed at protecting public health and safety and the environment from proposed land uses. Thus, the ICCTA does not preempt the City from considering *all* of the refinery expansion's impacts prior to denying a use permit for the refinery expansion.

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Moreover, since the Board has no authority to regulate Valero's refinery expansion, the City must be able to regulate it. Otherwise, there would be zero oversight of Valero's refinery expansion. Congress certainly did not intend to create a gaping hole in regulatory authority when it enacted the ICCTA.

B. *The Board Has Already Rejected Valero's Argument in SEA-3*

In a remarkably similar case, the Board recently considered and rejected the exceedingly broad reach of the ICCTA suggested by Valero. *SEA-3* involved the expansion of a non-rail carrier facility (owned by SEA-3) to offload six additional rail cars of propane per day. The facility was located in the Town of Newington and was served by Pan Am, a rail carrier. The rail line traveled through the City of Portsmouth, among other cities, before reaching SEA-3's property. SEA-3 sought approval from the Newington Planning Board for its expansion.

Newington considered the expansion to be a "development of regional impact," meaning the expansion would impact neighboring communities for various

reasons, such as the project's effect on the transportation network, anticipated emissions and proximity to aquifers or surface water.²³ During Newington's administrative review process, Portsmouth requested that a safety/hazard study be conducted for the project, but the Newington Planning Board granted SEA-3's application without requiring a study. Portsmouth appealed²⁴ on the grounds that the Planning Board failed to comply with the Newington zoning ordinance and site plan review regulations, which require an assessment of the project's environmental impacts and whether the project promotes the health, safety and welfare of its residents and other affected communities.

SEA-3 sought a declaratory order from the Surface Transportation Board that Portsmouth's claims, "including any claims that are derived from, or depend on, allegations that Portsmouth would be adversely affected as a result of increased rail transportation, are preempted." *SEA-3* at 3. SEA-3 argued that "any attempts by localities or states to direct rail traffic or impose preclearance requirements on transload facilities are federally preempted..." *Id.* at 2. Pan Am weighed in, arguing that Portsmouth was "attempting to regulate rail transportation..." *Id.* at 3. The Board disagreed with SEA-3 and Pan Am. The Board stated that Portsmouth's appeals were not preempted by the ICCTA because the appeals did not involve local regulation of transloading ***performed by a rail carrier or under the auspices of a rail carrier***, nor did they regulate ***Pan Am's*** operations. *Id.* at 6. Rather, according to the Board, "it appears that the only regulatory action at

²³ See N.H.R.S.A. § 36: 54-58.

²⁴ Portsmouth appealed to both the Zoning Board and the New Hampshire Superior Court.

issue in this case is a local government's participation in zoning litigation over the expansion of a non-carrier facility. Without more, the situation does not reflect undue interference with 'transportation by rail carriers.'" *Id.* at 6-7. 241071

SEA-3 is on point here. Like *SEA-3*, Valero is not a rail carrier. Like *SEA-3*, Valero applied for a local use permit to expand its private, non-rail carrier facility. Like *SEA-3*, Valero's facility is served by a rail carrier. Like *SEA-3*, the rail line that serves the facility travels through a number of cities and towns before reaching Valero's property. Like *SEA-3*, Valero's refinery expansion would impact neighboring communities for a variety of reasons. Like *SEA-3*, Valero's expansion requires consideration of environmental and public health and safety impacts. Like *SEA-3*, Valero argues that such consideration is an attempt to regulate rail transportation and is, therefore, federally preempted. Like Portsmouth's zoning appeals, Valero's appeal of the City's local land use and CEQA determinations do not involve local regulation of unloading *performed by a rail carrier or under the auspices of a rail carrier*. Like Portsmouth's zoning appeals, the City's local land use and CEQA determinations do not regulate *UPRR's* operations. Therefore, like the Board determined in *SEA-3*, the City of Benicia's decision to deny the use permit and certification of an EIR are not federally preempted.

Valero attempts to distinguish *SEA-3* from the facts here. In the last paragraph of the *SEA-3* decision, the Board stated that "[i]f Portsmouth or any other state or local entity were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with Pan Am's common carrier

operations, those actions would be preempted...” *SEA-3* at 7. Valero hangs its hat on this statement, arguing that, unlike Portsmouth’s zoning appeals, the City’s denial here “interfere[s] unduly with rail common carrier,” presumably UPRR’s,

“operations to the Benicia refinery.” Petition at 19. Yet, Valero fails to point to any facts showing that the City’s action took aim at UPRR’s operations or would prohibit UPRR from continuing to operate as usual. Indeed, there are no such facts.

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Just like *SEA-3*, Valero challenges an action that (1) relates to the application of non-discriminatory regulations to the expansion of a non-rail carrier facility, (2) for the protection of the environment and public health and safety, (3) that in no way prevents UPRR from operating as it does today.

C. Valero Relies on Inapposite Cases to Support its Argument

Valero relies on two cases to support its preemption argument: *Norfolk Southern Ry. Co. v. City of Alexandria* (4th Cir. 2010) 608 F.3d 150 (“*Alexandria*”) and *Boston and Main Corporation and Springfield Terminal Railroad Company—Petition for Declaratory Order*, FD 35749 (STB served July 19, 2013) (“*Winchester*”). The Board already distinguished these cases in *SEA-3*.

The *Alexandria* case involved local regulation of an ethanol transload facility constructed, owned and operated by Norfolk Southern Railway Company, **a rail carrier**. Because ethanol is highly flammable and volatile, and the facility was located near a school and residential neighborhoods, the City of Alexandria tried to **directly regulate the rail carrier** by issuing haul permits and amending a city ordinance to explicitly govern the transportation of bulk material. The permit

imposed several conditions, including limiting what could be hauled, specifying a haul route and restricting the days and times for hauling. *Alexandria*, 608 F.3d at 155, fn. 3. **Norfolk Southern** refused to abide by the permits and sought a declaratory judgment in district court that Alexandria was federally preempted from regulating the facility. The court agreed with Norfolk Southern, finding that the ordinance and permits were preempted by the ICCTA because they **regulated a rail carrier**.²⁵ *Id.* at 159-160.

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The *SEA-3* Board found that *Alexandria* was inapplicable to the facts there because *SEA-3* was not a rail carrier facility. *SEA-3* at 6. Likewise, here, Valero is not a rail carrier and its refinery unloading operations would not be carried out by, or under the auspices of, a rail carrier. Thus, *Alexandria* is inapplicable here and does not support Valero’s argument.

The *Winchester* case is also inapplicable here. *Winchester* involved a local regulation that would have stopped Pan Am, **a rail carrier**, from **continuing to operate** its trains over the rail line in question. The Winchester Zoning Board of Appeal filed a cease and desist order stopping all rail traffic going to a warehouse when nearby residents complained about the rail traffic noise. Pan Am petitioned for a declaratory order from the Board, asserting that the Zoning Board’s action was preempted by the ICCTA. The Board agreed, finding that the Zoning Board’s action **prevented a rail carrier from continuing to operate**. *Winchester* at 4.

²⁵ Notably, Alexandria petitioned the Surface Transportation Board for a declaration concerning Alexandria’s authority to regulate the facility. In its decision, the Board explained that “the Facility is part of [Norfolk Southern]’s rail operations” and, therefore, “the Facility qualifies for federal preemption.” *City of Alexandria, Virginia—Petition for Declaratory Order*, FD 35157 (STB Served Feb. 17, 2009).

The *SEA-3* Board found that *Winchester* was inapplicable to the facts there because Portsmouth was not attempting:

to regulate *Pan Am's* operations, as was the case in *Winchester*. Instead, Portsmouth's litigation challenging the Planning Board's decisions involves permitting of the expansion of *SEA-3's* facility, and as noted, it is undisputed that *SEA-3* is not a rail carrier...

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SEA-3 at 6. Likewise, here, the City's decision involves permitting of the expansion of *Valero's* facility (not UPRR's), and it is undisputed that *Valero* is not a rail carrier. Thus, *Winchester* is inapplicable here and does not support *Valero's* argument.

In sum, the City did not use its land use authority to regulate rail operations in any way. The City legitimately applied state and local laws, to protect the environment and public health and safety, to *Valero's* non-rail carrier, refinery facility expansion. The City took no action interfering with UPRR's operations. Further, whether the City denied the Project based on rail-related impacts, in addition to non-rail-related impacts, is irrelevant because the outcome is the same – UPRR can continue to operate as usual. Thus, the ICCTA does not preempt the City's denial of *Valero's* application for a use permit and certification of an EIR.

CONCLUSION AND REQUEST FOR RELIEF

The Board has no jurisdiction in this case because *Valero* is not a rail carrier. Even if the Board had jurisdiction here, the City relied on numerous findings unrelated to rail impacts when it denied the local use permit and certification of the EIR. Thus, any decision by the Board would be moot as to whether the City can deny the use permit and EIR. Finally, *Valero's* preemption argument is

unsupported by the decisions of the Board and courts. Thus, the Board should dismiss Valero's petition for declaratory order.

SAFER California respectfully requests that the STB:

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(1) Dismiss Valero's petition for declaratory order because Valero is not a rail carrier and, therefore, the Board has no jurisdiction here; or

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(2) Dismiss Valero's petition for declaratory order because the City relied

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on numerous findings unrelated to rail impacts when it denied the use permit and EIR. Thus, any decision by the Board would be moot as to whether the City can deny the Valero's application for a use permit to expand its refinery; or

(3) Issue an order that the City's action was not federally preempted because it did not involve regulation of activities performed by a rail carrier, nor did it regulate a railroad's ability to conduct its operations.

July 8, 2016

Respectfully submitted,



Rachael E. Koss
*Attorney for Safe Fuel and Energy
Resources California*

VERIFICATION

I, Rachael E. Koss, declare under penalty of perjury that the foregoing is true
and correct. Further, I certify that I am qualified and authorized to file this
pleading.

Executed: July 8, 2016

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Rachael E. Koss

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Request for Extension was filed electronically today with the Surface Transportation Board and served upon the

following:

By Email

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Dated: July 8, 2016

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Rita Chavez

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EXHIBIT A



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June 17, 2016

Ms. Cynthia T. Brown
 Chief, Section of Administration
 Office of Proceedings
 Surface Transportation Board
 395 E Street SW
 Washington, DC 20423

Re: STB Finance Docket No. 36036, Petition for Declaratory Order,
 Valero Refining Company - California

Dear Ms. Brown:

I write on behalf of Union Pacific Railroad Company ("Union Pacific") in support of the request of Valero Refining Company - California ("Valero") for the Board to institute a declaratory order proceeding in the above-captioned matter.

The Board is besieged with work. A surge in requests for declaratory orders coupled with new duties created by Congress is undoubtedly stressing the Board's resources. Where a request for a declaratory order asks the Board to apply established preemption standards to a new set of facts, the agency has recently begun deferring the questions to state or federal courts. Union Pacific well understands the Board's workload and does not lightly ask the agency to begin another declaratory order proceeding to explore another aspect of the scope of ICC Termination Act ("ICCTA") preemption.

But all stakeholders in the railroad industry need guidance from the STB on the scope of permissive *indirect* regulation of railroad operations. Union Pacific is not only concerned about the specific situation facing Valero, but the broader proliferation of state and local regulations, rules, conditions, permits, and approvals that impact rail transportation. States and localities frequently recognize that they cannot directly regulate railroads and rail operations, but with increasing frequency they attempt to control or even prohibit railroad operations through conditions imposed on rail customers seeking permits for their facilities. The problem is not community or commodity specific, and continues to expand across the country. The patchwork of state and local rules such an approach would create is unsustainable. Valero's petition should be embraced as an opportunity for the Board to take public comment on this important issue and provide needed guidance to all stakeholders.

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Union Pacific expects that when the Board begins a proceeding in this matter, it will establish a procedural schedule providing an opportunity for all interested parties to submit their arguments about the scope of ICCTA preemption. We therefore simply highlight the core issues presented to emphasize why the Board should begin a Public Record proceeding.

The facts of this controversy are not in dispute. As Valero explains in its petition, the company filed for a use permit application to install an off-loading rack and track at its Union Pacific-served oil refinery in Benicia California. The city of Benicia's professional staff authorized a complete Environmental Impact Report ("EIR"), but after careful review of preemption principles, its professional staff concluded that the city could not impose mitigation conditions on this project that would have the effect of regulating rail operations. As simply one example, opponents of the project were demanding conditions that would require Valero to accept crude-oil-by-rail only when hauled across the nation along tracks equipped with gas and vapor detection systems, by Tier 4 locomotives and transported in enhanced tank cars. That kind of local regulation is plainly preempted. The staff reasoned that the city could mitigate on-site environmental impacts by requiring Valero to install the off-loading rack and track within its plant, but not the off-site impacts generated by railroad operations. The city legal staff reasonably, and properly in our view, concluded that trying to use a local permitting process to regulate indirectly what the city cannot regulate directly was prohibited.

The Planning Commission disagreed and denied certification of the EIR on the basis of findings of adverse rail transportation impacts and the absence of mitigation of these impacts. Valero appealed the decision to the Benicia City Council and requested a decision be deferred to allow Valero time to seek declaratory relief from the Board. The Benicia City Council granted that request.

The Board is well aware of the broad nature of ICCTA's preemption provisions. See 49 U.S.C. § 10501(b). As the Board has explained, ICCTA was passed to "prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce." See *New England Transrail, LLC, d/b/a/ Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA*, STB Fin. Docket No. 34797, at 8 (S.T.B. served July 10, 2007) (citing H.R. Rep. No. 104-311, at 95-96 (1995), as reprinted in 1995 U.S.C.C.A.N. at 807-08). In addition to preempting direct regulation of railroads, ICCTA also preempts regulation of activities conducted under the auspices of railroads. See, e.g., *Joint Petition for Declaratory Order – Boston & Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971 (S.T.B. served Oct. 5, 2001).

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The project is being conducted under the auspices of Valero and not Union Pacific, but this does not end the inquiry. ICCTA does not merely preempt state and local regulations aimed *directly* at railroads. It also preempts *indirect* regulation that affects a railroad's ability to conduct common carrier transportation. See *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010); *Boston & Maine Corp. and Springfield Terminal R.R. Co. – Petition for Declaratory Order*, STB Fin. Docket No. 35749 (S.T.B. served July 19, 2013) (“*Winchester*”). Even in *Sea-3, Inc. – Petition for Declaratory Order*, STB Fin. Docket No. 35853, at 7 (S.T.B. served March 17, 2015), a case in which the Board found that preemption was not applicable, it explained that a state or local permitting process cannot interfere unduly with a railroad's common carrier operations merely because a non-carrier seeks the permit. It is the proliferation of this kind of indirect regulation that concerns Union Pacific.

