

TRANSCRIPTION OF THE VIDEOTAPED
BENICIA SPECIAL PLANNING COMMISSION MEETING

Date: Thursday, February 11, 2016

Transcribed By: Josie C. Gonzalez
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CITY OF BENICIA SPECIAL PLANNING COMMISSION VIDEOTAPED MEETING
THURSDAY, FEBRUARY 11, 2016

Video Transcription of City of Benicia Special Planning
Commission Meeting, transcribed by JOSIE C. GONZALEZ, Certified
Shorthand Reporter No. 13435, in and for the State of California.

1 CITY OF BENICIA SPECIAL PLANNING COMMISSION VIDEOTAPED MEETING

2 THURSDAY, FEBRUARY 11, 2016

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4 CHAIR DEAN: Commissioners? Commissioners? Are
5 we ready? Are we ready? Okay. Good evening,
6 everybody. Welcome back to the Benicia Planning
7 Commission. Will you rise and join me in the pledge of
8 allegiance.

9 (Pledge of Allegiance is cited by audience)

10 CHAIR DEAN: Will call the commission, please.

11 MS. MILLION: Commissioner Birdseye?

12 COMMISSIONER BIRDSEYE: Here.

13 MS. MILLION: Cohen Grossman?

14 COMMISSIONER COHEN GROSSMAN: Here.

15 MS. MILLION: Oakes?

16 COMMISSIONER OAKES: Here.

17 MS. MILLION: Radtke?

18 MS. RADTKE: Here.

19 MS. MILLION: Young?

20 MR. YOUNG: Here.

21 MS. MILLION: Chair Dean?

22 CHAIR DEAN: Here.

23 This is a reference to the fundamental rights of
24 the public. A plaque stating the fundamental rights of
25 each member of the public is posted at the entrance to

1 this meeting room per Section 4.04.030, the City of
2 Benicia's open government ordinance. This is a
3 continuation on the public hearing on the Valero Crude
4 by Rail project for certification of an EIR and adoption
5 of a use permit. We pick up where we were last night.
6 I think the commission posed a number of questions to
7 staff, and it's my understanding you have returned with
8 some of those answers.

9 MS. RATCLIFF: Yes. Thank you, Chair Dean and
10 Commission. We do have a presentation by pretty much
11 all staff members present. We would like to start off
12 with Mr. Hogin, contract attorney discussing a -- with a
13 discussion of the preemption question. Many questions
14 from the public as well as the commissions around that,
15 and I would like to turn it over to him to start with
16 that first, and then bring it back for further
17 information provided by other staff.

18 CHAIR DEAN: Okay. Thank you. Over to you,
19 Mr. Hogin.

20 MR. HOGIN: Yes, Mr. Chair and members of
21 commission. Let me see if I can get the presentation up
22 on the screen that I can see. There we go.

23 MS. RATCLIFF: Chair Dean, sorry. Just one
24 second. We are right now printing up copies of the
25 Power Point. I apologize. In the rush, we did forget

1 about that. We will be able to provide that for you as
2 well as members of the public in just a few minutes.

3 CHAIR DEAN: Okay. Do you want to hold off on
4 the preemption for a couple minutes and talk about some
5 of these other issues? No?

6 MS. RATCLIFF: No, I think this is fine.

7 MR. HOGIN: Mr. Chair and members of commission,
8 I am going to take just a few minutes to respond to some
9 of the questions and the comments that were received
10 both from the commission and from members of the
11 audience that spoke on the issue of preemption. To
12 start off the discussion, I'm just going to briefly
13 summarize what the staff's position is on preemption so
14 we can tee up the issues and refresh everyone's
15 recollection.

16 There's basically four points to it. First,
17 CEQA does apply in the view of staff to the on-site
18 operations that Valero has purposed, including the
19 unloading rack and related facilities that will be
20 owned, operated and constructed by Valero. Second, the
21 city has required Valero to participate in the
22 disclosure of impacts that will occur from rail
23 operations, which includes impacts from locomotive
24 emissions, impacts related to hazards and potential for
25 derailment and fire explosion and so on. All the

1 impacts that occur up rail of the Benicia Refinery.

2 I will note that in those two respects, staff
3 has taken a narrower view of preemption than Valero.
4 Valero asserted quite strenuously that CEQA does not
5 apply to the project at all, and Valero asserted quite
6 strenuously that the disclosure requirement is preempted
7 in addition to any other matters. The districts -- I'm
8 sorry. The city staff's view of preemption is not the
9 same as Valero, and it is in fact, in important
10 respects, significantly narrower.

11 The third point is that the staff has concluded
12 that mitigation of rail impacts is preempted. The city
13 does not have the authority to attempt to condition
14 Valero's permit on any mitigation of impacts that are
15 caused by railroad operations.

16 Finally, the fourth point is corollary of that.
17 The city does not have the authority to deny the permit
18 based on rail impacts, and that's in two respects. One,
19 the city doesn't have the ability to find, in weighing
20 the conditional use permit application, that the project
21 will be detrimental to the health, safety and welfare of
22 the community based on rail impacts. Could have other
23 on-site impacts, but not based on rail impacts.

24 And second, the requirement in Public Resources
25 Code Section 21081 that the city adopt a statement of

1 overriding considerations where there aren't any
2 significant unavoidable impacts, it is preempted to the
3 extent that the city cannot decide, the Planning
4 Commission cannot decide to reject the project on the
5 basis that the benefits of the project do not outweigh
6 the significant and unavoidable rail impacts which have
7 been identified.

8 That's, again, to tee it up. That's where we
9 are. First question I am going to address -- okay. I
10 got it. First question I am going to address is a
11 question raised by the Chair of the Planning Commission.
12 There was probably six or seven different speakers that
13 said last night that San Luis Obispo County, in
14 considering the Phillips 66 rails per project in the
15 Santa Maria area, had taken a different view of
16 preemption. And according to the speakers, six or
17 seven, that it was a much narrower view of preemption,
18 and their view was purportedly that the county was not
19 preempted for mitigating impacts from rail operations,
20 which is what we had said. And the Bay Area Air Quality
21 District sent a letter that strongly suggested that San
22 Luis Obispo had reached that conclusion. In fact, the
23 people who made those comments had apparently not read
24 any of the documents presented to the San Luis Obispo
25 County Board of Supervisors, including but not limited

1 to the staff report and/or the EIR. Because if you look
2 at those materials, what you will find is that their
3 approach is very similar in most respects to what the
4 city staff is proposing here, and the view that city
5 staff here has with respect to preemption, with a couple
6 differences.

7 I'll run through that very quickly. Number one,
8 they have the same view on CEQA's application to on-site
9 operations as we have. Number two, they have decided to
10 require disclosure of rail impacts under CEQA, which is
11 the same thing that city staff has done here. Number
12 three, the proposed findings that were presented to the
13 San Luis Obispo County Board of Supervisors included the
14 express finding that mitigation of rail impacts is
15 preempted by the ICCTA, which is exactly what the city
16 staff has concluded here.

17 The only different -- critical difference --
18 well, let me say that their -- in our case, the
19 conclusions about preemption were documented very
20 carefully in a detailed discussion of case law. It's an
21 appendix to the environmental impact report. San Luis
22 Obispo County did not have anything like that. They
23 were very general conclusions about preemption and are
24 very inconsistent.

25 In some cases the staff report in the ER will

1 say mitigation measures of rail impact is preempted, and
2 some cases they will say it's likely preempted. Other
3 cases they will say it may be preempted. So it's, in my
4 view, something of a sloppy work in the sense that it's
5 inconsistent. And in addition, they never explain why
6 preemption will apply or is likely to apply or may
7 apply. There's no discussion of case law, so I think
8 that there's no question but that city staff did a much
9 more thorough job, that their work was much more
10 transparent than really what San Luis Obispo County had
11 done. But in any case, in terms of the basic
12 conclusion, the finding, it's identical.

13 Where San Luis Obispo County differed -- there's
14 a factual difference and then a difference in approach.
15 The factual difference is that in the San Luis Obispo
16 County case, they did have impact from the on-site
17 operations. That is the non-rail components of the
18 project, thus giving the County Board of Supervisors the
19 clear authority to deny the project and deny the
20 conditional use permit based on the on-site operations,
21 regardless of whether there were significant off-site,
22 significant unavoidable rail impacts.

23 The legal difference, I suppose, is that the
24 staff report recommends denial of the permit based on
25 both on-site and off-site impacts. And what staff here

1 is saying is that you do not have the authority to deny
2 the project based on rail impact. Okay. Now, as a
3 practical matter, the San Luis Obispo case, they really
4 don't need to get to the issue of whether they can deny
5 the project solely based on rail impacts because they
6 have clear on-site impacts. Okay. So that was kind of
7 a difference. Maybe they never really got to that issue
8 in their analysis. It's hard to say, because like I
9 said, it's -- it's not super clear and transparent on
10 what they did with preemption, although the conclusions
11 are very clear.

12 What I have done is I have just highlighted some
13 excerpts from the report so I can just put it out there
14 and people don't have to take my word for it. You can
15 look at the key passages right here. This is from staff
16 report, Page 13. This is where the staff report says
17 that CEQA definitely applies to the on-site activities
18 and the construction operation of those equipment and
19 facilities that are owned and operated by Phillips 66 in
20 that case.

21 The next slide is the express finding, Exhibit
22 C, findings for denial. Number three, it says that the
23 benefits do not outweigh the significant unavoidable
24 impacts, and it says, "Additionally, due to federal
25 preemption, implementation of mitigation measures to

1 lessen the Class 1 impacts on the main line within San
2 Luis Obispo County in the state are infeasible as argued
3 by the applicant." Class 1 is a term they use to refer
4 to significant and unavoidable impacts. And the main
5 line, that's the term they used to refer to rail impacts
6 on the railroad main line. Okay.

7 Next one, just a couple specific examples.
8 Here's where they are talking about significant
9 unavoidable impacts from locomotive emissions from rail.
10 It says, "Mitigation has been recommended." It says,
11 "Since it is unlikely that these mitigation measures
12 will be implementable due to federal preemption," and so
13 on, the impacts associated with this will remain
14 significant and unavoidable.

15 Again, that's where they start to get
16 inconsistent with the language, and they say it's
17 unlikely as opposed to is. And then in the next
18 example, this relates to the hazard, possibility that
19 there might be derailment and fire explosion associated
20 with the transportation of crude oil from North American
21 sites. It talks about what the hazards are, and it
22 says, "These hazards are exacerbated because the county
23 is not legally able due to federal preemption to require
24 certain conditions of approval for Union Pacific along
25 the main rail lines," and there's some examples.

1 "Therefore, the county's approval would allow an
2 increase in risk along the main line as well as outside
3 the county and throughout the state."

4 Okay. This is the Bay Area Air Quality
5 District. And what I want to call out here is that this
6 letter is quite misleading, and I have highlighted the
7 relevant passages. It says, "A similar measure to the
8 one recommended by the air districts for this project
9 was recently included and a DEIR and a FEIR for a crude
10 by rail project."

11 Well, it was identified, and it was listed, and
12 it was found to be infeasible due to preemption. And
13 yet the letter simply states -- from the Bay Area Air
14 Quality and Management District simply states that the
15 recommended mitigation measure would not place any
16 burden by requiring and therefore, it would not conflict
17 with preemption. Well, it does not attempt to explain
18 why that would not be preempted.

19 I mentioned this before. This is the factual
20 difference between the San Luis Obispo project and ours,
21 is that here we do not have any significant unavoidable
22 impacts from on-site operations. I went back and looked
23 specifically at the San Luis Obispo approach because
24 that was Chair's question. I also looked at the other
25 approach adopted by an agency that looked at -- that has

1 the same issues we face in terms of preemption, and that
2 was the Kern County's approval of the Alon Crude-by-Rail
3 project in the Bakersfield area.

4 The Kern County approach is significantly
5 broader as to preemption than ours was. Kern County
6 concluded that all aspects of CEQA are preempted as to
7 rail impacts, including the disclosure requirement.
8 Kern County did not actually attempt to identify or
9 disclose what the impacts of rail operations were, and
10 they base the permit decision solely on the on-site
11 impacts. They also had -- to back up that conclusion,
12 they had, like the staff did here, a lengthy and
13 detailed discussion in the record that describes the
14 specific cases and statutes and reasons why any attempt
15 to mitigate preemption -- any attempt to mitigate impact
16 from rail operations would be preempted, and I've just
17 highlighted here in this slide -- I'm sorry. Let me
18 skip to this one -- highlight in this slide the
19 language, "Because the field of transport by rail is
20 preempted by federal regulation, the lead agency cannot
21 apply CEQA and its significant thresholds to impacts
22 resulting from mail line rail activities."

23 That is an example of the only other -- that I'm
24 aware of, the only other agency that has addressed this
25 issue, that has taken an even broader view of preemption

1 than staff has taken here. So those are the other
2 approaches to preemption. Now I'm going to now talk
3 briefly about the comments that said because Valero is
4 the applicant and not the railroad, then preemption does
5 not apply. And the city is free to make conditions that
6 address rail impacts and pose on Valero because Valero
7 itself is not a railroad.

8 And as the appendix to the EIR describes with
9 specific citations to case law, that is not correct.
10 What is dispositive is not the status of the applicant
11 as a railroad versus a private party. What is
12 dispositive is the nature of the regulation. Does the
13 regulation attempt to address local impacts from an
14 operation that -- from a facility that is owned and
15 operated by a private party that isn't a railroad, or
16 does the regulation attempt to address impacts from rail
17 operations, which may or may not be on the site and may
18 be many miles away from the project site.

19 And I have some specific case law examples here
20 where cities -- where the courts and/or the Surface
21 Transportation Board have held that a private applicant
22 cannot be subject to a condition that is aimed at
23 mitigating rail impacts. Okay. The first one is the
24 City of Alexandria case. I also refer to that as the
25 Norfolk Railway case, and this is discussed in EIR. The

1 court in that case held that a city cannot impose permit
2 requirements on private operators of trucks that serve a
3 transloading facility that is owned by the railroad,
4 because limiting the amount of trucks would limit the
5 ability of the railroad to run trains through that
6 transloading facilities. So it would in turn have an
7 effect, a direct effect on rail operations. And it is
8 therefore preempted even though the applicant was a
9 private party and was not a railroad.

10 Second one -- and this is a case that came to my
11 attention the last couple days. I think UP sent it over
12 and someone else sent it over to me. It's the
13 Winchester case. It's a Surface Transportation Board
14 Decision. The cite is 35794. In that case the Surface
15 Transportation Board -- city tried to say -- regulate a
16 private segment of track. It was owned by the private
17 operator at a transloading facility, but it was used by
18 the railroad. They tried to shut down that section of
19 track, and the Surface Transportation Board said that
20 the city does not have the authority to do that because
21 that would be having an affect on rail operations. The
22 city said wait a minute, the track is not owned by the
23 railroad. It's owned by a private party. It's not a
24 railroad. It says that doesn't matter. What matters is
25 that it has an impact on rail operations and therefore,

1 it's preempted.

2 In this case, I've included a highlight from it,
3 because I think it's very useful in distilling down what
4 I have been talking about all along, which is that a
5 city cannot regulate rail impacts directly by imposing
6 requirements on railroads, but it also cannot regulate
7 rail impacts indirectly by posing conditions on private
8 parties that are intended to have the effect of
9 regulating rail operations.

10 In this passage the Surface Transportation Board
11 cites the Norfolk case or the Alexandria case and
12 describes it as follows: "City cannot seek to regulate
13 interstate commerce indirectly by regulating trucks that
14 would use the carriers transload facility," and it goes
15 on to talk about the fact that shippers have a right to
16 access the common carrier, and that local agency cannot,
17 under the guise directed at shippers, thereby engage an
18 impermissible regulation of interstate railment work and
19 thereby create a patchwork of conflicting local
20 regulations.

21 I think that language is -- nicely captures what
22 staff has been saying all along here. Finally the cases
23 that the commenters relied upon are not relevant here,
24 and I'll very briefly -- and this is the last slide --
25 summarize what those cases are and why they aren't

1 relevant. And the reason is simply because in those
2 cases, the cities were attempting to address local
3 impacts rather than impacts from rail operations.

4 The West Palm Beach case cited in the appendix
5 discussed in the appendix there was a zoning ordinance
6 that said you can't have a transloading facility in a
7 residential zone. It was obviously designed to prevent
8 impacts that would occur when you put a transloading
9 facility next to homes. It obviously was addressed to
10 local impacts. And the court said because the owner and
11 operator of that transloading facility was not a
12 railroad, it was determined that was not preempted. The
13 Babylon case -- and I referred to this case in
14 discussing with the commissioners a couple days ago --
15 in the Babylon case there was a zoning ordinance that
16 prohibited waste transfer facilities. It was a
17 particular type of transloading facility. And the court
18 held that because that was directed at local impacts and
19 because the transfer facility was owned and operated by
20 a private party that was not the railroad, that that
21 regulation was not preempted.

22 And finally there was a case -- and I apologize.
23 I don't know if it was one of the commissioners that
24 cited this case or one of the commenters or both, but it
25 was the Newington case, STB 35853. It was the case

1 involving the city of Newington, which as I recall is in
2 Massachusetts. And they had a transloading facility
3 that they wanted to expand from five rail berths to 11
4 rail berths. The city stepped in and said before you
5 have the expansion, we want to take a look at that. We
6 want to make sure that under our zoning ordinance, there
7 aren't going to be impacts on the local area of that
8 expansion project. And the railroad said wait a minute,
9 that's just really to guise -- what you are really
10 concerned about is the rail traffic. Because we are
11 going to increase the berths, there's going to be more
12 rail traffic. Therefore, it's preempted because your
13 real purpose is to try to reduce the number of trains
14 that will be coming down the track.

15 The Surface Transportation Board said we have no
16 evidence of any real -- any subterfuge that is going on
17 here. As far as we can tell, this ordinance is just
18 intended to address local impacts in the area of this
19 transloading facility. And because it is owned and
20 operated by a private party that is not the railroad,
21 preemption does not apply. You can see that these cases
22 are all very different from mitigation measures here
23 that would address rail impacts because on their face
24 these mitigation measures would be doing just that;
25 addressing rail impacts on their face. They are not

1 local impacts, as was the case with these matters. They
2 would be expressly addressing and regulating the
3 operation of railroads.

4 And given the breadth of the ICCTA preemption
5 provision and the purpose behind it, which is to ensure
6 that railroads are subject to different requirements and
7 posed by the city of Benicia, city of Hercules, city of
8 Des Moines, Iowa, and so on, that there has to be
9 uniformity. It is consistent to say -- and the only
10 reasonable conclusion that one can draw from the statute
11 and all of these decisions is that this city does not
12 have the authority to decide what impacts -- what
13 impacts from locomotive emissions are acceptable, what
14 level of risk is acceptable when it comes to the
15 transportation of hazardous materials. That concludes
16 my summary. And I would be happy to answer any
17 questions now or perhaps later.

18 MS. MILLION: May we see the last slide?

19 MR. HOGIN: Yes, you absolutely may.

20 MS. MILLION: Last two slides, please.

21 MR. HOGIN: I'm sorry. Did I -- well, now --
22 okay. It disappears when I -- it's not functioning. I
23 have a malfunctioning device here, and I am not
24 qualified to address the malfunction in any way. Okay.

25 Can the audience see that? They can't. Okay.

1 Is it just the last slide we didn't see? Is it just
2 that one?

3 MS. MILLION: Yes, the last slide, please.
4 There it is.

5 MR. HOGIN: There it is. Those are the three
6 cases. Again, preemption did not apply because they
7 addressed local impacts, not impacts from rail
8 operations.

9 CHAIR DEAN: Questions from the commission?
10 Commissioner Young?

11 COMMISSIONER YOUNG: One of the mitigation
12 measures suggested by multiple agencies -- not by the
13
13 city but by commenters -- is to require Valero to enter
14 into off-site mitigation agreements with various air
15 districts, both here in the Bay Area and up rail. How
16 would such a mitigation measure interfere with the
17 management or operation of a railroad?

18 MR. HOGIN: A couple things. First, that isn't
19 the question, whether it would interfere or not. This
20 type of preclearance requirement involves categorical
21 preemption. The city cannot attempt to regulate -- to
22 impose conditions on a project that addresses rail
23 impacts. It doesn't matter whether there is a
24 substantial interference or interference or anything.
25 It's just simply by entering that realm, the city has

1 overstepped its boundaries.

2 COMMISSIONER YOUNG: But isn't that what the
3 statute requires, or the basic premise of the statute is
4 that you can't interfere with the management or
5 operation of a railroad?

6 MR. HOGIN: The statute says that you can't
7 regulate in that area, period. That's what the statute
8 says.

9 COMMISSIONER YOUNG: Okay. And nobody is
10 arguing that Valero is a railroad or a common carrier?

11 MR. HOGIN: No one is arguing that Valero is a
12 common carrier.

13 COMMISSIONER YOUNG: And I'm not a lawyer, and
14 I'm not really qualified to get into a back-and-forth in
15 this issue with you, but we did hear lots of testimony
16 from the lawyers last night and reference to other bills
17 and -- not bills -- sorry -- cases. And one of them
18 basically started with the -- ICCTA states that federal
19 jurisdiction over rail transportation is limited to,
20 quote, "Transportation by rail carriers," and defines a
21 rail carrier as someone providing common carrier rail
22 transportation for compensation. That's UP. It's not
23 Valero.

24 So I think what you are saying is that act
25 prohibits us from even considering any off-site impacts

1 of this project.

2 MR. HOGIN: Well, I'm going to be very precise
3 here. It prohibits you from considering any off-site
4 impacts from rail operations. If the unloading rack
5 had -- was going to be very noisy, and that was going to
6 disturb people across the street, that would be an
7 off-site impact, but it's not an off-site impact from
8 rail operations.

9 COMMISSIONER YOUNG: And if the city were to
10 deny -- not certify the EIR or deny the permit, that
11 wouldn't really be an impact on the railroad. It would
12 be an impact on Valero, clearly, but not on the
13 railroad.

14 MR. HOGIN: Well, I mean, first -- again, you
15 don't have to find an impact on the railroad to find
16 preemption, but as a practical matter, I would think
17 that it would have an impact on the railroad because it
18 would lose a customer, a prospective customer.

19 COMMISSIONER YOUNG: Sure, but does the ICCTA
20 guarantee that the railroad gets new business from
21 shippers?

22 MR. HOGIN: No, but it guarantees that local
23 agencies will not interfere in the ability of the
24 railroad to get business from customers. Absolutely.

25 COMMISSIONER YOUNG: Okay. So the letter -- one

1 of the letters talked about how the Surface
2 Transportation Board -- it quotes various cases, and one
3 in particular said that to be found subject to the
4 board's jurisdiction and qualified for federal
5 preemption, the activity at issue must be
6 transportation, and that transportation must be
7 performed by or under the auspices of a rail carrier.

8 And they quoted another case from Massachusetts,
9 and maybe it's the same one you talked about from
10 Massachusetts. But it says, "As this court reads the
11 relevant statutory language, congress intended that
12 transportation and related activities undertaken by rail
13 carriers to benefit from federal preemption, but did not
14 mean such preemption to extend to activity related to
15 rail transportation undertaken by non-rail carriers."

16 A case from Ohio said that "The mere fact that
17 the materials are delivered to a facility by rail does
18 not make their receipt railway transportation protected
19 from local regulations." It seems that the case you
20 cited support the argument about indirect preemption,
21 but they apply to third parties, not to railroads or the
22 attempt to regulate railroads.

23 MR. HOGIN: I'm not positive I understand your
24 question, but in light of your prior comments, the local
25 agency will run afoul if it adopts a regulation if it

1 directly or indirectly affects transportation by a rail
2 carrier. If the city here were to impose mitigation
3 measures on rail impacts, it would be running afoul of
4 that prohibition. The common carrier here is not
5 Valero. The common carrier here would be Union Pacific.

6 COMMISSIONER YOUNG: It seems we have a lot of
7 different opinions on this topic, and it's not really
8 subtle, as you imply. And this whole idea of mitigating
9 significant and unavoidable impacts is really predicated
10 on this opinion. And I certainly respect your opinion,
11 but I think my point is it's not subtle law, and we have
12 different opinions from different people, and the idea
13 that we should have no ability to address any of these
14 issues because of this opinion simply doesn't work for
15 me, at least.

16 On a related topic, the attorney general had
17 wrote an opinion about SB 861, which I assume you are
18 familiar with. And in there she pointed out that the
19 ICCTA does not preempt a state law to pay for pedestrian
20 overpasses. If that preemption does not apply to
21 pedestrian overpasses, I would assume it would not apply
22 to vehicle overpasses. Is that correct?

23 MR. HOGIN: I'm familiar with the pedestrian
24 overpass issue. I'm familiar with the -- I have read
25 the letter where the attorney general defends the state

1 law that requires reporting of Bakken train movements in
2 response to the railroad. I think the railroad actually
3 filed suit on that. I'm familiar with the attorney
4 general's position on that, and I can explain how that
5 is different.

6 COMMISSIONER YOUNG: Well, I guess my question
7 -- and it's specific to this overpass question.

8 MR. HOGIN: I'm not familiar with that.

9 COMMISSIONER YOUNG: Maybe sometime later you
10 can look at that, because I think that -- if that's
11 clear, if it's true that pedestrian overpasses are not
12 preempted by the ICCTA, then I think it follows that
13 vehicle overpasses are not preempted. And if that is
14 the case, we may have a solution to the issue of the
15 traffic blockage in the industrial park.

16 MR. HOGIN: Can we have Commissioner Young
17 perhaps e-mail that to staff and have that printed out
18 for me, and then later in the meeting I'll read and I
19 can respond to that. Does that work?

20 COMMISSIONER YOUNG: Thank you.

21 CHAIR DEAN: City attorney, you wanted to weigh
22 in?

23 CITY ATTORNEY WELLMAN: Yes, I wanted to weigh
24 in because when Commissioner Young asked the question, I
25 have a better idea of what he's asking.

1 You were asking about the cases where either the
2 STB or the courts had found that a third party was not
3 rail, and therefore a federal preemption did not apply.
4 In those particular cases it was where the third party
5 was trying to get out of having local jurisdiction apply
6 to the particular site, and therefore they went to court
7 saying we shouldn't have to abide by the city's zoning
8 or use permits because we should be preempted because we
9 are getting rail deliveries. In those cases they said,
10 no, you cannot use federal preemption for on-site
11 impacts. And that's the difference.

12 Federal preemption applies to impacts on the
13 rail, but the city has all the ability it needs to look
14
14 at any impacts that are on Valero's property, and that's
15 the difference. The case is -- if you go back to your
16 -- I don't know if you can -- the cities that may
17 address local impacts, those were the cases that you
18 were referring to, Commissioner Young. And those are
19
19 the cases where the third party was trying to get out of
20 the local -- the local regulation on their property.
21 And that's the difference.

22 In other words, third parties cannot use federal
23 regulation to get out of city's police authority, but
24 the cities can't make conditions on third parties that
25 are going to impact the rail. As much as we would like

1 to, we can't do it.

2 COMMISSIONER YOUNG: Well, again, I would just
3 say that that opinion is 180 degrees different than the
4 opinion of the other lawyers of other public agencies
5 from the attorneys for SACOG and numerous jurisdictions
6 up and down the line.

7 CITY ATTORNEY WELLMAN: Well, I think the
8 problem is that you can take cases and you can take
9 holdings from cases and you can make definitive
10 statements. For instance, when it's a third party that
11 is attempting to get out of having to abide by local
12 zoning regulations, then you get a ruling that they are
13 not the railroad, and therefore it doesn't apply. And
14 you can take that out of context and say that if it's
15 not a railroad, federal preemption does not apply, but
16 that's not the case.

