

Date: August 9, 2016

California Attorney General Kamala D. Harris
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

RE: Valero - Crude By Rail Project

Dear California Attorney General Harris:

Benicia needs your help. I am deeply concerned about the safety of the Valero Crude by Rail Project and the oral dismissal of your legal advice to the city of Benicia by the city contract attorney, Bradley R. Hogin, Esq.

Based on the fact that Valero is the largest private employer in Benicia, the city staff is in favor of the project, and due to the oral legal advice provided by Mr. Hogin implying the futility of any action by the city, from my perspective, it appears that Benicia City Council will vote to approve the project.

From my personal expertise as an engineer with refinery experience, and based on expert opinions of professional engineers who have reviewed the proposed project design, Valero's proposed crude-by-rail project design is **extremely dangerous**. Specifically, **the engineering design does not allow for sufficient safety setbacks (the distance between the rail cars and oil storage tanks, etc.) to mitigate the likelihood of a chain reaction explosion within the refinery. Thus, due to the massive explosive potential of each rail car and the close proximity of the rail cars to other explosive fuel sources, it is highly likely that an explosion of only one rail car within the refinery will escalate into larger explosions extending beyond Valero property and into the city of Benicia.**

Therefore, because of the **lack of safety setbacks** and the number of proposed rail cars entering the facility on a daily basis, the likelihood of catastrophic explosions at the refinery in Benicia puts hundreds, if not thousands, of Benicia residents directly in harm's way. Unfortunately, the city has no way to mitigate this terrible danger, let alone mitigate other safety and health issues such as additional health impacts from the predicted increase in local air pollution.

Valero has categorically asserted that Benicia City Council cannot look to these unmitigable health and safety issues to deny the project due to the law of federal preemption. Based on Valero's assertion, I wanted to bring comments from Mr. Hogin and Mr. John Flynn, Esq., Valero's attorney, to your attention.¹

¹ REPORTER'S TRANSCRIPT OF RECORDED PROCEEDINGS IN RE VALERO CRUDE BY RAIL PROJECT HEARING AND PUBLIC COMMENTS http://www.ci.benicia.ca.us/vertical/sites/%7BF991A639-AAED-4E1A-9735-86EA195E2C8D%7D/uploads/City_Council_April_18_2016_Transcript.pdf



In his testimony to the Benicia City Council, Mr. Hogin, advised that the city had no recourse under federal preemption to deny the project, summarily dismissed your letter of April 14, 2016, and did not provide the city with any legal advice on how to challenge the project under Constitutional law. For example, Mr. Hogin did not provide any legal advice concerning how the proposed project could be challenged under the 10th Amendment or the Dormant Commerce Clause (DCC) using the rational basis test for the legitimate non-economic purpose of protecting the health and safety of Benicia residents.

For your convenience, the following are recorded oral statements by Mr. Hogin and Mr. Flynn. I am deeply troubled by these statements, which I consider to be biased legal advice given to the Benicia city council April 18, 2016.

During the Benicia City Council meeting, Monday April 18, 2016, Mr. Hogin stated:

“The Attorney General letter really missed the point. The issue here is whether a City can regulate rail impacts indirectly by imposing requirements on a shipper that address rail impacts, as opposed to impacts from the shipper's facility, and the Attorney General opinion really doesn't discuss that.

The Attorney General opinion only discusses cases where cities were addressing impacts from a transloading facility that was owned and operated by a private party.

In none of the cases where -- that the Attorney General cites were any of the cities addressing rail impacts...”

Moreover, during the same Benicia City Council meeting, Mr. Flynn stated:

“As for the AG's letter, I'm going to choose my words very carefully because I have a lot of respect for Kamala Harris and I have a lot of respect for her office, **but that letter on the issue of preemption is dead wrong.** Your attorney -- the advice that you've been given by your attorney is exactly right. **If you follow the advice that's been given to you by Kamala Harris, you'll be making a terrible mistake, a terrible legal error.**

Somebody has suggested that Valero, because it's a -- it's a refinery, doesn't have any standing to ask for a Declaratory Order from the -- from the Surface Transportation Board. That, also, is dead wrong.

You don't have to be a railroad to get a Declaratory Order from the Surface Transportation Board, and that's been proven on many occasions as a result of the fact that the Surface Transportation Board has, in fact, issued a number of declaratory orders as the result of requests made by nonrail carriers.

Valero is a shipper. A "shipper" is a term of art under federal law. So we do have standing to request that Declaratory Order.” (Emphasis added)



Even though Mr. Hogin briefly mentioned later in his discourse that the city could look to non-rail related impacts to deny the project, the above quoted transcript of the oral arguments do not reflect **the serious and biased tone** of the legal advice as orally presented to the Benicia City Council. Specifically, the oral presentation by Mr. Hogin implied that any legal recourse would be futile, and that the city of Benicia has no other option but to approve the project.

While the legal advice from both attorneys concerns me greatly, Mr. Hogin's legal advice seems especially biased toward Valero's position, and does not seem to be in the best interest of his client, the city of Benicia.

Thus, Mr. Hogin provided legal advice in a manner strongly advocating Valero's position without formulating a defensible and well thought out argument for the case opposing Valero's position for the city to consider.

Based on the above, I emphatically urge you and your staff to personally visit the city of Benicia to reiterate your position. I implore you to please help the city of Benicia realize that they have the power to protect their citizens, and without taking your advice they would be making a terrible legal error and would be breaching their duty to the people of Benicia and beyond.

Sincerely,

C. Bart Sullivan, E.E, J.D.

CC: **Scott J. Lichtig** - Deputy Attorney General