Further guidance from the Board is needed because states and localities now seek to regulate railroad-related activities by targeting railroad customers. Indeed, in both Valero's Benicia situation and in many other analogous ones around the country, political leaders are frequently advised whether a certain action is or may be preempted. But without authoritative guidance from the STB, political leaders nonetheless override staff recommendations. That was the circumstance, for example, in *Winchester*, when special counsel advised the local Board of Selectmen that a proposed regulation would be preempted, but that advice was ignored. A similar scenario unfolded over an ethanol rail loading facility in West Sacramento. The history of these projects demonstrates that planning staff and counsel are usually aware of the limitations ICCTA places on indirect regulation of railroad operations by states and localities, but may need guidance from the Board to convince state and local political leaders to reach the same conclusion.

Accordingly, Union Pacific respectfully requests that the Board initiate the proceeding requested by Valero and set a procedural schedule for comments.

Sincerely,



Raymond A. Atkins

cc: Rachel Koss; Adams Broadwell Joseph & Cardozo
Jaclyn Prange; Natural Resources Defense Council
Kevin Sheys, Nossaman LL
Justin Marks, Nossaman LLP

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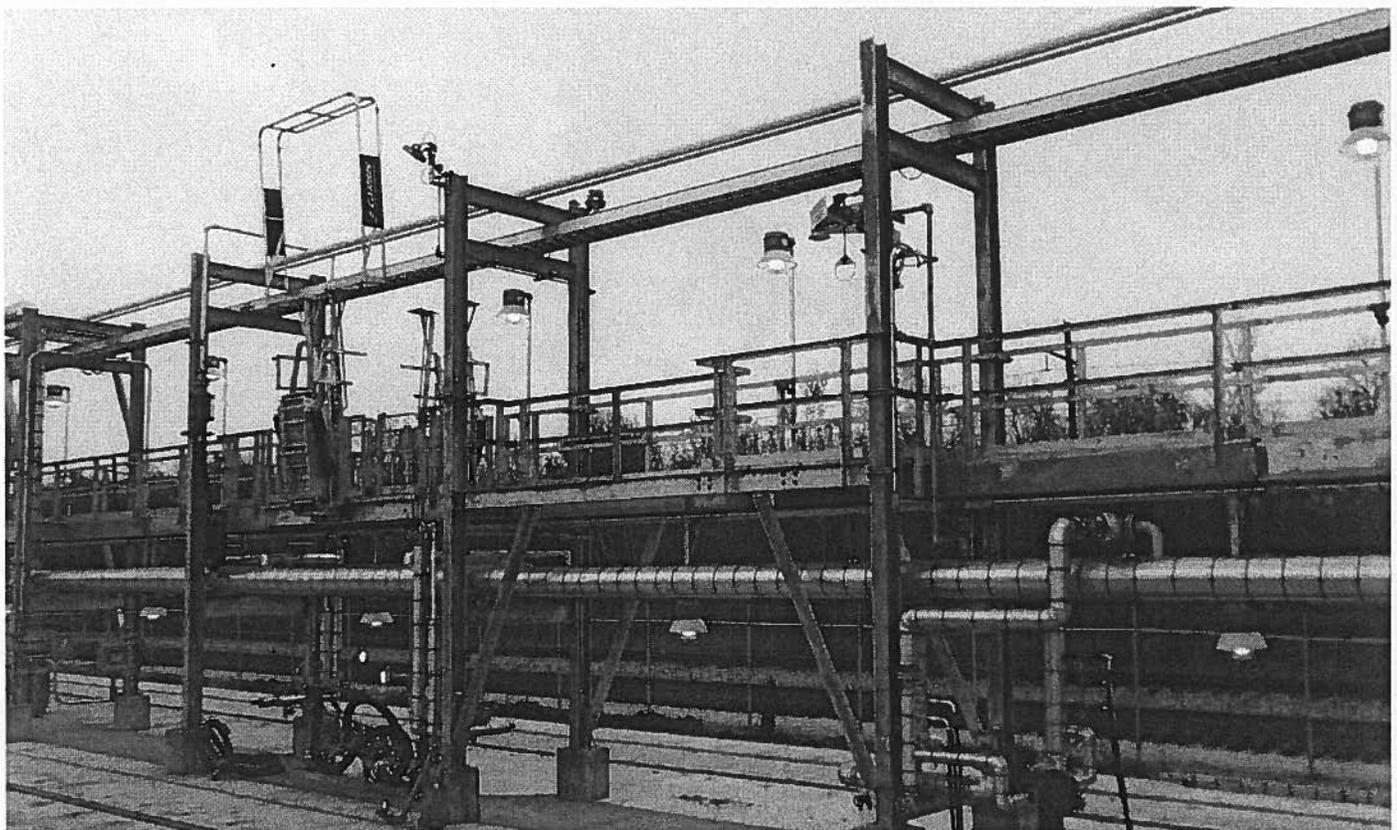
VALERO BENICIA CRUDE BY RAIL PROJECT

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

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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).

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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.

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).

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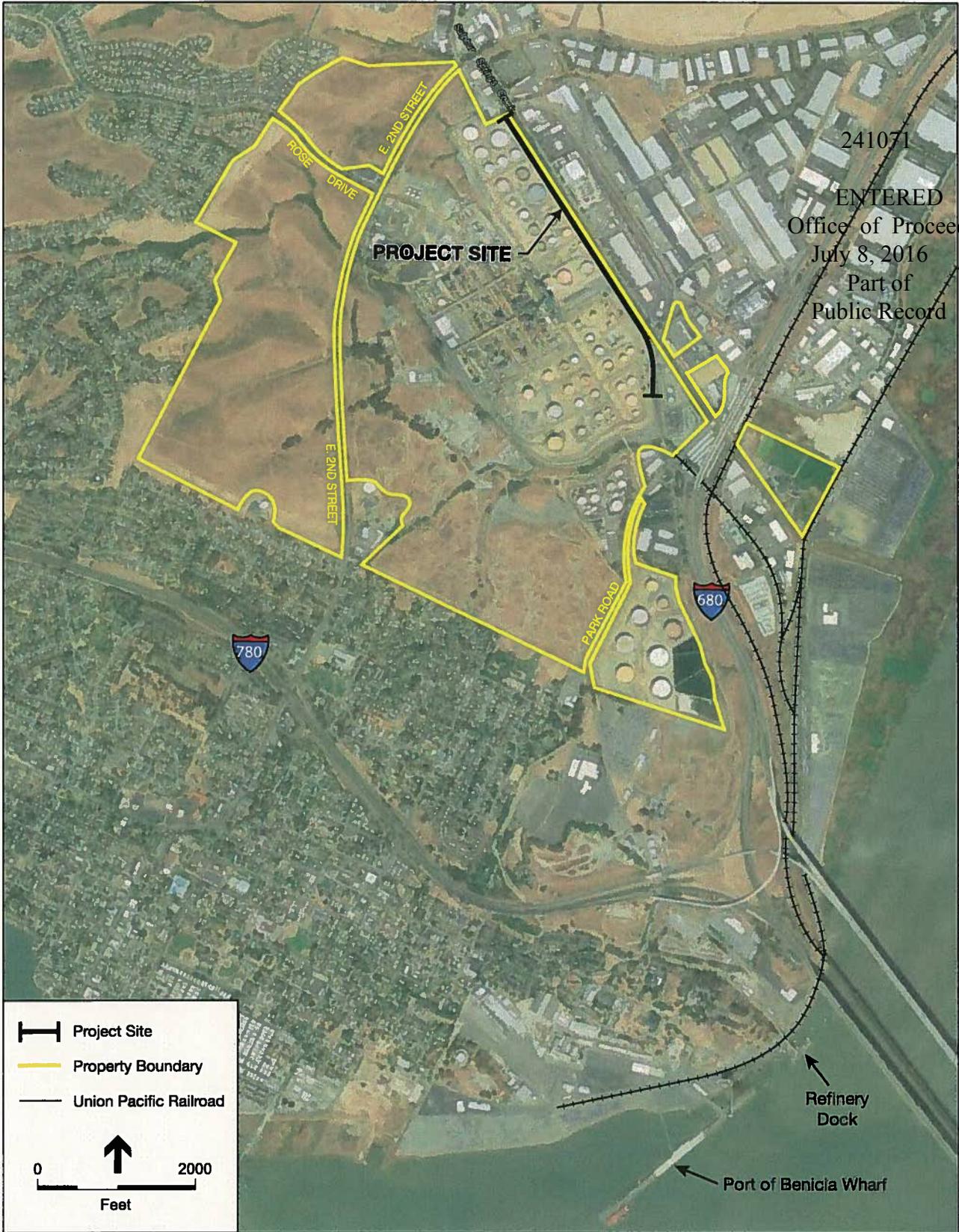
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SOURCE: Google Earth, ERM

Benicia Valero CBR . 202115.01

Figure ES-2
 Valero Refinery Boundary

using existing rail lines. Unit trains would consist of 50 or up to 100 tank cars (Valero, 2013c). 100-tank car trains would be transported with four locomotives and two buffer cars;³ 50-tank car trains would be transported with two locomotives and two buffer cars. Two 50-car trains would be dispatched from the Roseville Yard to the Refinery each day. UPRR would own and operate the 1071 locomotive engines. Valero would own or lease the tank cars. Valero proposes to use non-jacketed Casualty Prevention Circular (CPC)-1232-compliant tank cars. See DEIR Section 3.4.1.3, *Tank Cars*, for more information.

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2.1.5 DEIR ES-5, Alternatives

This EIR considers one No Project Alternative and three project alternatives. Each is summarized below.

2.1.5.1 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 and have no effect on the Refinery's existing ability to process crude oil received via other existing, approved mechanisms such as by marine vessel or pipeline. The Refinery's existing facilities at the site of the proposed unloading racks and spurs would remain. Air emissions (both criteria pollutants and greenhouse gases) from marine vessels that transport crude oil into the Bay Area Air Basin would remain unchanged, because there would be no reduction in marine vessel trips to the Refinery. Valero would not be able to achieve most of its Project objectives.

2.1.5.2 Alternative 1: Limiting Project to One 50-Car Train Delivery per Day

Under this alternative the Project would operate with a 50% reduction in the proposed number of train deliveries to the Refinery per day. Deliveries would be limited to a maximum of one⁴ 50-car train each day, containing a daily total of 35,000 barrels. This single train would be delivered during nighttime hours (between 8:00 p.m. and 5:00 a.m.) and once emptied, would depart the Refinery during nighttime hours and be returned to its origination point. All other aspects of this alternative would be the same as the Project. This alternative would not allow Valero to fully achieve the primary Project objectives 1 and 2, but would still fulfill Project objectives 3 through 5.

Any limitation on the volume of product shipped or the frequency, route, or configuration of such shipments is preempted under federal law. See Revised DEIR Appendix G. See also Valero's statement regarding preemption in Revised DEIR Appendix H. Thus, Alternative 1 is legally infeasible.

³ Railroads use "buffer" cars primarily to comply with U.S. Department of Transportation (USDOT) regulations regarding separation of occupied equipment (i.e., locomotives) from hazardous materials cars. Buffer cars provide no transportation function.

⁴ This means that one 50-car train would be delivered for unloading each day and after unloading the 50-car train would return to its origination point.

1716. Two pumps operating in parallel would pump the crude oil from the unloading rack header via a new 16-inch pipeline. The third pump will be installed as a spare pump. This will facilitate periodic maintenance on the primary pumps. Once emptied, the 50 tank cars would be disconnected from the rack, moved to an on-site departure spur, and then replaced by another 50-rail-car switch.

A typical tank car handling scenario is described below:

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1. Tank cars carrying crude oil destined for the Refinery arrive at ~~the UPRR's J.R. Davis Yard~~ ^{July 8, 2016} in Roseville, California (the "Roseville Yard") ~~railyard~~ ^{Part of} from a variety of potential North American crude sources including, but not limited to, locations in Texas, North Dakota, Oklahoma, New Mexico, or Canada (U.S. Energy Information Administration, 2015a, 2015b; see also, DEIR Appendix K). ^{Record}
2. UPRR-operated locomotives would move up to a 50 car unit train directly from the Roseville ~~Yard~~ railyard via UPRR mainlines to Benicia and then onto the Refinery unloading tracks on Refinery property, traveling at up to 50 miles per hour (mph) on the main line. When crossing Park Road at the Refinery property entrance, the trains would travel at approximately 5 mph.
3. Up to 25 tank cars would be positioned on the unloading tracks located on each side of the unloading rack. UPRR would leave its locomotives attached to each 25 tank car train.
4. UPRR would turn over operation of the trains to Valero for offloading.
5. A check valve would be installed onto each vent valve on the top of each tank car. The vent valve on the top of each tank car would be opened and the accompanying check valve would only allow fresh air into each tank car, and would prevent release of hydrocarbon fugitive emissions to the atmosphere. At each end car and on approximately every 8 tank cars in the 25 tank car string, a hose would be connected from the tank car's vent connection to a separate "equalization header." The equalization header would ensure the vapor spaces above the stored liquid crude in the tank cars is equalized between the tank cars. Individual drain hoses would be manually connected to the bottom of each tank car by on-site workers.
6. Valero would drain the contents of each tank car by gravity into a collection pipe (collection header) and then pump the contents directly into storage tankage located in the Refinery's crude oil storage tank field.
7. After the tank cars are emptied, the empty tank cars would be moved onto the departure spur on Refinery property adjacent to the unloading rack, where a train of up to 50 empty tank cars would be reassembled in preparation for transport off-site. Prior to departure, UPRR and Valero would conduct a safety inspection and ready the train for departure.
8. UPRR would transfer the empty 50 tank car train across Park Road and then east on the UPRR mainlines returning to ~~the UPRR's Roseville Yard~~ railyard. UPRR would assemble up to a 100 empty tank car train and transfer it to accept new loads from the North American crude source.