17 This is a very fact-specific area of the law.
18 You can't just take things out of context. You have to
19 look at the facts of every case and determine why in one
20 area it says the city does have jurisdiction over the
21 third parties, and in other cases where whatever the
22 city is trying to do to the third party is actually
23 impacting the rail.

24 COMMISSIONER YOUNG: Yeah, my only point is
25 you're very certain in your position, and the other

1 lawyers are very certain in their position, and it's not
2 settled law. And you're asking us to make a significant
3 decision based on what is not settled law.

4 CHAIR DEAN: Okay. Questions from other
5 commissions? Commissioner Birdseye?

6 COMMISSIONER BIRDSEYE: My question is regarding
7 the San Luis Obispo EIR. Did they include mitigation --
8 I know they analyzed the impacts up and down the rail.
9 Did they include mitigation factors?

10 MR. HOGIN: They identified different ways to
11 mitigate rail impacts, yes, but then concluded that
12 those mitigations were infeasible.

13 COMMISSIONER BIRDSEYE: We analyzed the impacts,
14 but we did not look at mitigation?

15 MR. HOGIN: Not in detail that San Luis Obispo
16 did. At least one of the alternatives, limiting the
17 number of trains, it was an alternative, but it is the
18 same thing as a mitigation measure designed to reduce
19 the impact -- reduce rail impacts. But at some point
20 staff, and in my view, very correctly relied upon the
21 CEQA case law that says if you don't have the authority
22 to do anything about a particular impact, you are not
23 required to spend a lot of time speculating about what
24 it is you would do if you could.

25 COMMISSIONER BIRDSEYE: Okay. Thank you.

1 CHAIR DEAN: Just to follow up on that, one of
2 the differences of the approach that the city has taken
3 and the San Luis Obispo cases in our current situation
4 with our EIR, we are saying that there are significant
5 unavoidable impacts related to rail. We have not looked
6 at any mitigations and those are -- because of this
7 preemption issue, those are off the table for any kind
8 of mitigation. In San Luis Obispo, they said we've
9 identified significant impacts, we have identified
10 mitigations for those impacts, but because we cannot
11 implement those mitigations due to preemption, that's
12 still a significant unavoidable impact.

13 So the difference is in one case they have
14 significant unavoidable impacts related to rail that
15 they cannot do anything about, and in our case we --
16 those significant unavoidable impacts are off the table,
17 in essence, discard those completely. So on one hand
18 they go on to make their findings actually using the
19 benefit of those, the preemption creates -- forwards the
20 significant unavoidable impact. In other words, it
21 creates that.

22 And they're using that -- they've turned it
23 around. They are using that as a reason for denial
24 rather than just kind of sweeping it off the table
25 saying we cannot discuss it. Is that an accurate --

1 MR. HOGIN: Mr. Chair, I was following you for
2 about three quarters of it, and then the last quarter I
3 lost you. But the first three quarters was exactly
4 right with one small qualification. I don't think it's
5 accurate to say that the EIR didn't consider any
6 mitigation for rail impacts. There was some, but San
7 Luis Obispo identified more.

8 And I have not gone -- I have not gone back to
9 count how many mitigation measures San Luis Obispo
10 identified. I don't know. Literally, was it four? Was
11 it 12? I have not done that. I have not done that
12 math. Otherwise, that is basically an accurate
13 description.

14 CHAIR DEAN: One other thing -- back to your
15 earlier power point. Number 4 item on your first page,
16 I think it was. "City cannot deny the permit based on
17 the rail impacts." And I'm not disputing the fact that
18 the preemption obviously seems to apply to any rail or
19 rail operations, but where it overlaps with public
20 process, particularly with CEQA, where in order to
21 either approve the project -- well, to approve the
22 project we would have to make findings of overriding
23 consideration.

24 In order to deny the project, you would have to
25 come up with findings to deny the project. You are

1 saying that these significant unavoidable impacts that
2 we are not discussing are off the table for purposes of
3 making findings.

4 MR. HOGIN: Yes, for purposes of making
5 findings, for denying the project, yes.

6 CHAIR DEAN: So is there a specific case -- we
7 have been talking about rail impacts. Is there a case
8 that speaks to this intersection of CEQA and ICCTA,
9 because one is process and one is physical affects on
10 the ground?

11 MR. HOGIN: Yes. I think I understand the
12 question, but let me talk a little bit and see if I do.
13 The city -- well, the first -- the Planning Commission
14 is going to be asked to make -- take four actions.
15 First one is to certify the EIR. Second one is adopt
16 mitigation monitoring program. Third one is to consider
17 the benefits and the significant unavoidable impacts,
18 and the fourth is to consider the application for
19 conditional use permit and the finding relating to
20 health, safety and welfare under the Municipal Code.

21 On the first one, we have -- staff has assumed
22 that the disclosure requirement applies and has required
23 disclosure. Let's say the commission says we are not
24 satisfied with the disclosure. Any number of comments
25 that have been made says the disclosure is not adequate.

1 Okay. So the commission could say we want more
2 disclosure rail impacts. Is that lawful? It might be.
3 It may not be actually because the preemption, as I have
4 said, could be so broad as to apply the disclosure
5 requirement also especially in the case here where
6 Valero has been trying to get this permit for years at
7 this point and has been unable to access rail operations
8 in the meantime. The argument that it's just disclosure
9 and doesn't really impact rail operations gets weaker
10 and weaker the longer it takes.

11 But again, focusing back on step number one,
12 it's definitely within the purview of the commission to
13 consider the adequacy of the EIR, it's definitely within
14 the purview of the commission to consider the adequacy
15 of the analysis of on-site impacts. Okay. It may be
16 within the purview of the commission to consider the
17 adequacy of disclosure of rail impacts or may not.

18 Okay. Does that help to address --

19 CHAIR DEAN: Well, so far.

20 MR. HOGIN: Okay. Okay. Good. We'll go to
21 number two. Mitigation, monitoring and reporting,
22 program --

23 CHAIR DEAN: Not an issue here.

24 MR. HOGIN: Okay. The next one is the benefits.
25 And Section 28081 says that if you have significant

1 unavoidable impacts and you want to approve the project,
2 you have to find that there are benefits that outweigh
3 the impacts. Okay. Staff has -- in this case the only
4 significant unavoidable impacts are rail impacts. What
5 staff is telling you is you don't-- you are preempted --
6 the requirement is preempted that would otherwise
7 require you to find benefits.

8 So you can't say the benefits do not outweigh
9 the rail impacts. Therefore, we are denying the
10 project. If you do that you have violated the ICCTA
11 preemption provision.

12 CHAIR DEAN: So right there really goes to the
13 heart of my question. We are talking about a process
14 item where the commission needs to make a judgment call
15 on impacts and benefits and yet we are -- what you are
16 telling us is, we can't make that determination because
17 of rail impacts.

18 MR. HOGIN: I understand your question. Staff
19 is asking you to make that determination, to make the
20 determination that the benefits do not outweigh the
21 significant unavoidable rail impacts.

22 CHAIR DEAN: You're asking us to make the
23 determination that the benefits do not outweigh --

24 MR. HOGIN: That's the staff recommendation,
25 yeah.

1 CHAIR DEAN: Correct. But then you are
2 saying --

3 MR. HOGIN: Then normally -- sorry to interrupt.
4 Just to finish the thought. But normally in a normal
5 protocol, you would then be unable to approve the
6 project.

7 CHAIR DEAN: Correct.

8 MR. HOGIN: But we are saying is this is not the
9 normal protocol. Then after you make that finding, you
10 have to go onto the next step and consider the permit,
11 the CUP conditions and CUP test, which is whether the
12 project would be detrimental to the health, safety and
13 welfare of the community.

14 CHAIR DEAN: To go to the next step, the
15 commission needs to make those findings that it would
16 not be detrimental to the health, safety and welfare of
17 the community. And are you saying we are preempted from
18 making a negative finding there?

19 MR. HOGIN: You are preempted from basing the
20 conclusion on rail impacts. If you base the conclusion
21 on on-site impacts, that is not preempted or impacts
22 from on-site operations, I should say.

23 CHAIR DEAN: So --

24 MR. HOGIN: So if you decided that the unloading
25 rack operations has a toxic impact on the neighbors, you

1 could deny the use permit on that basis. You would need
2 to have evidence.

3 CHAIR DEAN: And I understand what you are
4 saying. At least I think I understand what you are
5 saying. I guess the issue is that as a body, we're
6 being told that rather than make the finding that
7 traditionally we would make that will be impacted
8 because of rail impacts, that really -- let me -- I want
9 to -- we are prohibited by rail impacts that are
10 significant and unavoidable.

11 Can you see the conundrum as a commissioner? On
12 one hand -- you are asking us to say the benefits do not
13 outweigh the impacts. And yet the very impacts that we
14 can't outweigh with a benefit are the reason that we
15 can't -- the reason you would have to find it.

16 MR. HOGIN: You would have to make the balance
17 in the first place. Yes, I understand that. I
18 apologize that is a little unusual, but that's just
19 where we are. We're at the intersection of CEQA and
20 ICCTA, and it's not something that comes up a lot. So
21 that's just where we are. In terms of --

22 CHAIR DEAN: What you just said, the
23 intersection of CEQA and the ICCTA, is there specific
24 case law that goes to this issue of the rail preemption
25 preempting the determination of significant and

1 overriding impacts?

2 MR. HOGIN: No, but it is -- in my view -- an
3 unmistakable inference that one can draw for the ICCTA
4 preemption provisions.

5 CHAIR DEAN: So this is not something that has
6 been tried in court, but it's your interpretation given
7 the broadness of the law?

8 MR. HOGIN: Yes, and all the cases that are
9 cited. Again, there has been -- there have been cases
10 which have said the ICCTA preempts the application of
11 CEQA to projects proposed and operated by the railroad.
12 Okay. There is a federal district court case arising
13 out of Encinitas and there's a Surface Transportation
14 Board case involving the DesertXpress high-speed rail
15 from Los Angeles to Las Vegas. Both those cases, the
16 court and the STB said that local agencies cannot apply
17 CEQA directly to a railroad.

18 The situation we have here is it's indirect.
19 Okay. And there is no case in California that addresses
20 that specifically. So there is no case that addresses
21 application of CEQA in that situation. However, there
22 are cases that address the applications of laws like
23 CEQA, zoning ordinances, environmental statutes and so
24 on in the context of indirect effect. I see no
25 difference between those cases and CEQA. There's

1 nothing special about CEQA. CEQA is a state land use
2 law that gives certain authority to local governments,
3 but ICCTA preempts that type of authority.

4 CHAIR DEAN: I would agree that ICCTA probably
5 presents local land use zoning and other land-based
6 regulations or geographically based regulations, but
7 CEQA is also a process-oriented public disclosure law
8 which specifically requires that we, the agencies, make
9 findings, and at the same time we are preempted from
10 making the findings that we are told by CEQA that we
11 need to make.

12 So this real catch-22 you can see it makes a big
13 difference whether you are interpreting the preemption
14 law broadly or narrowly. I hope you can understand our
15 frustration with this. This is very much a conundrum
16 for the commission.

17 MR. HOGIN: I do. It hasn't been easy for me
18 either, Mr. Chair. I'm just kidding.

19 Where does this leave us at the end of the day?
20 We have an EIR that you need to determine whether it
21 adequately discloses all impacts. You may or may not be
22 preempted from deciding that the analysis of impacts is
23 adequate. That's just a call you have to make.
24 Mitigation monitoring is not an issue. Statement of
25 overriding considerations. I mean, what you need to do

1 is do the balancing. I mean, you can do that, right?
2 That's something you do all the time.

3 CHAIR DEAN: I'm sorry. Say that again.

4 MR. HOGIN: You can do the balancing to decide
5 as a matter of policy, here are the benefits of this
6 project as we have identified, as staff has identified
7 and as may be modified at the discretion of the Planning
8 Commission. Here are the impacts, and you can try to
9 decide if one outweighs the other. You can still do --
10 you can still perform that calculation, right? That's
11 something that the Planning Commission does all the
12 time, right?

13 CHAIR DEAN: Yes. You can still make that
14 calculation, but in the end you are telling us that we
15 can't -- if the calculation comes out that the benefits
16 don't outweigh the impacts, you can't deny the project.
17 That's basically -- you're telling us based on the real
18 impacts, and in which case, these are the most
19 significant impacts, and the ones in certain cases could
20 be hazardous or fatal. So --

21 MR. HOGIN: That's correct.

22 CHAIR DEAN: So I think --

23 MR. HOGIN: Another approach you could do is you
24 could say -- you know, if you agree that 21081 is
25 preempted, you could say, the only significant

1 unavoidable impacts, we have a rail impact, and the
2 weighing is a futile exercise, so we decide we are not
3 even going to do the weighing, and that would be legally
4 defensible as well. Does that make sense?

5 COMMISSIONER YOUNG: What is the last thing you
6 just said?

7 MR. HOGIN: Okay. The chair -- let me see if I
8 can characterize this. The chair has some discomfort
9 with the fact that it's been asked to do some weighing
10 and then -- for no purpose.

11 CHAIR DEAN: Correct.

12 MR. HOGIN: Okay. Good. What I am saying is
13 that is a valid point, and you can decide if it has no
14 purpose, we aren't going to do the weighing. That would
15 not be unlawful.

16 CHAIR DEAN: The weighing. The balancing of the
17 pros and cons for the benefits and the impacts.

18 MR. HOGIN: Staff has simply presented this.
19 Staff doesn't think the benefits outweigh. The staff
20 has presented it. There is nothing to prevent the
21 commission from deciding that the benefits do outweigh
22 the impacts. I mean, that's not what staff thinks, but
23 the commission might presumably think that. So there's
24 an opportunity to consider that. But if the commission
25 decides the balancing has no purpose. Therefore, we're

1 not even going to do it, I think that's a defensible,
2 lawful position. You would not be in violation of CEQA
3 or the ICCTA or anything if you were to make that
4 decision.

5 CHAIR DEAN: Okay. Other questions for staff on
6 this issue?

7 COMMISSIONER YOUNG: I do. One more. Earlier
8 we were sort of characterizing the situation that we are
9 in an almost a take-it-or-leave-it situation. We either
10 approve the project as it's presented or you reject the
11 project. Are you saying now that we can't even reject
12 the project?

13 MR. HOGIN: No.

14 COMMISSIONER YOUNG: We can't reject it if it
15 involves --

16 MR. HOGIN: Based on rails. You can't reject it
17 based on a finding that the benefits don't outweighs the
18 rail impacts, and you can't base it on a finding that
19 because of the rail impacts the project will be
20 detrimental to the health, safety and welfare of the
21 community.

22 COMMISSIONER YOUNG: Even if some of those
23 impacts are rail related and some may not be rail
24 related?

25 MR. HOGIN: Yes, because you were vulnerable if

1 it's unclear what your decision was based on, if it
2 might have been based on rail impacts, in my view.

3 CHAIR DEAN: Cohen Grossman?

4 COMMISSIONER COHEN GROSSMAN: I'll defer to the
5 city attorney, if you had something that --

6 CITY ATTORNEY WELLMAN: I just wanted to add a
7 little bit to this. I had a very hard time grasping
8 this until I started reading the cases. From having
9 read the cases I understand it a lot more that you can
10 look at all the impacts that are created by whatever
11 Valero was doing on its property. But if you make a
12 decision where you are actually impacting their ability
13 to use rail, that's where you are going to run into
14 problems.

15 So you can't make your decision based on the
16 impacts. Staff realizes that the impacts from rail can
17 be horrendous, and they don't want to ignore it. They
18 want to disclose it, and they actually are recommending
19 that you realize that the benefits may not outweigh the
20 impacts from rail. But unfortunately federal law
21 preempts our local jurisdiction, and we can't deny the
22 project on that basis. It's a very hard thing to wrap
23 your head around, but when you realize that the whole
24 name of the law is interstate state law commerce
25 commission termination act, and the whole purpose of the

1 law is to allow interstate commerce.

2 It means you can't control what's being
3 transported by rail unfortunately, and you can't impact
4 the customer's access to it unless you've got local
5 regulations that impact what's going on in the use of a
6 private property.

7 You can controls what happens on Valero's
8 property, but you can't make decisions that are going to
9 impact the rail. I don't know whether that's helpful or
10 not, and it's a horrible dilemma to be in, but we
11 sometimes are faced with these dilemmas in other areas
12 like constitutional law doesn't allow us to prohibit all
13 adult entertainment in the city whether we like it or
14 not. Sometimes we have these federal laws that keep us
15 from being able to consider things that we're preempted
16 from doing.

17 CHAIR DEAN: Okay.

18 COMMISSIONER COHEN GROSSMAN: Mr. Hogin, I have
19 a question.

20 MR. HOGIN: Absolutely.

21 COMMISSIONER COHEN GROSSMAN: You use the term
22 or the words local agency will run a foul of the
23 prohibition. You were talking about the preemption.
24 What is run a foul look like? What do you mean?

25 MR. HOGIN: That -- I'm not sure what the

1 context was but generally what I would mean by is that
2 they would take action that is preempted and that action
3 would be unlawful.

4 COMMISSIONER COHEN GROSSMAN: And what would
5 happen?

6 MR. HOGIN: The city would -- I would guess that
7 the city might well be sued by Valero and/or by the
8 railroad.

9 COMMISSIONER COHEN GROSSMAN: I have a
10 follow-up -- two follow-up questions. Thank you. In
11 the beginning, very, very beginning of your slideshow,
12 and you talk a little faster than my brain calculates
13 sometimes. I thought I heard you say that the city has
14 been more -- I'm really paraphrasing here. You were
15 comparing the city's approach to Valero's. Can you
16 clarify what you said there or just repeat it.

17 MR. HOGIN: Absolutely. There's two different
18
19 respects. The first is that Valero's position is that
20 CEQA doesn't apply even to on-site impacts, that the
21 city is -- would be required to consider their
22 conditional use permit application without preparing a
23 negative declaration, without preparing an EIR because
24 the facilities they are constructing are facilities that
25 are ancillary to a rail operation. That is not true.

1 It would be true if Union Pacific was building the
2 unloading rack. Okay. But because it's not Union
3 Pacific's loading rack, that's not true.

4 The second respect is that Valero has taken the
5 position that we should do what Kern County did, which
6 is not even consider rail impacts, not even disclose
7 them. They said the ICCTA preempts any type of a
8 preclearance review including preclearance requirement
9 that you have disclose, identify and disclose rail
10 impacts. In those two respects, the city has said no to
11 Valero. We have a narrower view of preemption in those
12 two respects than you do Valero.

13 COMMISSIONER YOUNG: On a slightly different
14 topic, if presumably UP is required to haul any railcar
15 that meets their specifications and hooks onto a
16 locomotive, if the city were to tell Valero, who owns
17 the rail cars, that we are concerned about certain
18 aspects of the railcar and we want the rail cars to have
19 certain features, that would be preempted?

20 MR. HOGIN: Yes.

21 COMMISSIONER YOUNG: Although --

22 MR. HOGIN: It doesn't matter that Valero owns
23 the car.

24 COMMISSIONER YOUNG: Or that they are compliant
25 with whatever UP requires?

1 MR. HOGIN: That's right. As long as -- UP as a
2 common carrier is required to accept the load as long as
3 it complies with all US Department of Transportation
4 packaging requirements and all the other requirements.

5 COMMISSIONER YOUNG: So if we told Valero that
6 we want stronger, sturdier rail cars, and they own the
7 rail cars, and those rail cars were able to be held by
8 UP without any problem, where does the preemption kick
9 in?

10 MR. HOGIN: Because the -- rail cars are part of
11 rail operations, an integral part of rail operations.
12 The city is preempted from taking any regulatory action
13 that would attempt to direct or control or manage the
14 operation of a railroad, and the railcar is part of the
15 operation of a railroad, just like a track is, just like
16 a locomotive engine is, but it doesn't matter that
17 Valero is the owner of the car.

18 COMMISSIONER YOUNG: But whether it was a weak
19 car or a strong car doesn't impact that position?

20 MR. HOGIN: That's correct. As long as the car
21 complies with the Department of Transportation's
22 specifications, the city has no say.

23 COMMISSIONER YOUNG: So to say that they should
24 use a stronger car, how does that manage UP's operation
25 or interfere with it?

1 MR. HOGIN: Because you are attempting to impose
2 requirements on the operation of a railroad when you do
3 that.

4 COMMISSIONER YOUNG: I guess I have to disagree.

5 MR. HOGIN: Okay.

6 COMMISSIONER YOUNG: Because it's a railcar that
7 is already allowed and permitted and meets all the
8 requirements of the need that UP has to haul it. We're
9 simply saying that okay, if you can use this car or this
10 car or this car, we want you to use this car.

11 How is that an interference with the management
12 of UP's railroad?

13 MR. HOGIN: I think that the head of the
14 Department of Transportation would tell you that it
15 would be a regulatory nightmare if every local
16 jurisdiction in the United States had the authority to
17 tell the shippers what cars they were allowed to use and
18 what cars they were not allowed to use because the city
19 of Benicia would one car, the city of Hercules would
20 require another car, city of Des Moines would require
21 another car. So I think that's what the ICCTA
22 preemption provision is all about.

23 COMMISSIONER YOUNG: Okay. Another issue that's
24 come up has to do with the volatility of the oil and the
25 need to either condition or degasify the oil to remove

1 the volatile elements. In many cases that conditioning
2 is either done in the field or it's done as the cars are
3 being loaded.

4 In either case, same question, how does a
5 requirement to degasify oil in the field impact UP's
6 operation of a railroad?

7 MR. HOGIN: Well, it's within the exclusive
8 jurisdiction of the Surface Transportation Board, and is
9 in fact regulated by the Department of Transportation.

10 In the last couple years the -- you know, the
11 background is that very little crude oil was being
12 transported by rail until three or four years ago, then
13 the amount increased by thousands of a percent overnight
14 and are most of it was Bakken crude oil. And initially
15 the oil fields whose responsibility it is, the people
16 who actually load the tank car -- this is not typically
17 the shipper. It's not Valero. It is the producer at
18 the well. They are doing a very poor job of degassing
19 it. This was part of the reason there were a lot of
20 these explosions, not the entire reason. There are
21 other reasons too, but that was one of the first issues
22 that the PIMSA, petroleum hazardous materials management
23 and the federal transportation authority, that was one
24 of the first issues they looked at. And they got right
25 on that. They sent out advisories, and they adopted

1 regulations, new regulations and so on and went around
2 and performed education of all the people in North
3 Dakota who were responsible for degassing the Bakken
4 oil. That was one of the first issues they addressed.
5 That is very -- if I can just finish the thought.

6 It is very much part and parcel of the federal
7 regulation of the transportation of hazardous materials.
8 So the city can't tell Valero or the oil producer at the
9 well head when and how they are supposed to degas Bakken
10 oil. That's not within the city's purview.

11 COMMISSIONER: I think you said that was
12 federally determined, but my understanding is each of
13 the states sets their own standards and those standards
14 are different in each state. It's not a federal thing,
15 it's a state thing. Texas, for example, has very
16 different standards for degasification than North Dakota
17 does.

18 MR. HOGIN: That may be the case, but what I'm
19 talking about is the federal requirements that apply
20 under the -- under the department of transportation, the
21 federal packaging requirements that apply if you are
22 going to -- if you are going to transport hazardous
23 materials like Bakken crude oil on a common carrier on
24 the interstate rail network. Those are specific
25 requirements.

1 There might be other requirements that are not
2 necessarily related to transportation. I don't know.
3 Maybe there are -- maybe the state of Texas regulates
4 oil wells, and it says when you produce oil from a well,
5 regardless if you are going to put it on a train or put
6 it on a pipeline or put it on a ship, you have to
7 degasify it. I don't know.

8 But what I do know, it is within the exclusive
9 jurisdiction of the Surface Transportation Board to
10 adopt packaging requirements for the transportation of
11 hazardous materials including but not limited to Bakken
12 crude oil, and they have in fact exercised that
13 regulatory jurisdiction. And because it's their
14 exclusive jurisdiction, the city has no authority to
15 step into that domain.

16 COMMISSIONER COHEN GROSSMAN: Who were the
17 regulators? Who enforces that? And what I'm asking
18 actually is a two-part question. I assume it's enforced
19 at the source but you know, things change in transit.
20 Is it inspected at the destination also for ensuring
21 compliance?

22 MR. HOGIN: That's a good question. I don't
23 know the answer to that. I don't know if the Valero
24 people are versed in the details of the packaging
25 requirements and so on. I don't know. I know that the

1 big -- like I said, this is what I know. One of the
2 major problems, especially in the very early phase, the
3 first year or so when Bakken crude oil started to be
4 shipped in very large volume, was the fact that the
5 shippers were not doing what they were -- not the
6 shippers, the people who were responsible for loading
7 the tank cars were not doing what they were supposed to
8 be doing. That was an issue that was addressed. I
9 think that probably has helped to prevent some
10 additional problems, but that's not the only solution.

11 CHAIR DEAN: Okay. It seems like we are seeing
12 no more questions from the commissioners. We're running
13 out of steam on this item. So shall we go onto the
14 other issues that staff has done a little research on
15 here?

16 MS. RATCLIFF: Thank you, Chair Dean, yes. I
17 would like to hand it over to Janice Scott from ESA who
18 is going to talk about some of the commissioners
19 questions regarding the EIR.

20 MS. SCOTT: Good evening. Several of the
21 commissioner had questions about various aspects of the
22 environmental analysis, and thanks for this opportunity
23 to circle back to those. Commissioner Birdseye asked
24 whether the EIR analyzed both daily and annual
25 unmitigated emissions. She raised this concern based on

1 the comment found on Pages 26 through 28 of the
2 February 8, 2016 letter that was submitted by the law
3 firm Adams Broadwell.

4 This question also relates to a question that
5 was raised by COMMISSIONER COHEN GROSSMAN regarding
6 response B11 in the final EIR. Did the ERI analyze both
7 daily and annual unmitigated emissions? Yes, it
8 decidedly did. The comment is based on the DEIR alone
9 only on the draft. The draft was supplemented by the
10 revised draft EIR, and further modified and clarified in
11 the final in response to comments.

12 So the estimate of daily emissions was included
13 in the response to one of Adams Broadwell's comments of
14 September 15th, 2014 on the draft EIR. It's response B
15 1172. Briefly, the response shows that the project's
16 average daily emissions of all criteria pollutants would
17 be less than the Bay Area Air Quality Management
18 District's significant threshold. The response also
19 makes clear that thresholds are based on average daily
20 emissions, not peak, as suggested in the comment.

21 If you would like, I would be happy to read the
22 response verbatim, if that would help. Otherwise --
23 okay.

24 CHAIR DEAN: Mr. Young?

25 COMMISSIONER YOUNG: So the question had to do

1 with -- the commenter was suggesting that you have to do
2 both the analysis on daily and the annual emissions.
3 What you just said is that looking at the daily
4 emissions, that those were still below the levels that
5 would make it a significant impact.

6 I think her point was that part of the analysis,
7 at least on the annual side, is that you looked at the
8 emissions from the locomotives locally, and then you
9 deducted the presumed loss or negative emissions from
10 having fewer marine tankers come in. Is that right?

11 MS. SCOTT: We looked at the emissions within
12 the Bay Area District, relative to the Bay Area
13 District's requirements. So within the district, yes,
14 we looked at marine emissions and rail emissions.

15 COMMISSIONER YOUNG: And then you subtracted the
16 emissions from the marine tanker -- is it an emission or
17 is it a subtraction?

18 MS. SCOTT: Within the district it results in a
19 beneficial effect, the GHG emissions within the
20 district. That's another question that was asked by a
21 lot of people. It's confusing because whether there is
22 a GHG benefit or significant adverse impact depends on
23 the geographic area that you are looking at.

