

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 36036

VALERO REFINING COMPANY - CALIFORNIA

PETITION FOR DECLARATORY ORDER

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Petitioner, Valero Refining Company - California (“Valero”), hereby respectfully petitions the Surface Transportation Board (“Board”) for a declaratory order pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321. Valero seeks a declaratory order that the City of Benicia Planning Commission’s decisions (1) denying certification of the environmental impact report based on findings with respect to rail transportation impacts and the absence of rail transportation mitigation, and (2) denying Valero’s conditional use permit for a crude oil off-loading facility for the same reasons are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”) (49 U.S.C. §§ 10101-16106).

INTRODUCTION

Valero owns and operates an oil refinery located in Benicia, California. The Benicia refinery produces ten percent of gasoline consumed in California and 25% of gasoline consumed in the San Francisco Bay Area. The refinery currently receives crude oil by marine vessel and pipeline. Although Valero receives some commodities by rail at the refinery, it does not receive any crude oil shipments for refinery operations. Valero has determined that in order for the Benicia refinery to remain competitive over the long term, it must have access to North American crude oil feedstock. In California, North American crude oil is available only by rail.

Accordingly, Valero has proposed to construct a crude oil off-loading facility to allow the refinery to efficiently receive North American crude oil deliveries by rail. Union Pacific Railroad Company (“UPRR”) will transport crude oil in unit train service to the refinery once the crude oil off-loading facility is built.

In December of 2012, Valero submitted a use permit application to the City of Benicia for construction and operation of the necessary crude oil off-loading facility. Over the next three years, the City staff and various environmental consultants evaluated the environmental impact of the construction and operation of the crude oil off-loading facility, culminating in the completion of a Final Environmental Impact Report (“EIR”) under the California Environmental Quality Act. The EIR disclosed the potential environmental impact of UPRR rail operations between the Benicia refinery and California’s borders with Oregon and Nevada, including in UPRR’s Roseville, CA yard, seventy-two miles from Benicia.

On February 11, 2016, the Planning Commission denied certification of the EIR and denied Valero’s land use permit application (collectively, the “EIR/Permit Denials”). The EIR/Permit Denials were substantially based on findings of adverse rail transportation impacts and the absence of rail transportation mitigation.

Valero has appealed the Planning Commission’s EIR/Permit Denials to the City Council. The City Council has granted Valero’s request to defer a decision on Valero’s appeal until September 20, 2016. The City Council’s decision allows time for Valero to seek this declaratory relief in advance of the City Council decision. As stated, the EIR/Permit Denials were based substantially on findings with respect to rail transportation impacts and the absence of rail transportation mitigation. Valero seeks a declaratory order that the EIR/Permit Denials are preempted by the ICCTA because the Planning Commission is indirectly regulating rail

transportation, denying Valero the right to receive rail common carrier service and preventing UPRR from providing such service and unreasonably burdening interstate commerce.

DECLARATORY RELIEF IS APPROPRIATE

The Board has discretion to issue declaratory judgments to eliminate controversy and remove uncertainty. 5 U.S.C. § 554(e); 49 U.S.C. § 1321. The Planning Commission's EIR/Permit Denials are preempted by the ICCTA. Valero therefore believes a Board declaration is appropriate here to provide specific guidance to the City Council as it considers Valero's appeal of the EIR/Permit Denials. Furthermore, the City Council continued the hearing to September 20, 2016 on Valero's request. The continuance provides an opportunity for the City Council to benefit from the Board's input on preemption.

The Benicia project is not the only rail facility project affected by local regulation of rail transportation. Localities have denied or materially delayed the construction, expansion or continued use of several other crude oil and ethanol rail projects based on rail transportation impacts. In each instance, the localities are indirectly regulating rail transportation in the guise of regulating refinery or fuel storage facilities. A Declaratory Order in this case could provide clarity and curb this unfortunate trend.

The Alon Bakersfield Refinery Crude Flexibility Project ("Alon Project"). The Alon Project, located in Kern County, California is for construction of a crude oil railcar unloading facility connected to the BNSF Railway. The Alon Project will increase the refinery's ability to receive light crude oils produced in North Dakota, Colorado and Utah.¹ The Kern County Board of Supervisors approved the Alon Project in September 2014 based upon its conclusion that it did not have authority to regulate BNSF rail operations or impose rail transportation

¹ *Ass'n of Irrigated Residents v. Kern County Bd. of Supervisors*, S1500-CV-283166 (Kern . Super. Ct. Apr. 1, 2016), Minute Order at 2 ("Alon Decision").

environmental mitigation due to ICCTA preemption.² Two environmental organizations and a group of residents challenged the County's approval of the Alon Project in state court, alleging that Kern County's approval failed to comply with CEQA in part because the County failed to adequately analyze rail impacts.³ On April 1, 2016, a year and a half after the lawsuit was filed, the Superior Court of California upheld the County's approval.⁴ An appeal is likely, which would delay the project for at least another 12 to 18 months.