UPRR owns and maintains a network of rail lines throughout California and the United States for the transport of crude (see Figure 1-2, Union Pacific Crude Network). This network includes the

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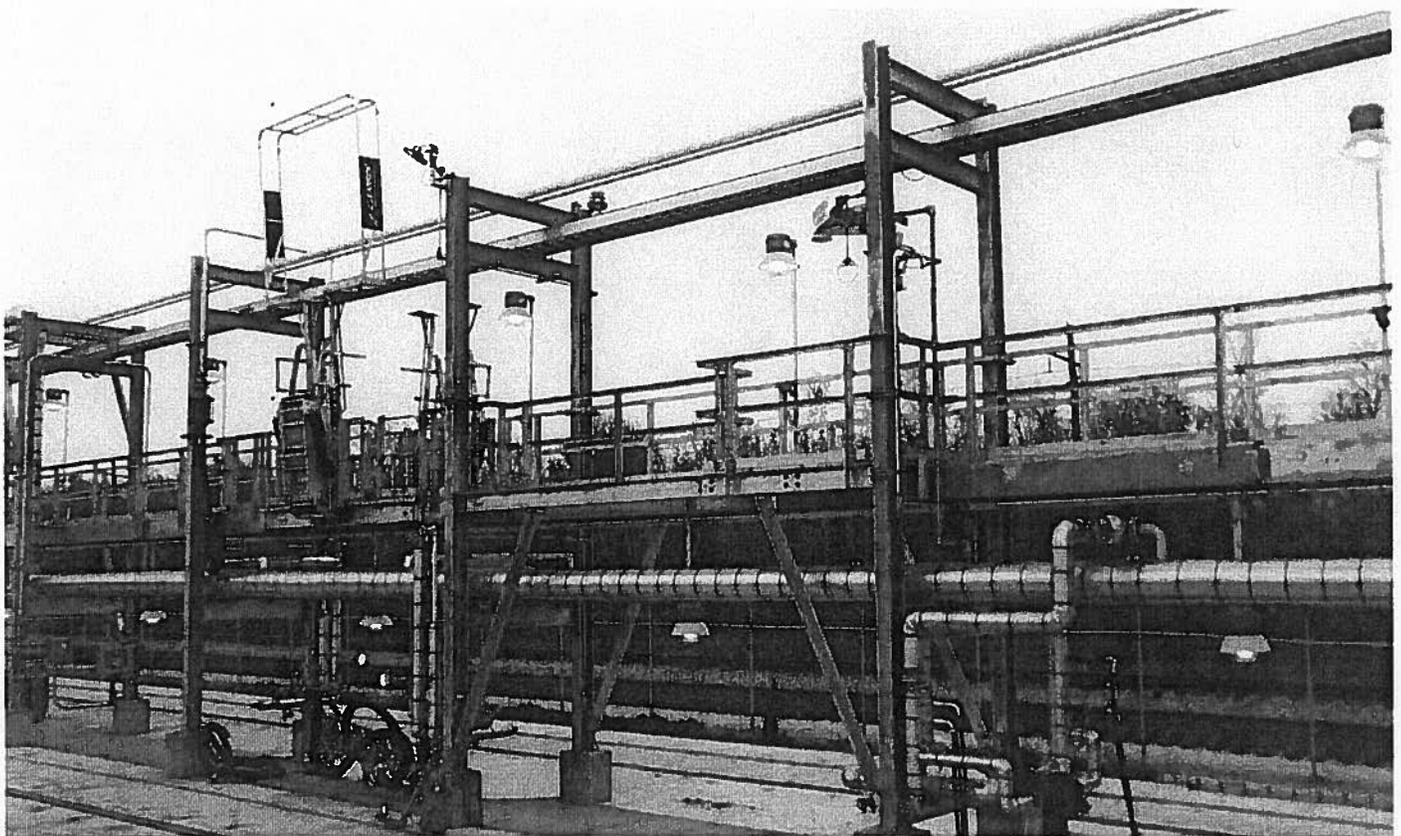
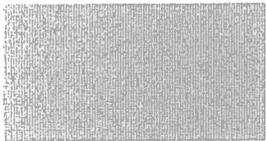
VALERO BENICIA CRUDE BY RAIL PROJECT

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

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2.5.4 Letter B4 – Responses to Comments from Union Pacific Railroad

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Public Record
- B4-1 UPRR’s work with federal agencies with regulatory oversight and other stakeholders is acknowledged. UPRR’s safety record and work with emergency responders along its rail lines to provide training for first responders also is acknowledged.
- B4-2 The FRA’s Action Plan for Hazardous Materials Safety (including as revised in June 2015⁶) and the voluntary agreement among major freight railroads and the DOT to implement new operating practices for moving crude oil by rail are acknowledged. However, for purposes of providing a conservative analysis (i.e., one that provides a realistic worst-case or greater-impact result so as not to under-represent potential effects), this EIR does not rely on the ameliorative effects of regulatory efforts that have not been finalized or voluntary efforts that are not independently enforceable to avoid or reduce potential significant impacts.
- B4-3 Regarding the role of preemption in the City’s consideration of potential effects of the Project, see DEIR Section 3.7, DEIR Appendix L, and Revised DEIR Appendices G and H.
- B4-4 See Response B4-3.
- B4-5 UPRR’s position regarding the federal preemption of regulation by the City of the proposed unloading rack at the Valero Refinery is acknowledged. Nonetheless, CEQA is triggered by the City’s discretionary decision-making processes such as for the authorization requested by Valero in Use Permit Application 12PLN-00063 and clearly applies here because: 1) Valero would own and operate the unloading facilities, 2) in constructing and operating the facilities, Valero would not be acting as an agent of UPRR, and 3) UPRR would not control the operation of the unloading facilities. On similar facts, decisions of the Surface Transportation Board and the courts make clear that preemption under the ICCTA applies to local and state regulation of unloading facilities if and only if the railroad owns and operates the facilities or the facilities operator is an agent of the railroad. See, e.g., *New York and Atlantic Railway Company v. Surface Transportation Board* (2nd Cir. 2011) 635 F.3d 66; *Florida East Coast Railway Company v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324.

⁶ FRA, 2015. Federal Railroad Administration’s Action Plan for the Safe Transportation of Energy Products (STEP). [<https://www.fra.dot.gov/Elib/Document/14478>]. Revised June 2015.

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EXHIBIT D

RESOLUTION NO. 16- 1 (PC)

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF BENICIA DENYING CERTIFICATION OF THE EIR AND DENYING A USE PERMIT FOR THE VALERO CRUDE BY RAIL PROJECT AT 3400 EAST SECOND STREET (1210N+00063)

WHEREAS, on December 21, 2012, Valero Refinery requested use permit approval for the Valero Crude by Rail (CBR) Project at 3400 East Second Street, and

WHEREAS, the City of Benicia, as the Lead Agency, prepared an Initial Study/Mitigated Negative Declaration to determine if the Valero CBR Project could have a significant impact on the environment, in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et seq.), the Guidelines for the Implementation of the California Environmental Quality Act (14 CCR Section 15000 et seq.), and the City of Benicia Guidelines pursuant thereto; and

WHEREAS, the Initial Study/Mitigated Negative Declaration was circulated for a 30-day comment period between May 30, 2013 through July 1, 2013; and

WHEREAS, a Draft Environmental Impact Report (Draft EIR) was prepared for the Valero CBR Project and circulated for a 90-day comment period between June 17, 2014 through September 15, 2014; and

WHEREAS, a Notice of Completion of the Draft EIR was filed with the Office of Planning and Research (OPR) on June 17, 2014, and a public notice of the availability of the Draft EIR was published in the Benicia Herald and Vallejo Time Herald on June 17, 2014; and

WHEREAS, copies of the Draft EIR were provided to the State Clearinghouse (State Clearinghouse No. 2013052074) and to those public agencies that have jurisdiction by law with respect to the project, and a Notice of Availability to other interested persons and agencies, and the comments of such persons and agencies were sought for a 90-day comment period between the dates of June 17 through September 15, 2014; and

WHEREAS, the Planning Commission held a public hearing and accepted testimony on the Draft EIR on July 10, 2014, August 14, 2014 and September 11, 2014, and the City accepted written comments on the Draft EIR through September 15, 2014; and

WHEREAS, a Revised DEIR was prepared for the Valero CBR Project and circulated for a 60-day comment period between August 31, 2015 through October 30, 2015; and

WHEREAS, a Notice of Completion of the Revised Draft EIR was filed with OPR

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on August 31, 2015, and a public notice of the availability of the Revised Draft EIR was published in the Benicia Herald and Vallejo Times Herald on August 31, 2015; and

WHEREAS, copies of the Revised Draft EIR were provided to the State Clearinghouse (State Clearinghouse No. 2013052074) and to those public agencies that have jurisdiction by law with respect to the project, and a Notice of Availability to other interested persons and agencies, and the comments of such persons and agencies were sought for a 60-day comment period between the dates of August 31, 2015 through October 30, 2015; and

WHEREAS, the Planning Commission held a public hearing and accepted testimony on the Revised Draft EIR on September 29, 2015, September 30, 2015, October 1, 2015 and October 8, 2015, and the City accepted written comments on the Revised Draft EIR through October 30, 2015; and

WHEREAS, 287 written communications were received regarding the Draft EIR, 3,822 written communications were received regarding the Revised Draft EIR and these are included, along with responses, in the Final EIR; and

WHEREAS, the Final EIR document consisting of the Initial Study/Mitigated Negative Declaration, Draft EIR, Revised Draft EIR and the Response to Comments; and said Response to Comments incorporated all written comments received, all oral comments made at the Planning Commission public hearings, the responses to those written and oral comments, and the necessary corrections to the Draft EIR; and

WHEREAS, the Response to Comments document was circulated for public information and provided to the Planning Commission on January 5, 2016; and

WHEREAS, agencies and persons commenting on the Draft EIR and Revised Draft EIR were provided with copies of the Response to Comments document or the City's proposed responses to their specific comments on January 5, 2016; and

WHEREAS, a Mitigation Monitoring and Reporting Program was prepared to ensure that the mitigation measures identified in the EIR are implemented; and

WHEREAS, the various documents and other materials related to the Project constitute the Record of Proceedings upon which the City bases its findings and decisions contained herein. Those documents and materials are located in the offices of the custodian of records for the documents and materials, who is the Community Development Director, City Hall, 250 East L Street, Benicia, California; and

WHEREAS, the Planning Commission held public hearings on February 8, 9, 10 and 11, 2016, at which it considered and discussed the Final EIR, the Mitigation Monitoring and Reporting Program, the staff report, and the proposed use permit with conditions of approval for the CBR Project, and heard testimony from members of the public regarding the documents and the proposed use permit; and

WHEREAS, per Section 15270 of the California Environmental Quality Act (CEQA) Guidelines, CEQA does not apply to projects that a public agency disapproves, but the Planning Commission determined it was necessary to provide findings per CEQA Sections 15090 and 15091, and to deny certification of the EIR and identified the following deficiencies in the EIR:

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1. The EIR does not express the independent judgment of the City as required by CEQA.
2. Staff's interpretation of preemption is too broad and the EIR should consider including mitigation measures to offset the significant and unavoidable impacts associated with rail operations, such as air pollution emissions, improved rail car requirements, additional funding for emergency responders and degasifying the oil before transport.
3. The application's objectives are not the City's objectives and the City's objectives were never stated or evaluated.
4. The EIR never discussed or evaluated the City's need for the project.
5. The project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property.
6. The size of the project is too big and would result in traffic and train backups which would negatively affect access to businesses in the Benicia Industrial Park.
7. 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.
8. The project could potentially have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait.
9. The traffic, air quality, and greenhouse gas emissions analyses are insufficient.
10. The EIR does not evaluate a sufficient number of project alternatives that are feasible.
11. The EIR does not evaluate mitigations to uprail communities and how each potential mitigation is or is not preempted.
12. The EIR's infeasibility determinations are incorrect for Alternative 1 (1, 50-car train) and Alternative 3 (off-site terminal).
13. The response to comments in the FEIR are found to be inadequate, non-responsive and dismissive including, but not limited to, the following specific comment letters:
 - a. Sacramento Area Council of Government: unfunded obligations on communities related to first responders, no evidence of mitigation measures to address transporting crude by rail, no evidence that mitigation measures for the significant and unavoidable impacts are infeasible due to preemption; and insufficient evaluation of potential alternatives including how preemption is applicable.
 - b. State of California Attorney General: insufficient evaluation of air quality impacts and an overly broad interpretation of trade secrets.
 - c. Bay Area Air Quality Management District: insufficient consideration of the their recommended mitigation measures for offsetting rail impacts, the

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analysis does not accurately characterize air emissions or health impacts, including an insufficient evaluation of PM2.5.

14. The EIR does not disclose all information necessary for complete evaluation of the air quality impacts of the project including the makeup of the crude oil associated with this project, which is based on an overly-broad interpretation of what constitutes trade secrets.

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NOW, THEREFORE, BE IT RESOLVED THAT the Planning Commission of the City of Benicia denies certification of the EIR and denies the use permit and makes the following finding based on the Valero Crude by Rail Project application, the staff report and related documents, and information presented at the public hearings on February 8, 9, 10 and 11, 2016:

- 1. That the proposed location of the conditional use and the proposed conditions under which it would be operated or maintained would not be consistent with the General Plan as it would be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of the use, or to the general welfare of the city, as well as uprail communities.*

The project is inconsistent with the General Plan including Goals 2.5, 4.8, and 4.9 due to the direct and indirect impacts of the proposed project which will not maintain the City's health, safety and quality of life. The negative impacts of the project such as impacts to the traffic in the industrial park, freeway, the community's ability to travel in and out of the industrial park and economic impacts to adjacent businesses would not maintain the City's health, safety, and quality of life. The potential for negative environmental impacts would dissuade businesses from staying in the Benicia Industrial Park and dissuade new businesses from locating in the Benicia Industrial Park. There is no provision for clean-up in case of a spill or accident and local jurisdictions, including Benicia would bear the economic burden of such a clean-up. In addition, the design of the unloading rack, its location in the 100-year flood zone, and the size of the facility creates issues with traffic and emergency access. The project would limit access for emergency response; especially access to Sulphur Springs Creek including the potential for rail cars to fall into Sulphur Springs Creek.

The Planning Commission finds that the project would be inconsistent with the General Plan in that it would place Benicia residents and uprail communities at risk. There is not sufficient technology currently available to make the rail cars safe. In addition, the project creates significant environmental concerns surrounding the project's impact on Sulphur Springs Creek and the bay, potential increases in the cost of insurance coverage for the community, liability risks for property damages and cleanup costs associated with on-site and off-site impacts of the transport of crude by rail.

As set forth above, the finding cannot be made for the Project due to the potential

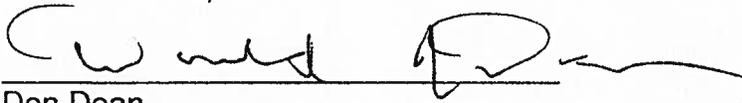
significant on- and off-site impacts associated with the project and the associated rail operations, the need for further evaluation of the environmental impacts, the economic purposes of the project and the conflicting interpretations of preemption.