24 COMMISSIONER YOUNG: Okay. But on a daily
25 basis, it also was less than significant?

1 MS. SCOTT: The -- yes.

2 COMMISSIONER YOUNG: And that's despite the fact
3 that on a daily basis you will have four trains a day,
4 but you only have marine tankers coming in 80 times a
5 year. So there is 250 days a year that there aren't any
6 marine tankers to offset the four trains that are coming
7 in. I don't see how you couldn't have a significant
8 impact. Maybe it's in how you measure it, but you got
9 280 days or 250 days or whatever it is when there's only
10 trains coming in, and there aren't any tankers. And you
11 can't reduce the emissions by the argument that the
12 tankers are using less.

13 So you can only look at the emissions from the
14 trains on those days. And what you are saying is on
15 those days when only trains are a factor, that that
16 still is less than significant.

17 MS. SCOTT: I am suggesting that the analysis
18 was conducted and in compliance with the requirements of
19 the Bay Area Air Quality Management District, and all of
20 the assumptions and calculations were provided in
21 appendixes to the DEIR and the FEIR.

22 COMMISSIONER YOUNG: So that's a yes?

23 MS. SCOTT: The decision is -- yes. It's a
24 less-than-significant impact based on the calculations
25 provided in the analysis.

1 COMMISSIONER YOUNG: It just doesn't follow for
2 me, but okay. Thank you.

3 CHAIR DEAN: Any other questions on the air
4 quality item? No? Okay. What's next on your list?

5 MS. SCOTT: Commissioner Oakes asked a traffic
6 question. It was a specific traffic question that
7 relates to the larger concern about potential impacts to
8 the industrial park businesses. He asked "If the
9 baseline has an average of 10 trains per day crossing
10 Park Road, then how do the project's four trains per day
11 represent a one-percent increase?"

12 It didn't seem to make sense to him; just
13 mathematically it sounds weird, and that's because it is
14 weird and it's not right. To be clear, the one-percent
15 change relative to existing conditions is not in the
16 EIR. Instead it was offered as part of a response
17 provided by the applicant's traffic consultant during
18 questioning the other night.

19 We heard Francisco Martin from Ferran Pierce
20 refer on Monday to that percentage being about the
21 project-specific delay considering nighttime traffic
22 would be more like one percent than the EIR's discussion
23 of two percent. We believe that those are just an
24 honest mistake given the stress of public testimony and
25 being asked questions and things like that.

1 In response to comment C128 in the final EIR
2 about the probability of a simultaneous train crossing
3 and emergency service call, the final EIR stated that
4 approximately 33 minutes per day of project caused
5 delay, and that's four trains times 8.3 minutes per
6 train represents about two percent of the total minutes
7 in a day. So 33 minutes divided by 1,440 minutes in a
8 day is 2.3 percent. That's what the analysis in the EIR
9 is based on.

10 With that said, we wanted to clarify that a
11 comparison of existing average train crossings per day
12 to existing project delay crossings would be misleading,
13 and it actually leads to an incorrect impact conclusion.
14 Although project trains would increase the frequency of
15 trains crossing Park Road by four crossings per day, the
16 total number of crossings actually would generally fall
17 within the range of existing conditions because the
18 project would add rail capacity within the refinery
19 boundary that would be sufficient for switching to incur
20 within the refinery.

21 That means that it no longer would be necessary
22 for a single train to back up and go forward and back up
23 and go forward, and thereby cross Park Road more than
24 entering and leaving. Does that help?

25 COMMISSIONER OAKES: I'm sorry. Does that mean

1 they suggest that there would not be any back and
2 fourth?

3 MS. SCOTT: There is sufficient capacity -- if
4 the project were approved, there would be sufficient
5 rail capacity in the rail refinery that the trains would
6 come in, split and unload. So, yes, no necessity to
7 back and forth multiple times across the road, which
8 occurs under current baseline conditions.

9 COMMISSIONER OAKES: That's what they do now is
10 that they break them up, move them around, and the
11 additional two lines for staging was the intent to
12 minimize that?

13 MS. SCOTT: That's correct.

14 COMMISSIONER OAKES: The mitigation measure?

15 MS. SCOTT: Yes.

16 COMMISSIONER OAKES: Thank you.

17 MS. SCOTT: We also wanted to circle back on
18 Commissioner Young's reference on Tuesday night to
19 multiple references to the Caltrans letter. Our traffic
20 engineer was here Monday but not Tuesday. So because
21 the Caltrans letter was -- you had a lot of questions
22 about it, we asked him to provide detailed responses to
23 those questions. He identified four. I would like to
24 just read them to you as he wrote them. And his name is
25 Jack Hutchinson.

1 "I've had a chance to review the Caltrans letter
2 dated January 15th, 2016, and the agency's follow-up
3 letter dated January 20th, 2016, which was attached to
4 the staff report for the Planning Commission hearing,
5 and raised by Commissioner Young during his comments on
6 Monday night. I offer the following responses: First,
7 in the paragraph under traffic operations, Page 1 of the
8 January 15th letter, Caltrans refers to field
9 observations they made on the number and duration of
10 existing train crossings of Park Road, and states that
11 based on those observations, the number of existing
12 trains crossing times equal to or greater to the unit
13 train occur four times per week.

14 "Caltrans provides no documentation of their
15 field observations. For example, when and for how many
16 days did they observe the train crossings. So there's
17 no way to substantiate the accuracy of their statement
18 about the number and duration of train crossings.
19 Relative to this unsupported assertion, the analysis in
20 the EIR waives seven days of video data continual,
21 results of the microstimulation modeling, which was
22 validated against field data to present a reasonable
23 approximation of existing conditions and other detailed
24 input from at least two different traffic professionals
25 that support the conclusions that are reached in the

1 draft EIR" -- I'm sorry -- "in the final EIR."

2 His second item is that "The last two sentences
3 on above cited paragraph were corrected in the January
4 20th follow-up letter and the revised single sentence
5 states that quote, when northbound I-680 off-ramp
6 operations are not impacted by unit train crossings, the
7 off-ramp operates at level of service, LOS A, unit train
8 crossings degrade off-ramp operations to LOS F. That
9 description of the impact of LOS conditions during train
10 crossings of Park Road is generally consistent with the
11 EIR's description, i.e., paraphrased for brevity without
12 losing accuracy." Quote, "The steady intersections on
13 Park Road, Bayshore Road and Bayshore Road I-680
14 northbound off-ramp currently operate at LOS A when no
15 train crossing occurs at Park Road.

16 However, if a train crossing with a duration of
17 about 12 minutes occurs, then the intersection service
18 degrades to LOS F, and vehicle cues extend upstream on
19 Park Road, Bayshore Road to and onto the I-680
20 northbound off-ramp, but do not extend onto the I-680
21 main line.

22 The draft EIR also addresses the nighttime
23 conditions on the same page stating that nighttime
24 traffic volumes are low enough to avoid unacceptable LOS
25 conditions if a train crossing occurs."

1 Item three. "In the paragraph at the top of
2 Page 2 of the January 15th letter, Caltrans puts forth a
3 worst case scenario under which, in its opinion, a
4 significant impact would occur, cues would back onto the
5 main line of northbound 680 Bayshore Road. Based on my
6 38 years" -- Jack's -- "38 years as a registered
7 professional traffic engineer, the worst case scenario
8 that Caltrans put forth two sequential train crossings
9 within six to eight minutes during peak travel times is
10 speculative and very unlikely to occur. It's important
11 to note that for purposes of cuing, backups, on the
12 northbound I-680 off-ramp at Bayshore Road, the peak
13 travel time is the AM peak period, which is 6:00 a.m. to
14 9:00 a.m.

15 "The exact scheduling of project trains would be
16 set by Union Pacific. But as described in the revised
17 draft EIR and in response to comment C118 in the final
18 EIR based on UP's documented pattern of practice of
19 coordinating schedules of passenger trains and freight
20 trains, it is reasonable to assume that UP could
21 schedule project trains to avoid the peak traffic hours.

22 In addition, as described on Page 4.11-4 of the
23 draft EIR, the train crossing at Park Road that occurred
24 during the week-long videotaping occurred at various
25 times between 9:30 a.m. and 7:15 p.m. i.e., there were

1 no train crossings during the above cited three-hour AM
2 peak traffic period. For these reasons it is my" --
3 Jack's -- "professional opinion that the suggested worst
4 case scenario would not provide a reasonable disclosure
5 for potential impacts."

6 Item four, "Regarding Caltrans reference to a
7 four-fold increase in the frequency of cueing on the
8 off-ramp in the next to last sentence of the above cited
9 paragraph" -- it's on Page 2 of the January 15th
10 letter -- "The source of that four-fold increase is
11 uncertain. Without data, verifiable facts or other
12 evidence that substantiates the assertion of the letter,
13 we have only enough information from Caltrans to know
14 that there is a disagreement."

15 CHAIR YOUNG: Commissioner Young.

16 COMMISSIONER YOUNG: Yeah, a couple things on
17 that. I think you said that the guy from Ferran Pierce
18 said that when there was a train crossing, that the
19 level of service would deteriorate to a level of service
20 of F.

21 Is that right?

22 MS. SCOTT: It would deteriorate to LOS F if a
23 train crossing with about 12 minutes occurs.

24 COMMISSIONER YOUNG: And the staff report says
25 that no intersection -- during a train crossing that no

1 intersection would go worse than level of service D.
2 And so there's a problem there. The staff is saying
3 that it's never going to get worse than D. Your
4 consultant said that it's going to get to F when there
5 is a train crossing. Is that right?

6 MS. SCOTT: No, that's not correct. The
7 calculation of level of service is based on an average.
8 It's not one specific point in time.

9 COMMISSIONER YOUNG: I don't understand.

10 MS. MILLION: So, Commissioner, I'm certainly
11 not going to pretend that I'm a traffic engineer,
12 because I am not. But I remember that Mr. Hutchinson
13 did make a point of saying -- actually I'll correct
14 that. I believe it was the representative of Ferran
15 Pierce was talking about standard practice for
16 calculating LOS. And he did say as part of that process
17 you take an average.

18 What the time frame was for that average span, I
19 don't know, but I do know that you don't look at every
20 intersection at every minute of the day and say it just
21 dropped to LOS F and therefore, that intersection is
22 classified at LOS F.

23 COMMISSIONER YOUNG: But the staff report does
24 say that at the time of a train crossing, no
25 intersection would be worse than level of service D.

1 That's what the staff report says.

2 MS. MILLION: Yes. So the representative from
3 Ferran Pierce -- I'm not even going to try to repeat
4 what he said because it was quite technical, but I know
5 that he addressed this point. Maybe I can go back to my
6 notes and try to bring it up. But the question was
7 asked of him, and he provided a very technical response,
8 which I'm not going to be able to repeat.

9 COMMISSIONER YOUNG: Right. I'm just trying to
10 boil it down because what I think Ms. -- Ms. Scott, is
11 it? What she just said is that in his response, when a
12 train crosses, it's going to be level of service F.
13 What the staff report says is when a train crosses, it's
14 never going to get worse than D. I'm just saying
15 there's a fundamental contradiction there.

16 MS. MILLION: Let me look at the staff report.

17 COMMISSIONER YOUNG: On the question of whether
18 or not cars would back up onto the main line of 680, I
19 think what he said, what you read was that it was highly
20 speculative and a worst-case scenario, and in his
21 30 years of experience it was very unlikely to happen.
22 Something to that effect.

23 We have a photograph here that was taken at
24 12:20 in the afternoon, not during a rush hour, with
25 cars backed up well onto the main line of 680 at a time

1 when the train was crossing. It may be his opinion that
2 it's not going to happen, but we have evidence that in
3 fact it does happen. I think it's not -- I don't want
4 to say it's not responsible. It's not accurate to say
5 that in a worst-case scenario it's not going to happen
6 because I don't know if this is a worst-case scenario,
7 but it clearly did happen on this particular day. We
8 have photographic evidence of it.

9 MS. RATCLIFF: Commissioner Young, if I could,
10 if you are referring to that photo -- and so I was
11 looking at it on the computer earlier today, but you can
12 see there is a sign that says "Road Work Ahead," and
13 also a Caltrans truck going in that. If you look on
14 that backup it says "Road Work." There's a sign, a
15 bright orange sign.

16 COMMISSIONER YOUNG: But they are on the exit
17 for Bayshore. They are not on the main line. Are you
18 suggesting that the road work was happening on the exit
19 on the off-ramp?

20 MS. RATCLIFF: You know, I don't know because I
21 wasn't there when this picture was taken. That was my
22 first thought was yes, cars are backed up and there is a
23 sign over on the right that says "Road Work," and a
24 Caltrans truck. It may not be.

25 MS. SCOTT: I would like to also point out that

1 response G1-4 in the final EIR suggests that the
2 commenter's presentation of the video -- and I think
3 based on the date, it might also be referring to this
4 photograph that the train crossing in vehicles cued on
5 I-680 off-ramp back up from Bayshore Road. We
6 acknowledge the photograph. That's not disputed.
7 However, the evidence of what the commenter claims
8 happened, that cars back up onto 680, isn't presented at
9 the hearing where that occurred. That wasn't in the
10 record at the time this was responded to. We certainly
11 have this now.

12 When the commenter showed this still photo
13 looking from the west side across the freeway to a point
14 approximately 400 feet upstream from Gore Point, which
15 is the point where the exit lane separates from the main
16 line of the freeway, it's not clear what the still
17 photograph is showing, according to the response, but it
18 does not show that cars are backed up from the off-ramp
19 onto the two main line lanes of the freeway. It does
20 not show a car barely out of traffic lanes trying to get
21 into the off-ramp.

22 COMMISSIONER YOUNG: But it does show cars
23 backed up on the Bayshore off-ramp, doesn't it?

24 MS. SCOTT: But not onto the main line of 680.

25 COMMISSIONER YOUNG: No, they are on the main

1 line waiting to get on the off-ramp.

2 MS. SCOTT: There's an axillary lane which is
3 not a main line in that location.

4 COMMISSIONER YOUNG: So they are on the shoulder
5 is what you are saying?

6 MS. SCOTT: That is the information -- that is
7 his assessment of this photograph, and that's the
8 evidence that's in the record as the response to that
9 question. You might disagree. That is his
10 professional, certified opinion.

11 MS. MILLION: Through the Chair, can I clarify?
12 I think the LOS conversation --

13 CHAIR DEAN: Yes, please.

14 MS. MILLION: So the language in the staff
15 report says -- and to quote -- the project's train
16 crossings will not degrade any intersection currently
17 operating at LOS D or better to a level worse than LOS
18 D. That doesn't mean that the current operation of
19 every intersection during a train crossing does not
20 degrade to LOS F. That's not what that's saying.

21 It's saying under current condition -- they are
22 saying that the current condition in the industrial park
23 is LOS D essentially at worst-case scenario. Again,
24 it's taking an average. Don't ask me what the average
25 is, but it's taking the average. When you make that

1 statement, because you are using an average, then
2 sometimes an intersection operates at A. Sometimes that
3 intersection operates at F.

4 What this is saying is that with the addition of
5 the project's train crossings, so those four train
6 crossings, a day do not degrade that average designation
7 of LOS D to an LOS F.

8 COMMISSIONER YOUNG: And that's because an
9 eight-and-a-half-minute train crossing four times a
10 day -- the level of service F means that you have to
11 wait more than a minute to cross. We have an
12 eight-and-a-half-minute crossing, so clearly while that
13 train is crossing it's level service F.

14 MS. MILLION: Correct.

15 COMMISSIONER YOUNG: But what you are saying is
16 that yeah, it's going to be bad when the train is
17 crossing, but the rest of the time it averages out, so
18 it's not so bad?

19 MS. MILLION: I'm saying that my -- I'm saying
20 that my less-than-limited experience as a traffic
21 engineer, which is none, is that it is based on an
22 average. So we are not taking a point in time. It's
23 not a matter of saying a train is crossing right now; we
24 have to wait. The intersection is currently operating
25 at LOS F, now that means that's what that intersection

1 is designated as.

2 You have to -- I can't explain to you what the
3 average is. I don't know how you do the average, but
4 that's how they can make that statement. You take it in
5 a span of time to make that determination.

6 CHAIR DEAN: Let me come to your aid here.

7 MS. MILLION: Thank you.

8 CHAIR DEAN: If you're going to -- when you do a
9 level of service, it's averaged over a peak hour
10 usually, so that if the train crosses and you have
11 delays that are extensive, those people are going to be
12 inconvenienced, and they actually do the delay chart so
13 you might have a period -- you might have a period of
14 time in which people are delayed maybe significantly.
15 But when you average out that delay over a period of an
16 hour, peak hour or even a peak period, which is two
17 hours, it might not degrade the overall average enough
18 to bring the LOS down. It's a function of averaging
19 over a period of time versus, you know, a 15-minute
20 block, say, when people would be most inconvenienced.

21 All right? Are there more on the traffic or is
22 that it?

23 MS. RATCLIFF: No. We don't have more on the
24 traffic unless there are other questions.

25 CHAIR DEAN: Other questions of the commission

1 on traffic issues?

2 Commissioner Oakes, you got your questions
3 answered? Yeah? Okay. Next item.

4 MS. RATCLIFF: We did want to discuss -- there
5 were several questions on a letter sent by Amar Faruz,
6 and I hope I'm not mispronouncing that. And there are a
7 couple different areas that he addressed. First, I
8 would like to turn it over to our Fire Chief Lydon.

9 MS. MILLION: Janice was going to start with
10 number 1.

11 MS. SCOTT: That's okay.

12 MS. RATCLIFF: To address the emergency access
13 questions that were brought up.

14 CHAIR DEAN: Would you explain the question a
15 little more. I think in the letter Mr. Faruz said that
16 with the addition of the train tracks to that area near
17 the creek, that there's currently a service road that
18 will no longer be -- that will be taken out. Is that
19 correct?

20 FIRE CHIEF LYDON: I'll walk you through it.

21 CHAIR DEAN: All right. Thank you. That's why
22 we are asking you.

23 FIRE CHIEF LYDON: Let's talk first about
24 emergency response. Emergency response, we try to take
25 the most direct route of travel to an incident. Within

1 the refinery our procedure is actually to respond to the
2 main gate. The reason we go to the main gate is so that
3 we can be escorted by their security staff or other
4 staff through the refinery to the actual incident.

5 The purpose for this is we don't necessarily
6 know on a given day what's occurring in a refinery.
7 There may be certain areas of their operation that are
8 closed off, roads that are not open, et cetera. We
9 would go to the main gate, tie in with them, and proceed
10 down wherever in the refinery we are going. It's not
11 common for us to come to Gate 4 off of Park Road for
12 emergency access. That's for clarification on how we
13 get into the plant.

14 As far as the area in question where the loading
15 rack is and the movement of service road A to become --
16 correction -- Avenue A, where the offloading rack is, to
17 the new service road A, which is located -- for
18 clarification, if we could just make this easy on all of
19 us. Let's assume that the loading rack is running
20 north/south as I talk about that area, because I think
21 it will be easier if we look at it in that regard.

22 So the service road A would be located, with my
23 orientation, on the west side of the offloading rack,
24 between the offloading rack and some of the tanks. That
25 road will be a continuous road very similar to what's

1 there. It's just going to be moved over because of the
2 offloading rack. There are numerous access points as we
3 come down from up above in the main entrance in the main
4 building. Ninth Street is one access, and 14th Street.
5 So there are several different routes of travel that
6 would take us to that new section of service road A,
7 still providing us with adequate emergency access.

8 As far as emergency access for suppression,
9 firefighting, that kind of thing, you know, not
10 necessarily do we always want to pull up right next to
11 the problem. We will probably stage in an area where we
12 can then deploy hose lines, et cetra.

13 In addition, within this area, the offloading
14 rack Avenue A, service road A, approximately every
15 150 feet there are already pre-plumbed waterway deluge
16 devices with stage foam product that can be deployed for
17 firefighting operations. So it doesn't necessarily mean
18 we have to drive our fire engine to the location to make
19 a fire attack. We may be using those other devices that
20 are already existing.

21 As to the area of section, typical section AA on
22 the drawing that is referenced in his letter, if you
23 look at that, it shows track 723, 22, 21, and 732 there.
24 So 721, 22, and 23, they are existing tracks that are
25 there that the current road travels next to. I have

1 been in this area for training exercises. So already
2 you have a location where there are multiple depths of
3 trains from the access road.

4 In that section drawing, it shows a train car on
5 the departure track. But what's hard to see there is
6 that the departure track is actually going down the
7 middle of the existing Avenue A. There is still going
8 to be a paved surface there with a rail track down the
9 middle of it. That doesn't mean that we won't have
10 access through there potentially. What it does mean is
11 yes, if the train is in the process of moving in and out
12 on that departure track, that section is going to be
13 blocked. Thus my point of going through the front gate,
14 engaging with the staff that is aware of what the
15 situation is, and taking the best access route at the
16 time of the emergency.

17 Does that answer your questions as far as the
18 access in that area?

19 CHAIR DEAN: So if there is a -- if the access
20 road -- if there's a track on the access road, and
21 there's a train on that track, that access is at least
22 temporarily blocked. So looking at these plans, have
23 you worked out different scenarios so that if there's a
24 train blocking that road, you can get in from another
25 location?

1 FIRE CHIEF LYDON: So the loading rack doesn't
2 start, you know, the transition of -- the new service
3 road doesn't start until north of track 723's turn,
4 which is basically the intersection at Ninth Street.
5 That might not be very easy for you to see in the
6 drawing or the detail that you have. But let me see
7 if -- basically if you are looking at -- do you have
8 this large drawing here?

9 CHAIR DEAN: Yes, I do.

10 FIRE CHIEF LYDON: So this is track 723 here,
11 the last track that you can see. The loading rack
12 occurs to the north of that. If there was an issue with
13 the train on the Avenue A section out here on a
14 departure track where that particular location is
15 semi-blocked or blocked, we have access coming down
16 Eighth Street, Seventh Street, Sixth Street. We could
17 come through Gate 4 or the access road that comes down
18 from up above towards Gate 4 to get to the other end of
19 the train. There are alternatives within that area for
20 us to kind of work our way around.

21 Are we going to be able to potentially pull up
22 next to the train? Maybe not. But again, maybe that's
23 not our best option either. We would be deploying hose
24 lines, that kind of thing, and we have the existing fire
25 equipment that's there.

1 CHAIR DEAN: You are satisfied that the variety
2 of access at this point is sufficient for you to do what
3 you need to do?

4 FIRE CHIEF LYDON: Correct.

5 CHAIR DEAN: All right.

6 FIRE CHIEF LYDON: As to the concerns with the
7 runoffs and spills and such, certainly within the
8 offloading rack area there's going to be containment
9 issues there. They built in design containment that
10 occurs within those areas. As far as the concern that
11 there's not a road down the east side of the loading
12 rack between the loading rack and Sulfur Springs, it is
13 not a common practice to deploy diking material, boom,
14 et cetera, via emergency apparatus.

15 Most of that work is done manually by hand or
16 with heavy equipment that would potentially be able --
17 loaders or things like that would potentially be able to
18 drive over those rail tracks. Certainly if there's a
19 train there or cars there, we would be working around
20 those. Again, it's not a common practice for us to come
21 in with some sort of vehicle where we are putting out
22 boom, having to have vehicle access. We have to get
23 somewhere close, and then it's manual work.

24 CHAIR DEAN: Question from Commissioner
25 Birdseye.

1 COMMISSIONER BIRDSEYE: So the three trains --
2 the three cars that derailed under the bridge
3 recently --

4 FIRE CHIEF LYDON: Yes.

5 COMMISSIONER BIRDSEYE: -- I -- they tipped
6 over. What puts them back onto the rail? What if
7 something happened where one of the trains didn't
8 explode, but you needed to get equipment in there to get
9 it back on the train or back on its -- on -- instead of
10 being on its side or whatever?

11 FIRE CHIEF LYDON: So that's a function of the
12 rail, and they contract with specialized equipment to do
13 that. They come in with some track vehicle crane type
14 vehicles that are able to go down alongside the cars --

15 COMMISSIONER BIRDSEYE: There's room there?

16 FIRE CHIEF LYDON: -- and basically put them
17 back onto the carriage and back on the track.

18 COMMISSIONER BIRDSEYE: I toured this area, and
19 in my mind it was going to be a lot bigger, and it's
20 pretty narrow for what's happening there. I'm wondering
21 if there's enough room on the sides there to get the
22 equipment that you need to ride the situation if
23 something happens there.

24 FIRE CHIEF LYDON: Again, it's a practice that
25 the rails deal with quite often. I witnessed the

1 incident you are talking about, Martinez. And it was,
2 you know, not uncommon to what I have seen here when
3 we've had some minor derailments as well. They are able
4 to -- they are a small tractor-like vehicle that is able
5 to go down alongside the train car and lift it, and then
6 they get the carriage back underneath it and off they
7 go.

8 CHAIR DEAN: Don? Mr. Young?

9 COMMISSIONER YOUNG: Following up on that, I
10 think what Commissioner Birdseye is trying to get to is
11 that departure rack is almost right on top of the berm,
12 separating it from Sulfur Springs Creek.

13 FIRE CHIEF LYDON: So --

14 COMMISSIONER YOUNG: If I'm looking at that
15 correctly.

16 FIRE CHIEF LYDON: So what I would suggest is
17 that it may be a long operation. It's not something
18 that may occur immediately. It may require the removal
19 of the other train cars that are next to it on the
20 loading rack in order to provide greater access into
21 that area.

22 COMMISSIONER YOUNG: But if it's derailed
23 towards Sulfur Springs Creek, are you going to be able
24 to get that equipment down that berm in order to lift
25 it?

1 FIRE CHIEF LYDON: I'm not suggesting that I
2 would get any equipment down there. It's going to be
3 the rail program and their subcontractors, and I would
4 suggest that this is something they do on a regular
5 basis when they have issues; that they would move the
6 cars that are not affected out of their way so that they
7 can get their crane and/or heavy equipment in there to
8 do this type of work.

9 CHAIR DEAN: Continue if you have other
10 questions.

11 COMMISSIONER YOUNG: Maybe this is a question
12 for Amy. The departure track appears to be, like I
13 said, right near or on top of the berm, flows at an
14 angle down to Sulfur Springs Creek. What the gentleman
15 said in his letter, he quotes from the section of the
16 Municipal Code that says, "All development shall be set
17 back a minimum of 25 feet from the top of the bank of
18 the streams and no development shall be permitted within
19 the setback."

20 He's asking the question. I think it's a good
21 question. This departure track, which is 3,600 feet
22 long and runs parallel to Sulfur Springs Creek, is it
23 within that 25-foot setback?

24 CHAIR DEAN: Please, if you have an answer.

25 MS. MILLION: Thank you for cuing me up because

1 I was next with question number four. This also -- I
2 think Commissioner Radtke also had a similar question on
3 Sulfur Springs Creek.

4 Just so you know, I believe it was Commissioner
5 Birdseye who finally said yes, there are a lot of points
6 in this letter of interest to me. So that's what we
7 have done. We focused on other things but are also
8 going to go through this letter, so we will get to all
9 the points.

10 But as far as a setback from Sulfur Springs
11 Creek, yes, the quotation of the Municipal Code is
12 correct. There is a 25-foot requirement that any
13 development be set back from the creek. So the drawings
14 that were submitted are preliminary drawings,
15 essentially architectural drawings. They are not the
16 detailed drawings for construction. Construction plans
17 will be submitted and approved during the building
18 permit process. What the preliminary drawings show is
19 that from the edge of the rail spur is about 33 feet
20 away from the property line and about nine feet away
21 from the fence line. The property line is -- the fence
22 line is more up on the hill, and the property line is a
23 little further south.

24 Because the code requires the 25-foot setback,
25 the project must comply with that in order for the

1 planning division to sign off on the permit. There is a
2 general condition of approval in the resolution for the
3 use permit now. It's condition of approval No. 14, and
4 essentially it's when -- it's a standard commission that
5 the commission sees for every use permit approval, which
6 says that the applicant is required to comply with the
7 applicable rules and procedures governing whatever.

