

**AGENDA ITEM
CITY COUNCIL MEETING DATE – JUNE 7, 2016
BUSINESS ITEMS**

DATE : June 1, 2016

TO : City Council

FROM : City Attorney

SUBJECT : **PROVIDE DIRECTION ON WHETHER TO FILE A RESPONSE TO VALERO'S PETITION TO THE SURFACE TRANSPORTATION BOARD RELATED TO THE CRUDE BY RAIL PROJECT AND PREEMPTION**

RECOMMENDATION:

Provide direction to the City Attorney on whether to file a response to Valero's Petition to assert the City's local land use authority or any other aspect.

EXECUTIVE SUMMARY:

This item would normally be a two-step item but due to the short time frame it has been processed as a business item. The issue is whether the City should submit some reply or comment to the Surface Transportation Board ("STB") in response to the Valero Petition. This work will require the hiring of outside counsel and is not included in the costs covered by Valero. Requests for quotations have been sent to several attorneys who expressed prior interest in helping the City.

BUDGET INFORMATION:

Until the responses are received it is hard to estimate the cost. It is expected the costs would not exceed \$20,000.

ENVIRONMENTAL REVIEW:

An Initial Study that led to an Environmental Impact Report (EIR) was prepared for Valero's Crude by Rail Project to comply with the California Environmental Quality Act ("CEQA"). A Draft EIR (DEIR) was issued for the Project on June 17, 2014. In response to requests made in comments on the DEIR, the City issued a Revised DEIR on August 31, 2015, to consider potential impacts that could occur uprail of Roseville, California and to supplement the DEIR's evaluation of the potential consequences of upsets or accidents involving crude oil trains based on new information that became available after the DEIR was published. The Final EIR was released on January 5, 2016. An appeal of the Planning Commission's decision on the EIR is in the process of being considered by the Council. Action has been continued to September 20, 2016 to allow for the Surface Transportation Board to weigh in.

The EIR identified eight less-than-significant impacts with mitigation measures and eleven significant and unavoidable impacts.

Any comment by the Council to the STB would not affect or alter the EIR.

BACKGROUND:

The City Council continued the hearing on the appeal of the Environmental Impact Report for the Crude By Rail project in response to Valero’s request and in anticipation of Valero filing with the Surface Transportation Board. On May 31, 2016, Valero filed a Petition for Declaratory Order with the Surface Transportation Board. The Petition requests expedited consideration so that the decision of the Surface Transportation Board may be considered by the City Council at the September 20, 2016 meeting.

This item is before you to allow the City Council to decide if the City should participate in the process before the Surface Transportation Board. According to the Surface Transportation Board’s website, it appears there are two ways the City could let its views be known. If the City wants to be a full participant it can be a “party of record”. If the City wants to let its views be known, it can file a letter. The letter will be part of the public record but not referred to in the Board’s decision.

As a reminder, the City’s position on preemption was not as aggressive as Valero’s. See the discussion in the March 15, 2016 staff report discussing the basis for the appeal regarding preemption. The City may want to weigh in on the preemption issue to make clear that the City does not interpret preemption as broadly as Valero has.

A request for interest was sent to the city attorney email list group and the City received indications of interest from Bradley R. Hogin of Woodruff, Spradlin and Smart, Charles A. Spitulnik of Kaplan Kirsch & Rockwell, Michael N. Conneran of Hanson Bridgett Vincent Ewing of Alvarez-Glasman & Colvin, and Steve Churchwell of Churchwell and White. I have sent them Valero’s Petition and asked for quotes for preparing comments. The cost for doing this work will come out of the City Attorney’s budget.

The Surface Transportation Board website has information under its FAQs including:

“How and where are STB decisions challenged?”

Answer. Under the “Hobbs Act,” 28 U.S.C. 2321 et seq., a party may seek judicial review of a final STB decision in the United States courts of appeals. A party may file a petition for review in the judicial circuit in which it resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit. In practice, more parties choose to file petitions for review in the D.C. Circuit than in other circuits.

Are any STB cases heard in the district courts?

Answer. Yes, but not many. On occasion, a United States district court may refer to the STB questions or issues that arise in a pending court case that involve matters within the STB's regulatory expertise. In that situation, the district court may hear a challenge to the STB decision issued in response to the court's referral. The district courts also have jurisdiction to hear cases seeking to enforce a STB order, or to enjoin a STB order that is solely for the payment of money or collection of fines. See 28 U.S.C. 1336."

If the Council directs staff to prepare a letter or become "a party of record", staff will select the firm to do the work assuming the quotes are less than \$50,000. Staff will then work with the firm to submit a response to the STB as soon as possible to be in compliance with any deadlines established by the STB.

Attachments:

- Valero's Petition - Available online at:
http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/Valeros_Petition_to_STB_for_Declaratory_Order_FILED_5_31_16.pdf
- Process Memo

MEMORANDUM

VIA ELECTRONIC MAIL

TO: Heather McLaughlin, Esq.