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On motion of Commissioner Young, seconded by Commissioner Birdseye, the above Resolution was adopted at a special meeting of the Planning Commission on February 11, 2016, by the following vote:

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Ayes: Commissioners Birdseye, Cohen-Grossman, Oakes, Radtke, Young and
Chair Dean
Noes: None
Absent: Commissioner Sherry
Abstain: None



Don Dean
Planning Commission Chair

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EXHIBIT E

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RACHAEL E. KOSS
JAMIE L. MAULDIN
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April 19, 2016

BY EMAIL

Honorable Mayor Patterson
and City Council Members
City of Benicia
250 East L Street
Benicia, CA 94510

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mhughes@ci.benicia.ca.us
tcampbell@ci.benicia.ca.us
aschwartzman@ci.benicia.ca.us
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Re: Valero Crude by Rail Project (12PLN-00063)

Dear Honorable Mayor Patterson and City Council Members:

We are writing on behalf of Safe Fuel and Energy Resources California ("SAFER California") to provide additional information for the City Council's consideration of Valero's appeal of the Planning Commission's unanimous decision to deny the Use Permit Application for the Valero Crude by Rail Project. On April 4, 2016 and April 18, 2016, we submitted comments on Valero's appeal and we provided additional information regarding the Project's significant impacts both within and outside the refinery boundary. Our comments included analyses from refinery expert Dr. Phyllis Fox. Attached are additional comments from Dr. Fox regarding the Project's significant air quality and public health impacts from operational emissions at the proposed unloading rack.¹

¹ **Attachment A:** Letter from Phyllis Fox to Rachael Koss re: ROG and Benzene Emissions from Unloading Rack Operations, April 19, 2016.

April 19, 2016
Page 2

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Thank you for your consideration.

Sincerely,



Rachael E. Koss

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REK:ric

cc: Donald Dean, Chair, Planning Commission ddean@ci.benicia.ca.us
Amy Million, Principal Planner amillion@ci.benicia.ca.us

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ATTACHMENT A

Phyllis Fox
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Environmental Management
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321-626-6885
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April 19, 2016

Rachael Koss
Adams Broadwell Joseph & Cardozo
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rkoss@adamsbroadwell.com

Re: Impacts from ROG and Benzene Emissions from Unloading Rack Operations

Dear Ms. Koss:

As you requested, I have estimated ROG and benzene emissions and resulting health impacts from Valero's proposed unloading rack operations.

I. RAILCAR FUGITIVE EMISSIONS AT UNLOADING RACKS

I estimated ROG and benzene emissions from railcars for the entire time that railcars would be present within the Refinery boundary in my 4/4/16 comments.¹ In the present comments, I used the same basic methods to estimate ROG and benzene emissions from railcars only during unloading at the Valero unloading racks, using the methods previously described in my 4/4/16 comments. My analysis, presented below, indicates that ROG emissions are significant. Further, benzene present in these emissions result in significant cancer risk and acute health impacts at nearby sensitive receptors.

¹ 4/4/16 Fox Comments, Comments II and III.

A. ROG Railcar Fugitive Emissions During Unloading are Significant and Unmitigated

The unloading scenario described in the EIR indicates "UPRR would turn over operation of the trains to Valero for offloading." Valero would drain the contents of each tank car by gravity into a collection pipe (collection header) and then pump the contents directly into storage tankage located in the Refinery's crude oil storage tank field. When emptied, UPRR would move the tank cars onto the departure spur on the Refinery property adjacent to the unloading rack, where they would be assembled into a 50-car unit train for transport off site.²

The unloaded crude oil would be pumped into a new 4,000 foot, 16-inch diameter pipeline between the unloading rack and an existing crude supply pipeline to the Valero Crude Tank Farm for storage.³ The pump would have a maximum crude oil pumping rate of 4,000 gpm.⁴ Thus, the minimum amount of time that the railcars would be at the unloading rack, under Valero control, would be 6 hours,⁵ assuming maximum pumping rate. In general, the pump would not be operated at maximum capacity, so the time at the rack under Valero control would be longer.

Using emission factors developed by EPA for marketing terminals, as assumed in Valero's railcar fugitive emission calculations but corrected as noted in my FEIR comments, the on-site ROG emissions per 50-car unit-train during unloading operations controlled by Valero at the Valero unloading rack would be 399 pounds (lb) per visit,⁶ 798 lb/day, and 146 ton/yr.⁷ The CEQA significance thresholds for ROG emissions established by the Bay Area Air Quality Management District (BAAQMD) are 54 lb/day and 10 ton/yr.⁸ Thus, both daily and annual on-site ROG railcar fugitive emissions during unloading operations controlled by Valero at Valero's unloading rack are highly significant and must be mitigated.

² DEIR, p. 3-21.

³ RDEIR, p. 2-6.

⁴ RDEIR, p. 42.

⁵ The time to unload 35,000 bbl per unit train = (35,000 bbl)(42 gal/bbl)/4,000 gal/min = 367.5 min = 6.13 hrs.

⁶ Exhibit 1a, cell: I31.

⁷ Annual railcar ROG emissions for two 50-car unit trains per day, 365 days/year using marketing terminal emission factors = [(399 lb)/(50-car train) × (2 × 50-car trains/day) × (365 day/yr)]/(2000 lb/ton) = 145.6 ton/yr.

⁸ FEIR, Table 4.3-9.

A. Benzene Railcar Fugitive Emissions During Unloading Are Significant and Unmitigated

The EIR did not include benzene emissions from railcar fugitive emissions during unloading in the health risk assessment. I estimated these emissions for the entire time that the railcars would be within the Refinery boundary in my comments.⁹

As I previously explained, benzene has been reported in Bakken crude oils to 7 wt. %. Assuming that 80% of the VOCs are ROG, benzene emissions could be up to 70 lb/day or 13 ton/yr during railcar unloading.¹⁰ These revised benzene emissions are substantially higher than those included in the revised health risk assessment from conventional fugitive sources (such as valves and pumps): 0.062 lb/day and 0.01 ton/yr.¹¹

I revised the risk calculations in Exhibit 2a to include benzene emissions from railcars during unloading alone. My calculations are summarized in Table 1 and documented in Exhibit 2a (Tab: Rev. Calcs).

⁹ 4/4/16 Fox Comments, Comment III.

¹⁰ Benzene weight percent (7%) is reported based on VOC emissions. ROG emissions are a subset of VOC emissions. Conservatively assuming that 80% of VOC is ROG, the maximum benzene emissions = $[399 \text{ lb ROG/visit}(2 \text{ visit/day})/(0.8 \text{ ROG/VOC})] \times (0.07 \text{ benzene/VOC}) = 69.83 \text{ lb/day}$.

¹¹ Amy Million, City of Benicia, Email to Rachael Koss, Adams Broadwell Joseph & Cardozo, Re: Modeling Files for Valero CBR - Adams Broadwell Request, February 2, 2016, 1:24 pm. ("Some files have been sent to you via the YouSendIt File Delivery Service. Download the file -... Updated Refinery HRA Calculation Jan 2016.xlsx...") (Exhibit 6 to 4/4/16 Fox Comments.) See also summary in Exhibit 1b, Tab Rev. Calcs.

Table 1: Revised Health Risk Calculations for Emissions of Benzene from Railcar Fugitive Emissions During Unloading.

| | Benzene Emissions (lb/day) | Chronic Hazard Index | Acute Hazard Index | Cancer Risk | Revised Benzene Emissions (lb/day) | Chronic Hazard Index | 241071 Acute Hazard Index | Cancer Risk |
|-------------------|----------------------------------|----------------------|--------------------|-------------|--|----------------------|---------------------------|-------------|
| | EIR Health Risks Benzene | | | | Revised Health Risks Benzene | | | |
| Resident | 6.17E-02 | 0.00 | 0.00 | 9.42E-09 | 69.83 | 0.0 | 4.2 | 1.07E-05 |
| Worker | 6.17E-02 | 0.00 | 0.08 | 2.18E-08 | 69.83 | 0.9 | 89.8 | 2.47E-05 |
| Daycare | 6.17E-02 | 0.00 | 0.00 | 3.87E-09 | 69.83 | 0.0 | 0.1 | 4.37E-06 |
| Elementary School | 6.17E-02 | 0.00 | 0.00 | 3.87E-09 | 69.83 | 0.1 | 0.5 | 4.37E-06 |
| | EIR Health Risks All TACs | | | | Modified Health Risks All TACs* | | | |
| Resident | | 0.00 | 0.01 | 2.20E-06 | | 0.0 | 4.2 | 1.28E-05 |
| Worker | | 0.02 | 0.16 | 7.40E-06 | | 0.9 | 89.9 | 3.20E-05 |
| Daycare | | 0.00 | 0.00 | 2.52E-07 | | 0.0 | 0.1 | 4.62E-06 |
| Elementary School | | 0.00 | 0.00 | 2.23E-07 | | 0.1 | 0.5 | 4.59E-06 |

*Assumes all emissions are estimated correctly except benzene. Highlighted/bolded cells indicate significant health risks (acute and chronic hazard index equal to or greater than 1.0; cancer risk equal to or greater than 1.0E-05.)

This table shows that benzene emissions from railcar unloading fugitive emissions under the control of Valero at the unloading racks result in significant cancer risk and acute health impacts at the MEIR (nearest resident) and MEIW (nearest worker). When emissions of all other TACs are included, health risks are even higher. Thus, Valero owned and operated facilities, the unloading racks, pose significant health risks, and result in significant health impacts, for nearby residents and workers.

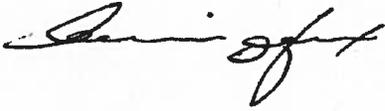
II. OTHER UNLOADING EMISSIONS

Other emission sources during unloading include: (1) fugitive component ROG and TAC emissions on equipment that connects the unloading rack to the storage tanks -- pumps, valves, flanges, connectors, and pressure relief valves; (2) coupling and uncoupling emissions when the railcars are connected and disconnected to/from the unloading racks; (3) evaporation of crude oil drips, drops, and larger spills during the coupling/decoupling process; and (4) sump emissions. The DEIR included pumps, valves, flanges, connectors, and pressure relief valves on facilities used to transport the

crude oil to storage tanks¹² but not the other sources of loading rack emissions, including coupling/decoupling emissions; spills; and sump emissions. Thus, the EIR fails as an information document as it did not include all ROG and TAC emission sources associated with unloading. 241071

In sum, on-site ROG and benzene emissions from Valero owned and controlled facilities and operations, the loading racks and unloading of railcars, would result in significant air quality and public health impacts. These impacts were not disclosed or mitigated in the EIR.

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Phyllis Fox

¹² DEIR, Table 3-4 and pdf 1179.

Ex. 1a

| ARRIVING RAIL CARS | | | Equipment | | Loading Rack | | Using Oil & Gas Production Emission Factors | | Using Marketing Terminal Emission Factors | |
|--|-----------------|-------------------|--------------------|--------------------|--------------|------------------------------|---|------------------------------|---|--|
| Component | Service | Count per Railcar | Number of Railcars | Number of Railcars | Hours | Emission Factor (kg/hr/comp) | ROG Emissions (lb/visit) | Emission Factor (kg/hr/comp) | ROG Emissions (lb/visit) | |
| Pressure Relief Valve | Gas | 2 | 50 | 50 | 6.1 | 0.8316 | 895 | 0.138 | 148 | |
| Valve | Light Crude Oil | 1 | 50 | 50 | 6.1 | 0.0707 | 38 | 0.023 | 12 | |
| Valve | Gas | 3 | 50 | 50 | 6.1 | 0.1386 | 224 | 0.023 | 37 | |
| Connectors | Gas | 9 | 50 | 50 | 6.1 | 0.0259 | 125 | 0.034 | 165 | |
| Connectors | Light Crude Oil | 2 | 50 | 50 | 6.1 | 0.0234 | 25 | 0.034 | 37 | |
| Total Railcar Fugitive ROG Emissions at Loading Racks | | | | | | | 1307 | | 399 | |

(1) Emission factors from CARB 1999, Table IV-2e for > / = 10,000 ppmv.

(2) Calculations assume 80% of VOCs are ROG.

(3) The RDEIR indicates that the maximum pumping rate is 4,000 gpm. RDEIR, p. 42 (pdf 327).

Thus, the time to unload 35,000 bbl/day (1 50-car unit train) = 35,000 bbl / 42 gal/bbl / 4,000 gal/min = 367.5 min = 6.13 hrs.

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Exh. 2a

| | Benzene Emissions (lb/day) | Chronic Hazard Index | Acute Hazard Index | Cancer Risk | Revised Benzene Emissions (lb/day) | Chronic Hazard Index | Acute Hazard Index | Cancer Risk |
|-------------------|----------------------------------|----------------------|--------------------|-------------|--|----------------------|--------------------|-------------|
| | EIR Health Risks Benzene | | | | Revised Health Risks Benzene | | | |
| Resident | 6.17E-02 | 0.00 | 0.00 | 9.42E-09 | 69.83 | 0.0 | 4.2 | 1.07E-05 |
| Worker | 6.17E-02 | 0.00 | 0.08 | 2.18E-08 | 69.83 | 0.9 | 89.9 | 2.47E-05 |
| Daycare | 6.17E-02 | 0.00 | 0.00 | 3.87E-09 | 69.83 | 0.0 | 0.5 | 4.67E-06 |
| Elementary School | 6.17E-02 | 0.00 | 0.00 | 3.87E-09 | 69.83 | 0.1 | 0.5 | 4.37E-06 |
| | EIR Health Risks All TACs | | | | Modified Health Risks All TACs* | | | |
| Resident | | 0.00 | 0.01 | 2.20E-06 | | 0.0 | 4.2 | 1.28E-05 |
| Worker | | 0.02 | 0.16 | 7.40E-06 | | 0.9 | 89.9 | 3.20E-05 |
| Daycare | | 0.00 | 0.00 | 2.52E-07 | | 0.0 | 0.1 | 4.62E-06 |
| Elementary School | | 0.00 | 0.00 | 2.23E-07 | | 0.1 | 0.5 | 4.59E-06 |

* Assumes all emissions are estimated correctly except benzene

Highlighted cells: significant health risks (acute and chronic hazard index equal to or greater than 1.0; cancer risk equal to or greater than 1.0E-05)

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EXHIBIT F

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JAMIE L. MAULDIN
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April 18, 2016

BY EMAIL AND HAND DELIVERY

Honorable Mayor Patterson
and City Council Members
City of Benicia
250 East L Street
Benicia, CA 94510

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Re: Valero Crude by Rail Project (12PLN-00063)

Dear Honorable Mayor Patterson and City Council Members:

We are writing on behalf of Safe Fuel and Energy Resources California ("SAFER California") to provide additional information for the City Council's consideration of Valero's appeal of the Planning Commission's unanimous decision to deny the Use Permit Application for the Valero Crude by Rail Project. On April 4, 2016, we submitted comments on Valero's appeal and we provided additional information regarding the Project's significant impacts both within and outside the refinery boundary. Our comments included analyses from refinery expert Dr. Phyllis Fox and biologist Scott Cashen.