The Phillips 66 Rail Spur Extension Project (“Phillips Project”). The Phillips Project, located in San Luis Obispo County, California, is for a crude oil railcar unloading facility connected to a UPRR line of railroad.⁵ The Phillips Project will enhance the refinery's ability to receive crude oil from oilfields throughout North America.⁶ The Planning Commission staff recommended denial of the permits, primarily based on the project's significant and unavoidable environmental impacts from UPRR rail operations. On May 16, 2016, the San Luis Obispo Planning Commission rejected the staff recommendation and directed staff to come back on September 22 with conditions of approval and a statement identifying any significant unavoidable environmental impacts.⁷

The Shell Oil Puget Sound Refinery Project (“Shell Project”). The Shell Project, located in Skagit County, Washington, is for a crude oil railcar unloading facility connected to a

² Kern County Board of Supervisor Meeting Minutes at 20 (Sept. 9, 2014), http://kern.granicus.com/DocumentViewer.php?file=kern_f1b938a1f6bdcc5691b47b31c3136709.pdf&view=1.

³ See Alon Decision.

⁴ *Id.*

⁵ Phillips 66 Company Rail Spur Extension Project, http://www.slocounty.ca.gov/planning/environmental/EnvironmentalNotices/Phillips_66_Company_Rail_Spur_Extension_Project.htm (last visited May 27, 2016).

⁶ San Luis Obispo County, Phillips 66 Company Rail Spur and Crude Unloading Project, Final Environmental Impact Report and Vertical Coastal Access Project Assessment, (2015), <http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project/FEIR+Phillips+Rail+Spur+Project+Dec+2015/Main+Document+EIR/Phillips+Rail+Spur+Project+FEIR+December+2015.pdf> at 2-1 – 2-2.

⁷ Although minutes are not yet available from the May 16, 2016 meeting, a video of the meeting is available at http://slocounty.granicus.com/MediaPlayer.php?view_id=3&clip_id=2314.

BNSF Railway line of railroad. The Shell Project will enhance the refinery's ability to receive light crude oils produced in North Dakota.⁸ In August 2014, Skagit County issued a modified mitigated determination of nonsignificance ("MDNS") and found that an environmental impact statement (EIS) was not required under the State Environmental Policy Act ("SEPA").

Consistent with SEPA and its implementing regulations, environmental groups appealed the modified MDNS to a hearing examiner in September 2014.⁹ The groups argued that the MDNS failed to account for the significant environmental impacts posed by the Shell Project, including crude oil spill risks and impacts along the rail route and at the facility, increased rail traffic and necessary coordination, and rail tank car safety. In February 2015, the hearing examiner ordered an EIS to be prepared.¹⁰ Among other things, the hearing examiner concluded that "the potential magnitude and duration of environmental and human harm from oil train operations in Northwest Washington could be very great."¹¹ On February 27, 2015, Shell appealed the hearing examiner's decision on several grounds, including that the decision intrudes upon the Surface

⁸ See, e.g., Letter from Tom Rizzo, Shell Oil Products USA to Leah Forbes, Senior Planner, Skagit County Planning and Development Services (July 17, 2014), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/Shell%20Crude%20by%20Rail%20Response%20to%20Skagit%20County%207-17-14.pdf> (referencing Bakken crude oil).

⁹ Notice of Appeal by RE Sources for Sustainable Communities, et al., In the Matter of the Application of Equilon Enterprises, LLC (Shell) for a Shoreline Substantial Development Permit and a Shoreline Substantial Development Permit and a Shoreline Variance Permit, PL 13-0468, PL 14-0396A, (Skagit County, WA Board of County Commissioners, Sept. 10, 2014), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/Notice%20of%20Appeal%20of%20Modified%20MDNS.pdf>.

¹⁰ Findings of Fact, Conclusions of Law and Order, In the Matter of the Application of Equilon Enterprises LLC, (Feb. 23, 2015), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/02-23-15%20Hearing%20Examiner%20Decision.pdf>;

See also Memorandum to Skagit County Hearing Examiner, from Leah Forbes, Senior Planner, Skagit County Planning and Development Services re; Appeal No. PL 14-0396, (January 8, 2015), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/Skagit%20County%20SEPA%20Appeal%20Memo%201-21-15.pdf>,

(Describing applicable procedures and role of hearing examiner).

¹¹ Findings of Fact, Conclusions of Law and Order, In the Matter of the Application of Equilon Enterprises LLC, (Feb. 23, 2015), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/02-23-15%20Hearing%20Examiner%20Decision.pdf>

at 13.