FROM: Bradley R. Hogin, Esq.

DATE: April 8, 2016

RE: Surface Transportation Board Proceedings on Petitions for Declaratory Orders

You have asked me to briefly summarize the process that the Surface Transportation Board (“STB”) follows in considering petitions for declaratory orders.

What is a Declaratory Order? A declaratory order is a form of declaratory relief provided by a federal administrative agency in response to a petition. Under the Administrative Procedure Act (“APA”), federal agencies like the STB may institute declaratory order proceedings in order to “terminate a controversy or remove uncertainty.”¹

How Are Proceedings Initiated? Any interested party may file a petition for declaratory order. The STB, however, has “significant discretion” in deciding whether to institute a declaratory order proceeding.² Upon deciding to institute a proceeding, the STB will publish a notice in the federal register. If the STB declines to institute a proceeding, it may nonetheless provide informal guidance to the petitioner.

Who Can File a Petition? Many petitions for declaratory orders are filed by rail carriers. The STB, however, regularly institutes declaratory order proceedings based on petitions filed by parties that are not rail carriers. The STB, for example, has held proceedings on petitions filed by shippers,³ property owners,⁴ cities,⁵ environmental groups,⁶ transload facility operators,⁷ and city residents.⁸

¹ 5 U.S.C. § 554(e).

² *Intercity Transp. Co. v. United States*, 737 F.2d 103, 106-07 (D.C. Cir. 1984).

³ See, e.g., *Am. Chemistry Council, the Chlorine Inst., & the Fertilizer Institute Petition for Declaratory Order Positive Train Control*, FD 35964, 2015 WL 5845419, at *1 (Oct. 6, 2015) [shipper] *Sherwin Alumina Co., LLC*, R 42143, 2015 WL 5711004, at *1 (Sept. 28, 2015).

⁴ See, e.g., *Allied Indus. Dev. Corporation Petition for Declaratory Order*, FD 35477, 2015 WL 5459098, at *1 (Sept. 15, 2015) *Pinelawn Cemetery Petition for Declaratory Order*, FD 35468, 2015 WL 1813674, at *1 (Apr. 20, 2015).

⁵ See, e.g., *City of Milwaukie Petition for Declaratory Order*, FD 35625, 2013 WL 1221975, at *1 (Mar. 20, 2013).

Is There an Opportunity for Public Participation? After instituting a declaratory order proceeding, the STB will allow interested parties an opportunity to respond to the petition. The STB will typically set forth a schedule for replies and rebuttal by the petitioner in the initial federal register notice.⁹ The STB has not adopted any procedures that apply to declaratory order proceedings, and instead sets the schedule on a case-by-case basis.

How Long Does the Process Take? Based on my review of various STB decisions, after a petition is filed it typically takes the STB three to six months to issue a decision. I did find a few cases where the STB process took less than three months or more than six months. The substantial majority of cases that I reviewed, however, were resolved in three to six months.

Can an STB Decision be Challenged in Court? As a general rule, an STB declaratory order is considered a final action and is subject to judicial review as set forth in the APA.¹⁰ And, in many cases, courts have reviewed STB declaratory orders regarding the scope of ICCTA preemption on specific facts.¹¹ It is true that, in some cases, courts have declined to review declaratory orders because there was no actual controversy presented – the matter, in other words, was not “ripe” for review.¹² Here, however, a court would likely consider the controversy over Valero’s facility to be ripe for review because it involves an actual controversy between Valero and project opponents over a specific planned facility.

⁶ See, e.g., *Friends of the Aquifer, City of Hauser, Id, Hauser Lake Water Dist., Cheryl L. Rodgers, Clay Larkin, Kootenai Env'tl. All., R.R. & Clearcuts Campaign*, 33966, 2001 WL 928949, at *1 (Aug. 10, 2001).

⁷ See, e.g., *Sea-3, Inc. Petition for Declaratory Order*, FD 35853, 2015 WL 1215490, at *1 (Mar. 16, 2015).

⁸ See, e.g., *Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, & Richard Kosiba* petition for Declaratory Order, FD 35652, 2014 WL 6852990, at *1 (Dec. 4, 2014).

⁹ See, e.g., *Canadian Pacific Railway Limited—Petition for Expedited Declaratory Order*, 81 FR 14172-02.

¹⁰ 5 U.S.C. § 702.

¹¹ See, e.g., *Padgett v. Surface Transp. Bd.*, 804 F.3d 103 (1st Cir. 2015); *Grosso v. Surface Transp. Bd.*, 804 F.3d 110 (1st Cir. 2015), reh'g denied sub nom. *Del Grosso v. Surface Transp. Bd.*, 811 F.3d 83 (1st Cir. 2016); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005).

¹² *Miller v. F.C.C.*, 66 F.3d 1140, 1141 (11th Cir. 1995).