8 So what that generally says is that when you
9 submit for your building permits, the regulations of
10 development are going to be verified by staff during
11 that time, and anything else that the Municipal Code
12 requires for ongoing things, like noise or whatever, you
13 will comply with that. That is a condition of your use
14 permit forever.

15 So the commission could take that use permit
16 condition and say when that will -- staff will not be
17 approving the final construction drawings without
18 verification that the 25-foot setback is met. If you
19 wanted to do a belts-and-suspenders approach, you could
20 sort of piecemeal that one out. That's fine. We do
21 that all the time. If there's something we want to
22 highlight, if we are concerned about the development
23 being within the 25 feet or compliance with that
24 particular code section, you could add a condition of
25 approval that says, you know, specifically the plan

1 submitted for building permit review and approval shall,
2 you know, identify the location of the 25-foot mark and
3 the edge of development clear. You can do that.

4 Whether you do it or not, staff is still going
5 to confer before approving the building permit.

6 CHAIR DEAN: So just for clarification, when you
7 are talking about 25-foot setback, is that from the
8 property line or from the --

9 MS. MILLION: It's from the creek. From the
10 creek, yeah.

11 CHAIR DEAN: Center line or --

12 MS. MILLION: I have the actual language. It's
13 right here. I do have the actual language. "From the
14 top of the bank."

15 CHAIR DEAN: Top of the bank, thank you. Okay.
16 Other -- Commissioner Radtke.

17 COMMISSIONER RADTKE: I have a couple questions.
18 I would like to go back to the fire chief, please.

19 With fire suppression foam -- and even though
20 it's not a toxic item, it's still, if you have a spill
21 or something where a fire is going to be containing
22 whatever was in that spill or fire, is the loading rack,
23 the sump pump or whatever you are calling it -- I forget
24 what you called it. That would be the catchment basin.
25 Is that big enough to absorb all of this runoff or is

1 all of this runoff going to be going to Sulfur Creek if
2 there is a response in that area.

3 FIRE CHIEF LYDON: I haven't studied the
4 details. I haven't provided that kind of a detail on
5 how big it is that I am aware of.

6 MR. BARRINGHAUS: If I could jump in. I think
7 that was the next item in the letter. I'll go ahead and
8 discuss that, if that's okay. Potential -- it's No. 5
9 in the letter talking about hazardous spills from the
10 rail and concerns about adequacy of containment. I just
11 want to point out potential spills on-site both during a
12 train maneuver at the unloading facility and during the
13 transfer from the tank cars to the unloading rack were
14 discussed in the EIR, superficially impacts 4.73 and
15 4.74 and is noted on Page 2-127 of the revised draft
16 EIR.

17 I'm just going to quote. "The sump under the
18 loading facility has the capacity to receive and contain
19 a volume almost nine times greater than the capacity of
20 one tank car. This containment volume is significantly
21 larger than US EPA spill prevention control and counter
22 measures plan requirements, which requires 100 percent
23 of a single storage container and sufficient freeboard
24 to contain precipitation." So I hope that helps answer
25 the design capacity of the sump.

1 COMMISSIONER RADTKE: There's a surrounding area
2 on the -- does that all leaning towards -- is it all
3 graded so it's heading into that area or is it a flat
4 grading?

5 MR. BARRINGHAUS: I believe so, but I would
6 defer to Valero for the technical description of the
7 sump itself.

8 COMMISSIONER RADTKE: To me I thought that area
9 and specifically was designed for a leakage from a
10 railcar, not for fire suppression materials and any sort
11 of things it picks up. That's my question is -- can he
12 answer? Can he come up?

13 MS. RATCLIFF: Through the chair. Through the
14 chair I have been corrected. If it's a specific
15 commissioner's question to the applicant, they can
16 answer.

17 CHAIR DEAN: Cannot answer?

18 MS. RATCLIFF: They can answer.

19 CHAIR DEAN: They can?

20 MS. RATCLIFF: They can.

21 CHAIR DEAN: Then, please.

22 MR. CUFFEL: Yes. Good evening. Thank you for
23 the opportunity to help out. The sump is built into the
24 structure that holds the rails. So these are not rails
25 that are on ground or on gravel. They are on a

1 structure like giant legos and it's the volume beneath
2 the rails that accesses the sump. It's a series of
3 segmented compartments so that we can contain it and we
4 can later recover it either with vacuum trucks or
5 something else that is appropriate.

6 COMMISSIONER RADTKE: Does it cover runoff,
7 though, in the general area? How far out does this
8 catchment area go? Does it go out to a point if you
9 have a foam -- you are foaming or you have a derailment
10 and you are foaming, is it wide enough or is it --

11 MR. CUFFEL: It's intended to be wide enough to
12 catch, number one any sort of hydrocarbon that would be
13 spilled from, say, a ruptured hose or a failed valve or
14 something of that nature, and then also firefighting
15 materials. If there is materials splashing around in
16 the course of fighting a fire it is possible that some
17 could hit an unpaved area. It's not an impossibility.

18 But also in that region, the refinery has storm
19 water sewers today that direct the material to our own
20 waste water plant. There are also allot falls that go
21 directly into Sulfur Springs Creek. Depending on where
22 this would occur, if it's at the loading rack it's going
23 to be contained. If it's farther down towards Gate 4
24 where you are no longer on these giant legos with the
25 sumps underneath, that would be a different situation.

1 You may recall when we toured, we came in the
2 back of the refinery at Gate 4 and it wasn't until we
3 got on that long straight Avenue A where I said this is
4 where the loading rack is going to be. In your mind's
5 eye, when you contemplate that long, straight road it
6 runs -- well, you can see it on your drawing. It runs
7 parallel to Sulfur Springs Creek. That's where the
8 giant legos will be.

9 CHAIR DEAN: Excuse me, Mr. Cuffel.

10 Chief Lydon, did you want to weigh in here?

11 FIRE CHIEF LYDON: Let me talk just a little bit
12 about our priorities with respect to dealing with an
13 emergency. Obviously our highest dealing is we address
14 life safety issues first, then we go into what we call
15 instant stabilization, and then we get into property
16 conservation. Those are the three objectives that we do
17 everything by.

18 When I start talking about instant
19 stabilization, one of the things is to address systems
20 is runoff.

21 Mr. Cuffel mentioned their storm water systems. One of
22 the things early on in an emergency that we would do is
23 most likely cover those with a certain sized device
24 because we don't want the product going down into the
25 storm drain and going out into the creek.

1 We start to do that process of diking off those
2 locations, putting out boom, all that stuff. Does it
3 happen that quick? No. But that's our objective. We
4 start to control where that type of product is going to
5 go. We dike it, we damn it, we contain it, and then we
6 do a containment process afterwards for the property
7 conservation issues.

8 COMMISSIONER RADTKE: Okay. Let's say you have
9 a railcar, and I notice the departure track is the
10 closest one to the creek, so that would mean you have
11 empty rail cars heading out. If you had a derailment of
12 a full tanker car coming into that area, how likely do
13 you think the impact -- how wide do you think the impact
14 of derailment would be as far as in proximity to the
15 creek? We're talking, what, 60-foot car and then the
16 height of the cars.

17 MR. CUFFEL: I'm not a railroad operations
18 expert. My understanding is that the trains will move
19 no more than five miles per hour. So the likelihood of
20 a derailment from my engineering judgement is slim, not
21 only because of that speed but also because those rails
22 will all be new. It's all new equipment.

23 CHAIR DEAN: Say the last part again.

24 MR. CUFFEL: The rails, the modifications to the
25 rails inside of the refinery on the segment that the

1 commissioner is describing, those will be new tracks,
2 not 80-year-old tracks.

3 CHAIR DEAN: Understood. Thank you.

4 COMMISSIONER RADTKE: Okay. I guess what I was
5 getting at is my second worst case scenario, not the
6 first worst case scenario, would be a derailment that
7 causes cars to go side. How likely is any of these cars
8 falling over or going sideways to end up in the creek?
9 Because it's a very small area we are talking about.
10 It's not very wide.

11 MR. CUFFEL: It is very small. I don't know if
12 your drawing shows that there is actually -- is it a
13 three-foot wall, three or four-foot wall between the
14 departure track and our fence line? There's actually a
15 civil engineered wall there which would also act as a
16 prevention for tipping. I don't know how to comment on
17 that further because I'm not the civil engineer that
18 designed it, but clearly as you described, the empty
19 cars are the closest ones to the creek by design. All
20 of that structure and are facility will be new and it's
21 designed with the intention of more than a hundred
22 percent containment.

23 COMMISSIONER RADTKE: Back to access. You had
24 talked about access if you are looking at the AA area,
25 but what about the B area, which is actually where all

1 of the unloading is going on?

2 FIRE CHIEF LYDON: So in detail BB, that is
3 where the road has been moved to the other side. So we
4 still have a 20-foot access Road which is what we
5 require around general development within this
6 community, and so I'm confident that we have access
7 there. And as far as the fact that we can't drive on
8 the other side of the three trains, you know, between
9 that train and the creek, that's no different than many
10 other areas or buildings or complexes that we deal with
11 throughout the community.

12 CHAIR DEAN: Don?

13 COMMISSIONER YOUNG: You have a requirement that
14 you have 20-foot road for access as part of development?

15 FIRE CHIEF LYDON: So within the fire code, fire
16 lane, the 20-foot is basically the minimum width for a
17 fire lane description with no parking on either side of
18 it.

19 COMMISSIONER YOUNG: But on the departure tracks
20 there is no 20-foot road that I can see, is there?

21 FIRE CHIEF LYDON: The departure track goes down
22 the middle of a road.

23 COMMISSIONER YOUNG: But when there's a train on
24 it, which would be virtually all the time because
25 they're either going to be unloading or departing.

1 There are two a day, and they are telling us it's a
2 two-hour operation, you would not be able to get to it.

3 FIRE CHIEF LYDON: Which part of the departure
4 track are you referring to?

5 COMMISSIONER YOUNG: Say, where it's AA, for
6 example.

7 FIRE CHIEF LYDON: That area of AA was the area
8 I described at the beginning of my presentation.

9 COMMISSIONER YOUNG: You come down some other
10 road?

11 FIRE CHIEF LYDON: You come down some other
12 road. There are other access ways to get along side --
13 90 degrees to that train --

14 COMMISSIONER YOUNG: Is sufficient?

15 FIRE CHIEF LYDON: Or 180 to it coming the other
16 way, that kind of a thing. I don't see that as a
17 problem.

18 COMMISSIONER YOUNG: All right. Back to the
19 idea of the -- I think Mr. Cuffel said that there would
20 be a wall, a three- our four-foot wall built, what,
21 three or four feet off the unloading rack, Mr. Cuffel?
22 Is that correct?

23 MR. CUFFEL: Yes. I and I was reminded by my
24 colleague that when a train is not there you can
25 actually drive down the departure track.

1 COMMISSIONER YOUNG: Right. I'm getting back to
2 the idea of the berm or the containment area of the wall
3 that you talked about on the unloading rack. And that
4 would be between the unloading rack and the creek.

5 MR. CUFFEL: And the fence line. That's true.

6 COMMISSIONER YOUNG: That wall would also be
7 within the -- outside the 20-foot setback?

8 MR. CUFFEL: That's my understanding, yes.

9 COMMISSIONER YOUNG: You have enough room there?

10 MR. CUFFEL: I beg your pardon?

11 COMMISSIONER YOUNG: You have enough room there?
12 Because as Commissioner Birdseye said, it's a pretty
13 narrow --

14 MR. CUFFEL: It is. I think the hardest part to
15 visualize because you have the tour in your mind's eye,
16 is recall those tank berms are moving to the west, and
17 that's what makes the room available for this service
18 road access road three trains and the wall and the fence
19 line.

20 COMMISSIONER YOUNG: Just put them closer to the
21 tanks?

22 MR. CUFFEL: That's correct. The fire walls
23 around the tanks, the berms or concrete berms depending
24 on what they are; they get moved closer to the tanks and
25 they get elevated so you maintain the same tank capacity

1 in case of a catastrophic tank failure. The safety
2 systems are not compromised by maintaining 110 percent
3 containment of the tank volume. That's a mandatory
4 requirement. And the space that is made available by
5 moving the berms closer to the tanks is where the new
6 facilities will go.

7 MS. MILLION: Through the chair I can point to a
8 visual that might help. If you pull the 11 by 17
9 drawings out of your staff report. They are
10 double-sided so go to the fifth sheet. You will see a
11 small little J in the corner. What this is
12 representing, that solid black line is representing the
13 location of the berm, the new berm, and you can see that
14 it's pushing the existing containment berm west assuming
15 the tracks are running north/south.

16 COMMISSIONER OAKES: What drawing are you
17 referring to?

18 MS. MILLION: If you start from the beginning,
19 it is technically the fifth sheet. It goes side by
20 side. The sheet is labeled on the right, bottom right
21 "Crude by rail existing plot plan ground water and
22 containment berms, revision J." It's the existing plot
23 plan groundwater and containment berms, railcar
24 unloading and it has a little revision J in the very,
25 very right bottom corner.

1 COMMISSIONER OAKES: You are saying --

2 MS. MILLION: So the existing berm is -- so if
3 you find the scale, sort of right in the middle of the
4 revision record on the bottom, right above that is a
5 line that says, "Remove existing berm." It's talking
6 about the hash, the thicker hash -- that's the existing
7 berm that Mr. Cuffel was talking about would then be
8 pushed back and relocated to the solid black line that
9 is indicated by a new seven-foot high containment wall.

10 CHAIR DEAN: Okay. Questions from the
11 commissioners? Commissioner Young?

12 COMMISSIONER YOUNG: Not on this item.

13 CHAIR DEAN: Not on the this item? Any other
14 questions on this item? No? Next item.

15 MR. BARRINGHAUS: Chair, I'm going to continue
16 it with actually further with the letter. There was a
17 particular sentence in one of our responses that --
18 dealing with flooding and habitual structures for human
19 occupancy. The commenter thought it was not very nice,
20 I guess you could say. I just want to clarify some of
21 the discussion about human occupancy.

22 CHAIR DEAN: Mr. Barringhaus, hang on one
23 second.

24 We have been sitting for a while. Are you
25 people ready for a break? Maybe we can take a 15-minute

1 break and resume. Say, be back say about 9:00. Thank
2 you.

3 (Brief recess)

4 CHAIR DEAN: Okay. Thank you.

5 Mr. Barringhaus, I think you had the floor. Can
6 you remind us where you were and if you want to start
7 over. I think you certainly lost my attention.

8 MR. BARRINGHAUS: No problem. I was looking at
9 the letter that we've discussed a lot of the points here
10 today tonight. I'm down to what's referred to as No. 6
11 in that letter.

12 There was a question about a sentence and a
13 comment dealing with flooding effects and his underlying
14 question is he didn't understand why workers aren't
15 classified as occupants here. The sentence says,
16 "Further project elements are not habitual structures
17 for human occupancy." Workers are not classified as
18 occupants for purposes of the EIR because quote, a
19 structure for human occupancy, unquote, is defined on
20 the California building code as any structure used for
21 intending or supporting sheltering any use or occupancy
22 which is expected to have a human occupancy rate of more
23 than 2,000 person hours per year in accordance with
24 Title 14, Division 2. I won't go into the numbering.

25 If the project elements had met the definition

1 for human occupancy, which it does not, the CBC would
2 trigger additional design specifications to protect
3 people. So I just wanted to clarify why that phrase was
4 there.

5 CHAIR DEAN: Any questions on that item from the
6 commission? Okay.

7 MS. SCOTT: Turning to item 7 in the letter,
8 which relates to dams safety and its affects on the
9 project. Mr. Faruz asked how confident we are about the
10 identification of the Lake Herman fault as not active.
11 We are as certain as science allows us to be. The Lake
12 Herman fault runs along the eastern portion of the
13 refinery property. It's a pre-aternary fault which
14 means that there has been no displacement during the
15 last 1.6 million years. Further, the California
16 geological survey, which is within the state's
17 department of conservation is charged with providing
18 scientific products and servies about the state's
19 geology, seismology and mineral resources that affect
20 health, safety and business interests of the people of
21 California. Based on its data information and expertise
22 as the agency with subject matter jurisdiction over
23 questions like this, CGS does not delineate the Lake
24 Herman fault as active percentage to the Aclu's Pernola
25 Act.

1 And stepping back to the primary question of dam
2 safety, Graham Wadsworth is the city's public work's
3 director, has advised city staff that Lake Herman is
4 well maintained and that the state has not expressed
5 concerns about dam safety. Furthermore, we note that
6 the California supreme court issued its decision on
7 December 17th in the CBIA Bachman case. This is the one
8 that's commonly referred to as the reversed CEQA case
9 because the court considered the issue of what
10 circumstances, if any, CEQA requires an analysis of how
11 existing environmental conditions will affect a project
12 or its users or future residents.

13 The court held that agencies subject to CEQA
14 generally are not required to analyze the impact of
15 existing environmental conditions on a project's future
16 users or residents. So CEQA does not provide enough of
17 a basis, they said, to suggest that the term
18 "environmental effects," as used in this context, is
19 meant in a general manner to encompass these broader
20 situations associated with the health and safety of a
21 project's future residents or users.

22 Expressly acknowledging the legislature's
23 interest in public health and safety, CEQA does not
24 contain language directing agencies to analyze the
25 environment's effects on a project. Requiring such an

1 evaluation and all circumstances would impermissibly
2 expand the scope of CEQA. Therefore, consistent with
3 the Supreme Court's holding, the effect of dam safety on
4 the project is beyond the scope of the EIR.

5 CHAIR DEAN: Any questions from the commission
6 on this? No? Okay.

7 MS. SCOTT: Last item in the letter, item 8
8 regarding citations to the California Building Code.
9 We've confirmed that the commenter is correct regarding
10 the updated California building code, the IBC and the
11 IACE versions. We asked one of our technical reviewers
12 who is a certified California professional geologist, a
13 certified hydro geologist and a certified engineering
14 geologist with more of 30 years of experience about
15 this. He apologized for the oversight in citation and
16 he confirmed today based on his review that the
17 differences in the version cited in the document and the
18 current version did not affect the analysis or the
19 conclusions in the EIR.

20 The commenter's incorrect about that the
21 statement that the state does not amend its own code.
22 The CBC is supposed to be updated every five years but
23 the actual schedule varies.

24 CHAIR DEAN: Any questions from the commission
25 on this? City attorney, I see you reaching.

1 CITY ATTORNEY WELLMAN: Yes, I have the next
2 item, which is Commissioner Young had asked a question
3 about the operational aid agreement between the Benicia
4
5 Fire Department and the Valero Refinery Fire Department.
6 This is a mutual aid agreement, and I believe the
7 question had to do with whether or not there were any
8 provisions in the agreement expressly dealing with
9 enforcement or cost recovery, and no, there is not.

10 It is mutual aid and both -- it's also noted in
11 here that it's a long-standing commitment that they had
12 for a very long time providing mutual aid to each other.

13 CHAIR DEAN: Commissioner Young?

14 CITY ATTORNEY WELLMAN: That's considered the
15 benefit.

16 CHAIR DEAN: All right. Thank you. Are we --
17 next item?

18 MS. SCOTT: We wanted to circle back to two
19 other questions that Commissioner Young had asked. The
20 first one related to how compliance with the law can be
21 a mitigation measure.

22 CHAIR DEAN: I'm sorry. Say that again.

23 MS. SCOTT: Compliance with the law can be a
24 mitigation measure under CEQA. CEQA practitioners
25 generally refer, frequently refer, to practice guides

1 sort of like Kostka and Zische's Practice Under the
2 Environmental Quality Act. It's conceived by the
3 California supreme court and other resources. It has a
4 section on compliance and regulatory standards as
5 mitigation measures.

6 There is a case that's exactly on point here.
7 It's Sundstrom versus County Mendocino from 1988 where
8 the court upheld measures and mitigated negative
9 declaration requiring compliance with air quality
10 standards. I think we heard during the discussion the
11 other night that it's very common to have mitigation
12 measures that require compliance with existing
13 requirements.

14 And Amy mentioned earlier this evening that it's
15 commonly used as sort of a belt and suspender's approach
16 to make sure that proper attention is paid to
17 requirements that are of particular concern.

18 CHAIR DEAN: Commissioner Young, you want to
19 respond?

20 COMMISSIONER YOUNG: Yeah. I still don't
21 understand how following the law is considered a
22 mitigation measure. Following the law is an expectation
23 that we have for anybody who does business in the
24 community. And so to say that we are going to mitigate
25 an impact because they are going to follow the law,

1 doesn't -- at least to me -- meet a test where you are
2 actually going to address a problem if all you are doing
3 is following what the law requires you to do anyway.

4 MS. RATCLIFF: So if I could jump in just to
5 phrase it slightly differently. If an impact was
6 identified. An impact is going to be mitigated. We are
7 calling out how it is going to be mitigated. In that
8 sense, it doesn't matter for the mitigation if it's a
9 requirement by regulatory agency or it's something else
10 that is being added on as a condition of approval.

11 We are identifying in the EIR an impact and how
12 it is mitigated, and it's mitigated through that
13 regulatory agency. Okay.

14 COMMISSIONER OAKES: One of the things that the
15 mitigation plan has in it is in fact that they don't
16 follow that and they can stop the project. That's the
17 big hook. That's the difference. That's why they do
18 that. They put it in there so they can control whether
19 the project starts or goes forward.

20 MS. SCOTT: The other question that Commissioner
21 Young asked that we would like to circle back on related
22 to the cost of clean up and who bears that
23 responsibility. UP would be responsible for any
24 necessary rail transport related clean up costs. Lisa
25 Stark, UP's director of public affairs stated during the

1 hearing on September 11th of 2014, quote, "We are liable
2 for every product that we move on a railroad for a
3 customer. We take that responsibility obviously very,
4 very seriously. When asked by Commissioner Young to
5 clarify whether liability includes responsibility, quote
6 for clean up costs for any spills and any property
7 damage related to any fires or explosions," she
8 responded, quote, "that's correct. The railroad is
9 responsible for any type of incident we have. We are
10 financially liable for all of that, and that applies to
11 local or state emergency response costs that are
12 associated with an incident. It also deals with all
13 clean up as well as all mitigation that is required as
14 any part of any type of incident. That all is funded by
15 the railroad."

16 The gentleman who represented UP, who was here
17 the other night, followed up in writing regarding this
18 question as well. He didn't have the details at the
19 time, but he submitted a letter February 10th, 2016. It
20 says, "One question related to who will pay for clean up
21 in the event of a spill and whether UP has adequate
22 insurance to cover such costs. The who pays question
23 depends on who is at fault. However, both Valero and
24 Union Pacific are both Fortune 500 companies with
25 sufficient assets to cover the cost of the worst case

1 spill as defined by the state of California.

2 Union Pacific is self-insured. Union Pacific's
3 net worth is 21 billion dollars. The company has 52
4 billion dollars in US assets. This information is on
5 file with securities and exchange commission. It is
6 also available a UP's website."

7 CHAIR DEAN: Okay. Commissioner Oakes?

8 COMMISSIONER OAKES: They alluded to the fact
9 that Fortune 500 companies are basically self-insured.
10 That's their coverage. "I'm a 62-billion dollar
11 company. I'm self-insured." That's what they are
12 telling you, right?

13 MS. SCOTT: That's what it says.

14 COMMISSIONER OAKES: The people out here are
15 not. That's the problem. The people that are going to
16 be impacted by this project, if there is a problem, are
17 not self-insured. They are still litigated problems
18 that happened 12, 15, 20 years ago. That's the problem.
19 There's no nexus. There's no connection between that
20 and the people that are not self-insured. That's the
21 issue. How do we mitigate that? We want insurances up
22 front, that there is money available for immediate
23 relief, not protracted relief that may be years and
24 years and years later. That's what we are seeking.

25 CHAIR DEAN: Commissioner Young.

1 COMMISSIONER YOUNG: I think Mr. Hogin, one of
2 the questions asks the other night said that the
3 statement by Ms. Stark into the record wasn't really
4 sufficient to provide the level of security that the
5 city would probably want to see going forward.

6 In the EIR I asked that question directly in the
7 EIR, and the response that was given to me in the EIR --
8 let me see if I can find it here. Excuse me. It was
9 basically that it depends who is at fault, and it's
10 going to be the insurance companies and the courts who
11 will ultimately decide questions of liability. That's a
12 reasonable answer, but I think that's the answer. It's
13
13 not UP or Valero is just going to step forward and say
14 there was a disaster, and we are on the hook. Their
15 lawyers are going to be saying well, there's a lot of
16 money at stake here. And if what happened in Quebec and
17 other places is representative, we're going to have
18 companies pointing the fingers at each other and going
19 to court and the courts, over some period of time, maybe
20 years, might decide who is ultimately responsible. But
21 in the meantime, those costs of clean up and rebuilding
22 are going to fall on the shoulders of hard-strapped
23 local governments. Because nobody else is going to be
24 able to do anything in the meantime. That's my concern
25 with that kind of an answer. I don't think it's

1 necessarily sufficient.

2 CHAIR DEAN: Any other comments from the
3 commission on this item? No? Okay. Mr. Barringhaus?

4 MR. BARRINGHAUS: Hi. I just wanted to clarify
5 something. There was a commenter, I believe, yesterday
6 or maybe a couple days ago who had a comment concerning
7 offloading racks or the term offloading versus
8 unloading. We just wanted to clarify that if we have
9 identified the right comment, which I am fairly
10 confident, it was from a public hearing in August of
11 2014. The commenter goes at length talking about the
12 potential for export, which we've discussed many times
13 here. And he refers to an offloading rack. So our
14 response also used that term in reference to his use of
15 that term, referring to the potential for export. We
16 didn't mean to imply that, we weren't trying to dismiss
17 his use of the term as inaccurate. I just wanted to
18 clarify.

19 CHAIR DEAN: Thank you. Additional items for
20 clarification?

21 MS. RATCLIFF: There is. Mr. Hugin?

22 MR. HOGIN: Mr. Chair, apparently there is a
23 question about how to deal with redacted information.
24 And under CEQA, the applicant has the right to submit
25 trade secret information that has been redacted. For

1 the most part staff has not viewed that. And I'm not
2 sure if the EIR consultants have reviewed it, trade
3 secret information. Our experts have reviewed it. If
4 the staff is declined to view that information, they
5 could but they just don't want to, you know, potentially
6 be in a situation where they are accused of leaking
7 confidential information, I suppose, is a way to put it.

8 So unless the Planning Commission is interested
9 in looking at that information, it should just make the
10 determination based on the way things appear, the
11 information that it has.

12 CHAIR DEAN: Commissioner Young, I think you
13 brought that up.

14 COMMISSIONER YOUNG: I did, and it had to do
15 with the calculation of greenhouse gases and the
16 composite distance that it was claimed that the oil
17 tankers were traveling versus how far the trains would
18 travel. I guess I'm just going to have to trust that
19 when you say we gave it to our experts and our experts
20 are unbiased and our experts confirmed that number,
21 that's as good as we can get, I guess.

22 MR. HOGIN: I think I can represent that we gave
23 it to our experts, that the experts are unbiased and
24 they confirmed that number, yes.

25 CHAIR DEAN: Okay.

1 COMMISSIONER YOUNG: There were some other
2 questions that were raised both last night by the
3 commenters in the written information that we received
4 last night.