Transportation Board's exclusive jurisdiction over interstate railroad operations and facilities.¹²

On March 17, 2015, the County Board of Commissioners dismissed the appeal for lack of jurisdiction on the grounds that the hearing examiner's decision was not appealable to the Board (see Skagit County Code § 14.12.210(1)). An EIS is now being prepared for the project.¹³

The Tesoro Savage Vancouver Energy Project (“Tesoro Project”). The Tesoro Project involves the construction of a crude by rail unloading facility at the Port of Vancouver, Washington. The Tesoro Project's principal purpose is to provide North American crude oil to U.S. refineries.¹⁴ Tesoro Savage Petroleum Terminal LLC submitted an Application for Site Certification to the Energy Facility Site Evaluation Council (“EFSEC”) in August 2013. The EFSEC will hold a hearing on the application in June and July 2016. The rail impact issues that are to be addressed at the hearing include whether the Tesoro Project: (1) will have impacts on water quality, including from diesel emissions and potential oil spills and/or train derailments at the project location and along the rail route; (2) will provide for an adequate response to potential oil spills in the Columbia River; (3) will cause impacts related to the sources and types of crude oil shipped, including with respect to health risks, fire and explosion, spill clean-up, and climate impacts; (4) will have impacts on air quality; (5) will have GHG emission impacts; (6) will have impacts on wildlife movement/migration; (7) will have geological impacts, including on soil; (8) will have noise impacts; (9) will impact local communities as to environmental justice issues, including noise, odors, toxic fumes, and rail-related traffic and access issues; (10) will

¹² Request for Confirmation and, in the Alternative, Notice of Appeal By Equilon Enterprises LLC, In the Matter of the Appeal of the Application of Equilon Enterprises LLC, (Feb. 27, 2015), <http://skagitcounty.net/PlanningAndPermit/Documents/ShellPermit/02-27-15%20Notice%20of%20Appeal%20PL15-0071.pdf> at 3.

¹³ See [Shell Puget Sound Refinery East Gate Rail Project](http://www.shell.us/about-us/projects-and-locations/puget-sound-refinery/shell-puget-sound-refinery-east-gate-rail-project.html), <http://www.shell.us/about-us/projects-and-locations/puget-sound-refinery/shell-puget-sound-refinery-east-gate-rail-project.html> (last visited May 27, 2016).

¹⁴ Washington State Energy Facility Site Evaluation Council, Tesoro Savage Vancouver Energy Distribution Facility, Draft Environmental Impact Statement, (2015), http://www.efsec.wa.gov/Tesoro%20Savage/SEPA%20-%20DEIS/DEIS%20Chapters/DEIS%20Ch%200b%20Exec_Summary.pdf at ES-4.

adequately protect public safety, including relating to train safety at the project location and along the rail route; and (11) will adequately protect and provide for response against natural disasters or catastrophic accidents, including earthquakes, floods, windstorms, tank fires, oil spills, train derailments, and other disaster scenarios.¹⁵ The EFSEC will also consider at the June and July hearings whether these impacts can be adequately mitigated.¹⁶

The Buckeye Terminal Project (“*Buckeye Project*”). Buckeye Terminals operates a bulk petroleum fuel storage and distribution facility in the City of West Sacramento. The Buckeye Project involved the reissuance of a conditional use permit for the continued use of an existing rail loading facility for ethanol delivery.¹⁷ In the City staff report, it was noted that local governments are limited in their ability to regulate rail, whereas transportation by road can be locally regulated.¹⁸ In November 2014, the West Sacramento Planning Commission denied the conditional use permit in part based on the conclusion that shipping ethanol by truck was more desirable than rail because it “would reduce the number of rail crossings, decrease[] traffic conflicts, and improve[] emergency response time.”¹⁹ Buckeye Terminals challenged the denial in Yolo County Superior Court, but later decided not to pursue the case due to the high cost of the litigation.²⁰ Buckeye Terminals continues to operate the storage and distribution facility, but now does so without rail service even though truck transport of ethanol is more expensive.

¹⁵ Order Clarifying EFSEC’s Process, etc., Case No. 15-001. In the Matter of Application No. 2013-01, Tesoro Savage, LLC Vancouver Energy Distribution Terminal, State of Washington Energy Facility Site Evaluation Council, (February __- 2016) <http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/20160203TESORO%20Issue%20Consolidation%20Order%20-%20ES.pdf> at 4-5.

¹⁶ *Id.*

¹⁷ See City of West Sacramento, Planning Commission Agenda Report, Item No. 2, November 6, 2014, <http://www.cityofwestsacramento.org/civica/filebank/blobdload.asp?BlobID=11162>.

¹⁸ *Id.* at 18 (Attachment 8).

¹⁹ *Id.* at 5.

²⁰ *Buckeye Terminals v City of West Sacramento*, Case No. PT14-2060 (Yolo Cnty. Super. Ct.) (dismissed Oct. 2015).

