March 31, 2016

Via email to
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Re: The Valero Benicia Crude-by-Rail Project

Dear Mayor Patterson and City Councilmembers,

The City Council can, and must, uphold the Planning Commission's unanimous decision to deny the use permit for the Valero crude-by-rail project. Federal law does not preempt the City from denying the permit for this project. Furthermore, the City should not tolerate Valero's delay tactic of seeking a declaratory order from the Surface Transportation Board (STB). As explained below, the STB does not have jurisdiction over this project and will almost certainly decline to hear Valero's petition for the very same reason that preemption does not apply. Finally, even if preemption were to apply here, the project's on-site impacts, especially the increases in refinery pollution, require the City to deny the permit.

The City Council's power to deny this project is not preempted by federal law. The Interstate Commerce Commission Termination Act (ICCTA) applies only if the activity being considered is "transportation by a rail carrier." 49 U.S.C. § 10501(b). Thus, finding preemption by ICCTA in these circumstances is a two-step inquiry. First, is the regulated activity undertaken by a rail carrier? Second, if the activity is undertaken by a rail carrier, is the local regulation of that activity preempted by ICCTA? **Because Valero is not a rail carrier, the answer to the first question is "no," and the analysis ends there—ICCTA does not apply.** *See, e.g., J.P. Rail, Inc. v. N.J. Pinelands Comm'n*, 404 F. Supp. 2d 636, 651–52 & n. 30 (D.N.J. 2005) (concluding that the challenged activity was not conducted by a rail carrier and explaining that "this conclusion ends the [c]ourt's preemption analysis . . .").

The City Attorney and Valero ignore the first question. They cite authorities—such as the *Alexandria* and *Winchester* cases—that deal only with the second question, because the projects in those cases involved local regulation of

transportation by a "rail carrier." In *Alexandria*, the court found that the city "has regulated 'transportation by a rail carrier,'" because the project was proposed by Norfolk Southern, a railroad. *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 159 (4th Cir. 2010). In *Winchester*, the STB addressed a city "ban [on] certain rail transportation conducted by Pan Am," a railroad. *See Boston & Me. Corp. and Springfield R.R. Co.*, FD 35749, 2013 WL 3788140, at *3 (S.T.B. July 19, 2013).

But because Valero is not a rail carrier or performing activities under the auspices of a rail carrier (as the City has already correctly determined), its proposed terminal falls outside of ICCTA's scope entirely. Valero, not Union Pacific, owns the land and would conduct operations at the terminal. Merely receiving goods by rail does not exempt a non-rail carrier from state and local laws. *See Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1332 (11th Cir. 2001) ("[I]n no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate . . . simply because the entity is under a lease from the railroad. The language of the ICCTA pre-emption provision in no way suggests that local regulation was to be so thoroughly disabled."); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004) (rejecting the idea that ICCTA preempted regulation of a non-rail carrier's operations whenever "at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier," because Congress could not have intended that ICCTA preemption "sweep that broadly").

For this same reason, the City should not await a determination by the Surface Transportation Board, should Valero file a petition. The STB will almost certainly deny any such petition because Valero is not a rail carrier. Just last year, the STB denied a petition for a declaratory order that ICCTA preempted local regulation of a proposed liquefied petroleum gas transloading facility served by rail. The STB found that it did not have jurisdiction—and that the *Alexandria* and *Winchester* cases were inapplicable—because the project proponent was not a rail carrier. *See* SEA-3, *Inc. Petition for Declaratory Order*, FD 35853, 2015 WL 1215490, at *4-5 (Mar. 16, 2015) ("[T]he only regulatory action at issue in this case is a local government's participation in zoning litigation over the expansion of a non-carrier facility. Without more, this situation does not reflect undue interference with 'transportation by rail carriers.'"). A copy of the STB's decision in *SEA-3* is attached to this letter for the Council's convenience (Attachment 1).

At the March 15, 2016, City Council hearing, the City Attorney stated that the Attorney General has not weighed in on preemption. But why would the Attorney General urge the City to revise its environmental review documents,

including the section on rail impacts, if she thought the City had no authority to deny the project? The Attorney General specifically noted in her comment letter (Attachment 2) that the City's ability to exercise it police power to lessen rail impacts would likely depend on, among other factors, "whether the project proponent is a 'rail carrier' subject to federal law." The City Attorney also mentioned the State's position on the high speed rail cases, but again, those cases involve a rail carrier (the State of California's High Speed Rail Authority). The City Attorney's implication that the Attorney General agrees with the City's preemption analysis here has no basis whatsoever.

The City Attorney also represented that San Luis Obispo County staff had determined that the County could not deny a similar project based on rail impacts. While it is true that the EIR for the San Luis Obispo project found significant on-site impacts, nothing in staff's recommendation prohibits the County from denying the project based on rail impacts as well. In fact, staff affirmatively recommended that the County deny the project precisely because of the mainline rail impacts. *See* Attachment 3 (Feb. 4, 2016, San Luis Obispo staff report) at 6 (recommending denial because, among other things, the "Project would result in 10 significant and unavoidable environmental impacts . . . with regards to the mainline rail operations beyond San Luis Obispo County and throughout the State.").

Finally, even putting aside mainline rail impacts, there are multiple, significant *on-site* environmental impacts that require denial of this project. Valero's appeal letter claims that "[a]ll of the public discussion about the Project has focused on the impacts of rail operations," but nothing could be further from the truth. We have repeatedly and consistently argued that the project would have significant non-rail impacts, especially air quality impacts that would occur at the refinery. Our prior comment letters—which we have attached for the Council's reference (Attachment 4)—discussed these impacts at length. We and others have also submitted numerous expert opinions about refinery impacts. There is overwhelming evidence in the record that this project would have significant on-site impacts, and the City Council should deny the project on those bases as well. While the EIR improperly fails to identify those impacts as significant under CEQA, nothing prohibits the City from denying the permit because of on-site impacts under its own municipal code. At the very least, the City must revise and recirculate the inadequate EIR if it intends to move forward with the project.

This project would harm Benicians and citizens throughout the state. We urge the City to deny the permit as soon as possible.

Sincerely,

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