5 CHAIR DEAN: On the proprietary issue?

6 COMMISSIONER YOUNG: No, on a different issue.
7 Sorry.

8 CHAIR DEAN: Hang on. Do we still have items we
9 are going through on the staff list?

10 MS. RATCLIFF: We didn't. We just have -- we
11 did want -- I did want to say that we forgot to announce
12 that there are 18 new comment letters that we received,
13 some from last night and some today that are at the desk
14 for you. We did want to briefly go through a memo that
15 talks about process and preemption and as far as the EIR
16 document and use permit application, but if the
17 commission has other questions before that, that our
18 consultants or staff can ask then perhaps we should do
19 that first.

20 CHAIR DEAN: Why don't we do that? Why don't we
21 make sure that the commissioners get their questions
22 answered, and then we'll go to your processed memo.

23 Commissioner Young?

24 COMMISSIONER YOUNG: Thank you. The project
25 objectives state that the delivery of crude by rail

1 would be offset by a proportionate reduction in oil
2 delivered by tanker. Is that reduction in marine
3 deliveries a condition of approval?

4 MS. MILLION: It's a condition of approval in a
5 sense that they are required -- it's at a condition at
6 one, two or three. It's in the beginning. It basically
7 says that they are required to adhere to the application
8 which they submitted in which the project description is
9 to offset -- not offset. I'm sorry. To move up to
10 70,000 barrels per day by rail as opposed to marine
11 vessel.

12 COMMISSIONER YOUNG: What are the mechanisms
13 that would guarantee the reduction of oil delivered by
14 tanker? Is there any kind of binding commitment that
15 says that they --

16 MS. MILLION: The binding commitment is the fact
17 that we are issuing them a use permit.

18 COMMISSIONER YOUNG: No. That Valero in
19 exchange for getting the use permit will commit to not
20 receiving the equivalent number of marine tanker
21 deliveries.

22 MS. MILLION: This is going to go to a, really,
23 capacity question for Valero, right, and going back to
24 their Bay Area Air Quality Management District permit
25 will regulate their emissions as well as their total

1 amount of throughput.

2 COMMISSIONER YOUNG: On that question, I believe
3 that their capacity or their permitted level is 170,000
4 barrels a day, something close to that. And yes, it's
5 around that number. 165. And their current or recent
6 throughput number that I saw was 114,443 barrels a day,
7 something around that number. That leaves a difference
8 of about more than 50,000 barrels a day of excess
9 capacity.

10 So is there anything in the conditions of
11 approval that -- if there's nothing there that limits
12 their capacity to its current level and they are allowed
13 to refine up to 170,000 barrels a day, there's nothing
14 that would stop them from simply importing more oil by
15 marine tanker in order to provide the crude necessary to
16 meet that allowable threshold. Is that true?

17 MS. MILLION: I think this might be an
18 operations question. Probably better answered by
19 Valero.

20 CHAIR DEAN: Okay. Mr. Cuffel, you want to step
21 forward?

22 MR. CUFFEL: Yes. You are circling around the
23 exact truth, and that is the Bay Area Air Quality
24 District establishes our throughput limits and maximum
25 capacities, which are enforceable by our Title 5 permit.

1 So the permitted capacity of 165,000 barrels is the
2 maximum. And all of our emissions limits are congruent
3 with that production rate. So whether the crude arrives
4 by pipeline or by ship or by rail, it cannot exceed
5 165,000 barrels a day. As I told you on Tuesday
6 night -- I think it was Tuesday -- it's unpredictable
7 from day to day whether the economics will have us be
8 buying crude by pipeline, by ship, by rail, or by some
9 combination of the three.

10 The intention of the 70,000 barrel-per-day
11 maximum -- that's the keyword -- that's also an
12 enforceable limit.

13 COMMISSIONER YOUNG: For the crude by rail?

14 MR. CUFFEL: Absolutely.

15 COMMISSIONER YOUNG: Right, but I guess my
16 question is --

17 MR. CUFFEL: But we can't be obligated to get
18 70,000 every day is my point, because economics --

19 COMMISSIONER YOUNG: Right. But if you got the
20 70,000 by rail and you are going to displace or not get
21 70,000 a day by marine tanker, then the argument about
22 the greenhouse gases is still in play. If you are going
23 to increase your production and you are still going to
24 get 70,000 barrels a day by rail, and you want to
25 increase production, and I think you said that the

1 pipeline capacity was declining, or that the amount of
2 oil you were getting through the pipeline was
3 declining --

4 MR. CUFFEL: Today it's about 20 percent.

5 COMMISSIONER YOUNG: So the only way you could
6 get the crude necessary to increase your production
7 would be by tanker?

8 MR. CUFFEL: So now remember, the maximum
9 throughput is constrained, and the tank throughput is
10 also constrained.

11 COMMISSIONER YOUNG: I understand. Right.

12 MR. CUFFEL: So you cannot --

13 COMMISSIONER YOUNG: You still got a
14 50,000-barrel-a-day capacity limit that you can get
15 to --

16 MR. CUFFEL: For which we all --

17 COMMISSIONER YOUNG: -- that you are not
18 currently using.

19 MR. CUFFEL: For which the emissions are
20 permitted, yes.

21 COMMISSIONER YOUNG: Yes, for which the
22 emissions are permitted. Right?

23 MR. CUFFEL: Correct.

24 COMMISSIONER YOUNG: My point is that the only
25 way you would get to that number is to have more oil

1 brought in by tanker. If you are limited by rail to
2 70,000 barrels and the pipeline is limited by capacity,
3 the only way you can get that extra oil is to bring it
4 in by tanker; is that right?

5 MR. CUFFEL: Let's look at the maximum emissions
6 case.

7 COMMISSIONER YOUNG: I just want to make sure I
8 understand.

9 MR. CUFFEL: It's not a yes-or-no question. Let
10 me give you a little context. Today without crude by
11 rail, there's 20 percent by ship and 20 percent by
12 pipeline, no matter what our production level is.
13 That's about the ratio, typically. Having said that,
14 the maximum emissions case is when you bring 80 percent
15 of 165,000 barrels in by ship. That's what we are
16 permitted to do -- they can all come in by ship today,
17 but it doesn't.

18 The emissions that we are permitted to have are
19 really for the worst-case scenario today, which is all
20 by ship. This project can only reduce that because no
21 more can be brought in. Only less can be brought in by
22 ship.

23 COMMISSIONER YOUNG: Why is that? Because
24 you've got access capacity. You can increase up to your
25 permissible level, which is another 50,000 barrels a

1 day, and you can't bring in more than 70,000 barrels by
2 rail, so how would you get that extra 50,000 barrels if
3 you aren't going to bring them by rail?

4 MR. CUFFEL: Well, in your example, if you think
5 we have 114 today -- so adding 70 to that would exceed
6 our capacity.

7 COMMISSIONER YOUNG: No, not 70. 50, let's say.
8 I guess my point is that there's nothing in this
9 agreement, there is nothing in the EIR, there's nothing
10 in the use permit that is a binding commitment by Valero
11 that you will reduce your number of deliveries by marine
12 tanker.

13 MR. CUFFEL: It's built into the relationship by
14 the three different sources by total constraint of our
15 operating permit.

16 COMMISSIONER YOUNG: Right. But the operating
17 permit is different than the actual what you are doing
18 today.

19 MR. CUFFEL: Well, it's intentionally built with
20 flexibility because no one can say with certainty where
21 will oil be available from or in what quantity. We have
22 to have operating flexibility in order to meet the
23 market conditions.

24 COMMISSIONER YOUNG: What you are saying is you
25 very well might have more imported by marine tanker

1 depending on the market, depending if you want to
2 increase your production? Is that true?

3 MR. CUFFEL: It cannot be more than our
4 permitted limits.

5 COMMISSIONER YOUNG: I understand.

6 MR. CUFFEL: Which is true today.

7 COMMISSIONER YOUNG: Right. I understand. I'm
8 not talking about your permittable limit. I'm talking
9 about your actual permit today; not your permit, your
10 actual production today. Not what you are allowed, but
11 what you are actually doing.

12 MR. CUFFEL: All three can vary, all three. The
13 pipeline rate can vary.

14 COMMISSIONER YOUNG: So my point is, if you were
15 to increase your amount of production, and the only way
16 to bring in that extra crude was by marine tanker, which
17 I think you have agreed is how you would have to bring
18 it because you would be limited by the crude and you
19 would be limited by the pipeline, the only other way you
20 can bring it is by tanker.

21 MR. CUFFEL: If what you are describing is the
22 trains are full, the pipeline is full, yes, the only
23 variables are the ships.

24 COMMISSIONER YOUNG: In that instance, the
25 actual delivery by marine tanker is not going to be

1 reduced. It might in fact be increased.

2 MR. CUFFEL: Only compared to a less-than-full
3 capacity.

4 COMMISSIONER YOUNG: Only compared to today,
5 only compared to the baseline.

6 MR. CUFFEL: And it's compliant with our
7 baselines.

8 COMMISSIONER YOUNG: I understand. I'm not
9 questioning what you are doing wouldn't be permitted.
10 What I'm questioning is whether we analyzed the
11 possibility, or maybe it's more than a possibility, that
12 you will be using tankers in the future at a greater
13 rate than is described in the document. What the
14 document says is you are going to reduce your use of
15 tankers by an amount equal to 70,000 barrels a day.
16 What I'm trying to get to is that it's very possible
17 that you won't be reducing your use of tankers.

18 MR. CUFFEL: It's very possible that if the
19 economics drive us to not use the crude-by-rail system,
20 it will sit idle. And we would continue to purchase
21 crude today as we do through pipeline and ship. That's
22 exactly right.

23 COMMISSIONER YOUNG: Right.

24 MR. CUFFEL: It's not a matter of spare
25 capacity. It's entirely a matter of market demand and

1 the economics of the crude itself.

2 COMMISSIONER YOUNG: So it's more than possible
3 that the analysis that was done for the EIR -- which is
4 based on the assumption that you are going to be
5 reducing the amount of oil brought by tanker and
6 therefore reduce the GHG emissions -- might not really
7 be accurate because in the future, as you just said, you
8 might be in fact using more marine delivery.

9 MR. CUFFEL: So we have characterized that
10 accurately by saying it's up to -- the maximum reduction
11 will be 225,000 tons per year. It's not guaranteed
12 every year. It's not guaranteed day in and day out.
13 It's up to that amount, and it's predicated on having a
14 full 70,000 barrels a day coming by rail.

15 That may be very unlikely. One doesn't know.
16 It's very unpredictable what amount will come in by
17 rail, if any. But the fact is the emissions reductions
18 are real for every barrel that's delivered by rail
19 versus delivered by ship. To what extent that will
20 occur, I can't tell you, but the upper bound is 225.

21 COMMISSIONER YOUNG: But that's only true to the
22 extent that you have actually reduced the number of
23 marine deliveries. And the point I'm trying to get to
24 is that you in fact may be increasing the amount of
25 marine deliveries. And in that case, the analysis in

1 the EIR is not valid.

2 MR. CUFFEL: No. I disagree respectfully
3 because, again, we can do that today. That's the
4 pre-project condition. Today we can increase our marine
5 deliveries to full capacity if we found a way to do
6 that, and we need it to be driven by the economics.

7 COMMISSIONER YOUNG: The question for the EIR
8 consultant, then, did our analysis assume only that we
9 were going to be decreasing the amount of marine
10 delivery or did it allow for what Mr. Cuffel just
11 described, the very real possibility that in fact they
12 may change and they might have more delivery by marine
13 tanker, depending on the economics of the market?

14 MS. SCOTT: The baseline for the GHG analysis
15 used annual average baseline GHG emissions, estimated
16 using a baseline period of three years, from December
17 2009 through November 2012. The reason for the 2012 is
18 that's when the applicant filed the use permit
19 application. Baseline emissions include maritime
20 emissions from the following sources: Oceangoing
21 vessels' main engines from the California coastal waters
22 boundary, which is approximately 71 nautical miles west
23 of the Golden Gate Bridge, to the refinery marine
24 terminal; the vessels' auxiliary engines and auxiliary
25 boilers, and the tugboats that would be required to

1 escort and to position the oceangoing vessels at the
2 marine terminal.

3 COMMISSIONER YOUNG: I read that, but I don't
4 think that's responsive to my question.

5 MS. SCOTT: Can you restate your question? I
6 thought you were asking what the baseline was.

7 COMMISSIONER YOUNG: Let me try again. Did the
8 analysis consider the possibility, if not likelihood,
9 that marine deliveries would not be reduced by 70,000
10 barrels a day but in fact might increase?

11 MR. HOGIN: Mr. Chair, may I? I don't mean to
12 interrupt. May I address this issue?

13 CHAIR DEAN: Yes.

14 MR. HOGIN: Mr. Cuffel directly pointed out that
15 the project was not -- an annopoly was never described
16 as anything other than replacing up to 70,000 barrels
17 per day. There was never any assumption that every
18 single day this refinery would be receiving 70,000
19 barrels per day.

20 Commissioner Young is asking the question while
21 if -- let's assume that the ship deliveries are some
22 number, X. Mr. Young -- Commissioner Young is asking if
23 in the future Valero were to increase shipments above
24 the number X, that would increase the greenhouse
25 emissions from ships, and that's correct, but that would

1 not be caused in any way by the project. That would not
2 be an impact of the project that would need to be
3 considered in the EIR.

4 CHAIR DEAN: Respective speakers, please.
5 Commissioner would like to hear what everybody has to
6 say.

7 COMMISSIONER YOUNG: The project, as I
8 understand it and as it was described, is to switch the
9 method of delivery from marine tanker to rail at up to
10 70,000 barrels a day. Presumably the analysis was done
11 based on that switch from marine tanker to rail. If
12 there's not a binding commitment that says Valero will
13 in fact not increase the number of marine tankers they
14 are using, and in fact they can increase the number of
15 tankers they use in the future, should not that impact
16 of emissions have been analyzed in the EIR?

17 MR. HOGIN: The answer is no. Let me see if I
18 can explain it a different way.

19 The baseline right now, Valero can receive up to
20 how many barrels per day by ship?

21 MR. CUFFEL: The dock limit is something above
22 165 because it corresponds to the tank throughput. I
23 think it's 171.

24 MR. HOGIN: Let's call it 170. Valero can
25 receive 170 barrels a day by ship. It's going to

1 replace up to 70,000 barrels per day of that by rail,
2 but it could be 35,000 barrels on any given day. It
3 could be 40,000 barrels on any given day. There's
4 nothing in the EIR that assumes that Valero is going to
5 replace 70,000 barrels per day every single day. Okay.

6 To the extent that it only replaces 35,000,
7 let's say, then you are not going to get the full
8 benefit that the project can offer, but there's
9 nothing -- that is -- it's going to be no worse than the
10 baseline condition. The baseline condition is if they
11 can receive the entire 170,000 barrels per day by ship.

12 COMMISSIONER YOUNG: But we are not really --

13 CHAIR DEAN: Let me see if I can untangle this,
14 because I understand the question Commissioner Young is
15 trying to get to. Correct me if I'm wrong, Ms. Scott
16 and Mr. Barringhaus. When you did your air quality
17 analysis, you assumed that you were basically swapping
18 out 70,000 barrels of marine delivery for 70,000 barrels
19 of crude by rail. So in essence, the air quality
20 difference is the difference between the delivery of the
21 two modes.

22 MS. SCOTT: That's correct.

23 CHAIR DEAN: Okay. So if Valero is not
24 operating at capacity, they still have excess capacity
25 to process additional oil, regardless of whether it's

1 coming from crude by rail -- if you think of a bar
2 graph, they can process -- you've assumed they have
3 swapped out 70,000 barrels of ship for 70,000 barrels of
4
4 crude capacity. But because Valero has excess capacity,
5 they could increase their production, and where would
6 that additional supply come from, and Commissioner Young
7 is making the point it would probably come by ship.
8 Yes?

9 MS. SCOTT: That excess capacity is part of the
10 baseline conditions. That's not a project-related
11 change.

12 CHAIR DEAN: I'm not saying it's related to the
13 project, but --

14 COMMISSIONER YOUNG: It should be part of the
15 analysis.

16 CHAIR DEAN: It was not included, that
17 additional -- Commissioner Young is asking the question,
18 there's nothing to say that they can't bring in
19 additional shipment through marine delivery that would
20 increase their capacity, and it's not part of the
21 project, but it was not included in the analysis.

22 MS. SCOTT: That's correct, because that's true
23 regardless of whether the project is approved or denied.

24 CHAIR DEAN: Well, one of the ramifications of
25 the crude by rail is that they have now opened up an

1 additional -- since they are not bringing in an
2 increased -- since they have opened up an additional
3 line of supply of crude by rail, there is now additional
4 capacity at the port to maintain that marine delivery
5 that they wouldn't have been able to use before because
6 it was already occupied. Does that make sense?

7 MS. SCOTT: I don't think that it does. What I
8 am missing here is that excess capacity exists, so they
9 can bring in that amount now.

10 CHAIR DEAN: Yes, they could. Well, they can't
11 bring in -- they are limited by how much -- by their
12 marine power and by their pipeline. So if you replace
13 part of the marine delivery system with crude by rail,
14 they have now freed up additional marine capacity. Is
15 that --

16 Mr. Cuffel, do you follow that?

17 MR. CUFFEL: Yes. I understand what we are
18 circling around here. The challenge is you run out of
19 tanks. You cannot infinitely increase your marine
20 deliveries and at the same time increase your crude by
21 rail deliveries and at the same time receive your
22 pipeline deliveries because either you will run out of
23 tanks first or you will hit your limit which exists
24 today.

25 And I think the point the three of us are making

1 is that is the pre-project condition today. Those
2 greenhouse gas emissions are part of today's operation.
3 The baseline wasn't at capacity, but remember, the
4 capacity was fully reviewed under the VIP.

5 COMMISSIONER YOUNG: Right, but that's a
6 different project.

7 MR. CUFFEL: I understand.

8 COMMISSIONER YOUNG: And this project requires
9 an analysis based on what is happening today and what
10 would happen if this project is approved.

11 MR. CUFFEL: So the distinction is, if you look
12 at the baseline period, we were not full.

13 COMMISSIONER YOUNG: Right.

14 MR. CUFFEL: Okay. But at any time we can be
15 full with or without this project. I understand what
16 you are looking for, but I agree with the other speakers
17 that it is not a result of the project because we can do
18 that today. This project did not enable us to store or
19 process more crude than we can today.

20 What changes is the makeup of three
21 possibilities of transportation.

22 COMMISSIONER YOUNG: But those three -- one of
23 those legs, the marine transport, won't necessarily be
24 reduced. It could stay the same, it could increase.

25 MR. CUFFEL: It could not stay the same. It

1 could not stay the same because we would exceed our
2 capacity.

3 COMMISSIONER YOUNG: It could not stay the same,
4 but it could certainly -- what was implied in the
5 analysis is it is going to be reduced by up to 70,000
6 barrels a day.

7 MR. CUFFEL: Which is describing the range of
8 benefit. The benefit could be zero if we don't buy any
9 crude by rail, or it could be up to 225,000 tons.
10 You're right. There is no guarantee whatsoever that we
11 will get all of that benefit, but that's what the
12 project is defining is the range of possible benefit.

13 CHAIR DEAN: Commissioner Young, would you yield
14 for --

15 COMMISSIONER OAKES: I want to get to the point
16 you just said; it is a widely variable result. I
17 thought the EIR presented it as a finite number.

18 MS. MILLION: Can I add another way of looking
19 at this? Taking baseline scenario out of the
20 conversation, so a project was submitted by Valero in
21 which the city is responsible for analyzing. The
22 project description that submitted and analyzed EIR is
23 to replace up to 70,000 barrels per day from marine
24 vessel by rail. Right? That's a given.

25 The EIR is required to analyze the project.

1 That is the project. The EIR is not required to analyze
2 non-project scenarios. So the EIR is not required to
3 analyze not replacing 70,000 barrels per day, and as
4 Commissioner Young is saying, increasing marine vessels.
5 That's not the project. That doesn't make the EIR
6 inadequate. The EIR is supposed to analyze the project.
7 Valero's project is to replace 70,000 barrels per day.
8 That's what was analyzed. That is what is before you.

9 CHAIR DEAN: Commissioner Oakes?

10 COMMISSIONER OAKES: The project was zero to
11 70,000. We only saw the 70,000.

12 MS. MILLION: Correct. Up to, right?

13 COMMISSIONER OAKES: Right. Why isn't there a
14 scale? Come on.

15 MS. MILLION: So the analysis which you will
16 see, which is consistent throughout the EIR is
17 essentially a worst-case scenario or best case -- it
18 basically takes the extreme for the purposes of
19 providing all of the impacts, right?

20 So when you are looking at, for example, the
21 hazards scenario, you are looking at a worst-case
22 scenario and a consequence analysis and so on and so
23 forth. For the purposes of analyzing greenhouse
24 emissions, you are doing the same thing. You are taking
25 the full project, which is why it says up to 70,000

1 barrels per day would provide up to a certain GHG level
2 but not a guaranteed GHG level reduction.

3 COMMISSIONER OAKES: I think the whole
4 information is not available. Based upon what has been
5 talked about today, I'm out here fighting like Mohamed
6 Ali with both hands tied behind my back, and we need to
7 talk about the impact on local stuff. This impacts
8 local stuff. I would like the whole story to be there.
9 My personal opinion is that is a flaw in this EIR. For
10 that reason I want to make sure that that's on here,
11 that's going to be voted that way, in my opinion. Thank
12 you.

13 CHAIR DEAN: Commissioner Young.

14 COMMISSIONER YOUNG: I think I have said what I
15 needed to say on this. And I'm glad at least one of the
16 commissioners understands the flaw in the analysis when
17 we don't look at a reasonably likely scenario, and the
18 impacts of that reasonably likely scenario. I don't
19 necessarily accept that you only have to look at the
20 permitted level when in fact the actual level is
21 different, and that you have to only assume that the oil
22 will be reduced by 70,000 barrels a day by tanker, when
23 I think we just heard that it could in fact be
24 increased.

25 So if both those things are true, then we should

1 have done an analysis of GHG with a broader perspective,
2 and I don't think we did.

3 CHAIR DEAN: Okay. Commissioner Birdseye.

4 COMMISSIONER BIRDSEYE: On the bottom of Page 35
5 in the staff report it identifies -- it says, "In order
6 to prepare the statement of overriding considerations
7 the staff has identified the following benefits of the
8 project." And No. 3 is stated as the project will
9 reduce greenhouse gas emissions by a total of 225,000
10 tons per year based on replacing ship trips with
11 locomotive trips for delivery of 70,000 barrels a day of
12 crude oil to the refinery. There's no up to.

13 CHAIR DEAN: Staff, you are reaching.

14 MS. MILLION: I was actually turning it off.

15 CHAIR DEAN: All right. Commissioner Radtke.

16 COMMISSIONER RADTKE: I understand where you
17 guys were coming from in your analysis. I'm a little
18 concerned that the baseline you used was three years at
19 the beginning of our recession. That changes a little
20 bit of the needs that were happening at the time, and
21 also it sort of lacks a cumulative impact.

22 Look, whereas, if we make this change, this
23 could happen. I'm not sure it really analyzed the
24 cumulative impact of changing out by adding another way
25 of bringing crude in. I think that may be some of what

1 Commissioner Young was getting at.

2 CHAIR DEAN: All right. So let's move on. A
3 related question?

4 COMMISSIONER YOUNG: A related question. Not
5 the same.

6 CHAIR DEAN: Please. Commissioner Young.

7 COMMISSIONER YOUNG: So Valero hasn't really
8 been willing to talk about the type of crude that's
9 going to be delivered. They have claimed under trade
10 secrets or confidential business information that they
11 don't need to disclose the type of oil that is going to
12 be brought in. Since that is the case, how does the EIR
13 or how can the EIR evaluate possible changes in air
14 quality based on these types of crude if we don't know
15 what they are?

16 MS. SCOTT: The EIR looked at the various types
17 of crude that could be received by rail based on the
18 locations that would be accessible by rail through the
19 North American Freight Line. It looked at the different
20 components of crudes from those areas. And where a
21 crude had higher volatility, we assumed that the highest
22 volatility was used. Where a different crude perhaps
23 would have more severe potential water quality effects
24 for purposes of hydrology and water quality, we assumed
25 the reasonable worst case.

1 So we didn't assume Bakken across the board. We
2 assumed potential crudes that would create or result in
3 the worst reasonable potential impact each resource
4 area. The hazards analysis, for example, did look at a
5 Bakken-style crude because those potential impacts for
6 purposes of hazards and hazardous materials were
7 believed to result potentially in the worst impacts.

8 There was no averaging. There was no -- we
9 picked what would cause the worst problem and analyzed
10 that.

11 COMMISSIONER YOUNG: And that would include Tar
12 Sands oil as well? If I understand what you said, you
13 don't really know what they are going to bring in, but
14 you sort of looked at what they possibly could bring in
15 and did an analysis on that?

16 MS. SCOTT: Correct.

17 COMMISSIONER YOUNG: But we don't know how much
18 of any particular oil they are going to bring in.
19 Wouldn't we need to know some of that information in
20 order to adequately analyze emissions?

21 MS. SCOTT: No. We assumed that all up to
22 70,000 barrels would be of whatever the worst one was
23 for whatever that resource area.

24 COMMISSIONER YOUNG: But it could be a mix of --
25 sometimes it could be 70,000 barrels of Bakken and the

1 next day it could be 70,000 barrels of Tar Sands.

2 MS. SCOTT: That's true, but if that's true,
3 then there would be less than the worst possible case
4 for air, less than the worst possible case for hazards,
5 less than the worst possible case for water quality. We
6 assumed --

7 COMMISSIONER YOUNG: Except that each of those
8 different types of oils have different elements and
9 different impacts.

10 MS. SCOTT: Exactly. Each of those we picked --
11 for each individual resource area for that analysis, we
12 picked whichever type of crude would cause the worst
13 problem. We assumed all 70, up to the maximum amount
14 that could possibly be brought in by rail, would consist
15 of whatever would cause the worst problem.

16 If something is less than the maximum amount, it
17 would be then less than the worst possible problem could
18 be created, and it would fall within the parameters of
19 the analysis.

20 COMMISSIONER YOUNG: And your analysis is in
21 that worst-case scenario they would still be less than
22 significant impacts?

23 MS. SCOTT: That is a resource-by-resource
24 determination. For example, hazard and hazardous
25 materials identifies potential significant and

1 unavoidable impact.

2 COMMISSIONER YOUNG: Was that the conclusion?

3 MS. SCOTT: Oh, yeah. There are 11 significant
4 unavoidable impacts identified in the EIR.

5 COMMISSIONER YOUNG: In terms of emissions from
6 the local refinery?

7 MS. SCOTT: The emissions impacts --

8 Do you want to talk about the emissions impact
9 conclusions?

10 MR. BARRINGHAUS: Yeah. The air quality -- the
11 significant air quality impacts were all related to the
12 locomotive emissions.

13 COMMISSIONER YOUNG: So none of them were
14 related to the refining of the oil?

15 MS. SCOTT: Refining of the oil is not part of
16 the analysis. The refining happens after the crude that
17 would be brought by rail is blended with the purpose --

18 MR. HOGIN: May I jump in?

19 MS. SCOTT: Please.

20 MR. HOGIN: The EIR did look very carefully at
21 whether there would be any change in the refinery
22 process emissions based on the fact that Valero would
23 have access to crudes from different sources, that is,
24 sources in North America as opposed to the rest of the
25 world, which is where it has been getting it.

1 The EIR concluded that there would be no
2 increase in emissions of any type from the process
3 equipment. The reason is that even if Valero would have
4 access to crudes that were significantly more sulfurous
5 or of a different weight -- API gravity is what the term
6 is -- whether they would be heavier or lighter, Valero
7 still has to blend crude oils before it can process them
8 at the refinery. And because of the unique
9 configuration of the refinery, Valero has to blend the
10 crude oil to a very narrow range of sulphur content and
11 weight.

12 So regardless of whether there are new sources
13 of crude oil, the crude oil that is actually refined is
14 going to look essentially the same for all intents and
15 purposes.