STATEMENT OF FACTS

The Benicia Refinery. The refinery is located on the north shore of the Carquinez Strait, in the San Francisco Bay area and the refinery is currently permitted to process on average up to 165,000 barrels of crude oil per day. From this crude oil the refinery produces gasoline, diesel, jet fuel, and asphalt.²¹ Ten percent of gasoline consumed in California – the most populous state in the Union,²² which has approximately 28,686,000²³ motorized vehicles – is from the Benicia refinery.²⁴ California is the third largest consumer of gasoline in the world. Valero currently receives crude oil by marine vessel from Alaska and foreign sources, and by pipeline from California. The refinery does not receive any crude oil by rail.²⁵

The Planned Off-Loading Facility. Valero submitted its application to the City requesting a permit to install the off-loading rack, track on both sides of the rack and track connecting the rack to UPRR. The crude oil off-loading facility will have the capacity to receive 50-car unit trains of crude oil twice per day, equal to 70,000 barrels of crude oil per day. However, the operating capacity of the refinery will not change. See Land Use Permit Application Crude by Rail Project, Valero Benicia Refinery at 1 (Dec. 2012), Exhibit 1.

The Need For North American Crude Oil Feedstock. Valero has determined that the refinery needs access to North American crude oil feedstock in order to remain viable and competitive over the long term. North American crude oil is economically and competitively

²¹ City of Benicia, Valero Benicia Crude By Rail Project, Revised Draft Environmental Impact Report at 2-20 (2015).

²² 2010 Statistical Abstract: State Rankings, UNITED STATES CENSUS BUREAU, <https://www.census.gov/library/publications/2009/compendia/statab/129ed/rankings.html> (last visited May 17, 2016).

²³ Statista, <http://www.statista.com/statistics/196024/number-of-registered-automobiles-in-california/> (last visited May 17, 2016).

²⁴ The Benicia refinery produces 25% of gasoline consumed in the San Francisco Bay Area. Additionally, the refinery produces 35% of the asphalt supply in northern California. Valero, <https://www.valero.com/en-us/Pages/Benicia.aspx> (last visited May 18, 2016).

²⁵ The refinery receives isobutane, and ships caustic, commercial coke, liquefied propane gas, and petroleum coke by rail. However, only isobutane relates to feedstocks used in crude oil refinery operations.

accessible to the Benicia refinery only by rail delivery. The crude oil off-loading facility (with UPRR common carrier service) will provide the refinery with this needed source of crude oil. In 2012, when the off-loading facility was proposed, access to North American crude oil had the potential to save Valero millions of dollars per month, compared with the high price of oil shipped by marine vessel. The price of crude oil has declined, but oil prices fluctuate by source and Valero must diversify its sources of crude oil for the sake of long-term viability and competitiveness.²⁶

The Planning Commission Actions. On December 21, 2012, Valero submitted a land use permit application to the City of Benicia for the crude oil off-loading facility.²⁷ On August 9, 2013, the City issued a notice informing the public that it intended to prepare an EIR to ensure full consideration of all environmental issues.²⁸ City staff ultimately completed a Draft EIR, a Revised Draft EIR, and a Final EIR (referred to collectively herein as the “EIR”).²⁹ The EIR disclosed potential rail transportation environmental impacts (including locomotive emissions) on UPRR rail lines between the refinery and California’s borders with Oregon and Nevada, including in UPRR’s Roseville, CA yard, approximately 72 miles from Benicia.³⁰

The EIR did not include proposed mitigation for potential environmental impacts of UPRR railroad operations, because City staff, advised by Special Counsel, determined that such

²⁶ If used to full capacity (70,000 barrels per day), the crude oil off-loading facility will reduce greenhouse gas emissions by 225,000 tons per year compared with crude oil delivered by marine vessel. The reduction in air pollutants is primarily due to the shorter transport distance by rail. City of Benicia, Valero Benicia Crude By Rail Project, Revised Draft Environmental Impact Report at 2-60 (2015), Exhibit 2.

²⁷ Land Use Permit Application Crude by Rail Project, Valero Benicia Refinery (Dec. 2012), Exhibit 1.

²⁸ City of Benicia, Notice of Preparation of An Environmental Impact Report and Notice of Scoping Meeting, Valero Crude by Rail Project (Aug. 9, 2013), available at <http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/EIR-ScopeNoticePreparation.pdf>.

²⁹ City of Benicia, Valero Benicia Crude By Rail Project website, http://www.ci.benicia.ca.us/index.asp?SEC=B7EDC93A-FFF0-4A14-9B1A-1C8563BC256A&Type=B_BASIC.

³⁰ City of Benicia, Valero Benicia Crude By Rail Project, Revised Draft Environmental Impact Report at 2-30 – 2-39; 2-40 – 2-41; 2-27 (2015), Exhibit 2.

mitigation would be preempted by the ICCTA.³¹ In staff’s presentation to the Planning Commission, the Special Counsel advised the Planning Commission that although state law did apply to the unloading rack itself, the Planning Commission did not have the “authority to attempt to condition Valero’s permit on any mitigation of impacts that are caused by rail operations” nor does the City of Benicia “have the authority to deny the permit based on rail impacts.”³²

On February 11, 2016 the Planning Commission voted to deny certification of the EIR and to deny Valero’s conditional use permit application.³³ With respect to denial of certification of the EIR, the Planning Commission Resolution included the following findings:

2. Staff’s interpretation of preemption is too broad and the EIR should consider including mitigation measures to offset the significant and unavoidable impacts associated with rail operations, such as air pollution emissions, improved rail car requirements, additional funding for emergency responders and degasifying the oil before transport.