On April 12, 2016, City staff issued its report for tonight's City Council hearing on Valero's appeal. Staff's report and attachments include responses to our April 4, 2016 comment letter. We reviewed the report with Dr. Fox and Mr. Cashen, and we conclude that it does not remedy the Final Environmental Impact Report's numerous errors and omissions identified in our comments. Attached are Dr. Fox's and Mr. Cashen's responses to the staff report.¹ In short, Dr. Fox and Mr. Cashen conclude:

¹ **Attachment A:** Letter from Phyllis Fox to Rachael Koss re: Review of Responses to Fox April 4, 2016 Comments on Valero's Appeal of Planning Commission's Denial of Valero Crude-by-Rail Project, April 18, 2016; **Attachment B:** Letter from Scott Cashen to Rachael Koss re: Comments on the Valero Benicia Crude by Rail Project, April 18, 2016.

- Project operation within the refinery boundary would result in a significant air quality impact from emissions of reactive organic gases ("ROG") from crude storage tanks.
- Project operation within the refinery boundary would result in a significant air quality impact from railcar fugitive ROG emissions.
- Project operation would result in significant acute and chronic health impacts from benzene present in railcar fugitive ROG emissions.
- An accident from Project operation within the refinery boundary would result in a significant, unmitigated impact to public health and safety from on-site hazards, including injury and death.
- Project operation within the refinery boundary would result in a significant, unmitigated impact from exacerbating flooding conditions.
- Project operation within the refinery boundary would result in significant, unmitigated impacts to birds and other wildlife.

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Therefore, we urge the City Council to deny Valero's appeal.

Sincerely,



Rachael E. Koss

REK:ric

cc: Donald Dean, Chair, Planning Commission ddean@ci.benicia.ca.us
Amy Million, Principal Planner amillion@ci.benicia.ca.us

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ATTACHMENT A

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April 18, 2016

Rachael Koss
Adams Broadwell Joseph & Cardozo
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rkoss@adamsbroadwell.com

Re: Review of Responses to Fox April 4, 2016 Comments on Valero's Appeal of Planning Commission's Denial of Valero Crude-by-Rail Project

Dear Ms. Koss:

As you requested, I have reviewed the letters by MRS¹ and ESA² that respond to my 4/4/16 Comments on Valero's Appeal of Planning Commission's Denial of the Valero Crude-by-Rail Project.³ The MRS and ESA responses are notable for their lack of support for numerous assertions. With few exceptions, they present no supporting calculations nor citations to specific pages in the EIR, reports, or web links. Thus, they present no new evidence and fail to respond to my comments.

¹ Letter from Steven R. Radis, MRS, to Amy Million, City of Benicia, Re: Response to Comments on Valero Crude-by-Rail Project, April 12, 2016 (4/12/16 Radis Letter); Available at: https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/8773/Attachment_3-MRS_Response_Letter_to_Fox_Comments.pdf.

² Memorandum from Tim Rimpo, Janna Scott, and Cory Barringhaus, ESA, to Amy Million, City of Benicia, Re: Response to Comments of Phyllis Fox, April 11, 2016 (4/11/16 ESA Letter); Available at: https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/8773/Attachment_3-MRS_Response_Letter_to_Fox_Comments.pdf.

³ Phyllis Fox, Comments on Valero's Appeal of Planning Commission's Denial of Valero Crude-by-Rail Project, April 4, 2016 (4/4/16 Fox Letter), pdf 49-140 (w/out exhibits); Available at: http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/Public_Comments_Submitted_April_4-5_2016.pdf.

I. ON-SITE HAZARDS (MRS)

A. Accidents At Crude Unloading Terminals

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Mr. Radis uses incident information from the Pipeline and Hazardous Materials Safety Administration (PHMSA) to conclude that "accident history at rail crude oil unloading facilities is almost the polar opposite" of the scenarios that I described. He further asserts that accidents at crude oil unloading facilities are "quite rare."⁴ The support for these claims is 2000 to 2015 PHMSA data for "rail crude oil unloading facilities." However, the supporting data or a specific citation where the data could be found are not provided. I was unable to confirm Mr. Radis' claim with publicly available data on the PHMSA website. Regardless, Mr. Radis' argument is misleading and incorrect as explained below.

1. Private Rail Terminals Are Exempt from PHMSA Reporting

Incidents need only be reported to PHMSA during "transportation" by a rail carrier.⁵ Thus, incidents during unloading operations at a private (non-railroad) terminal, such as the Valero terminal, are not reported to PHMSA:

*"Unloading operations. Incidents that occur or are discovered while a consignee is unloading a hazardous material from a transport vehicle or bulk packaging after the carrier has delivered the material are not required to be reported because these incidents occur after transportation has ended. Incidents that occur while the carrier that delivered the hazardous material is observing or participating in unloading operations must be reported because the carrier is deemed to be in possession of the hazardous material at that point; thus, these incidents occur during transportation. For these incidents, the carrier must complete the report."*⁶

⁴ 4/12/16 Radis Letter, pp. 1-3.

⁵ See reporting requirements at 49 CFR 171.15, 49 CFR 171.16 and 49 CFR 225.09.

⁶ PHMSA, Guide for Preparing Hazardous Materials Incidents Reports, January 2004, p. 1; Available at: http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_E48DC74FFC5E921568E9E899FA06C94EA17B4200/filename/reporting_instructions_rev.pdf.

Similar language is present in the PHMSA Guide for loading operations. Therefore, the data that Mr. Radis relied on to assert that accidents at crude oil unloading facilities are "quite rare" and that "accident history at rail crude oil unloading facilities is almost the polar opposite" of the scenarios that I described is based on a database that does not include any data from private rail unloading terminals such as the proposed Valero terminal. The majority of the crude oil rail terminals are privately owned.

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2. The PHMSA Incident Data Are Unreliable

The PHMSA website includes a data quality assessment report that confirms that PHMSA incident reports are very incomplete and miss most incidents, including those "outside transportation" (such as during loading and unloading), and that there are otherwise major problems with incident reports that PHMSA does receive:

"Missing data often compromises our ability to draw useful conclusions. A 2007 review estimated we are missing 60-90% of the hazmat incidents that occur.

[...]

*Our "peripheral vision" is limited too: for several "invisible risks" (e.g., gas pipeline master meter operators or failures of DOT packages "outside transportation"), we have little/no risk data."*⁷

Elsewhere, this data quality report explains that:

"There are several "invisible risks" (within our statutory authority but not necessarily regulated) where we have little/no risk data – for example:

- *Bulk loading and unloading of rail tank cars"*⁸

And with respect to "hazmat bulk loading/unloading analysis" PHMSA explains:

- *"We lack data on one of the central risks – unloading of rail cars at fixed facilities – because our reporting requirements for hazmat incidents are limited to events that occur "in transportation." [...]*

⁷ Rick Kowalewski, PHMSA, A Data Quality Assessment. Evaluating the Major Safety Data Programs for Pipeline and Hazardous Materials Safety, November 10, 2009, pp. 1-2. ; Available at: http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_BA1B26D970823D0EF3A2A5BE71A5E0DF4B691800/filename/DQA%20Report.pdf.

⁸ Kowalewski, p. C-4.

- *We have large uncertainty in our conclusions because of substantial underreporting of hazmat incidents, and failure codes which cannot be used to nail down the transport phase during which a failure occurred. Some large effects were due to a small number of companies reporting, suggesting missing data.*⁹

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Thus, it is not surprising that Mr. Radis concluded that accidents at crude oil unloading facilities are “quite rare” and don’t include the types of accidents I indicated could occur. He relied on a data base that doesn’t report accidents at the type of facility Valero proposes to build. There are many other problems with Mr. Radis’ analysis, outlined below.

3. The Scope of Review Is Misleading and Inadequate

Mr. Radis relies on only the last 15 years of PHSMA data for crude oil rail unloading facilities to support his proclamations. This time period is far too short and the facility type far too narrow to estimate the probability and consequences of accidents over the lifetime of the proposed Valero terminal.

First, the proposed unloading terminal is unique due to its location adjacent to the refinery tank farm immediately west of the rail spur and unloading racks (West Tank Farm), Sulphur Springs Creek, and commercial properties along East Channel Road in the Benicia Industrial Park. The new rail spur and unloading rack are parallel to the existing Valero Refinery West Tank Farm, sandwiched between the West Tank Farm on the west and Sulphur Springs Creek on the east. The closest tank in the existing West Tank Farm is only 45 feet away from the arriving tracks and loading racks, separated from the tanks by only a 20-foot wide service road and the tank farm berm, which will be moved closer to the tanks to make room for the Project.¹⁰

Further, the rail-imported crude oil will be transported through a pipeline that runs through the West Tank Farm to the “Crude Tank Farm,” located over 7,000 feet southwest of the unloading racks, adjacent to a residential neighborhood. Finally, the site is located in a “regulatory floodway” and in an area of high earthquake-induced shaking.

This juxtaposition of facilities, dangerous natural conditions, and nearby sensitive receptors renders the proposed site much more dangerous than typical

⁹ Kowalewski, p. D-4 (emphasis in original).

¹⁰ See photographs 1-13 in Land Use Application.

terminals. The co-location of the West Tank Farm and unloading terminal coupled with these natural hazards significantly increases the probabilities, types, and magnitudes of accidents that can occur at the rail terminal due to chain reactions that involve multiple facilities.

The co-location of the West Tank Farm and unloading terminal is double jeopardy. An accident in the adjacent West Tank Farm, which includes LPG spheres, could trigger accidents at the unloading facility via vapor clouds that ignite at the unloading terminal, causing multiple unloading rail cars to discharge their contents. As a result, the 30,000 gallon capacity (one railcar of crude) of the underground containment sump would be exceeded and so would other safety features. Even if the capacity of the sump were not exceeded, a large spill of highly volatile Bakken crude on a hot summer day, triggered by a tank BLEVE, could form a vapor cloud at the terminal that could ignite, creating a fireball that would damage adjacent railcars and their transfer hoses. Alternatively, an accident at the terminal could engulf tanks in the West Tank Farm, triggering a much larger accident than caused by the terminal in isolation. Similar accidents have been reported elsewhere.¹¹

Similarly, accidents at the Crude Tank Farm, where the rail-imported crude oil will be stored, could release vapors that would engulf adjacent tanks and nearby crude oil and LPG railcars, setting off chain reactions.¹² Alternatively, a major earthquake could disconnect the railcars from the loading rack or tip over numerous railcars, spilling their contents and releasing vapor clouds. Emergency response systems would likely be unavailable due to widespread power outages.

Thus, narrowly focusing only on crude oil unloading facilities (which are not even included in the PHSMA database) as in Mr. Radis' 4/12/16 Letter misleads as to the probability and consequences of accidents. Tank accidents, including for LPG spheres in the West Tank Farm, as well as conventional unloading accidents and

¹¹ See, e.g., Lees, Table A1.5, #468: PEMEX LPG Terminal, Mexico City; (An 8-inch pipe between a sphere and a series of cylinders ruptured. LPG was released for about 5-10 minutes, forming a vapor cloud that drifted to a flare stack. It ignited, causing a violent ground shock. A number of ground fires occurred. About 15 minutes after the initial release the first BLEVE occurred. For the next hour and a half there followed a series of BLEVEs as the LPG vessels violently exploded. 500 individuals were killed and the terminal was destroyed.) See: <http://www.hse.gov.uk/comah/sragtech/casepemex84.htm>.

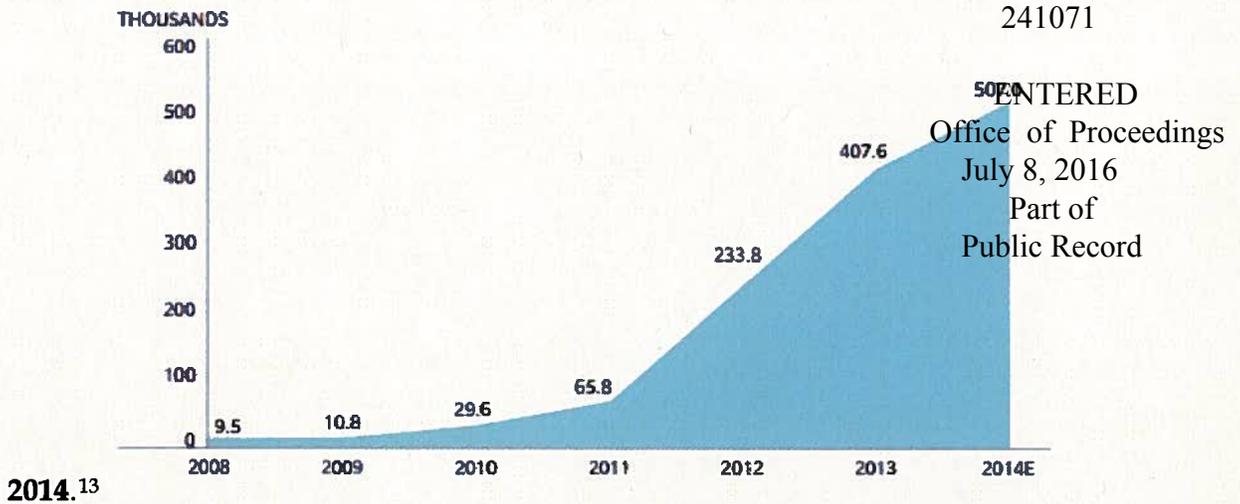
¹² See, e.g., Lees, Table A1.5, #305: Philadelphia Crude Oil Tank Farm. (Hydrocarbon vapors released during loading of overfilling of crude oil into an internal floating roof tank ignited outside of the tank and followed the vapor back into tank, causing fire at the tank's vents and explosions, which spread to adjacent tanks and other nearby equipment. There were 8 deaths and 2 injuries.)

supporting arrival and departure railspurs, should have been considered in determining accident probabilities and consequences.