16 That is -- I don't -- I apologize. I don't have
17 the page numbers here. Maybe someone could find it if
18 anybody is curious, but that's the yellow box that we
19 have talked about. The crude oil has to be blended to
20 fit within the yellow box before it can be processed at
21 the refinery.

22 CHAIR DEAN: Commissioner Oakes, you had a
23 question or comment?

24 COMMISSIONER OAKES: It's in addition to this.
25 We had a lot of documentation by Dr. Fox and the group,

1 and they talked about emissions different than, more
2 than what we had in the EIR, and I wonder if you guys
3 had a chance to look at or address those.

4 MR. HOGIN: That's exactly what I was just
5 talking about. Dr. Fox had said a lot of things. She
6 said that the crude slate could become significantly
7 lighter, and that would have a certain effect on process
8 emissions. She said it could become significantly
9 heavier and more sulphurous, and that would have a
10 different effect on process emissions. And we looked at
11 that issue very carefully working with the refinery
12 people and our independent expert, and what we concluded
13 is what I just described, which is the crude that is
14 actually blended regardless of whether crude slate
15 changes significantly in terms of weight and sulphur
16 content, regardless of whether the crude that is
17 actually blended has to look the same before and after
18 the project.

19 COMMISSIONER OAKES: But she also addressed the
20 fact that these emissions and the characteristics of the
21 oil from the area in different places impact the tanks
22 as well, and it may increase the emissions associated
23 with tank leakage and pipe leakage and valve leakage and
24 on and on, and that's what I'm asking if it was
25 evaluated.

1 MR. HOGIN: I understand the fugitive emissions,
2 and yes, we did look at that, and we determined that
3 Dr. Fox was incorrect, and it had to do with the fact
4 that the rate -- I wish we had a -- I don't know if Don
5 is prepared to talk about it. It had to do with the --
6 there is a limited rate at which fugitive emissions can
7 escape from a leak. And if you put in higher -- if you
8 put in a crude oil that is higher rate vapor pressure
9 than you used to have, it still can only release at that
10 same rate.

11 So increasing the rate vapor pressure of the
12 constituents -- I'm looking at the technical guys
13 because -- for confidence, but changing the volatility
14 of the constituents does not increase the rate of the
15 leak.

16 MR. CUFFEL: That's right. The rate per pounds
17 per hour doesn't change. The composition might change.
18 Here's the key. Let's go back to Tuesday night.
19 Remember the Bay Area's rule on tanks. What controls
20 the emissions are two things: The maximum throughput of
21 the tank, how much you are allowed to put in so the roof
22 goes up and down and the vapor pressure at storage
23 temperature, and the limit is 11.

24 So no matter what crude you bring in, it's got
25 to be less than 11 at storage temperature. I think as

1 it was eloquently said over here, you can bring in the
2 lightest crude possible but still make it compliant. It
3 can't be 13. It can't be 11 and a half. It has to be
4 11 or less or you bring in a heavy crude and you have
5 less emissions.

6 COMMISSIONER OAKES: You mentioned the other
7 night that was measured at the point when they loaded
8 the tanks, right?

9 MR. CUFFEL: It would have to be verified before
10 the cargo is shipped because that's how you prove
11 compliance.

12 COMMISSIONER OAKES: That's what they were
13 saying from Union Pacific, too. They didn't want to
14 carry anything that was PS --

15 MR. CUFFEL: Exactly.

16 COMMISSIONER OAKES: I think that's good, but
17 I'm still concerned that all of the emissions and the
18 possible leakages were concerns. I didn't see that much
19 clarification in the EIR.

20 MR. CUFFEL: I know it's tricky when you don't
21 have the notion of the permit in the mind's eye. Let me
22 remind you that every single combustion source on the
23 refinery has emissions limits and maximum production
24 limits. Every tank or group of tanks have throughput
25 limits. Then the overall refinery, we talked about

1 165 barrels a day. That's really the -- yes, it's
2 enforceable, but before you get there, you're likely to
3 hit some other limit along the way that keeps you from
4 getting there.

5 There are so many interactions of different
6 limits of parts of the process. All of them, every
7 single one is designed to control emissions. That's
8 what the air district regulates, and they are very good
9 at it. We have a 870-page permit that is full of
10 limits. Thank you.

11 CHAIR DEAN: Thank you.

12 COMMISSIONER COHEN GROSSMAN: I have a question,
13 a follow-up question on the --

14 CHAIR DEAN: Mr. Cuffel, do you want to --

15 COMMISSIONER COHEN GROSSMAN: Because I'm not
16 anywhere near a chemistry expert -- along the lines of
17 exactly what we are talking about Page 2.5274, the
18 response to Ms. Fox's or Dr. Fox's comments says the
19 commenter also raises issues about unloading rack
20 emissions, which is just what we are talking about. The
21 emissions -- or it's related to we are talking about.
22 The emissions estimates for fugitive emissions from
23 these racks are included in Table 4.1-5 under the line
24 item titled "Unloading rack and pipeline fugitive
25 components."

1 When I looked at that table, the only change --
2 that's what CEQA is all about -- what's the change? It
3 was only the ROG's. I always forget what that stands
4 for.

5 MR. CUFFEL: Reactive organic compounds.
6 Basically that means any hydrocarbon.

7 COMMISSIONER COHEN GROSSMAN: Why? Is that the
8 only thing that can be omitted?

9 MR. CUFFEL: That is -- no, it's not the only
10 thing that can be omitted, but that's what is mostly
11 regulated because that is the primary pollutant that the
12 air district regulates in terms of fugitive emissions.
13 It's the leak rate of organic compounds, and that's
14 built into the regulation.

15 COMMISSIONER COHEN GROSSMAN: Thank you.

16 MR. CUFFEL: I don't know if that helps or not.

17 COMMISSIONER COHEN GROSSMAN: I understand that.

18 MR. CUFFEL: Thank you.

19 COMMISSIONER YOUNG: A related question to the
20 consultant. One of the commenters from a law firm
21 stated that the review of the emissions of fugitive
22 volatile organic compounds was based on the applicant's
23 unsupported calculations and provided no citations or
24 supporting documentations for the emission calculations.

25 My question is did the consultant do an

1 independent analysis on volatile compound emissions or
2 did they just rely on the information from the
3 applicant?

4 MS. SCOTT: We always independently verify data
5 received from the applicant. As a consultant
6 representing a lead agency -- apologies -- we are always
7 suspicious about the information that we get, and we
8 truth test it. So no, we didn't take anything we
9 received at face value.

10 CHAIR DEAN: Okay. So we have read through the
11 staff list of questions. Any additional questions from
12 the commission?

13 COMMISSIONER COHEN GROSSMAN: I just have a
14 comment. We have been talking a lot about Valero,
15 Valero, Valero, but one of the things about a use permit
16 is it's issued -- and Amy can pipe in at any time, Amy.
17 When a use permit is issued, it's issued with the land.
18 So if it's not Valero, if Valero is, for whatever
19 reason, not the operator -- I guess that's the right
20 term -- then there's still a use permit. I think that's
21 an important thing to point out, because I don't have
22
22 any reason to think that Valero isn't operating with the
23 utmost professionalism. I'm more concerned about
24 someone else, frankly.

25 CHAIR DEAN: Commissioner Young.

1 COMMISSIONER YOUNG: On the question of
2 construction emissions, I asked the other day, I think,
3 or maybe it was somebody in the audience asked about why
4 the actual emissions were amortized over 30 years
5 instead of simply reported as they happened. And I
6 think your response was it's an acceptable practice; is
7 that right?

8 MS. SCOTT: Standard practice, not just
9 acceptable.

10 COMMISSIONER YOUNG: Pardon me?

11 MS. SCOTT: Standard practice, not just
12 acceptable.

13 COMMISSIONER YOUNG: Standard practice to
14 amortize those over 30 years. And the EIR says that
15 those construction emissions would be offset by a
16 reduction in the emissions from the marine tanker
17 deliveries; is that right?

18 MS. SCOTT: Yes. The emissions caused by
19 transporting crude by rail would offset emissions caused
20 by transporting crude by marine vessel.

21 COMMISSIONER YOUNG: Construction of the
22 offloading facility itself. That's what I mean by
23 construction emissions, right?

24 MS. SCOTT: Right.

25 COMMISSIONER YOUNG: Those would be offset. My

1 question is the marine deliveries would not be stopped
2 until well after the offloading rack is constructed and
3 oil began to be delivered by rail. How can you offset
4 the reductions of construction emissions when you are
5 still getting tankers delivered?

6 MS. SCOTT: The methodology that was used in the
7 analysis is standard practice. I understand you have
8 questions, and I'm sorry if that's not a satisfactory
9 answer. We analyzed the potential impacts the way --
10 consistent with professional standard.

11 COMMISSIONER YOUNG: That may be, but it doesn't
12 really pass the common-sense test. Because, as I said,
13 what you are saying is we are going to offset the
14 construction emissions by the fact that there is going
15 to be fewer marine tankers coming in, but we know that
16 that isn't going to happen until the offloading dock is
17 completed and the trains start to run.

18 It may be accepted practice, but if that is the
19 accepted practice, there's something wrong with that
20 practice. That's what you said. That's what the EIR
21 says, I guess.

22 CHAIR DEAN: I think she's answered your
23 question to the best of her ability. Okay.

24 Other questions or comments from commission to
25 staff? Okay. Let's make sure we get everything

1 answered.

2 COMMISSIONER RADTKE: This may be because I'm
3 just a little late to the whole process, but how did you
4 pick 70,000 barrels?

5 MR. CUFFEL: That is a great question, and it
6 has nothing to do with who built the pool. I want to
7 verify with my colleagues here. I believe that was the
8 largest train that we could safely subdivide on our
9 property, correct? Okay.

10 So as you have commented earlier this evening,
11 it's a narrow space down there, and the maximum number
12 of cars that we could fit on either side of a loading
13 rack was 25, which then led to a 50-car train. Then
14 because of the unloading time, of normally 10 to 12
15 hours, that says the most you could do in a day is two
16 50-car trains. That's how that came about.

17 As you know, with any kind of a project maximum,
18 those are the effects you have to analyze, which is why
19 we are analyzing 100 cars at 700 barrels each. That's
20 70,000 barrels.

21 COMMISSIONER RADTKE: How did you pick the site?
22 Is it the only -- I mean, obviously, then, you were
23 fitting it into the site. How did you pick this
24 particular site for it?

25 MR. CUFFEL: The refinery is built on what used

1 to be the arsenal, and we have hills and valleys and
2 canyons and all kinds of uneven topography. That
3 location is the only level -- essentially level
4 location. We looked at other places where existing rail
5 goes and the refinery such as up to our silos, but
6 there's quite a steep hill, and it just didn't pose a
7 really good opportunity for safe and reliable
8 operations.

9 The elevation of Avenue A is just within a few
10 feet of Bay Shore, so you essentially have a level
11 playing field, quite literally, to maneuver with the
12 trains. It's the safest option.

13 COMMISSIONER RADTKE: Is it safe to say that you
14 were not going for a total replacement of shipping? You
15 were just going to maximize the amount you could bring
16 in and buy crude by rail and then supplement with
17 shipping? Is that what the thought process was?

18 MR. CUFFEL: That's correct.

19 COMMISSIONER RADTKE: Thank you.

20 MR. CUFFEL: Thank you.

21 CHAIR DEAN: Commissioner Oakes.

22 COMMISSIONER OAKES: I have an operational
23 question on the offloading. You guys don't heat the
24 tanks or the cars or the fuel to offload it, do you, the
25 crude?

1 MR. CUFFEL: Sorry?

2 COMMISSIONER OAKES: During the offloading
3 process of the project --

4 MR. CUFFEL: That's attended.

5 COMMISSIONER OAKES: That's not what I asked.
6 Are you heating it?

7 MR. CUFFEL: No. Sorry. The question is are we
8 heating it? No, the cars are not heated nor are we
9 using any supplemental heat. So that precludes what
10 people are calling Tar Sands, because that material
11 doesn't flow unless it's in a heated car. That's not
12 our project.

13 COMMISSIONER OAKES: And that changes emissions
14 as well.

15 MR. CUFFEL: Absolutely, because then you have
16 to account for steam production.

17 COMMISSIONER YOUNG: Are you saying you will not
18 be refining Tar Sands oil?

19 MR. CUFFEL: Tar Sands is a broad term. What I
20 can say with certainty is we are not going to be
21 importing any crude that will not flow at any ambient
22 temperatures. More to the point that was made earlier,
23 it has to be blendable inside our box.

24 So the extreme crudes that are often presented
25 in commenters' letters are those extreme crude that we

1 simply couldn't handle under any circumstances. But
2 they are using it to make a point, which I think we
3 all --

4 COMMISSIONER YOUNG: If it's diluted bitumen,
5 that could be refined?

6 MR. CUFFEL: I don't know. I would have to know
7 the details of that specific mixture to understand if we
8 can handle it properly, if it's blendable into our crude
9 box and if it's capable with our equipment. Not all
10 crudes play well together in terms of blending. That's
11 an important chemical relationship. That goes beyond my
12 knowledge, but I do know that when you are putting
13 material into tanks, you have to be mindful of what was
14 there before. You can't necessarily combine all
15 different mixtures of crude oils.

16 COMMISSIONER YOUNG: If it's a case that you are
17 not going to import Tar Sands, that's an important thing
18 for the community and the commission to know, but I
19 think what you said is you couldn't guarantee that.

20 MR. CUFFEL: The problem is the word Tar Sands
21 means different things to different people. For some
22 people it means how the material was extracted out of
23 the earth. For other people it describes the very
24 specific chemical composition. Right there you have a
25 disconnect and understanding that leads to confusion.

1 That's why I keep coming back to it's the physical
2 properties of the crude that matter. It's sulphur.
3 It's gravity, other attributes of the crude itself.

4 No matter what it's called, that's what we have
5 to look at before we can accept it as a crude candidate
6 for our facility. I wish it were easier, but it's not.

7 COMMISSIONER COHEN GROSSMAN: I have a related
8 question on the other end of the spectrum, the Bakken.
9 You talked on Tuesday night about the shipment of Bakken
10 that you got was stranded at sea.

11 MR. CUFFEL: It was distressed cargo, meaning
12 somebody couldn't receive it as they had planned, and it
13 became available to us.

14 COMMISSIONER COHEN GROSSMAN: Is that the only
15 time you have ever received Bakken?

16 MR. CUFFEL: My understanding is we have had two
17 shipments of it.

18 COMMISSIONER COHEN GROSSMAN: So I have a
19 question about that because we are talking about the
20 handling processes. A couple questions.

21 When you got it or the two times you have gotten
22 it, did you store it or do you not have the capacity to
23 store it or did it go right into blending?

24 MR. CUFFEL: So any crude that arrives at our
25 dock goes into the tanking cage.

1 COMMISSIONER COHEN GROSSMAN: Even Bakken?

2 MR. CUFFEL: It must. And yes, I verified that
3 the vapor pressure was below 11. We found the records,
4 and it was. It went into our tanks. When crude comes
5 in by ship, frequently it has water impurities in it and
6 it has to sit in a tank for a day or two to let the
7 water flow to the bottom. That water is drawn off and
8 goes to our wastewater plant for treatment, then the
9 crude is considered dry. Then the dry crude can be
10 blended with other tanks as it goes to the processing
11 unit.

12 COMMISSIONER COHEN GROSSMAN: If you get crude
13 by rail, do you expect to get crude by rail, stuff like
14 Bakken?

15 MR. CUFFEL: There could be light oils, but
16 again, they have to be compliant. As you know from the
17 project description, they would be unloaded from the
18 cars, pumped to existing crude tanks, and the same
19 process I just described would occur; drying the crude
20 and then blending the crude.

21 COMMISSIONER COHEN GROSSMAN: I think what you
22 said a few minutes ago. You said not all crudes play
23 well together.

24 MR. CUFFEL: That's right.

25 COMMISSIONER COHEN GROSSMAN: Can you tell us

1 more about what the refinery might have to do if you
2 start increasing your percentage of Bakken type or light
3 type crudes.

4 MR. CUFFEL: When I say they won't play well
5 together, what I mean is when we clean tanks out,
6 sometimes we find waxy things on the bottom that are the
7 result of what has been stored there over the years, so
8 it makes cleaning it more difficult. It doesn't mean we
9 can't get it cleaned and restored to good operation. It
10 just makes it more expensive and more time consuming.

11 COMMISSIONER COHEN GROSSMAN: What I am really
12 asking is do you have to do things differently than you
13 are doing them now --

14 MR. CUFFEL: No.

15 COMMISSIONER COHEN GROSSMAN: -- if you start
16 increasing a huge percentage of your amount of crude
17 being Bakken type?

18 MR. CUFFEL: If there was a large amount of
19 lighter crude, that would mean we need a corresponding
20 increase in the heavier crudes so they blend together
21 into the box. The refinery can't run on just light
22 crude, and it cannot run on just heavy crude. That's
23 not possible. We are not going to do anything
24 differently, to answer your question.

25 We will continue to identify candidates that

1 blend into our box that we can store in a compliant
2 manner and then refine safely.

3 COMMISSIONER COHEN GROSSMAN: It sounds like you
4 are more at the edges -- the possibility of whatever the
5 market has and what you can get, you may be -- instead
6 of that narrow range that you were built for and of
7 course, ideally you require product for -- this is a
8 question -- now you are talking about the heavy and the
9 light.

10 MR. CUFFEL: I'm not so much talking about that.
11 I'm trying to be consistent with how the project was
12 evaluated, and I think it was articulated well today
13 that each risk has to be evaluated with the worst case,
14 and some instances that's a light crude, and some
15 instances that's a heavy crude.

16 In our setting we will never be at those
17 extremes. We are going to be somewhere closer to the
18 center. We have given you actual data. It's on the pad
19 5 chart that shows the triangles that are outside our
20 box, and you can see how they would blend to be inside
21 the box. Those are some, I think, visual tools to help
22 imagine what goes on.

23 COMMISSIONER COHEN GROSSMAN: Right. I
24 understand that. I'm kind of trying to go into the
25 future. I'm really concerned about, you know, what's

1 being shipped in. But since we can't talk about rail
2 impacts, I'm really trying to tease it out of you of how
3 much of the light stuff are you going to be requiring to
4 come in by rail, and that's really my question.

5 MR. CUFFEL: I wish I could answer that. Again,
6 I'm not trying to be evasive. I don't know. It really
7 is going to depend on who is producing what and at what
8 price. Once again, Valero has to purchase the crude o
9 the world market, which may drive us to bring in more by
10 ship, as Commissioner Young has said. More by pipeline.
11 Who knows what's going to be developed in California if
12 the Monterey project takes off. Who knows.

13 It's very difficult to say, within any degree of
14 certainty, we will run this and with confidence. We
15 don't have long-term contracts that I know of, and
16 that's just the nature of our business. I'm sorry I
17 can't be more precise.

18 CHAIR DEAN: Thank you. Okay. So where does
19 that leave us? I want to make sure the commission gets
20 all its questions answered. What's next? All right.

21 MS. RATCLIFF: Chair Dean?

22 CHAIR DEAN: Yeah.

23 MS. RATCLIFF: If are there no other questions
24 from the commission to staff, I did want to point out
25 the memorandum that you got today. It's titled

1 "Planning Commission's purview for the Valero crude by
2 rail project." It's more of a kind of an overall
3 discussion, a little bit of preemption in order of
4 operations, if you will, as far as taking action on the
5 project.

6 Just to walk you through this, -- this is as a
7 result of some requests from a couple of commissioners.
8 We wanted to clarify the boundaries for preemption. I
9 think Mr. Hogin's presentation handled that pretty
10 thoroughly. If the commission wishes to approve or
11 conditionally approve the use permit, they first must
12 make a decision on the EIR. There's two paths for that
13 decision.

14 They can certify the EIR based on the fact that
15 the EIR was completed in compliance with CEQA and is
16 sufficient, and that the final EIR reflects the city's
17 independent judgement and analysis. As part of that EIR
18 certification, the commission may modify the mitigation
19 monitoring and reporting program to the extent that
20 those aspects are not regulated by the Surface
21 Transportation Board as previously mentioned and
22 discussed by Mr. Hogin.

23 Commission may also choose to remand the EIR
24 back to city staff for further analysis. If the
25 commission wants to do this, they need to cite very

1 specific directions as to what portions of the EIR they
2 find inadequate so that staff can clearly proceed with
3 further analysis on that.

4 Once that is taken care of, then the commission
5 can act on the use permit if they wish to approve the
6 use permit. The findings are in the memo. They are
7 also in the staff report. I don't want to repeat them
8 here too much. In addition, the commission may
9 recommend to the City Council that the city send a
10 letter to Congressional representatives urging that they
11 adopt appropriate laws to protect the public from
12 significant rail impacts, as we have seen that staff
13 identified there are significant impacts from the
14 project that are up rail that staff believes we are
15 preempted from mitigating.

16 Commission may make the above use permit
17 findings based on aspects of the project which are not
18 regulated by the Surface Transportation Board. Just a
19 reminder: Any action by the Planning Commission is
20 appealable, either the certification or the remanding of
21 the EIR as well as the use permit. The following is not
22 within the authority of the Planning Commission, is you
23 cannot require additional regulations on aspects of the
24 project that are regulated by the Surface Transportation
25 Board.

1 We go into that -- I think Mr. Hogin covered
2 that, the transport of crude by railcar specifications,
3 et cetera, movement, timing. Also because of
4 preemption, you cannot deny the application based on the
5 fact that the benefits did not outweigh the project's
6 unavoidable significant impacts from rail operations.

7 If the commission has questions on that or any
8 other topic, staff will be happy to answer to the best
9 of our ability.

10 CHAIR DEAN: I have a question. It goes to the
11 use permit and the findings for the use permit.

12 Particularly No. 2, the proposed location of the
13 condensed sole use and proposed conditions under which
14 it will be operated or maintained will be consistent
15 with the general plan and will not be detrimental to the
16 public health, safety and welfare of persons residing or
17 working in or adjacent to the neighborhoods in such use
18 or detrimental to the properties or improvements in the
19 vicinity or to the general welfare of the city.

20 From -- we haven't really talked about our
21 positions on the project yet. I think everybody has
22 been holding that very close to the vest. I might as
23 well start that conversation. From the very beginning
24 my concern has been not necessarily about the crude when
25 it arrives at the refinery -- that might be the safest

1 place for it -- but actually the transportation origin
2 and the refinery.

3 Particularly I have ridden the rail between,
4 say, Martinez and Truckee, so the rail corridor through
5 the marsh, and then into the cities of Davis and West
6 Sacramento and all the towns along the way. Certainly
7 there's a lot of residential along the rail corridor
8 that would be affected if there was ever an incident in
9 the transportation of a crude rail train.

10 So just to retrace the history of the analysis
11 in the first EIR, the draft EIR, the analysis showed
12 that there was no -- the hazard analysis showed there
13 was no significant impact related to the transport of
14 crude by rail. There was a lot of comment on that, and
15 so the recirculated draft EIR had a very different
16 conclusion; that there was significant unavoidable
17 impacts related to that transport and to the hazards.

18 In fact, they did a pretty good analysis of the
19 hazards that could lead to injuries and fatalities.
20 That was all included in the recirculated draft EIR. So
21 I have a very hard -- and I have to think that when I
22 read this finding that you are asking us to make, that
23 this project will not be detrimental to the public
24 health, safety or welfare of persons residing or working
25 in or adjacent to the neighborhoods of such use.

1 I know that language was crafted for Benicia and
2 for Benicia neighborhoods, but I can't help but think
3 that this is not an ordinary project, and that when we
4 say maybe neighborhoods, it's not just neighborhoods in
5 Benicia, but we also have up-rail neighbors who would be
6 much more affected than us if there was some incident
7 along the rail corridor.

8 I would have a very tough time making this
9 finding. I'm also -- where does that leave us in terms
10 of the process? And I understand from our earlier
11 conversation with Mr. Hogin that this is not actually
12 necessary; is that correct? Even if we were to make
13 this finding -- I guess I'm confused by the process.

14 On one hand you're asking us to make this
15 finding, which we might not be able to make, and on the
16 other hand I'm hearing that it's an irrelevant finding
17 because it's preempted by the ICCTA.

18 MR. HOGIN: Now -- I'm sorry. Go ahead.

19 MS. MILLION: Let me help you kind of explain
20 the thought process behind staff being able to make that
21 statement. It essentially -- it is talking about for
22 areas of impact within the city's purview. It's not --
23 you can -- Ms. Wellman can correct me if I'm wrong. I
24 think you can. If the commission wants to consider
25 other neighborhoods, maybe other cities when thinking

1 about this finding, I don't see a problem with that.

2 But your focus on this finding needs to remove
3 the rail impacts, because that's not within the city's
4 purview. That's how we can make this finding. As we've
5 said, it's staff's position that the benefits of the
6 project do not outweigh the impacts. It is clear that
7 there are potential for significant unavoidable impacts
8 that would be detrimental to the health and safety of
9 people if an accident were to happen. That's clear.

10 But since we cannot deny a permit based on rail
11 operations, that is not within the city's purview, and
12 therefore, not written into this finding. Mr. Hogin?

13 MR. HOGIN: Mr. Chair, the step that you don't
14 need to do relates to the weighing or balancing the
15 project benefits against the significant unavoidable
16 impacts. The step that you were referring to, No. 2 on
17 Page 2, in order to rule on the use permit application,
18 you have to consider that, and I fully understand the
19 comments you were making. And all I can say is that it
20 is my view and staff's view that in weighing whether or
21 not this project is detrimental to public health, safety
22 or welfare of persons, you cannot consider impacts from
23 rail operations such as derailment, fire or explosion
24 that can occur in an up-rail community because that's
25 preempted by federal law. Whether we think that's right

1 or whether we think that's wrong, that is what the law
2 says.

3 CHAIR DEAN: I understand the legal theory that
4 you are stating. I'm just telling you that as a
5 planning commissioner, that doesn't make sense from a
6 human point of view.

7 City Attorney, do you want to --

8 CITY ATTORNEY WELLMAN: Yes. I'll just add a
9 little to it. I totally understand as well. I think
10 when we talk about the use permit, the finding has to be
11
11 the use, the Valero use. That's what you -- remember we
12 talked about you can look at the actual project on the
13 site and you have to make a determination as to whether
14 that use is not detrimental to public health, safety,
15 welfare of persons.

16 I think that what you are wanting to do is to
17 recognize that there are unavoidable, potentially very
18 significant impacts that may happen up rail, and you
19 don't want to ignore that. The way that you can do that
20 is by looking at the alternative statements of
21 overriding considerations that staff recommended that
22 you consider, which actually recognizes that the
23 benefits of the project do not outweigh the significant
24 unavoidable impacts.

25 And also the other recognition is that we would

1 like to see some changes in rail safety and asking the
2 City Council to send a letter to Congress to try to make
3 those changes, but that was -- but as far as the use
4 permit, it's the permit for the site. As far as the
5 environmental impact, you can't mitigate any of those
6 significant unavoidable impacts, but you can at least
7 recognize them by deciding that you are going to adopt
8 that first one that staff is recommending.

9 COMMISSIONER YOUNG: I have a process question.

10 CHAIR DEAN: Yes, Commissioner Young.

11 COMMISSIONER YOUNG: If I understand it, we have
12 to do this stuff in sequential order.

13 CITY ATTORNEY WELLMAN: Yes.

14 COMMISSIONER YOUNG: And the first one is to
15 certify or not certify the EIR.

16 CITY ATTORNEY WELLMAN: Exactly.

17 COMMISSIONER YOUNG: I think the discussion on
18 the use permit is premature until we take that action.
19 What I would like to do is return this to the
20 commission, with the Chair's okay, and stop the back and
21 forth with staff and have the commission start
22 deliberating on the EIR. And depending on how that
23 goes, we can talk about the use permit and necessary
24 findings.