* * *

6. The size of the project is too big and would result in traffic and train backups which would negatively affect access to businesses in the Benicia Industrial Park.

* * *

8. The project could potentially have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait.

9. The traffic, air quality, and greenhouse gas emissions analyses are insufficient.

* * *

³¹ Transcript of Record at 5-6, Benicia Special Planning Commission Meeting (Feb. 11, 2016)(statement of City Special Counsel Bradley Hogin), Exhibit 3.

³² *Id.*

³³ City of Benicia, Cal., Planning Comm’n Resolution No. 16-1 (Feb. 11, 2016), Exhibit 4.

11. The EIR does not evaluate mitigations to uprail communities and how each potential mitigation is or is not preempted.

* * *

13. The response to comments in the FEIR are found to be inadequate, non-responsive and dismissive including, but not limited to, the following specific comment letters:
 - a. Sacramento Area Council of Government: unfunded obligations on communities related to first responders, no evidence of mitigation measures to address transporting crude by rail, no evidence that mitigation measures for the significant and unavoidable impacts are infeasible due to preemption; and insufficient evaluation of potential alternatives including how preemption is applicable.
 - b. State of California Attorney General: insufficient evaluation of air quality impacts and an overly broad interpretation of trade secrets.
 - c. Bay Area Air Quality Management District: insufficient consideration of the their (sic) recommended mitigation measures for offsetting rail impacts, the analysis does not accurately characterize air emissions or health impacts, including an insufficient evaluation of PM2.5.³⁴

City of Benicia, Cal., Planning Comm'n Resolution No. 16-1 (Feb. 11, 2016) Exhibit 4 at 4-5.

With respect to denial of the use permit, the Planning Commission Resolution included the following findings:

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

* * *

³⁴ PM2.5 is particulate matter less than 2.5 microns in diameter. The EPA defines PM2.5 as “the term for particles found in the air, including dust, dirt, soot, smoke, and liquid droplets.” *Fine Particle Designations, Frequent Questions*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www3.epa.gov/pmdesignations/faq.htm#0> (last visited May 17, 2016).

There is no provision for clean-up in case of a spill or accident and local jurisdictions, including Benicia would bear the economic burden of such a clean-up...The project would limit access for emergency response; especially access to Sulphur Springs Creek including the potential for rail cars to fall into Sulphur Springs Creek.

* * *

As set forth above, the finding cannot be made for the Project due to the potential significant on- and off-site impacts associated with the project and the associated rail operations, the need for further evaluation of the environmental impacts, the economic purposes of the project and the conflicting interpretations of preemption. [Emphasis added.]

Id. at 5-6.

On February 29, 2016, Valero appealed the Planning Commission's decision to the Benicia City Council.³⁵ On April 19, 2016, Valero requested that the Benicia City Council defer a decision on Valero's appeal so that Valero could seek this declaratory relief.³⁶ The City Council voted to defer a decision until September 20, 2016.³⁷

ARGUMENT

The ICCTA preempts states or localities from indirectly regulating rail transportation by imposing requirements that could deny a shipper the right to receive rail carrier service or deny a railroad's ability to conduct rail operations. In this case, the EIR/Permit Denials were based in very large part on findings of unacceptable rail transportation impacts, and the absence of rail transportation mitigation. The EIR/Permit Denials prevent efficient rail transportation of crude oil to the refinery, thereby denying Valero its right to receive rail service, preventing UPRR from providing such rail service, interfering with interstate rail transportation essential to the long-

³⁵ Letter from John J. Flynn III, Counsel to Valero to Lisa Wolfe, City Clerk, City of Benicia (Feb. 29, 2016).

³⁶ Transcript of Record at 109, Benicia City Council Meeting (Mar. 15, 2016), Exhibit 5.

³⁷ Transcript of Record at 150-151, Benicia City Council Meeting (Apr. 19, 2016), Exhibit 6.

term viability of a refinery that produces ten percent of the gasoline consumed in the most populous state in the Union, which is the third largest consumer of gasoline in the world, and impinging on the Board's exclusive jurisdiction over transportation by rail carriers.

1. State And Local Laws That Deny A Rail Carrier The Ability To Provide Service Or Deny A Shipper The Right To Receive Rail Carrier Service Are Preempted.

Under the ICCTA, the jurisdiction of the Board over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). The intent of section 10501(b) is to “prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35749, slip op. at 3 (STB served July 19, 2013)(“*Winchester*”), reconsideration denied (STB served October 31, 2013); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 11 (STB served Mar. 14, 2005), reconsideration denied (STB served May 3, 2005)(States and municipalities “cannot take an action that would...unreasonably burden interstate commerce.”)

