

BENICIA CITY COUNCIL HEARING ON VALERO CRUDE BY RAIL - APRIL 6, 2016
COMMENTS OF BENICIA PLANNING COMMISSIONER STEVE YOUNG

Valero's request for delay / Indirect pre-emption

At the last Council meeting, held March 15th, on Valero's appeal, several council members expressed surprise at Valero's request for a delay, and wondered why the request could not have been made much earlier in this 2-1/2 year process.

The answer is that the idea of indirect pre-emption did not exist until very recently.

The Draft EIR, released in 2014, included a statement from Union Pacific on how federal law pre-empted local control of railroad operations. But there was no statement at that time from either Valero or the City that even hinted at the idea that Valero itself could somehow be covered under the pre-emption shield.

It was not until the release of the Revised Draft EIR in August 2015 that this idea was presented at all, and that was in Appendix H, which was the final inclusion in a group of Appendices only provided on a CD attached at the back of the RDEIR document, or available online.

By the time of the release of the Final EIR just four months later, this indirect pre-emption argument had become the basis for the staff recommendation that the applicant should not be held responsible for any of the significant and unmitigated impacts of their project, as required by CEQA – either here or in any of the uprill communities. That would take on significant unbudgeted expenses as a result of this project.

The request to delay the decision and ask the Surface Transportation Board for an opinion should not be approved.

Further delay will keep the staff from attending to other pressing duties, and will not serve the citizens of Benicia who have been waiting nearly three years for a final decision on this project.

The Surface Transportation Board is a regulatory panel in Washington DC that, according to their website, "is an independent adjudicatory and economic-regulatory agency charged by Congress with resolving railroad rate and service disputes and reviewing proposed railroad mergers. The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments)". I do not see how giving an opinion on indirect pre-emption falls within those defined duties.

The purpose of the STB is to rule on disputes between shippers and railroads. In this case, Valero is the shipper and UP is the railroad. But there is no dispute between those two parties- they are on the same side of the issue.

So to allow Valero to characterize BOTH sides of the issue, and then seek an opinion on an issue on which they themselves do not disagree, would lead to an inevitable, but irrelevant, opinion.

This issue of pre-emption by proxy will likely end up in the courts where it belongs. Ample testimony was received by attorneys from both governmental agencies and environmental groups that directly contradicted the opinions put forth by Valero and the City's contract attorney Mr. Hogin.

In summary, the issue of indirect pre-emption is a novel approach by Valero and their attorneys-but can certainly NOT be characterized as settled law.

Findings of Overriding Consideration

I am sure your staff and attorneys have informed you that, in order to approve a project under CEQA where there are significant and unavoidable impacts that will not be mitigated, it is necessary for you to make Findings of Overriding Consideration.

In this case those Findings, included in your packet, are not supported by facts that have been entered into the public record, as required by CEQA.

The first benefit listed in the Findings involves extra tax revenue as estimated by a report from the Andrew Chang company commissioned by Valero. That report references the \$55 million value of the project and the up to 20 new jobs that would be created.

However, it then expands those benefits from the known 20 new jobs to 1000 jobs generated from unknown sources. There is no justification presented for this 50 fold increase in jobs to be created.

It further claims that the City will receive a one time injection of \$2 million in one time sales tax from the sales of construction materials.

According to the Benicia Finance Department, the City receives approximately 1% of the sales tax generated by sales by Benicia companies. To generate \$2 million in sales tax would,

therefore, require total sales by Benicia companies of construction materials totaling \$200 million.

Not only is it unclear that there are Benicia companies able to produce that amount of steel, concrete, piping and electrical materials required for this project, but the entire project, including labor, materials and engineering, is estimated to cost only \$55 million.

The math simply does not add up, and there is no factual basis to accept this Finding.

Benefit 1 also says the project will increase property tax revenues by \$175,000 per year.

This number needs to be put in perspective.

According to the Solano County Assessor, in 2004, Valero had their property tax assessment reduced on appeal from \$864 million to \$674 million. That reduction in their property tax assessment cost the City general fund \$600,000 per year.

In 2005, after the completion of the Valero Improvement Project, Valero's assessed value was increased to \$963 million. They again appealed their assessment and had it reduced to \$848 million. That action by Valero cost the City general fund another \$300,000 per year.

Currently, Valero has another assessment appeal pending that would lower their property tax assessment from \$900 million to \$100 million-an astonishing request.

If that appeal is granted, as were the last two, that would cost the City general fund an additional \$3 million per year.

If the Council chooses to approve this project against the unanimous recommendation of your Planning Commission, I would hope that part of the approval would include a requirement for Valero to drop their current assessment appeal and pledge not to seek additional reductions in the future. The City can ill afford the lost revenue from Valero's repeated appeals of their property tax assessment.

A second benefit listed in the Findings is the presumed reduction in GHG emissions from the switch from tankers to diesel locomotives. This is based on the assertion that the average distance of tanker travel is approximately 7300 miles. However, the data needed to support that claim has never been made public as Valero is claiming it is a trade secret.

CEQA requires that findings of overriding consideration be based on known, accepted, data and the City needs to seek substantiation of this claim, and share that data with the public, before relying on it in making this Finding.

The Findings also say that the switch to trains from ships will reduce the likelihood of an oil spill. In my careful review of all the documents, I can find no scientific or other support for that conclusion.

There continues to be a lack of clarity over questions of liability in the event of an accident or spill. Who would be responsible for clean up and reimbursement for actions by first responders and property damage anywhere along the route?

In past instances, liability on crude oil leaks and explosions has been a subject of multiple lawsuits and bankruptcies, with insurance companies, railroads, tank car owners and shippers all pointing fingers of responsibility at each other - and with local governments left holding the bag to address immediate clean up and recovery costs and longer term impacts while the liability issues work their way through a jammed legal system.

While UPRR states that they are self-insured, that does not provide any level of coverage for potential victims of an accident. Valero has not addressed this issue at all.

San Luis Obispo

In describing the Phillips 66 project in San Luis Obispo (SLO) County at the March 14 hearing, a very similar project to this one, the SLO staff position was characterized by Mr. Hogin as adopting the same position as Valero and City staff in regards to pre-emption.

That characterization was misleading, as was pointed out at the April 6 hearing.

Among the significant differences between the two projects is the fact that the EIR for the SLO project did, unlike the Benicia EIR, identify mitigating measures that could be imposed on the applicant to address impacts in uprail communities. In fact, SLO County Deputy County Counsel, Whitney McDonald, was quoted in the local paper as follows: "The County could consider impacts along the main rail line because the County is charged with carrying out and implementing state law and policy. We are required to look at the environmental effects of a project we are evaluating and if we approve it, what may happen as a result. And what may happen as a result may need to be addressed by other agencies."

In addition, Planning staff in SLO County is recommending denial of the application.

Deny the project

The request for a delay in this process should be denied, and the actions of your Planning Commission should be upheld.

Thank you for your attention to this important issue.

Steve Young