25 MS. RATCLIFF: Chair Dean?

1 CHAIR DEAN: Yes.

2 MS. RATCLIFF: I just wanted a quick
3 clarification to something Commissioner Young said.

4 CHAIR DEAN: Yes.

5 MS. RATCLIFF: That if the commission's decision
6 is to deny the use permit, there is no need to act on
7 the EIR.

8 COMMISSIONER YOUNG: Isn't it actually the other
9 way around?

10 MS. RATCLIFF: However, the causes for denial
11 may not reflect negative impacts from the rail.

12 COMMISSIONER YOUNG: I understand that's the
13 staff's opinion, but my understanding is we have to deal
14 with this EIR first. If the EIR is not certified, there
15 is no discussion on the use permit because you can't
16 approve a project that doesn't have a certified EIR.
17 Isn't that right?

18 MS. RATCLIFF: You cannot approve a project
19 without a certified EIR. You can deny a project without
20 an EIR, without a certified EIR.

21 COMMISSIONER YOUNG: Okay.

22 CHAIR DEAN: Yes?

23 MS. RATCLIFF: Okay.

24 CHAIR DEAN: Additional thoughts here from the
25 commissioner? Commissioner Radtke.

1 COMMISSIONER RADTKE: I think it would behoove
2 us for each of us to go through our lists of concerns
3 and issues before we actually get into how we want to
4 deal with this overall.

5 CHAIR DEAN: Okay. Concerns -- so let me just
6 make sure I'm clear. Concerns and issues on the EIR on
7 the project? All right.

8 MS. RADTKE: It's kind of like what each one of
9 our talking points talks about everything, and we'll see
10 it's lumped together or if it's an individual thing by
11 doing that.

12 CHAIR DEAN: Very good. Would you like to
13 start?

14 MS. RADTKE: I'm the newest one here. Sure,
15 because I don't know any better. Let's just see what I
16 do with this. Okay.

17 I actually -- I think we probably all have
18 prepared some statements and that we are crossing and
19 lining and adding as we work up here. I would like to
20 back up a little bit and just some general comments,
21 because I did come late to this whole process, and I
22 cannot imagine what the city staff has been dealing with
23 over the last several years. I suspect you have had a
24 lot of heated discussions in your office and with
25 consultants and everybody else, and I thank you for

1 putting all your hard work and thought into what's best
2 for Benicia. I'm glad you guys have thick skin.

3 I also know that it can divide staff. It's
4 dividing our country. So I hope even at this point you
5 guys are thinking of some way to at least bring our
6 community back together after the process.

7 One of the best things -- I like to look at the
8 good parts first. That's what leadership training
9 teaches you. So I'm sitting here looking for the good
10 part, and I'm feeling really good about the relationship
11 between the Valero Fire Department and the Benicia Fire
12 Department. I think their working on this for the last
13 several years will benefit our entire community no
14 matter what, the mutual aid agreement, some agreements
15 they have come up with to improve our firefighting
16 response and emergency response. I know we are all
17 going to benefit from it. That's definitely a good
18 thing that I have seen that has come from this process,
19 and I know both of those fire chiefs will keep their
20 professionalism and concern for Benicia at the top no
21 matter the outcome with this process. So I thank both
22 of you for that.

23 It's also caused a lot more people in our
24 community to look at the Benicia Industrial Park and how
25 it works together and what is needed to keep our tax

1 base strong so that we can form bigger and better ways
2 to diversify and not be heavily linked to any one
3 industry.

4 I'm also really heartened by the fact that we
5 have so many eloquent speakers and intelligent people in
6 our community. For anyone who says Americans are not
7 educated, they should come to one of these meetings.

8 We've got to get back to what the concerns are
9 and how it fits into what is best for Benicia. And we
10 always go back to the general plan and our zoning laws
11 because that's what we are here for. I do have concerns
12 with the existing site and the existing design of the
13 unloading facility. It is in a hundred-year floodplain.
14 I think people in most of the rest of the country will
15 tell you the hundred-year floodplain idea has pretty
16 much gone out the window.

17 If you have been in the Bay Area very long, any
18 time you take a watershed like the Lake Herman watershed
19 and drain it into a narrow canyon channel like Sulfur
20 Creek Springs and then it hits the bay, you're going to
21 have backup from the high tides, and there's no telling
22 where it's going to go. It may not have happened yet in
23 this particular area, but it has happened down closer to
24 the bay. We've seen the Jackson storage area with water
25 in that from that.

1 So with climate change and sea-level rise, I
2 don't see this issue getting any better for a
3 hundred-year floodplain, and I'm not sure we as a city
4 should allow any new construction in the hundred-year
5 floodplain anywhere, regardless of what the construction
6 is.

7 I feel a lot better about access to this area by
8 emergency vehicles, but I still think that it is
9 something that, because they are maximizing the use of
10 this area for rail, that they are still limiting some of
11 the emergency response and getting things closer to the
12 creek so that if you do have rail cars and such going
13 into the creek, it's going to be a lot harder resolving
14 that problem.

15 And I feel that the size of this facility is
16 creating problems in and of its own self. If you had a
17 20-car rail line unloading facility there, you would not
18 have the cumulative impacts through traffic backup onto
19 680. You would have much shorter trains going across
20 there. You would not have the traffic backing up as
21 much because the time wouldn't be as long. I think the
22 size of this facility is also too big in the fact that
23 it backs up areas. It causes the length of the trains
24 to close off a number of businesses in the industrial
25 park. I think that's the biggest safety and hazardous

1 issue that we're looking at that's extremely close to
2 home. We have 1200 something people getting trained at
3 the Iron Worker's place. We have McJunkin next to them.
4 You have Ruszel Woodworks. All of those businesses are
5 stuck behind a rail wall or could be stuck or trapped
6 behind a rail wall.

7 If you had shorter trains going in there because
8 of the unloading facility being smaller, you might
9 actually be able to bring in some emergency access
10 around Ruszel Woodworks and connect all the businesses
11 together on the backside so that the vehicles could get
12 in even if there were trains on the track.

13 And are we creating -- a lot of the findings we
14 are looking at, you can approve it or say it's okay,
15 it's for economic purposes, so I think we need to take a
16 deeper look at economic purposes aside from the EIR
17 environmental impacts. One of them is the fact that are
18 we creating another reason that businesses may not want
19 to relocate to the Benicia Industrial Park. Our
20 industrial park needs modernizing and diversifying now.
21 Is this going to introduce another obstacle?

22 When we asked Valero what was in it for
23 everybody else in the industrial park, it was all
24 secondary type things. A few more jobs, you're good
25 neighbors. You're part of a vibrant industrial

1 community. There is no concrete support there to
2 improve our industrial park and actually increase
3 another reason or put in another reason why people would
4 not want to move to our industrial park.

5 This is one that some people may think is really
6 kind of not worth looking at, but I have serious
7 concerns with insurance coverage from many aspects. If
8 you are building in a hundred-year floodplain and the
9 flood does cause the problem, is there federal taxes
10 that is going to have to fix that or not? I don't know.
11 When you get into a hundred-year floodplain issues, you
12 change the whole game.

13 Are our businesses going to have their premiums
14 increase due to their proximity to the site? Maybe not
15 immediately, but if there's an incident anywhere across
16 the country, it could increase the insurance on the
17 businesses or even cause problems. You wouldn't even
18 think this was an issue but home insurance could be an
19 issue. My parents owned a house on the west side of
20 Houston over 50 miles from the Gulf of Mexico with the
21 entire city of Houston being between them and the Gulf
22 of Mexico. After Hurricane Katrina the insurance
23 company that covered them for 30 years dropped their
24 insurance, saying it was too hazardous for them in that
25 area for them to be located.

1 There is no way to predict what an insurance
2 company is going to do in the ability for just
3 homeowners as they are changing homes. When I buy a
4 place, first thing I do is I call the insurance company
5 and say if I do this, is this a bad location? Am I
6 going to get an insurance for it? Is it going to be a
7 high-premium area? What am I dealing with? When we did
8 that in purchasing a cabin in the foothills of the
9 Sierras, we happened to be doing it in the summertime
10 when there was a giant realm of wildfires in Southern
11 California. I called them up earlier on. They said,
12 "Oh, yeah. No problem. We'll cover them." By the time
13 we purchased the property and went to get our policy in
14 place, they were waffling. "I don't know if we want to
15 cover you or not anymore." And they were talking about
16 fires in Southern California being an issue.

17 So I think it is something we need to take into
18 consideration as what are we doing for the economic base
19 of our community by allowing this size of an unloading
20 facility to be placed there. I'll come back to the rest
21 later.

22 CHAIR DEAN: Okay. Commissioner Birdseye, you
23 want to go next?

24 COMMISSIONER BIRDSEYE: Okay. So I want to
25 concentrate on the concerns I have with the EIR in

1 particular. First of all, it's our purview here. We're
2 all sitting up here volunteering our time to consider
3 the city's land use and environmental review laws. They
4 are intended to protect public health, community safety,
5 and the environment from the impacts of new land use and
6 activity, regardless of who proposes those activities.
7 That's the lens that I'm looking through. I have
8 several concerns.

9 First is the lack of clarity on this preemption
10 issue. It's troubling and confusing to me. I know our
11 city's attorneys have one opinion, but from everything I
12 have read, it's just an opinion. There's no stated law
13 at the Supreme Court that we can look at to say, "Okay.
14 This is very valid." In response, I've read everything
15 and I'm really confused by what NRDC said, and the
16 Stanford memo, so I think there's a lot of wiggle room
17 here, and we're presenting -- the city is presenting
18 like this is fact, and I'm not feeling that it's the law
19 of the land.

20 I concur with my CEQA mentor, Bob Berman. I
21 worked for him a bit, and I worked on EIRs related to
22 the Marin County General Plan Update, and he taught me a
23 lot about CEQA in those couple years that I worked with
24 him. In his comments that he submitted, he says that he
25 believes -- and I concur with this -- "I believe that

1 the impacts would result in a project inconsistent with
2 several goals of the general plan of our city. Goals
3 2.5, 4.8 and 4.9."

4 And I believe, as Bob does, that the direct and
5 indirect impacts of this project will not maintain the
6 city's health, safety and quality of life. Therefore,
7 it's a direct goal in conflict with the goals of our
8 general plan here. Also, CEQA guidelines call for an
9 examination of all impacts. What was found were 11
10 significant and unavoidable impacts that directly or
11 indirectly related to the proposed project. Several of
12 these impacts will directly affect Benicians.

13 We -- my family lives here. My children grew up
14 in Benicia. My dad and grandmother are growing old in
15 Benicia. There's a good chance that my grandchildren
16 will grow up in Benicia. I'm taking this process very
17 seriously, and I know many of you have been here all
18 week with us and you're taking it seriously too.

19 All of us, not just the communities along the
20 rail, all of us stand to be directly affected by this
21 project. And therefore, it's not just the rail effects.
22 It's real here, and we could be significantly impacted.
23 Because these impacts cannot be mitigated and because
24 the city's examination of the overriding economic
25 benefits related to the proposed project did not include

1 local employment and economic benefits that would in any
2 possible scenario compensate Benicians for the
3 significant and unavoidable impacts, I have serious
4 concerns with the EIR, and there are serious flaws.

5 CHAIR DEAN: Commissioner Oakes.

6 COMMISSIONER OAKES: Thank you. Way to echo
7 many of the things -- I didn't know this was going to be
8 a full-time job as it was for everybody here. I think
9 everybody started the process with the same thing:

10 Let's get this right. I think everybody has worked real
11 hard to do that. I think we found some serious flaws in
12 the EIR. I think they go around the traffic impacts
13 that we have here. I still think that we are not
14 counting all of the emissions that are not accurately
15 portrayed. I think we need to evaluate those as well.

16 For to be told at the 11th hour that we have
17 virtually no options when it comes to rail is -- I don't
18 know what the correct word is, but it's not nice. I
19 can't tell you how many hundreds of hours I personally
20 have spent -- and anxious, frustrated. I don't
21 de-stress well. Being here, working at night, my wife
22 working days, some of those other stress-management
23 options aren't available. We have to laugh sometime.

24 I don't want to be complicit in a decision made
25 here with what has become a social nightmare across our

1 country. That is -- they don't even call them crude oil
2 trains. They call them bomb trains. I don't
3 necessarily agree with that. I think everybody in the
4 process, again, wants to do the right thing. But I
5 think that the business has outstripped the technology
6 in common sense. Until we can write that, I have a hard
7 time allowing that stuff in our country -- in our state
8 here, which is an island, they have already told us.
9 It's an oil island. Let's keep it out. We don't know
10 enough about it.

11 In the early 1980's -- in the early 1990's I was
12 a founder, co-founder, and first president of the first
13 clean-air vehicle coalition in the Bay Area. We -- I
14 fought for that because I thought it was the right thing
15 to do. Things have changed. But without the technology
16 that the clean air movement brought to us -- they
17 brought us electric vehicles. They brought batteries.
18 They brought us a way to use natural gas, and one of our
19 big partners was PG&E. Obviously they want to sell
20 more, but all of this comes at a time when it becomes
21 obvious we need to wean ourselves away from this.

22 I don't think we are going to do that in my
23 lifetime. I think that the impacts on the economy would
24 be so catastrophic that you wouldn't even deal with it.
25 But the facts we have at hand here are -- what we are

1 really talking about is additional profit for a couple
2 of companies; some in the oil fields, some on the rail
3 lines, and some refining stuff. We already pay more
4 than any state for gasoline, for oil. We are a captive
5 audience to multi-thousands of tons of pollution a year
6 with five refineries -- you better move.

7 CHAIR DEAN: Okay. I'll go next. You've
8 already heard my prime concerns, which is the hazards
9 related to transportation of crude by rail. I have all
10 the concerns related to the road impacts, particularly
11 how those extend through the industrial park and
12 possibly onto the freeway. Also economic impacts to
13 businesses that would be blocked by crude-by-rail trains
14 and just general inconvenience to Benicians trying to
15 get in and out of the industrial park on a regular basis
16 without interruptions to their -- daily interruptions to
17 their lives. Those are my main concerns.

18 Also a biological concern in the Sulfur Creek
19 area, and certainly in the -- through the marsh between
20 the industrial park and the bay or the straight. With
21 that, Commissioner Cohen Grossman.

22 COMMISSIONER COHEN GROSSMAN: When I started
23 reading the draft EIR I thought, well, you know, I can
24 read. I have a graduate degree. I spent probably three
25 days on two pages under air pollution. I'm not a

1 regulator. I'm not a chemist. I'm not a lawyer. It's
2 a lot of words on paper. So, okay. I learned a lot
3 about crude by rail. I've learned a lot about the oil
4
4 industry. I've learned a little bit about Valero, and I
5 respect all of the professions I've just mentioned. I
6 respect the people who get their hands really, really
7 dirty, whether it's in North Dakota or the Middle East,
8 doing the heavy-duty lifting, the stuff that -- I don't
9 have calluses on my hands, but I drove a car here; and
10 they have calluses on their hands and they've got gunk
11 on their face and worse because they have done the work
12 to get the oil to us.

13 We are still dependent on oil. I wish we were
14 not, but we are. So with respect to this project -- I
15 guess I'll say it this way: It's clear -- and I really
16 appreciate Commissioner Radtke teasing it out that the
17 goal is to have more oil come in by train than by ship,
18 and knowing that we already have a lot of crude going
19 through here. Maybe it doesn't stop, but it comes right
20 through. We have train tracks and we have crude. We
21 have learned a lot about this in the last two or three
22 years.

23 Despite the economic impacts, I think the
24 environmental impacts and the consideration for the
25 world, for our brethren, sistren, upstate, up rail, I

1 don't want to be the one planning commissioner in the
2 one city that said -- excuse my language -- "screw you"
3 to the up-rail cities. I don't feel that way. I'm not
4 a lawyer, and I'm not a chemist, and I'm probably not
5 even very good at public policy. But I like people, and
6 I'm a person, and I live here. And the people in --
7 name a county -- Siskiyou County, they live there. And
8 we have, even though we are not supposed to talk about
9 it -- that's the lawyer that's telling me -- not
10 criticizing anyone in the room or not in the room -- we
11 are not supposed to talk about up-rail impacts because
12 that's not our business, but it's a fact that has been
13 brought out. And to have to put blinders on because of
14 this issue is -- I think Chair Dean said it very well
15 earlier. It's like being tied in a knot.

16 I think every commissioner, including the newer
17 ones, have spent hours and hours and hours. You guys
18 have spent hours and hours and hours, you all in the
19 room, and the public at home has spent hours and hours
20 and hours, and staff has spent hours. They fed us.
21 Thank you. They've endured questions of every simple
22 and complicated nature.

23 I'm just going to say it this way. Maybe all my
24 colleagues here have said it better than I'll say it.
25 The general plan doesn't support this idea of making the

1 world any more dangerous. The health and safety of our
2 residents is key. If we are just going to look at
3 Benicia, we'll stop at the general plan. That's all I
4 have to say right now.

5 CHAIR DEAN: Commissioner Young.

6 COMMISSIONER YOUNG: First of all, I want to
7
8 thank Valero for their patience. And they waited a long
9 time for this to happen. I think they have been very
10 professional in this whole thing all the way through. I
11 was struck by the comments of the people from Davis and
12 Sacramento yesterday talking about the impacts of having
13 two trains a day going through their community --
14 sorry -- four trains a day, and be close to their
15 schools and blocking traffic for eight-and-a-half
16 minutes at all the grade crossings.

17 And I -- it struck me: What if instead of
18 Valero Refinery being on the east side of town, it was
19 on the west side of town? Because right now these
20 trains would just barely touch Valero -- I'm sorry --
21 Benicia. If the refinery was now where the state park
22 is instead, and the trains had to cross First Street and
23 Military and any number of streets at grade crossings
24 and block traffic for eight-and-a-half minutes, and if
25 this project, which will likely end up in front of the
City Council anyway for a final determination -- if this

1 project was put to them with that kind of scenario, the
2 amount of opposition that we have seen from Benicia
3 residents so far would be a fraction of what you would
4 hear from people when they saw what was happening in
5 their neighborhoods.

6 So as a commissioner, it's our duty to decide,
7 based on the requirements of CEQA, if the EIR has
8 satisfied those requirements. It's our duties as
9 commissioners to study and evaluate the adequacies of
10 the document and consider the public input as well. I
11 know how important this project is to both the city and
12 the applicant. Somebody yesterday said it was the most
13 important project since World War II. I wasn't around
14 in World War II. It may look like I was, but -- I have
15 to probably agree that it's a project of such
16 significance. That its importance cannot be
17 underestimated.

18 I have tried my best to examine this in a
19 reasonable and objective manner, including the responses
20 by the city to the comments that people made about the
21 EIR. CEQA is a process mandated by law with minimum
22 standards for certifications. CEQA is really all about
23 getting public comment and making sure all the impacts
24 of a project are examined and analyzed and mitigated if
25 possible. For this project the public included a lot of

1 non-expert commentators as well as expert commentators.
2 And these were commentators with expertise in one or
3 more fields associated with the project. There were
4 lawyers and chemists and rail experts and all sorts of
5 people.

6 I'm really grateful for the quality of those
7 comments that came in, both verbally and in writing. I
8 want to recognize them and the hours and research and
9 writing and critical examination that people invested in
10 this process. So thanks to really everybody for staying
11 involved with this to this point. You are probably
12 going to have to continue that involvement as this
13 project moves to the City Council.

14 A significant number of the public, both experts
15 and non-experts, express their surprise and
16 disappointment at the city staff recommendation,
17 certifying the EIR and recommending the project
18 approval. And given the significant and unavoidable
19 impacts of the project, and the absence of project
20 alternatives, and the wide scope of the project impacts,
21 not just in Benicia but throughout the state, and what I
22 believe are the EIR's inadequate response to public
23 comments, and especially the unresolved legal
24 controversies regarding preemption, the public's
25 frustration with the document in its current state is

1 reasonable and understandable.

2 Here's just a few comments from those expert
3 commenters that are representers of the inadequacies in
4 the document. I'm referring only to certain
5 commentators, but these comments -- I'm going to quote
6 just a few of them, but they are repeated by multiple
7 commenters, and it's a common theme. They are
8 legitimately raised, in my opinion, by multiple parties
9 who all responded independently of each other but with
10 similar criticisms.

11 SACOG, which represents 22 cities and six
12 counties in the metropolitan Sacramento area, said that,
13 quote, the project imposes unfunded obligations on local
14 communities to prepare, train, equip and supply first
15 responders for known rail accidents and the consequences
16 thereof.

17 In a separate letter SACOG asserted that the
18 concerns they expressed in their previous letters after
19 the release of the draft and the revised draft had not
20 been addressed. They stated that, quote, While the
21 responses from the city assert that the city had
22 evaluated all feasible mitigation measures to reduce
23 potential significant impacts to a less than significant
24 level, there was no evidence in either document of such
25 analysis or evaluation. Rather the documents largely on

1 the applicants and rail carriers' assertions simply
2 conclude that any measures that would mitigate the
3 significant impacts of crude by rail shipments through
4 our region would be preempted.

5 Anticipating this assertion, SACOG submitted
6 substantial analysis, including one from the California
7 attorney general rebutting those assertions in the
8 revised draft EIR, and establishing that the lead
9 agency's authority to impose appropriate measures under
10 those circumstances. But the final EIR provides no new
11 or additional information and is essentially a
12 non-response to SACOG. The final EIR provides no
13 substantial evidence to support the assertion that
14 measures to mitigate the impacts are not feasible.

15 They later state that the city presumes it
16 cannot adopt any mitigation measures based on the
17 broadest possible interpretation of federal preemption,
18 and thus, it never analyzes or evaluates any of the
19 multitude of potential measures and whether they are
20 specifically preempted.

21 I think that's right. I don't think that we
22 really looked at very many alternatives basically
23 saying, well, if it's connected to a rail, it's
24 preempted, so we really don't need to look at it. This
25 approach is flawed. It fails to identify for the public

1 all the potential mitigation measures and how each
2 measure is or is not preempted.

3 On a different topic, the California attorney
4 general wrote and said, quote, The document improperly
5 asserts that the proper baseline for the impact on air
6 emissions is determined by the refinery's maximum
7 permitted emissions. The document fails to analyze the
8 impacts on air quality from the foreseeable change in
9 the mix of crude oils processed at the refinery. The
10 document implies an overly broad determination of trade
11 secrets, which results in the non-disclosure of the
12 types of crude to be shipped by rail and processed at
13 the refinery, and concludes by stating that these and
14 other deficiencies must be addressed and corrected
15 before the city takes action on the project pursuant to
16 CEQA.

17 The broad branch of trade secret protection,
18 said the attorney general, directly conflicts with
19 recent 2014 decisions by the US Department of
20 Transportation and the California Office of Emergency
21 Services that information about the specific
22 characteristics of crude oil travelling by rail are not
23 protected trade secrets and should be publically
24 released.

25 This failure of transparency in the document is

1 particularly improper given that Valero must submit to
2 the Office of Emergency Services the same information
3 regarding the properties of its feed stocks imported by
4 rail, and OES will release it to the public. Benicia's
5 non-disclosure of this information deprived both the
6 public and Benicia officials of the informed
7 decision-making process that is at the heart of CEQA.

8 On the question of air emissions, a letter was
9 received from the air district, the Bay Area Air
10 District, referencing their frustration with the city's
11 lack of response to their comments. They wrote about
12 comments they submitted on behalf of themselves and
13 other air districts in which they recommended the city
14 evaluate a potential mitigation measure for off-site
15 mitigation of air impacts. Their recommended measure
16 would not put any burden on UP and therefore was not
17 subject to preemption.

18 According to the letter received Monday and
19 signed by the deputy executive office of the district,
20 quote, The city did not evaluate the feasibility of the
21 recommended mitigation measure in the EIR and did not
22 provide an adequate response as required by CEQA. After
23 review of the final EIR, air district staff remain
24 concerned that the cumulative air quality and impact and
25 health risk analysis provided in the final EIR does not

1 accurately characterize the potential air emissions or
2 health impacts associated with the project.

3 The analysis relies in part on an outdated
4 health risk assessment from the 2002 Valero improvement
5 project DEIR underestimates the number of remaining ship
6 calls to the refinery, uses unreasonable locomotive fuel
7 efficiency estimates, omits some sources of emissions,
8 and does not evaluate the potential health effects of
9 PM2.5 of emissions.

10 In our comment letters Bay Area District staff
11 requested that the city provide additional analysis in
12 the final EIR to make up for these and other
13 deficiencies so the project's air quality impacts can be
14 more accurately characterized. The city did not attempt
15 to revise or expand on the project's cumulative air
16 quality and health risk analyses. Instead the city
17 claimed that the cumulative analysis and health risk and
18 assessment reflects, quote, the most recent data
19 available. Air district staff respectively disagrees
20 with this opinion.

21 These comments were made independently of each
22 other yet came to similar conclusions about the
23 inadequacies of the EIR. I agree with those comments
24 and have the same concerns about the document. So how
25 do we really get to this state? What made the final EIR

1 that inadequate? I think to understand that, we have to
2 look back at the history of this project and understand
3 how we got here. Valero started the installation of
4 rail spurs on their property to serve this project
5 almost before they started the application process.
6 That was at the applicant's risk.

7 The investment of significant funds into
8 infrastructure for a project that had not been approved
9 may indicate the applicant's high confidence that the
10 city would naturally approve the permit. Historically
11 the applicant's permits have been approved with little
12 or no opposition, certainly as compared to this project.
13 In reviewing the project, the city first put forth a
14 mitigated negative declaration. That's a declaration
15 that minimizes the impacts of a project to such a degree
16 that no CEQA review would be required.

17 If a reasonably adequate understanding of the
18 project was conducted at that time, it's hard to
19 understand why and how he mitigated negative dec was
20 even brought forth to the Planning Commission.

21 The hearing at the Planning Commission on that
22 request made it obvious that a full EIR would need to be
23 prepared. Once a decision was made that an EIR would be
24 required, instead of issuing a request for
25 qualifications or a request for proposals from

1 environmental firms, which is the normal standard
2 procurement process for soliciting municipal contracts,
3 staff independently and without consulting the Planning
4 Commission or the public decided to hire the ESA to
5 write the EIR.

6 ESA is the same firm that prepared Valero's EIR
7 for the Valero improvement project. The first draft
8 EIR, which was released in June 2013, was roundly
9 criticized by every local government between here and
10 Roseville as well as the state attorney general,
11 Caltrans, the air district, and the large majority of
12 other groups and organizations and individuals who took
13 the time to comment.

14 Legitimate criticisms on the adequacy of the
15 document under CEQA were presented and supported.
16 Despite the extensive criticism of the draft EIR, the
17 city signed a contract extension with ESA for the
18 revised draft EIR, which was released in August of 2015.
19 The revised draft, to its credit, was a more complete
20 document, and it identified several significant and
21 unavoidable impacts that would likely be a result of the
22 project, and, importantly, also modify the scope of the
23 project to acknowledge the impact in areas throughout
24 Northern California.

25 However, comments to the revised draft indicated

1 that many of the previously identified basic underlying
2 flaws and inadequacies of the document remained
3 unaddressed. In fact the public and agencies were left
4 to restate their prior input as originally stated in the
5 draft EIR. Last month the staff issued the final EIR,
6 the document that is the subject of this hearing. On
7 multiple issues, the chances of a rail accident, the
8 calculations of air emissions, the extent and
9 seriousness of traffic impacts, the ability to address
10 public safety issues both within the city and up rail,
11 whether the product conflicted or not with the city
12 general plan and climate action plan and, most
13 importantly, on the issue of preemption on every issue.
14 The city and the consultants had bent over backwards to
15 make findings favorable to the applicant.