The ICCTA prevents states or localities from intruding into matters directly regulated by the Board, including rail carrier operations and services. *Winchester* at 3-4. The ICCTA also prevents states or localities from indirectly regulating rail transportation by “imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations.” *Id.* at 3. (citing *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *Norfolk S. Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662 (STB served Mar. 14, 2005), reconsideration denied (STB served May 3, 2005); *Joint Pet. for Declaratory Order—Bos. & Me. Corp.*, FD 33971 (“*Town of Ayer*”) (STB served May 1, 2001), reconsideration denied (STB

served Oct. 5, 2001)). “While federal law permits ‘the continued application of laws having a more remote or incidental effect on rail transportation,’ it preempts ‘state laws that may reasonably be said to have the effect of managing or governing rail transportation.’” *Id.*, quoting *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007)).

The ICCTA provides any person with the right to request common carrier rail service and obligates rail carriers to provide such service upon reasonable request. 49 U.S.C. § 11101. The Board has exclusive jurisdiction over a shipper’s right to receive rail carrier service. *Winchester*, slip op at 4. State and local laws that deny a shipper the right to receive rail carrier service or have the effect of managing or governing the receipt of such service are preempted. *Id.*

2. The EIR/Permit Denials Were Based To A Great Degree On Rail Transportation Impacts And The Absence Of Rail Transportation Mitigation; Deny Valero The Right To Receive Rail Common Carrier Service; And Prevent UPRR From Providing Such Service.

The EIR/Permit Denials were substantially based on findings with respect to rail transportation impacts and objections to the absence of rail transportation mitigation. The need to regulate rail transportation impacts is the thread that runs through the entire Planning Commission Resolution. For example: the project would result in “train backups which would negatively affect access to businesses in the Benicia Industrial Park;”³⁸ the project could “have negative biological impacts on Sulphur Springs Creek and the marsh area between the Benicia Industrial Park and the Carquinez Strait; the EIR “traffic, air quality, and greenhouse gas emissions analyses are insufficient;”³⁹ the EIR inadequately responded to the assertion of “insufficient evaluation of air quality impacts;”⁴⁰ the EIR inadequately responded to the assertion

³⁸ Planning Comm’n Resolution, Exhibit 4, at 4. Planning Commission Chair Dean said, “[e]xtra traffic tie-ups caused by trains put a constraint on the attractiveness of the [industrial] park to new business. Transcript of Record at 10, Benicia Special Planning Commission Meeting (Feb. 9, 2016), Exhibit 7.

³⁹ Planning Comm’n Resolution, Exhibit 4, at 4.

⁴⁰ *Id.*

that it did not “accurately characterize air emissions or health impacts, including an insufficient evaluation of PM2.5;”⁴¹ the crude oil off-loading facility “would not be consistent with the General Plan as it would be detrimental to the public health, safety, or welfare of persons residing or working in ... uprail communities;”⁴² and “the finding cannot be made for the Project” (i.e., the EIR cannot be certified) due to significant “off-site impacts associated with the project and the associated rail operations.”⁴³

The Planning Commission Resolution repeatedly invokes the absence of rail transportation mitigation or such mitigation analysis. For example: “the EIR should consider including mitigation measures to offset the significant and unavoidable impacts associated with rail operations, such as air pollution emissions, improved rail car requirements, additional funding for emergency responders and degasifying the oil before transport;”⁴⁴ the EIR “does not evaluate mitigations to uprail communities;”⁴⁵ the EIR inadequately responded to the assertion of “unfunded obligations on communities related to first responders, [and] no evidence of mitigation measures to address transporting crude by rail;”⁴⁶ the EIR inadequately responded to a commenter assertion of “insufficient consideration of the their (sic) recommended mitigation measures for offsetting rail impacts;”⁴⁷ and “[t]here is no provision for clean-up in case of a spill or accident and local jurisdictions, including Benicia would bear the economic burden of such a

⁴¹ *Id.* at 4-5

⁴² *Id.* at 5. The Resolution refers to the crude oil off-loading facility, but it is inconceivable that the crude oil off-loading facility could affect the safety of persons in uprail communities. This can only be reasonably construed as addressed to rail transportation.

⁴³ *Id.* at 5-6. Planning Commissioner Chair Dean’s comment supports the language of the Resolution. He expresses his “prime concern, which is the hazards related to transportation of crude by rail” Transcript of Record at 166, Benicia Special Planning Commission Meeting (Feb. 11, 2016), Exhibit 3.