Second, a very long and broad record is required to establish worst-case accident scenarios and probabilities for the lifetime of the facility. Sizeable crude oil transport in 50 to 100 car unit trains is a new phenomenon. Historically, crude oil has been transported by pipeline, ship, and tanker truck. Historically, crude oil transported by train was uncommon and generally only in "manifest" or "mixed" trains carrying crude oil interspersed with other commodities in box cars, hoppers, etc. Thus, relevant accident data for unloading two 50-car unit trains of crude oil every day is very scarce, far too scarce to determine accident probabilities and consequences over the lifetime of the proposed Valero facility by considering only crude oil unloading terminal incidents in database that does not report incidents from these terminals.

Third, sizeable shipments of crude oil in unit trains started only around 2011, in response to new shale crude discoveries in the midcontinent that were not connected to market by pipeline. This is demonstrated by Figure 1, which shows a dramatic rise in crude oil shipped by rail, starting around 2011. Mr. Radis relies on statistics for the 15 year period 2000 to 2015, which misleads because only 4 years out of this 15-year record included significant unit train crude transport and unloading. Four years of data is simply inadequate to determine accident probabilities for a terminal that will operate for at least 30 years.

Figure 1: Originated Class I Carloads of Crude Oil, 2008-



Fourth, Mr. Radis restricted the population considered to just “rail crude oil unloading facilities.” This is far too narrow to estimate the range of likely potential spill volumes and accident types at rail terminals because, as demonstrated in Figure 1, shipping crude by rail to unloading facilities is very new, starting only around 2011. Further, there are very few dedicated unit-train crude oil terminals with long-term operating histories from which to draw accident conclusions.¹⁴ Most are new and thus would not experience the types of accidents that might occur as the proposed facility ages. Finally, restricting the population to crude oil rail terminals ignores the rail spur, adjacent tanks farm, crude oil storage facilities, connecting pipeline and other infrastructure.

It is standard procedure to extrapolate from similar facilities when there is inadequate data to establish accident probabilities for a narrowly defined, specific type of facility, as here. Thus, accident statistics for all terminal operations, including loading and unloading all flammable liquid products, as well as tank farms and pipelines, should have been considered for a substantially longer period of record. Lees’ seminal *Loss Prevention in the Process Industries* includes a summary of case

¹³ Oliver Wyman, Ten Questions on Crude-by-Rail Risks, 2015; Available at: <http://www.oliverwyman.com/content/dam/oliver-wyman/global/en/2015/feb/ten-questions-on-crude-by-rail-risks.pdf>. See also: Annual Rail Traffic Data; Available at: <https://www.aar.org/pages/freight-rail-traffic-data.aspx>.

¹⁴ Crude-by-Rail Facilities Map; Available at: <https://www.bnsf.com/customers/oil-gas/interactive-map/pdfs/BNSF-OG-Overview-Map.pdf>. See also: [tp://priceofoil.org/rail-map/](http://priceofoil.org/rail-map/).

histories of "some major accidents in the process industries."¹⁵ This summary identifies many examples of "major" accidents at loading terminals and adjacent facilities, comparable to those that I identified as possible at the Project site in my comments. Other major accidents at unloading terminals are documented on the National Transportation Safety Board website.¹⁶

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B. The EIR's Quantitative Risk Assessment for On-Site Hazard Impacts Is Incomplete and Not Supported

My 4/4/16 comment letter addressed only on-site impacts. The MRS concatenates the on-site and off-site QRA. The off-site QRA is generally much better supported in the record than the on-site QRA, which is unsupported.

The MRS letter includes numerous general assertions as to methodologies, scenarios, and assumptions that were evaluated in the EIR. However, none of these assertions are supported with citations to page numbers in the EIR or elsewhere in the record where the information can be found. Further, these assertions are "generalized" and not project- or site-specific and thus cannot be used to support the EIR's on-site hazard analysis and the risk profiles used to determine significance. Some examples, presented as the page number from the 4/12/16 Radis letter, followed by my summary response in **bold**, include the following:

- Radis, p. 2: The QRA followed recommended PHMSA and other methodologies. **The on-site QRA was performed with models that the QRA claims are confidential. None of the supporting calculations and specific methodologies are disclosed in the record.**
- Radis, p. 4: "The QRA considered the adverse consequences of a derailment and tank car failure, but given the low probability of this scenario, it was not a significant contributor to societal risk." **The EIR does not include any support for societal risk from on-site accidents for any accident scenario, including derailment and tank car failure.**¹⁷

¹⁵ Dr Sam Mannan, *Lees' Loss Prevention in the Process Industries: Hazard Identification, Assessment and Control*, Fourth Edition, 2012, Appendix 1, Table A1.5.

¹⁶ See, e.g., NTSB, *Hazardous Materials Release from Railroad Tank Car with Subsequent Fire at Riverview, Michigan*, July 14, 2001; Available at: <https://app.nts.gov/doclib/reports/2002/HZM0201.pdf>.

¹⁷ The referenced "societal risk" is the unsupported "risk profiles" in RDEIR Figure 5-3. The EIR contains no support for these risk profiles, as explained in my 4/4/16 comments, Comment IV.A.3 and IV.B. The

- Radis, p. 5: "...the QRA did include the risk of spills into the berm area surrounding the tanks, as well as the thermal radiation hazards that could result from a pool fire at the tank farm." **As discussed below, the EIR does not include any analysis of the risk of spills in the berms surrounding the tanks where the rail-imported crude oil would be stored.**
- Radis, p. 5/6: Ignition sources are generally discussed in response to my comment that they are not disclosed. **The EIR does not identify the specific ignition sources and probabilities used to calculate the accident frequencies used in the risk profiles in RDEIR Figure 5-3. The general discussion does not fill this gap.**

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The EIR determined the significance of accidents using "risk profiles". These risk profiles plot the frequency of the worst-case accident on the y-axis versus the number of injuries and fatalities on the x-axis.¹⁸ These risk profiles are unsupported in the record. They simply appear. The EIR, the responses to Public Record Act (PRA) requests, and the responses to comments do not disclose how the accident frequencies on the y-axes of the risk profiles or the number of injuries and fatalities on the x-axes were determined. In other words, the on-site QRA's significance determination is unsupported.

My review of the EIR, PRA responses, and other materials indicates that most assertions in response to my 4/4/16 comments are unsupported and/or demonstrably and factually incorrect. The key step in the accident analyses -- assigning significance based on risk profiles -- is missing from the record. The public shouldn't have to piece together the hazard analysis from obscure clues spread throughout the record and guess what the missing parts might be. The EIR should clearly disclose all assumptions and present all calculations that support the risk profiles in one coherent place. It does not. The EIR fails as an informational document.

4/12/16 Radis letter does not addresses my comments, but rather asserts the analysis is there, without citing it. The analysis is missing from the EIR.

¹⁸ RDEIR, Figure 5-3.

C. Tank Accidents Were Not Evaluated

I commented that accidents at the tanks that would store rail-imported crude were not included in the QRA.¹⁹ This is a significant omission because the tank farm²⁴¹⁰⁷¹ that will store the rail-imported crude is very close to a residential neighborhood²⁰ and the Robert Semple Elementary School,²¹ which are in the “blast zone.”

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First, Mr. Radis asserts that the tanks that would store rail-imported crude oil are “existing” and thus “are considered as part of the CEQA baseline and are already in crude oil service.”²² This is wrong. Existing permit limits do not establish the CEQA baseline, but rather actual conditions. As explained in my previous comments, in the baseline, these tanks stored heavy low vapor pressure crudes, which would be much less likely to ignite and cause an accident than the highly volatile rail-imported crudes, which have much higher vapor pressures.²³ The EIR must evaluate the increase in probability and consequences of an accident at these tanks relative to the baseline crudes. The EIR and the various responses to comments and PRA requests do not include any accident analyses for these tanks (Tanks 1701-1708).

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Second, Mr. Radis asserts that “the QRA did include the risk of spills into the berm area surrounding the tanks”, without specifying which tanks (there are many adjacent to the proposed terminal) ...” as well as the thermal radiation hazards that could result from a pool fire at the tank farm.”²⁴ However, he fails to point to a specific page of the EIR where these analyses may be found. My search of the EIR fails to identify any analysis of spills into the tank berm area or pool fires at the tank farm where the rail-imported crude oil would be stored.

Rather, the 4/12/16 Radis letter includes Figure 1, presumably to support this claim. This figure was also provided in response to SAFER California’s March 10, 2016 PRA request. It shows the “blast zone” for the same accident, presented as a series of concentric circles centered around six different accident locations, including four within the tank farm immediately west of the Project site (Figure 1b).

¹⁹ 4/4/16 Fox Comments, pp. 57-61.

²⁰ 4/4/16 Fox Comments, p. 27 and Figure 5.

²¹ 4/4/16 Fox Comments, pp. 28-29 and Figure 6.

²² 4/12/16 Radis Letter, p. 5.

²³ 4/4/16 Fox Comments, Table 1.

²⁴ 4/12/16 Radis Letter, p. 5.

However, none of these four tank locations are near those where the rail-imported crude oil would be stored (Tanks 1701-1708). The tanks that would store rail-imported crude (1701-1708) are southwest of the area shown on Radis Figure 1, reproduced below as Figure 2b. This unanalyzed release point is the closest to residential and other sensitive receptors, as shown in Figure 1 of my 4/4/16 comments reproduced below as Figure 2a. The tank farm that would actually store imported crude oil was not analyzed in the EIR or in subsequently submitted responses to PRA requests. If it had been, off-site impacts would have been significant due to the proximity of sensitive receptors and the higher population density of residential areas.

Mr. Radis' Figure 1 simply moves the worst-case, on-site accident to different locations, without considering the changing conditions at those locations that would affect accident consequences. For example, an accident at a tank in the West Tank Farm could engulf several adjacent tanks, including LPG spheres, resulting in much greater consequences than the spill of 240,000 gallons of crude oil in the middle of the unloading rack. Thus, moving the worst-case rail spur accident centroid around in the West Tank Farm without performing a site-specific QRA for the specific impacted tanks is not relevant and does not constitute a tank accident analysis.

Figure 2: Comparison of Tank Release Points Modeled in Radis Figure 1 with Tanks that Would Store Rail-Imported Crude Oil (red crosshatched area Fig. 2a).

(2a) 4/4/16 Fox Comments, Figure 1 (2b) 4/14/15 Radis Figure



Finally, it is important to note that Radis Figure 1 (Fig. 2b above) was not included in the EIR and was submitted in response to a PRA request addressed in the

3/30/16 Radis letter.²⁵ The record contains no support for this figure nor discussion of its implications. My inspection of this figure indicates that it just moves the hazard zones for the same worst-case accident around the site and West Tank Farm, in an effort to support the selected location for the worst-case accident. However, the figure fails to include the true worst-case location, the actual tank farm where the crude oil would be stored, the red cross-hatched area in Figure 2a, located only 1,000 feet from a residential neighborhood. Further, if the worst case on-site accident occurred in the West Tank Farm, it could have much more severe consequences than the assumed on-site worst-case accident, located in the middle of the unloading rack, due to proximity of adjacent tanks.

D. Safety Features Will Not Prevent Accidents

The 4/12/16 Radis Letter relies on unloading rack safety features to mitigate impacts of accidents.²⁶ However, these safety features only mitigate spills within the unloading rack area that are less than 30,000 gallons (about one railcar).²⁷ Spills at the tank farm and along the rail line outside of the unloading racks would not be controlled by these safety features. Further, spilled Bakken and other highly volatile crudes could form a vapor cloud before the spilled crude reaches the sump, which could ignite before built-in safety features shutdown. Finally, during a natural disaster, such as an earthquake, power outages would likely occur, resulting in the failure of electrically activated safety features, such as the SCADA system.

E. The Worst-Case Accident Location Was Not Selected

The EIR assumes the worst-case accident would occur in the southern one third of the loading rack. However, I commented that if the accident occurred elsewhere, such as at the northern end of the loading rack or in the Crude Tank Farm where rail-imported crude will be stored, consequences would be greater due to proximity of residential areas. I further noted the EIR includes no justification for selecting the center

²⁵ Letter from Steven R. Radis, MRS, to Amy Million, Benicia, Re: Public Records Act Request for the Valero Crude by Rail Project, March 30, 2016 (3/30/16 Radis Letter).

²⁶ 4/12/16 Radis Letter, pp. 4 ("The unloading facility is designed to drain any spilled oil away from the rail cars and to minimize the potential for flammable vapors to be released..."), 5 ("..safety features that are part of the proposed project to minimize the hazards associated with the unloading facility and adjacent refinery tanks and equipment.").

²⁷ RDEIR, pdf 327.

of the loading rack as the location for the worst-case accident.²⁸ Figure 2b above is not justification because it fails to consider site-specific conditions at each location.

The Radis response characterizes my comment as “disingenuous” because I had access to his map showing different release points. My comments acknowledge this map and include it as Figure 29. However, this map does not address my comments, which relate to the fact that the EIR and this map do not include two additional accident sites that I pointed to in my comments: (1) the northern end of the loading rack and (2) the West Tank Farm. The Radis response ignores the West Tank Farm where imported crude oil would be stored, which is the worst case location for the selected accident scenario.

The Radis response also argues that an accident at the northern end of the loading rack would be precluded by facility design.²⁹ However, this is clearly wrong. *First*, the worst-case accident involves a spill of 240,000 gallons (8 rail cars).³⁰ The containment sump at the unloading rack is designed to contain only 30,000 gallons. *Second*, the EIR concluded the location of the worst-case accident was in the middle of the loading rack, which would include the same facility design. Thus, if facility design does not control an accident in the middle of the loading rack (the EIR case), an accident a little further north, but still within the loading rack, also would not be controlled.

In other words, Mr. Radis has contradicted himself. He first asserts the worst-case accident would occur in the middle of the loading rack, where he does not claim the facility design mitigates the impact. He then asserts, when I propose a location at the northern end of the same loading rack, that facility design would mitigate the significant impacts of the very same worst-case scenario. He can't have it both ways.

F. Mitigation for Other Rail Traffic at the Site Is Not Enforceable

Mr. Radis asserts that there is no potential for interaction of Project trains and facilities with the LPG and coke rail cars because “there would be no simultaneous use of the tracks.”³¹ However, this does not preclude the presence of parked railcars of LPG awaiting shipment that could be involved in accidents involving chain reactions. Further, the EIR does not include restrictions on simultaneous use of the tracks as a mitigation measure. The EIR must be revised to include “no simultaneous use of tracks

²⁸ 4/4/16 Fox Comments, Comment IV.F.4, p. 74.

²⁹ 4/12/16 Radis Letter, p. 6.

³⁰ RDEIR, p. 2-94.

³¹ 4/12/16 Radis Letter, p. 7.

by other commodities", or the hazard analysis must be revised to consider the interactions.