16 The question before the committee is simply
17 stated: Does the document meet the minimum requirements
18 of CEQA? The analysis required to make that decision is
19 quite complex. Comments submitted by the public to the
20 final EIR, in particular the same entity as it commented
21 on prior documents, were basically a restatement of the
22 same issues and concerns.

23 CEQA regulation 15088 states that Benicia as the
24 lead agency is required to review, evaluate and prepare
25 written responses to comments on environmental issued

1 received on the EIR. Dispossession of significant
2 environmental issues raised shall be described. When a
3 lead agency disagrees with a comment, the response must
4 address the comment in detail. The lead agency must
5 provide a good-faith recent analysis. Conclusory
6 statements without facts are not adequate, unquote.

7 The limited revisions in the final EIR do not
8 address the majority of the fundamental flaws of the
9 document, going back as far as the draft EIR. In
10 addition, the final EIR seems to ignore many of the
11 relevant criticisms offered. In fact, the majority of
12 the public and public agencies have said that many of
13 their questions that they had submitted were largely
14 ignored and remained unanswered. In fact, the repeated
15 adjective used in the comments was that the responses
16 from staff were, quote, dismissive of their concerns.

17 There's also the question of the basic
18 objectives of the project. According to the CEQA guide
19 book, the statement of objectives is supposed to
20 represent those of the lead agency. Quote, Sometimes a
21 private project applicant will have their own objectives
22 that are not necessarily the same as the city's. In
23 those situations, the city is under no obligation to use
24 the proponent's objective as its own. It should write
25 the proponent's objective in such a way that explains

1 the underlying need for the project from the standpoint
2 of public need. Unquote.

3 I didn't find that separation between the
4 applicant's description of the project need and the
5 city's description. In fact, in the executive summary,
6 in discussing the no-project alternative, it said Valero
7 would not be able to achieve most of its project
8 objectives under the no project alternative. So that
9 raises the question whether those objectives are those
10 of the city or Valero's or are they the same? If they
11 are not the objectives of the city, CEQA requires that
12 the city explain the underlying need for the project
13 from the standpoint of public need. But there isn't an
14 explanation how this project serves a public need.

15 Section 17.104.06 of the Municipal Code was
16 talked about by other commissioners, but it says that a
17 project cannot be detrimental to the public health,
18 safety or welfare of persons residing or working in or
19 adjacent to the neighborhood of such use nor detrimental
20 to properties or improvements in the vicinity or general
21 welfare of the city.

22 Based on what we know about the project, can we
23 make a finding that the project is in conformance with
24 that requirement? I think there are serious holes in
25 the disclosures in the document about how -- about the

1 makeup of the oil that will be transported. On the
2 no-project alternative, the commission's authority has
3 been reduced to accepting or denying the project by
4 virtue of the flawed CEQA analysis. It's the flaws in
5 that document that have resulted in this outcome.

6 Why were other alternatives eliminated?

7 Alternative one, which would have eliminated deliveries
8 to one 50-car train a day, was rejected on the basis of
9 preemption. This implies that UP, not Valero, is in
10 control of how much Valero's oil would be shipped.

11 Alternative three was for an off-site unloading
12 facility. That was rejected because it was inadequate

13
14 room on Valero property. But feasible alternatives like
15 utilizing the Port of Stockton and moving oil by barge
16 were never considered.

17 If the document had examined the project
18 properly at sufficient depth, additional project oil
19 alternatives would probably have become apparent. For
20 example, Dr. Phyllis Fox, who we spoke of earlier, who
21 is an expert in refinery and safety of operation,
22 suggested the use of two permitted oil terminals in
23 Bakersfield should be considered and why it was a
24 feasible alternative.

25 The response from staff to the suggested

1 alternative is, quote, It's unclear how this can serve
2 as an alternative to the project. The purpose of the
3 project is to allow the Benicia refinery to receive up
4 to 70,000 barrels a day of crude oil for North American
5 sources. A minimal review of that alternative would
6 have shown that those terminals were receiving that same
7 North American source crude oil as planned by Valero,
8 that they had adequate permitted capacity to receive an
9 additional 70,000 barrels a day, and they were connected
10 to Valero by a series of pipelines. Yet that
11 alternative was never made part of the final EIR or
12 presented to the public or the commission.

13 Without those undisclosed alternatives, the main
14 reason for the fact that there are no project
15 alternatives in the document today is a legal argument
16 about the breadth of federal preemption. The city is
17 taking an extremely broad interpretation of the law in
18 saying the federal preemption applies not only to UP but
19 indirectly to Valero since Valero will be using UP
20 railroad to deliver the crude. This is an argument
21 about which there is much disagreement. The opinion of
22 the city --

23 CHAIR DEAN: Commissioner Young?

24 COMMISSIONER YOUNG: I'm sorry.

25 CHAIR DEAN: Can I ask you to wrap up for a

1 second?

2 COMMISSIONER YOUNG: Yes.

3 CHAIR DEAN: We have gone -- our own guidelines
4 say we go to 11:00. And then if we are going to proceed
5 beyond that, we are going to pick a time certain. I
6 didn't mean to interrupt you, but --

7 COMMISSIONER YOUNG: I think we are close.

8 CHAIR DEAN: You are getting close?

9 COMMISSIONER YOUNG: I think we are getting
10 close to having a motion.

11 CHAIR DEAN: If you want to finish your comments
12 and then we can talk about how much longer we want to
13 go, and are we going --

14 COMMISSIONER YOUNG: The opinion of the city in
15 this document is not an opinion shared by the majority
16 of the legal community of commenters, including the
17
17 state attorney general, SACOG, air districts, and local
18 governments across Northern California. All of them
19 argue that since Valero is the applicant and Valero is
20 not a railroad, they are not covered by preemption, and
21 that the city would be well within their rights and in
22 fact should require mitigation measures to offset the
23 impacts of air pollution by negotiating purchases of
24 credits or requiring safer train cars or requiring
25 Valero to provide funding for first responders who would

1 have to deal with any fire, explosion brought on by
2 derailments or by degasifying the oil before it's
3 transported.

4 Putting these types of mitigation on measures --
5 sorry. Putting these types of mitigation measures on
6 Valero, they argued, would not interfere with or
7 regulate the operations of the railroad in any way and
8 would therefore not be preempted. But by taking the
9
9 position that Valero is indirectly protected by federal
10 preemption, this allows the city to basically throw up
11 their hands and say, yes, there are significant
12 unavoidable impacts to the community and other
13 communities. Yes, the undesirable impacts of the
14 project clearly outweigh any benefits of the project,
15 but federal preemption says that we cannot be compelled
16 -- we cannot compel Valero to address any of those
17 impacts.

18 In a nutshell, over the progression of various
19 EIR drafts, the city has evolved to the opinion
20 initially put forth by UP and Valero about preemption.
21 Both UP and Valero have a clear business incentive to
22 adopt this interpretation of the law.

23 You know, meaningful mitigation measures would
24 be expensive. Commissioner, therefore, must decide for
25 ourselves what are the merits and validity of the

1 various arguments on preemption. This is a matter of
2 unsettled law. As Mr. Hogin said, there was not a
3 binding California law on the subject, and perhaps this
4 project will lead to one.

5 Then there's the unanswered question about
6 liability. Who will be responsible for property damage
7 and cleanup costs in the worst case possible of a
8 derailment fire and explosion? Have UP and Valero
9 agreed on who would be responsible and to what degree?
10 We simply don't know. Without a firm and enforceable
11 agreement on this issue, the burden to clean up and
12 rebuild after a major rail incident will fall on the
13 strapped local governments while the issue is fought
14 over in the courts by the insurance companies.

15 So where do we go from here? As lead agency,
16 it's the city's job to be compliant with CEQA. It's our
17 job as commissioners to decide whether this document
18 provides the information necessary to make an informed
19 decision. We have to ask ourselves does the document
20 really disclose the objectives of the project or are the
21 objectives unduly narrow? If the objectives are too
22 narrow, then the CEQA's review would be too narrow.

23 Does the document adequately describe the
24 project or is the project wider in scope than
25 characterized? As the city's long -- I'm sorry. To

1 summarize, this is not an easy task, clearly. The
2 project is technically complicated, legally murky, and
3 wide in scope. But just because it's difficult, that
4 does not excuse an inadequate EIR. The project has no
5 end date. That means once it's permitted, the impacts
6 and the consequences may go on forever. This makes it
7 even more critical that the examination in CEQA be
8 compliant, comprehensive, unbiased, and transparent.
9 There's no room to intentionally or accidentally address
10 the issues at hand.

11 If we miss or mischaracterize a significant
12 impact, that impact may be with this generation and the
13 next. We will have missed an opportunity to modify or
14 mitigate that impact, and we will have seriously erred
15 in the process to the detriment of future generations.

16

16 By their own description, Valero has described this as a
17 simple logistics project providing them with an
18 additional way to receive oil. Mr. Wilson, the general
19 manager at Valero, testified Tuesday that they will not
20 close the refinery if the permit is denied. It will be
21 business as usual. So the fact that significant and
22 unavoidable impacts of the project are known and that
23 those impacts will not be mitigated, it argues if not
24 requires, that the commission not certify the EIR and
25 deny the issuance of a use permit. With that, I'm ready

1 to make a motion.

2 CHAIR DEAN: So before you make a motion --
3 because typically we discuss motions -- how much
4 later -- what's our plan here? How much later do you
5 want to go tonight? Wrap up? You think we can do that
6 quickly?

7 COMMISSIONER COHEN GROSSMAN: I don't know if we
8 can do it quickly, but I think we should keep going.

9 CHAIR DEAN: We should keep going? Okay. So we
10 will keep going. Let's say we go -- it's now 11:17.

11 COMMISSIONER COHEN GROSSMAN: Until we finish.

12 CHAIR DEAN: Until we finish. Okay.

13 CITY ATTORNEY WELLMAN: Chair Dean?

14 CHAIR DEAN: Hang on. I see the city attorney.

15 CITY ATTORNEY WELLMAN: Absolutely. Unless I'm
16 mischaracterizing what I just heard from every single
17 commissioner, I'm getting the impression that you want
18 to deny the project. And if you want to deny the
19 project, there is no purpose in talking about the EIR
20 because all that would do is to remand it back to you.
21 If you want to deny the project, you should just go
22 ahead and make the motion to deny and not deal with the
23 EIR.

24 COMMISSIONER YOUNG: I think we need to deal
25 with EIR. I think it's our responsibility to make a

1 decision on this.

2 CHAIR DEAN: But I think what the city attorney
3 is saying is if we deny the project --

4 COMMISSIONER YOUNG: My understanding is that
5 under the rules of CEQA and this project, we have to
6 first certify or not certify the EIR. If we don't
7 certify the EIR, we don't need to deal with the project,
8 because a project cannot be approved without a certified
9 EIR.

10 CHAIR DEAN: City --

11 MS. RATCLIFF: If I can verify, the options in
12 the EIR are either to certify it, which obviously is not
13 happening tonight, or to remand it back to staff. So
14 send it back to staff with specific instructions and
15 directions on what the commission feels is an adequate
16 EIR, and then staff would then proceed with evaluating
17 that in order to make that compliant.

18 CHAIR YOUNG: Commissioner Cohen Grossman.

19 COMMISSIONER COHEN GROSSMAN: I have a question.
20 If we don't do that but we do deny the use permit -- I'm
21 not sure who to ask -- what happens to the EIR? We know
22 there will be an appeal, and we know it will go up a
23 layer, if not beyond. What happens to the EIR if the
24 Planning Commission doesn't take action on it?

25 CITY ATTORNEY WELLMAN: If you deny the project

1 and it's appealed, it goes up to the City Council. The
2 City Council would have to look at the EIR as well as
3 the project. The reason why I'm recommending denial of
4 the project rather than going through the EIR is because
5 if you know that you're not going to approve the
6 project, then fixing the EIR so that it deals with
7 whatever you think are the inadequacies is still not
8 going to get you to an approval of the project.

9 What is good about the process and the fact that
10 you actually addressed what your issues were about the
11 inadequacies, it does give the consultants the

12
12 opportunity to look at those things before it goes up to
13 the City Council, which I'm assuming would happen if
14 Valero appeals. There's no need for it to come back to
15 you if you know you're going to deny the project.
16 There's a specific CEQA section. It's also in the
17 public resource code.

18 It's usually not used unless you are doing a
19 quick review of the project, but it also does not change
20 the obligations of the applicant to pay for the process
21 even if you decide to deny the project and not deal with
22 the EIR.

23 COMMISSIONER YOUNG: Isn't it true that if
24 Valero is going to appeal, it's got to be done within
25 30 days?

1 MS. MILLION: The appeal period? The appeal
2 period is 10 days.

3 COMMISSIONER YOUNG: So if it's 10 business days
4 they have to appeal, clearly nothing is going to happen
5 in 10 business days in terms of changes to the EIR. I
6 think it's important that the commission take an action
7 on the EIR and the use permit, so that when it goes to
8 the City Council, they have the benefit of our action
9 and our comments, and that it's simply not being sent
10 forward as if we never dealt with it.

11 MS. RATCLIFF: Commissioner -- through the
12 Chair.

13 CHAIR DEAN: Yes, please.

14 MS. RATCLIFF: In order to act on the use
15 permit, you have to certify the EIR.

16 CHAIR DEAN: To act on the use permit. But
17 according to the city attorney, you could deny the use
18 permit without dealing with the EIR.

19 MS. RATCLIFF: Correct. But I thought I
20 understood Commissioner Young to say that he wanted to
21 act on the EIR as well as the use permit.

22 COMMISSIONER YOUNG: I think the first thing you
23 have to do is act on the EIR, and then if the EIR is not
24 certified, that is also an appealable action. Is it
25 not?

1 MS. RATCLIFF: So if you do not certify the EIR,
2 you would be remanding it to staff. Yes, that would be
3 appealable.

4 COMMISSIONER YOUNG: So if we don't certify it,
5 we remand it to staff with our suggestions on what needs
6 to be addressed. Within 10 days Valero is going to be
7 appealing -- presumably appealing to the City Council.
8 No action is going to be done by the consultant on that
9 EIR until the City Council acts realistically. So I
10 think it's important that the City Council hear and see
11 and get the benefits of our deliberation.

12 And for that reason, I think it's important that
13 we act on the EIR, and I don't know that we have to go
14 further than that because that is a -- that has to
15 happen first. You can't deal with the project until you
16 have dealt with the EIR. I'm willing to deal with the
17 project, but I think the first thing we have to do is
18 deal with the EIR, and I have suggestions on what needs
19 to be changed in it, and I'm happy to discuss those with
20 the commission. But I think -- like I said, I think
21 it's important that we vote on the EIR.

22 CHAIR DEAN: I want to hear from the rest of the
23 commission.

24 MR. HOGIN: Sorry. I just -- here's what I
25 would recommend. Two motions: One is to not certify

1 the EIR, and second is to deny the project, and then we
2 can all go home.

3 COMMISSIONER COHEN GROSSMAN: I have a comment.
4 I like the last part, but about the first part --

5 MR. HOGIN: I thought you would.

6 COMMISSIONER HOGIN: We have been told by city
7 staff over and over and over that we need to -- I guess
8 the word is remand or basically critique the EIR. If we
9 don't do that --

10 MR. HOGIN: Well, you have done that. I
11 apologize.

12 CHAIR DEAN: I understand the feeling, yeah.

13 MR. HOGIN: I've heard that myself, and I'm
14 going to turn to Ms. Million and Ms. Ratcliff. I'm not
15 aware of any requirement that -- unless it's in the
16 Municipal Code, I'm not aware of any requirement that a
17 Planning Commission remand the EIR as opposed to simply
18 not certify it, and that decision could be appealed to
19 City Council. I'm not familiar with the Municipal Code
20 here. Is there anything --

21 CHAIR DEAN: I'm sorry, sir. Can you say that
22 again?

23 MR. HOGIN: Yeah. Unless there's a Municipal
24 Code requirement that I'm not aware of, I don't know why
25 the Planning Commission cannot simply vote to not

1 certify the EIR and vote to deny the project, and then
2 both of those decisions could be appealed to the City
3 Council without a need for any type of remand to staff
4 to try and work on the EIR again.

5 CHAIR DEAN: So if we were to follow that
6 course, not vote on the EIR and deny the project, we
7 would have to make findings for the denial, would we
8 not?

9 MR. HOGIN: Yes. But I think -- again, I don't
10 know what the practice here would be, but you know, I
11 think staff could, you know, cull together some findings
12 from the comments that have been made, and those could
13 be made.

14 CHAIR DEAN: Okay. All right.

15 COMMISSIONER YOUNG: With all due respect to
16 staff, we had an experience recently with another topic
17 where we took an action and we relied on staff to make
18 findings and forward them to the City Council, and it
19 didn't really work out that way. I think it's important
20 that we see these findings, and that we are convinced
21 that they truly represent our positions, particularly
22 since we are taking an action that is at odds with the
23 staff's recommendations.

24 CHAIR DEAN: There is a compromise on that
25 particular item. As Chair, I'm required to sign all the

1 findings and resolutions. So if you would allow me to
2 work with staff to come up with those, we might save a
3 couple steps there.

4 I want to hear from -- Commissioner Young is
5 suggesting that we not certify the EIR: We take all the
6 shortcomings that have been identified, send it back,
7 kind of the opposing -- another option -- that's one
8 option. Another option would be that the city attorney
9 has suggested that we not take any action on the EIR:
10 We just outright deny the project. Commissioner
11 Birdseye.

12 CITY ATTORNEY WELLMAN: And the third is that
13 you don't -- you take a motion to not certify the EIR
14 and then deny the project.

15 COMMISSIONER BIRDSEYE: I like that version.

16 CHAIR DEAN: What advantage -- back to the city
17 attorney, what advantage does that provide?

18 MR. HOGIN: I think it allows the Planning
19 Commission to express its conclusions as to the
20 inadequacy of the EIR, and it should make it an
21 appealable decision, I would think, unless there's
22 something in the Municipal Code that I'm not aware of.
23 It should make it an appealable decision to the City
24 Council, and then the denial of permit would also become
25 an appealable decision to the City Council.

1 CHAIR DEAN: Okay.

2 COMMISSIONER BIRDSEYE: And this question of
3 remanding it back to city staff, would that have to
4 happen?

5 CITY ATTORNEY WELLMAN: No.

6 MR. HOGIN: No.

7 MS. MILLION: Right. I think it might be a
8 matter of semantics, because essentially if the
9 commission is saying that we cannot certify the EIR
10 because of A, B, and C, the assumption there is if staff
11 addresses A, B, and C, then the commission would be able
12 to certify the EIR, because you are saying it's not
13 legally sufficient. If you work on these issues, you
14 bring it back, hopefully we correct the problems and you
15 can certify it.

16 Essentially by saying you are not going to
17 certify it and you have identified the issues on why you
18 are not going to certify it, you are essentially telling
19 staff what they need to fix. So whether or not you call
20 it not certification or remanding it back, the
21 conclusion is going to be the same, right?

22 COMMISSIONER BIRDSEYE: Unless we also deny the
23 use permit.

24 MS. MILLION: Right. Of course the position
25 going into this was that there's a CEQA section that

1 says if you choose -- if the believed agency denies a
2 project, then CEQA does not apply. That was where we
3 were coming from when we started this conversation.
4 Since then, we basically said if the commission is
5 absolutely insistent upon doing both actions, do it and
6 we will figure it out.

7 MR. HOGIN: I recommend a vote to not certify --
8 to declare the EIR inadequate for the reasons stated:
9 Refuse -- not certify the EIR and deny the project. And
10 if that is approved, then it will be done so with the
11 understanding that there is no requirement that it be
12
12 remanded to staff and that Valero presumably will appeal
13 both decisions to the City Council.

14 CHAIR DEAN: Commissioner Cohen Grossman.

15 COMMISSIONER COHEN GROSSMAN: I have concerns
16 about that because I don't know what happens next. And
17 since so much of this -- the concerns we have been
18 expressing are about the preemption and the risk of --
19 well, I won't elaborate. I'm past my reaching hour.
20 But the preemption issue is pretty big. That's an
21 understatement, and the legal opinions on preemption,
22 that's going to be a discussion at City Council
23 regardless of how we vote.

24 But I really feel that we -- for all the time
25 and energy that we, the collective we, have put into

1 this -- should not simply take the vote that's been
2 recommended without really stating some of the concerns
3 about the EIR or else my concern is that City Council
4 won't necessarily be compelled to deal with those
5 things.

6 Now, they are not compelled by us necessarily,
7 but we have a legal authority here, and I think if we
8 don't do it --

9 CHAIR DEAN: The chance will be lost?

10 COMMISSIONER COHEN GROSSMAN: I think there will
11 be a lot of effort that will not necessarily be
12 recognized, and that's my concern.

13 CHAIR DEAN: So you're thinking that remand the
14 EIR with these -- with the need -- identify the need of
15 changes, and you are saying also deny the project?

16 COMMISSIONER COHEN GROSSMAN: Uh-huh. I'm not
17 saying remand it, but I am saying deny the project. I
18 am saying also -- I feel like I need to stand up -- to
19 express very clearly our views on the EIR.

20 MR. HOGIN: Mr. Chair, perhaps that can be done
21 in the form of the findings that Chair is going to work
22 together to develop with staff. The findings will have
23 the specificity as to the inadequacy of the EIR. Does
24 that --

25 CHAIR DEAN: That makes sense to me.

1 Commissioner Radtke, you had a question about
2 the process here? You got it? Commissioner Birdseye?

3 COMMISSIONER BIRDSEYE: I'm getting blurry.

4 CHAIR DEAN: It sounds like we are kind of
5 coming to a consensus with Commissioner Cohen Grossman's
6 recommendation to identify the shortcomings of the EIR
7 and deny the project. Do you want to make a motion to
8 that effect? Commissioner Radtke.

9 COMMISSIONER RADTKE: I thought ahead another
10 step. If we don't certify the EIR and we want to deny
11 the permit, both, and we want to make sure all of our
12 findings are clearly stated out, are we going to come
13 back and vote on how those findings are written or
14 you're going to do that for us?

15 CHAIR DEAN: I'm suggesting that I could do that
16 for you unless you really feel compelled to come back
17 and identify all those -- that would mean an additional
18 meeting. You would have to come back, and you would
19 have to talk about findings and say yes, we agree.

20 COMMISSIONER YOUNG: I've got some things
21 already prepared if you want to consider them.

22 CHAIR DEAN: You could give them to me and I
23 would certainly take them to staff.

24 COMMISSIONER YOUNG: I mean for the whole
25 commission. We could just hear them right now and we

1 could make that motion as well. We are failing to
2 certify for the following reasons so that it's a little
3 clearer in our motion. No?

4 COMMISSIONER RADTKE: I think we have enough
5 different reasons for both the EIR and the permit
6 between all of us. I feel it would be better for them
7 to go back through the notes and everything we have said
8 and put it together and then review it as one. I don't
9 know if that makes sense.

10 CHAIR DEAN: Am I hearing that the commission
11 wants to review the findings?

12 COMMISSIONER RADTKE: No, but I don't want to
13 take the list and vote on it tonight, the findings list.
14 I think we need to spend a little more time, have staff
15 go back through all the notes that we've said here and
16 help with the written findings with your help. Is that
17 what we are talking about?

18 CHAIR DEAN: Sure. That makes sense to me.
19 Otherwise, it means another meeting and everybody needs
20 to come back and confirm that we are there. I think
21 between the staff and what I have heard tonight we can
22 come up with some very reasonable findings.

23 Commissioner Young.

24 COMMISSIONER YOUNG: I will make a motion that
25 we find that the EIR is not adequate and we deny

1 certification for the EIR. Secondly, that we deny the
2 approval of the conditional use permit, and that the
3 Chair is authorized to develop the findings necessary
4 for these two actions in consultation with the staff.

5 COMMISSIONER BIRDSEYE: I second that motion.

6 CHAIR DEAN: Okay. Any further discussion
7 before we vote? I'm seeing none.

8 Commissioner Cohen Grossman.

9 COMMISSIONER COHEN GROSSMAN: No.

10 CHAIR DEAN: I guess we are ready for the vote.
11 Is it clear what the motion is?

12 MS. MILLION: It is clear. Just a point of
13 order with Ms. Wellman, if you don't mind. We had
14 originally broke it -- separated the process into two
15 resolutions. You see the issue with one motion that we
16 essentially could attach to both.

17 CITY ATTORNEY WELLMAN: I think that's fine.

18 MS. MILLION: With that, I'll take roll.

19 Commissioner Birdseye?

20 COMMISSIONER BIRDSEYE: Yes.

21 MS. MILLION: Commissioner Cohen Grossman?

22 COMMISSIONER COHEN GROSSMAN: Yes.

23 MS. MILLION: Commissioner Oakes?

24 COMMISSIONER OAKES: Yes.

25 MS. MILLION: Commissioner Radtke?

1 COMMISSIONER RADTKE: Yes.

2 MS. MILLION: Commissioner Young?

3 COMMISSIONER YOUNG: Yes.

4 MS. MILLION: Chair Dean?

5 CHAIR DEAN: Yes.

6 MS. MILLION: Motion passes.

7 CHAIR DEAN: I would -- I have to say, I had no
8 idea how this vote was going to work out when I walked
9 in tonight, but I am pleasantly pleased that the
10 commission is unanimous on this vote, and I think it
11 sends a message that I hope the Council will take note
12 of.

13 COMMISSIONER YOUNG: Can I make one more motion?

14 CHAIR DEAN: As long as it's quick.

15 COMMISSIONER YOUNG: It is. If and when -- I
16 would like to move that if and when this motion is
17 appealed to the City Council, the commission appoint a
18 representative to represent our position, since it will
19 be at odds with the staff recommendation.

20 MR. OAKES: I second that.

21 CHAIR DEAN: I hear Commissioner Oakes seconds
22 that. Who would that representative be? When is that
23 going to be determined?

24 COMMISSIONER RADTKE: I nominate you, as the
25 writer of our findings, to represent those findings at

1 City Council.

2 CITY ATTORNEY WELLMAN: Hold on a second. This
3 is not part of our noticed meeting. If you want to do
4 this, you normally -- this would be an action that you
5 are taking. This is not part of your agenda. I'm so
6 sorry, but if this is how you feel about it, you are
7 going to have a special meeting before the council
8 meeting, if it comes up before then, and take this
9 action.

10 CHAIR DEAN: All right. So there's no official
11 action here, but if there's an unofficial desire for
12 somebody to represent the commission at the council --

13 CITY ATTORNEY WELLMAN: That's fine, but don't
14 do that to me. Okay?

15 CHAIR DEAN: Any final business before we
16 adjourn?

17 MS. MILLION: Just make sure that we go through
18 the process, staff communications and then the
19 adjournment. I think the only thing that I was going to
20 provide --

21 Excuse me. People in the audience, could you
22 just keep it down for another minute or so.

23 CHAIR DEAN: We have just a couple items of
24 business.

25 MS. MILLION: We are almost done. I promise. I

1 just wanted to announce just generally on the appeal
2 period since we didn't cover that. So the appeal period
3 for the decision is 10 business days. For those of you
4 in the audience, the city is closed Friday and Monday,
5 so you would start the first day on Tuesday, is how that
6 would work.

7 I was going to do that before we jumped. But
8 other than that, I have no other staff communications.

9 CHAIR DEAN: Any communications from commission
10 to staff? Seeing none, I say we are adjourned.

11 * * *

12 End of video

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REPORTER'S CERTIFICATION

I, Josie C. Gonzalez, a Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing video file was reported by me stenographically to the best of my ability and later transcribed into typewriting under my direction; that the foregoing is a true record of the audio file.

IN WITNESS WHEREOF, I have subscribed my name this 22nd day of February, 2016.

JOSIE C. GONZALEZ
CSR No. 13435