⁴⁴ Planning Comm’n Resolution, Exhibit 4, at 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 4-5.

clean-up...The project would limit access for emergency response; especially access to Sulphur Springs Creek including the potential for rail cars to fall into Sulphur Springs Creek.”⁴⁸

Perhaps Planning Commissioner Grossman’s comments sum it up best. Even though the EIR/Permit Denial would have adverse economic impact, he concluded “the environmental impacts and the consideration for the world, for our brethren, sistren, upstate, up rail” required denial and he did not want to say “’screw you’ to the up rail cities.” Transcript of Record at 167-68, Benicia Special Planning Commission Meeting (Feb. 11, 2016), Exhibit 3. The Planning Commission Resolution is so full of managing, governing and regulating rail transportation that it is not possible to determine with any degree of certainty what action the Planning Commission would have taken on the EIR or the permit if it had acted within the bounds of its authority. What is known is that the EIR/Permit Denials prevent rail transportation of crude oil to the refinery, thereby denying Valero its right to receive rail service, preventing UPRR from providing such rail service, interfering with interstate rail transportation essential to the long term viability of a refinery that produces ten percent of the gasoline consumed in the most populous state in the Union, the third largest consumer of gasoline in the world and impinging on the Board’s exclusive jurisdiction over transportation by rail carriers.⁴⁹

Valero does not seek by this Petition an order declaring that the City of Benicia’s permitting authority over the construction and operation of the unloading rack itself is subject to ICCTA preemption. However, the EIR/Permit Denials impinge on Board jurisdiction, regulate rail transportation and unreasonably burden interstate commerce.

3. A Board Declaration That The EIR/Permit Denials Are Preempted Would Be Consistent With Board Precedent.

⁴⁸ *Id.* at 5.

⁴⁹ If the EIR had contained rail transportation mitigation and had been certified, and the Planning Commission had approved Valero’s use permit with rail transportation conditions, those conditions would not have been enforceable.

a. The Board's Decision In The *Winchester* Case Supports A Preemption Declaration In This Case.

In *Winchester*, the Board concluded that a town zoning board's orders banning rail transportation to a warehouse were preempted because they deprived a shipper of the right to receive service and encroached on the Board's exclusive jurisdiction over rail transportation. The case involved service provided by two rail common carriers (collectively referred to as "Pan Am") to a warehouse operated by Tighe Logistics Group ("Tighe"). *Winchester*, slip op. at 1. After residents complained about noise associated with switching operations at the Tighe warehouse, the zoning board found that freight service to Tighe violated municipal zoning laws and ordered cessation of rail service to Tighe. *Id.* at 2.⁵⁰ The Board found the zoning board's order was preempted because:

The Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable request. ... The Town's orders prohibiting all rail traffic to the warehouse conflict with the federal right of Tighe to request common carrier service and the federal obligation of Pan Am, a rail common carrier, to provide that service, as well as the Board's exclusive jurisdiction over that service. 49 U.S.C. § 10501(b)(1). As the federal courts and the Board have stated repeatedly, where a local regulation conflicts with the rights and obligations contained in the Interstate Commerce Act, federal law will preempt the local regulation. ... Such an attempt to prohibit common carrier rail transportation directly conflicts with the most fundamental common carrier rights and obligations provided by federal law and the Board's exclusive jurisdiction over that service.

Id. at 3-4 (citing *City of Auburn*, 154 F.3d at 1031; *City of Austell*, 1997 U.S. Dist. LEXIS 17236, at *19-22; *CSXT*, slip op. at 8-9; *Town of Ayer*, slip op. at 8-11).

The *Winchester* zoning board asserted that its actions were aimed at Tighe alone. This was inaccurate, but the Board said even if it construed the zoning board's action as directed only

⁵⁰ The Town of *Winchester* sought the advice of special counsel on ICCTA preemption. Special counsel opined that banning rail transportation to a warehouse appeared to be preempted. Petition for Declaratory Order at 1-2,4, *Boston and Maine Corporation and Springfield Terminal Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35749 (Filed July 1, 2013).

at Tighe, there would still be a fundamental conflict between the zoning board’s regulation and the rights of Tighe as the shipper to request rail service and “states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid” in the ICCTA.⁵¹ The same unlawful regulation – regulation of rail transportation – under the guise of local regulations directed at another party – is happening in the present case.

In this case, as in *Winchester*, the EIR/Permit Denials conflict with the right of Valero to request common carrier service, and prevent UPRR from providing such rail service, as well as the Board’s exclusive jurisdiction over the service. 49 U.S.C. § 10501(b)(1). The Planning Commission’s attempt to prohibit common carrier rail transportation to the refinery directly conflicts with the “most fundamental common carrier rights and obligations” provided by federal law and directly threatens the long-term viability of an essential facility for the production of gasoline supplying the most populous state in the Union.

b. The Board’s Decision In The SEA-3 Case Is Factually Distinguishable, But Supports A Preemption Declaration In This Case.

In *SEA-3, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 35853 (STB Served Mar. 17, 2015)(“*SEA-3*”), the Board denied a Petition for Declaratory Order filed by the owner/operator of a liquefied natural gas (“LNG”) transload facility because the action challenged did not impose conditions on rail carrier transportation to or from the LNG facility.⁵²

The Board noted that the challenge related to the expansion of an LNG facility and that the

⁵¹ *Winchester*, slip op. at 5, citing as in accord *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 158-60 (4th Cir. 2010)(“*City of Alexandria*”) (city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier’s transload facility). See discussion of *City of Alexandria*, below.