II. ON-SITE ROG EMISSIONS (ESA)

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The EIR failed to evaluate two major on-site sources of ROG emissions: (1) railcar fugitive emissions and (2) tank emissions. The responses to my 4/12/16 comments do not address the deficiencies.

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A. On-Site Fugitive ROG Emissions from Railcars Are Significant

The ESA letter asserts that "[t]he Revised DEIR and FEIR include emission estimates for rail car tanker fugitive ROG emissions (see Revised DEIR Appendix A)."³² The RDEIR contains an unsupported and erroneous estimate of railcar fugitive emissions from seven uprail air districts. The BAAQMD and the proposed Valero Terminal are excluded.³³ I estimated on-site ROG emissions from railcars. The EIR does not include any estimate for these emissions.

B. Crude Oil Storage Tanks ROG Emission Are Significant

The ESA letter asserts that as the Project does not include any changes to the Refinery's existing permits, there would not be any increase in tank ROG emissions.³⁴ This is wrong.

First, the baseline for determining an increase in emission under CEQA is the actual emissions at the time environmental review begins, not permit limits.

Second, the subject permit does not contain any ROG emission limits or vapor pressure limits, which could be used to estimate ROG emissions. While BAAQMD Regulation 8, Rule 5 prohibits storing crudes with a true vapor pressure (TVP) equal to or greater than 11 psia in external floating roof tanks, without certain modifications, the EIR discloses that the subject crudes could have TVPs ranging up to 13 psia.³⁵ Further, no monitoring for ROG or vapor pressure is required in the subject permits. Thus, even the upper limit of 11 psia for an unmodified tank is unenforceable as a practical matter.

³² 4/12/16 ESA Letter, p. 1.

³³ RDEIR, pp. A-3 to A-14.

³⁴ 4/11/16 ESA Letter, pp. 1-2.

³⁵ 4/11/16 Fox Comments, pp. 19-20.

C. On-Site TAC Emissions from Railcars Result In Significant Health Impacts

The ESA letter asserts that I used "different estimates of ROG evaporative emissions from storage tanks and railcar unloading than those documented and analyzed in the EIR" to assert significant health impacts from benzene.³⁶ This is incorrect.

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I did not estimate benzene emissions from storage tanks and railcar unloading. Rather, I estimated benzene emissions from railcar fugitive emissions, an entirely separate source. The EIR does not include any estimate of benzene emissions from railcar fugitive emissions or tanks. Thus, there is no methodological issue. The EIR failed to evaluate benzene emissions from on-site railcar fugitive emissions.

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III. FLOODING IMPACTS (ESA)

My previous comments show that, based on substantial evidence (including calculations), flooding impacts are significant. The responses cite to various places in the DEIR, RDEIR, and FEIR where flooding impacts are discussed. I reviewed and considered these and other references to flooding in the EIR when drafting my 4/4/16 comments. However, as explained in my previous comments, these citations refer to unsupported assertions which lack supporting citations, analyses, and calculations. Unsupported assertions are not substantial evidence. The ESA response does not cure this defect by providing substantial evidence, but simply repeats the unsupported assertions in the EIR, except as discussed below.

A. The Project Could Increase Flooding

The EIR's qualitative and unsupported analysis of flooding focuses on "structures" (aboveground facilities associated with the loading terminal, e.g., the racks, pump, pipeline) within the flood zone and ignores the trains. See, for example, the first, second, and last complete paragraphs on page 3 of the 4/11/16 ESA Letter. See also the assertion: "The impact analysis is correctly focused on permanent structures that could redirect flows during a flood event."³⁷

I demonstrated by calculation and other analysis that the presence of up to three 50-car unit trains on site would block the passage of flood flows, acting like a dam and occupying volume that flood flows would otherwise use to dissipate. I estimated total

³⁶ 4/11/16 ESA Letter, p. 2.

³⁷ 4/11/16 ESA Letter, p. 5.

on-site train weight would be at least 10,646 tons, so they would not wash away, but could tip over. I further estimated that these trains would displace 48% of the volume otherwise available for flood flows at the yard and 29% of the volume at the loading racks. This would cause an increase in elevation of floodwater upstream of the Project site and cause floodwaters to spread out to the east (as the West Tank Farm berm ENR 241671 the floodwaters on the west), penetrating further into the Benicia Industrial Park. Thus, the on-site trains themselves have the potential to aggravate flooding in nearby areas, which is a significant impact under CEQA that was not disclosed in the EIR.³⁸ Part of Public Record

The ESA letter responds that flooding is not an issue because: (1) the rail cars would be evacuated before the floodwaters arrive; (2) the railcar wheels are 24 inches in diameter so, presumably, the water would flow under them; and (3) any flooding would be contained on the west side of Sulphur Springs Creek due to elevation differences. None of these assertions is supported with substantial evidence, and they are factually wrong.

1. The Rail Cars Could Not Be Evacuated Fast Enough to Avoid Significant Impacts from Increased Flooding

The response asserts that floods at the Project site would not tip over railcars as shown in my Figure 32 because "railcars could be moved off-site to higher ground and their arrivals and departures rescheduled to avoid and minimize flood related risks based on weather predictions."³⁹ It asserts that adequate advance warning would be available because "[s]evere flash flooding and related hurricane precursors that resulted in the Texas derailment [...] are decidedly unanticipated in the Project area [...] No evidence has been presented suggesting that flood waters would rise so quickly in the area as to preclude a responsible response to potential risk including removing trains from harm's way."⁴⁰

(a) *Advance Flood Warning May Not Occur*

There are local situations in which floodwaters would rise before the trains could be evacuated, resulting in tipped-over railcars. If the tipped-over railcars occurred during a flooding event, flooding would be aggravated, resulting in a significant impact not disclosed in the EIR. If the tipped-over railcars occurred during a flooding event, such as an earthquake, released crude oil could result in a vapor cloud explosion or

³⁸ 4/4/16 Fox Comments, pp. 79-85.

³⁹ 4/11/16 ESA Letter, p. 5.

⁴⁰ 4/11/16 ESA Letter, p. 5.

BLEVE, leading to much more severe accidents than disclosed in the EIR as well as complicating any effort to move railcars offsite.

First, Lake Herman, which is upstream of the Project site on Sulphur Springs Creek, is in the "High" flood hazard category.⁴¹ This means it is a dam where failure or misoperation will probably cause loss of human life.⁴² The dam could fail unexpectedly from natural causes, such as an earthquake or from structural failure. While the probability for these events may be low, they are not zero. In these situations, there would be no advance warning and thus no time to remove the railcars from the site. Further, emergency warning systems may not be operating due to local power outages.

Second, the type of weather events that knocked over the Texas railcars and which have also occurred in Benicia⁴³ and may occur more frequently at the Project site in the future, have not been typical of either location historically⁴⁴. Storm events have been changing due to global climate change. In general, more severe weather is forecast for the future. Thus, the EIR must consider that flash floods, with little advance warning, could occur over the lifetime of the Project, aggravating flooding at adjacent properties.

(b) *Evacuation to Higher Ground May Not Be Feasible*

The EIR did not identify the location of higher ground, identify the route(s) to higher ground, or explain how long it would take to move the railcars to higher ground. All of this information should be identified in an emergency evacuation plan that should be required as flood mitigation.

First, railcars could not be instantly removed from the site in the event of a flood emergency, such as earthquake-induced or other failure of the 100-year old Herman dam. There could be up to three 50-car unit trains on site at the time of the flood warning. The railcars at the loading rack would have to be disconnected from the rack, assembled into a unit train(s), and moved offsite at 3 mi/hr with on-site staff for normal

⁴¹ Solano County Emergency Operations Plan, Flood and Tsunami Annex, March 2012; Available at: <https://www.solanocounty.com/civicax/filebank/blobdload.aspx?BlobID=13276>.

⁴² National Inventory of Dams Data Status; April 20, 2003; Available at: <https://cryptome.org/eyeball/sfb/sfb-eyeball.htm>.

⁴³ JB Davis, City Opens Emergency Operations Center to Coordinate Efforts to Combat Flooding, Benicia, CA, December 2, 2012; Available at: <http://patch.com/california/benicia/watch-rain-water-overflow-at-east-n-and-east-second-street>.

⁴⁴ Al Gore, The Case for Optimism on Climate Change, February 2015, TDE2016; Available at: http://www.ted.com/talks/al_gore_the_case_for_optimism_on_climate_change#t-137484.

operations. Empty rail cars on the siding also would have to be assembled into a unit train(s) with available staff and moved off site. This would take at least 4 hours, perhaps longer, as it would occur under emergency conditions.⁴⁵ Further, advance warning of floods is frequently as short as 2 hours, particularly for the cloudburst type of storm typical of the area.⁴⁶ Thus, it is plausible that flood waters could reach the site before trains could be moved to higher ground.

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Second, the EIR failed to identify the routes that would be taken to avoid floodwaters and where the higher ground is located. The ESA letter mentions that about 500 linear feet southwest of Bayshore Road is in an area of minimal flooding or Zone X.⁴⁷ However, 500 linear feet is not adequate to store three 50-car unit trains, which would be about 5,000 feet long.⁴⁸

Third, in the event of a flood emergency, other local rail unloading/loading facilities in the floodplain, e.g., auto staging area in the Benicia Railyard, straddling the lower end of Sulphur Springs Creek, would also have to evacuate. This would create congestion and delay.

Fourth, available local tracks that could be used to reach higher ground may also be flooded, preventing escape. The southern track of the UP Mainline runs parallel with and close to the Bay shore. This southern track is used to access the refinery. East of Sulphur Springs Creek, the southern track of the UP Mainline is very low lying, at an elevation of only 1 ft crossing Lake Herman Road. East of Lake Herman Road, the northern and southern tracks of the UP Mainline converge and traverse Suisun marshland. The rail line in this area is already subject to unstable ground and flooding. The unstable ground can cause "dips" in the track, at which trains must slow down.⁴⁹

⁴⁵ 4/4/16 Fox Comments, p. 4; Santa Maria FEIR, Table 2.5.

⁴⁶ Solano County Emergency Operations Plan, Flood and Tsunami Annex, March 2012; Available at: <https://www.solanocounty.com/civicax/filebank/blobdload.aspx?BlobID=13276>.

⁴⁷ 4/11/16 ESA Letter, p. 3.

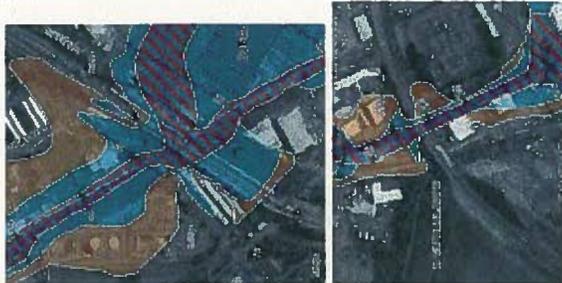
⁴⁸ RDEIR, p. 2-28 (two train lengths are about 3,300 feet).

⁴⁹ Solano Rail Facilities Plan Update, July 8, 2015, p. 53 ("The lower track location at Lake Herman Road is at 1ft elevation and likely impacted by future sea level rise (see section 3.3). This was not a major consideration or concern at the time of the previous rail facilities plan 20 years ago, but is a significant issue now and in the future."), p. 96 ("One key area for delays is in the Suisun Marsh between Cordelia Road and Benicia. This area is subject to unstable ground and flooding. The unstable ground can cause "dips" in the track, at which trains must slow down, while flooding presents obvious obstacles to train movements, as well as expensive repairs. Potential improvements in this area include subgrade/ground improvements to reduce raising the track above the level of flooding."), p. 97 (The rail tracks crossing Suisun Marsh wetlands area are likely to be impacted by sea level rise. Soil subsidence in the wetlands is an additional concern and is the cause for much of the current UPRR railroad track maintenance in the

The excerpts from FEMA Panel 634 in Figure 2 show that rail lines leading into and out of the Project site would also likely be flooded.

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Figure 2. Excerpts of FEMA Panel 634, 1/12/2015.



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Fifth, if the trains were evacuated under emergency flooding conditions, this could put motorists stranded at railway crossings or workers trapped in buildings, such as the Ironworkers Union Local 378 on Bayshore Road, while the trains passed, at significant risk of death or injury from rising floodwaters. The EIR did not consider these significant secondary impacts of evacuating the trains.

2. Railcar Wheel Diameter Will Not Prevent Increased Flooding

The ESA flooding response relies on an email from the City's Public Works Director to conclude flooding impacts are not significant: "The FEMA Flood Insurance Rate Map Panel 634 shows the area of Industrial Way Between Bayshore Road east of Sulphur Spring Creek and West Channel Road as 'one AO (Depth 2)'. I assume that the [crude by rail] tankers will park in this area parallel to Industrial Way. Since the rail car wheels are probably 24 inches in diameter, I do not see much risk."⁵⁰ Thus, the EIR assumed flood flows would pass under the railcars, which would not result in increased flooding in surrounding areas.⁵¹

First, what does "not..much risk" mean? If it means some risk, then the EIR must evaluate it.

wetland area to maintain a level surface for the tracks. Inundation of the tracks is likely to occur with sea level rise, and temporary flooding of the tracks may occur with a storm tide."); Available at: <http://www.sta.ca.gov/docManager/1000005509/Solano%20Rail%20Facilities%20Plan%20Update.pdf>.

⁵⁰ 4/11/16 ESA Letter, p. 3.

⁵¹ 4/11/16 ESA Letter, p. 5 ("Nonetheless, even if rail cars were located on-site during a flood event, they would not substantially impeded flows as water could travel underneath and between cars, .i.e., the rail cars would not act like an impenetrable dam or wall to flood flows in any way similar to the photographs shown.").

Second, this is true only if the flood elevation is less than 24 inches. However, the West Tank Farm berm is 8 feet tall. The design basis is unknown, but is likely the hundred year flood elevation, to protect the tanks from flooding. Thus, while flood flows under 24 inches could theoretically pass mostly unimpeded⁵² beneath the railcars, much deeper flood flows would not. They would be blocked by the railcars. The railcars would block flood flows as I estimated in my comments,⁵³ which properly excluded the distance between the tank car and the ground. The volume occupied by the railcars would increase flooding elsewhere, including in the Benicia Industrial Park. This is a significant impact that must be mitigated.

Third, as flood waters rise, the force of the water against the railcars would tip them over, as shown in Figure 32 of my 4/4/16 comments. The tipped-over railcar would continue to displace the entire volume of the unit trains. This would increase flooding elsewhere, including in the Benicia Industrial Park.

3. Flooding Would Not Be Contained on the East Side of Sulphur Springs Creek

The 4/11/16 ESA letter asserts, again based on an email from the City's Public Director, that the Project site is at a higher elevation than East Channel Road by up to 10 feet, so any flooding would be contained on the west side of Sulphur Springs Creek.⁵⁴ A topographical map was not produced to confirm this conclusion. Moreover, it is inconsistent with the FEMA Flood Insurance Rate Map, which shows the regulatory floodway extends to the West Tank Farm berm along most of the Project site, except at the northern and southern ends. See Figure 3.

⁵² Accumulated debris that would accumulate around the wheels and protrusions would block some of the flow.

⁵³ 4/4/16 Fox Comments, Comment V.B. See volume calculation in footnote 274, which is based only on the volume of the railcar and does not include the 24 inches between the rail and the bottom of the tank.

⁵⁴ 4/11/16 ESA Letter, pp. 3-4.

Figure 3. Regulatory Floodway at Project site (red crosshatch).



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This is also inconsistent with the statement elsewhere on p. 4 of the ESA Letter that "...the unloading rack area would be located within a 100-year flood zone is acknowledged and evaluated [in the EIR]."⁵⁵ If the unloading rack is within the 100-year floodplain, as shown in Figure 3, flooding is not contained on the west side of Sulphur Springs Creek, but rather rises above the elevation of the Project site. The height of the West Tank Farm berm, 8 feet, suggests a significant rise.

The excerpt from the email fails to disclose floodwater depth along the Project site, which would have been much more useful than land surface elevations. Figure 3.

4. Mitigation Is Not Required

The response first argues that "it is logical to assume that the delivery of crude oil trains to the Project site would be temporarily halted during a flood even to prevent damage to the rail cars."⁵⁶ However, rather than requiring this as mitigation, the response goes on to assert that the impact is not significant and no mitigation is required. It further asserts that "it is wholly appropriate to expect that professionals will exercise a reasonable duty of care in carrying out their official duties..."⁵⁷ Professional expectations are not valid CEQA mitigation because they are not enforceable. Further, professional judgement during emergencies can, and often are, compromised by the resulting chaos.

⁵⁵ 4/11/16 ESA Letter, p. 4.

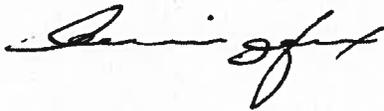
⁵⁶ 4/11/16 ESA Letter, p. 5.

⁵⁷ 4/11/16 ESA Letter, p. 5.

The EIR fails to lay out a plan that would be followed for evacuating the site in an emergency. Relying on "professional judgement" in an emergency is a recipe for disaster. The EIR should require an evacuation plan and require that it be reviewed by on-site employees in annual training. 241077

In sum, the MRS and ESA letters fail to address my 4/4/16 comments and present no new information or analyses. The Project as proposed in the EIR will result in significant on-site air quality impacts from railcar and storage tank ROG emissions of significant chronic and acute health impacts due to benzene present in on-site railcar ROG fugitive emissions; significant off-site impacts (death and injuries) from on-site accidents; and significant off-site flooding impacts from on-site railcars that would occupy floodplain volume.

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ATTACHMENT B

Scott Cashen, M.S.—Independent Biological Resources Consultant

April 18, 2016

Ms. Rachael E. Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080

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Subject: Comments on the Valero Benicia Crude by Rail Project

Dear Ms. Koss:

I submitted a comment letter (dated March 28, 2016) describing biological resource issues associated with the Final Environmental Impact Report (“FEIR”) and other environmental documents prepared by the City of Benicia (“City”) for the Valero Benicia Crude by Rail Project (“Project”). The comment letter established my professional qualifications and described the actions I took to evaluate the FEIR and underlying analyses. I incorporate my previous comments by reference.

My previous comment letter discussed the following issues:

1. The FEIR failed to properly analyze the effects of night lighting and human activity on wildlife occupying Sulphur Springs Creek, including wildlife that use the creek as a movement corridor.
2. The FEIR failed to incorporate a mitigation and monitoring program that would ensure impacts to wildlife movement in the Sulphur Springs Creek corridor are mitigated to a less than significant level.
3. The FEIR failed to disclose and properly analyze the effects of Project noise on wildlife.
4. The FEIR failed to disclose and analyze adverse effects to biological resources due to chronic exposure to contaminants, even without a spill or accident.
5. The FEIR failed to consider impacts of on-site accidents to Sulphur Springs Creek and its riparian corridor, marshes, and biota.
6. The FEIR failed to incorporate adequate mitigation measures for spills and accidents that could occur at the rail spur and unloading facility. Mitigation measures that would reduce adverse effects on biological resources from a spill or accident on Valero property are feasible and not preempted by federal law.
7. The “nesting bird” mitigation measure incorporated into the FEIR is insufficient to avoid and minimize significant impacts to nesting birds protected under the Migratory Bird Treaty Act and other state and federal regulations.

On April 12, 2016, City Staff issued a report that responded to various questions and issues related to the Project. Staff's report does not resolve, or provide specific responses to, the issues raised in my previous comment letter. The Project's impacts on biological resources remain significant and unmitigated. 241071

Ecological Value of Sulphur Springs Creek, Suisun Marsh, and Suisun Bay ENTERED

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Sulphur Springs Creek provides habitat for numerous special-status species. In addition, it provides one of the last remaining corridors of aquatic and riparian habitat between Suisun Marsh (and Bay) and open space to the north of the Project site.¹ As described in the Suisun Marsh Preservation Act of 1977 ("Act"), Suisun Marsh represents a unique and irreplaceable resource to the people of the state and nation. The Act states:

The Legislature hereby finds and declares that the Suisun Marsh, consisting of approximately 55,000 acres of marshland and 30,000 acres of bays and sloughs, and comprising almost 10 per cent of the remaining natural wetlands in California, plays an important role in providing wintering habitat for waterfowl of the Pacific Flyway; that during years of drought the area becomes particularly important to waterfowl by virtue of its large expanse of aquatic habitat and the scarcity of such habitat elsewhere; that the area provides critical habitat for other wildlife forms, including such endangered, rare, or unique species as the peregrine falcon, white-tailed kite, golden eagle, California clapper rail, black rail, salt-marsh harvest mouse, and Suisun shrew; that the existence of this wide variety of wildlife is due to the relatively large expanse of unbroken native habitat and the diversity of vegetation and aquatic conditions that prevail in the marsh; that man is an integral part of the present marsh ecosystem and, to a significant extent, exercises control over the widespread presence of water and the abundant source of waterfowl foods; that the Suisun Marsh represents a unique and irreplaceable resource to the people of the state and nation; that future residential, commercial, and industrial developments could adversely affect the wildlife value of the area; and that it is the policy of the state to preserve and protect resources of this nature for the enjoyment of the current and succeeding generations... The Suisun Marsh is located where the salt water of the Pacific Ocean and the fresh water of the Sacramento and San Joaquin River Delta meet and mix; and because of its location, the marsh provides a transition zone between salt and fresh water habitats, creating a unique diversity of fish and wildlife habitats.²

Sulphur Springs Creek is located immediately adjacent to the proposed rail spur and unloading rack. Because Sulphur Springs Creek flows into Suisun Marsh, any effects to the creek would also affect the marsh. As described in my previous comment letter, the FEIR fails to incorporate mitigation to protect the ecological values of Sulphur Springs Creek, and thus, the ecological resources of Suisun Marsh.

¹ James Associates, Inc. 2012. Benicia, Vine Hill, and Fairfield South 7.5-minute quadrangles [topographic maps]. MacTopos 3.0 georeferenced for MacGPS Pro.

² California Public Resources Code 29000-29612.

The Suisun Marsh Preservation Act of 1977 was enacted "to preserve the integrity and assure continued wildlife use" of the Suisun Marsh.³ Based on my independent review, it is my professional opinion that the proposed Project is inconsistent with the intent of the Act. 241071

Further, City Council's Resolution No. 04-50 states that "...it is the policy of the City Council...that California Environmental Quality Act documents prepared for City project Proceedings within the Suisun Marsh region that propose mitigation measures other than avoidance, 2016 will not be acceptable for Council certification."⁴ The Project is within the Suisun Marsh region. Yet, the FEIR includes mitigation measures other than avoidance for the Project's significant impacts to birds and other wildlife in the Sulphur Springs Creek riparian corridor. Therefore, the Project is inconsistent with Resolution No. 04-50.

Sincerely,



Scott Cashen, M.S.
Senior Biologist

³ *Ibid.*

⁴ City Council of the City of Benicia Resolution No. 04-50, p. 3, par. 4.

RESOLUTION NO. 04-50

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BENICIA
AFFIRMING SUPPORT FOR AN INTERMODAL TRANSPORTATION
STATION AND DIRECTING COMPLETION OF ADDITIONAL
TRANSPORTATION AND PLANNING STUDIES AND THE PREPARATION OF
THE CAPITAL IMPROVEMENT PLAN BENEFITING THE COMMUNITY**

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WHEREAS, the Benicia General Plan Goal 2.17 sets City policy to provide an efficient, reliable, and convenient transit system, and includes policies and programs to improve inter-modal coordination of transit services and, coordination of transit services and trip reduction efforts with other agencies, provision of intercity bus service to Vallejo and Fairfield, coordination of transit planning with the Contra Costa Transportation Authority and Solano county, and coordination of future mass transit planning with all other regional efforts; and

WHEREAS, General Plan Goal 2.18 encourages the provision of convenient rail service to Benicia and includes programs to consider mixed use, commercial and industrial uses that complement the transportation station, and to plan for convenient auto and transit access to and auto parking at the transportation station to encourage its use; and

WHEREAS, the City has received funding from STA to assess Benicia's transportation needs over the next ten years and has interest in pursuing Transportation for Livable Cities funding to assess opportunities for mixed use land use planning supportive of an Intermodal Transportation Station; and

WHEREAS, the voters of Benicia on November 4, 2003 resoundingly supported Measure K, an initiative to prohibit uses requiring urban facilities or services beyond the Urban Growth Boundary Line, to protect Sky Valley as agricultural and open space, and to prevent urban sprawl and maintain the open space that separates the communities of Benicia, Vallejo, and Fairfield; and

WHEREAS, a future intermodal transportation station to be successful should be planned fully within the established Urban Growth Boundary and should consist of mixed uses of commercial and compact urban development, and needs to be walkable, have an efficient location with development that balance the need for adequate density to support convenient transit service within the scale of the adjacent community; and

WHEREAS, an intermodal transportation station should have a direct benefit to the residents of Benicia as set forth in the General Plan goals, policies and programs. No City funds should be spent or obligated for regional transportation capital projects without such demonstrated benefit; and

WHEREAS, the General Plan states that the marshlands of Suisun Bay provide habitat of particular importance to wildlife including special-status species such as, but not limited to, the Suisun song sparrow, salt marsh yellowthroat, Suisun shrew, California clapper rail, and for many of these species, the upper limits of the marshland and the remaining adjacent upland habitat are essential retreats during extreme high tides, and the General Plan therefore calls for the protection of adequate buffers to ensure the preservation of sufficient retreat habitat essential to maintaining the value of the marshlands; and

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WHEREAS, because of the habitat, ecological and environmental values associated with the Suisun Marsh wetlands, including but not limited to, water quality, significant direct and indirect environmental impacts should be minimized; and

WHEREAS, Benicia General Plan Goal 2.19 promotes a regional (San Francisco, Oakland, Alameda) and local (Martinez, Port Costa, and Crockett) ferry service; and

WHEREAS, a City-sponsored survey of residents in 2001 determined what issues were of greatest concern to residents, and more than 86 percent of those questioned said ferry service was key to them; and

WHEREAS, the City is at various stages of considering other major capital improvement projects such as a new police station, upgrades to the water distribution and storm drain systems, and a community center; and

WHEREAS, biennial preparation of a multi-year capital improvement plan in coordination with adoption of the City's two-year budget will help ensure efficient expenditure of public funds relating to the subjects addressed in the general plan pursuant to Government Code sections 65400 and 66000 *et. seq.*

NOW, THEREFORE, BE IT RESOLVED THAT the City Council of the City of Benicia hereby resolves that:

1. The City Council finds and declares that it is in the best interest of the City and its residents to support an intermodal transportation station based on comprehensive planning in coordination with staff preparation for adoption by the City Council the Benicia Capital Improvement Plan consistent with the General Plan and its overarching goal of sustainable development; and
2. The City Council further finds and declares that broad-based, public participation is necessary in the Intermodal Transportation Station siting and planning and the formulation of the Capital Improvement Plan; and
3. The Capital Improvement Plan shall be prepared in conformance with the provisions of Public Resources Code section 21000 *et. seq.* including but not limited to the following State policies:

- (a) Develop and maintain a high-quality environment now and in the future, and the all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.
- (b) Take all action necessary to provide the people of this state with clean air²⁴¹⁰⁷¹ and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise. ENTERED
- (c) Prevent the elimination of fish or wildlife species due to man's [sic] activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history. Office of Proceedings below 9/16
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- (d) Ensure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every California, shall be the guiding criterion in public decisions.
- (e) Create and maintain conditions under which man [sic] and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.
- (f) Require governmental agencies at al levels to develop standards and procedures necessary to protect environmental quality.
- (g) Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment,

prior to the expenditure by the City of Benicia of federal, state, regional, local or City funds for new studies, environmental assessment or construction of the intermodal transportation project at the currently proposed site except for the studies referenced in the City Manager's report may be completed. The Short-Range Transportation Plan shall be completed and reimbursement for eligible project related expenses shall be received before the consultant for the EIR/EIS is directed to complete the final EIR. Such funds may be spend prior to the completion of the Capital Improvement Plan to analyze alternative sites if necessary; and

4. The City Council declares it is the policy of the City Council of the City of Benicia that avoidance shall henceforth be the only acceptable mitigation measure for significant direct and indirect environmental impacts that may result from any project within the Suisun Marsh Management Zone, and that California Environmental Quality Act documents prepared for any project within the Suisun Marsh region that propose mitigation measures other than avoidance will not be acceptable for Council certification.

On motion of Vice Mayor **Patterson**, seconded by Council Member **Smith**, the above Resolution is introduced and passed by the City Council of the City of Benicia at a regular meeting of the Council held on the 6th day of April 2004 and adopted by the following vote:

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Ayes: Council Members Campbell, Patterson and Smith

Noes: Council Member Whitney and Mayor Messina

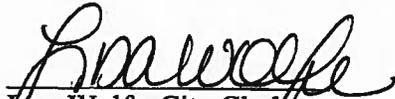
Absent: None

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Steve Messina, Mayor

Attest:



Lisa Wolfe, City Clerk