⁵² The LNG facility was served by Pan Am. SEA-3 secured approval from the Town of Newington Planning Board to expand the LNG facility. The Town of Portsmouth sued the Newington Planning Board for not complying with its own zoning and site review regulations and sought, among other things, a safety/hazard study of the facility expansion. *SEA-3*, slip op at 3.

facility was neither a rail carrier facility nor operated under the auspices of a rail carrier. *SEA-3*, slip op at 5.

Although *SEA-3* argued that the Board's decision in *Winchester* supported its Petition, the Board concluded that *SEA-3* had not "identified an attempt by Portsmouth to regulate *Pan Am's* operations, as was the case in *Winchester*." *SEA-3*, slip op. at 6. The Board added that "[i]f Portsmouth or any state or local entity were to take actions as part of a proposed safety/hazard study, or otherwise, that interfere unduly with Pan Am's common carrier operations, those actions would be preempted under § 10501(b)." *SEA-3*, slip op. at 7. Thus, the *SEA-3* case, like *Winchester*, stands for the proposition that states and localities with authority to regulate shipper facilities cannot use that authority to regulate "transportation by rail carriers."

The present case has the fact pattern the Board warned of in *SEA-3*. The EIR/Permit Denials interfere unduly with rail common carrier operations to the Benicia refinery.

4. A Board Declaration That The EIR/Permit Denials Are Preempted Would Be Consistent With Court Precedent Regarding Preemption Of Indirect Regulation Of Rail Transportation.

In *City of Alexandria*, the locality attempted to regulate a Norfolk Southern Railroad ethanol rail transloading facility by regulating non-rail carrier truck access to the facility. *City of Alexandria*, 608 F.3d 150, 158-60 (4th Cir. 2010). The lower court held that the ICCTA preempted the locality's regulations and the locality appealed. *City of Alexandria*, 608 F. 3d at 154. The court concluded that the ordinance and permitting process granted the locality the "power to halt or significantly diminish the transloading operations at the [f]acility by declining to issue haul permits or by increasing the restrictions therein." *City of Alexandria*, 608 F. 3d at 160. Therefore, the ordinance and permitting process "directly impact[ed] Norfolk Southern's

ability to move goods shipped by rail” and therefore “unreasonably burdened rail carriage and thus cannot escape ICCTA preemption.” *Id.* at 159-160.

In this case, like the locality in *City of Alexandria*, the Planning Commission is indirectly attempting to regulate rail transportation. The locality in *City of Alexandria* attempted to indirectly regulate Norfolk Southern rail carrier operations by regulating non-rail trucking companies. In this case, the Planning Commission attempted to indirectly regulate UPRR rail carrier operations by regulating the Benicia facility. Even though the Benicia refinery is not a rail-owned or operated facility, the obvious indirect regulation of rail transportation by the Planning Commission is equally impermissible. The Planning Commission’s EIR/Permit Denials granted the Planning Commission the power to halt or significantly diminish UPRR crude oil deliveries to the refinery. Therefore, the Planning Commission unreasonably burdened rail carriage because the EIR/Permit Denials directly impacted UPRR’s ability to move crude oil.

REQUEST FOR EXPEDITED CONSIDERATION

Valero respectfully requests that the Board issue an order regarding the scope of ICCTA preemption as applicable to the EIR/Permit Denials. On April 19, 2016, Valero requested that the Benicia City Council defer a decision on Valero’s appeal so that Valero could seek this declaratory relief. The City Council voted to defer a decision until September 20, 2016.

To facilitate expedited consideration, Valero has served a copy of this Petition for Declaratory Order on the City Attorney for the City of Benicia and on the Principal Planner, Community Development for the City of Benicia with the request that the Petition be posted on the City of Benicia website.

PROPOSED PROCEDURAL SCHEDULE

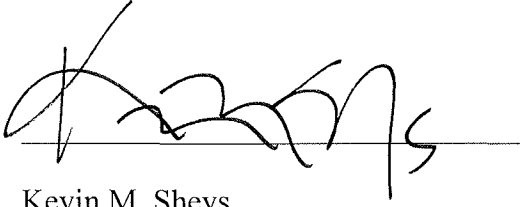
In consideration of Valero's request for expedited consideration, Valero respectfully requests that the Board adopt the following schedule for submission of comments in this proceeding.

Day 0	STB order instituting a declaratory proceeding
Day 30	Reply Comments Due
Day 45	Rebuttal Comments Due

CONCLUSION

For the foregoing reasons, Valero respectfully requests the Board issue an order declaring that the EIR/Permit Denials are preempted by the ICCTA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Sheys', written over a horizontal line.

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Dated: May 31, 2016.