UP letter

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By U.S. Mail and Email MMcKeever@sacog.org

Mr. Mike McKeever
Chief Executive Officer
Sacramento Area Council of Governments
1415 L Street, Suite 300
Sacramento, CA 95814

Re: Union Pacific – Valero Refinery Project

Dear Mr. McKeever:

Union Pacific Railroad Company (UP) appreciates this opportunity to comment on the draft Comment Letter on Valero Crude by Rail Project Environmental Impact Report, Item #14-8-4, which we understand will be considered by the Sacramento Area Council of Governments (SACOG) on August 21, 2014.

UP understands the concern about the risks associated with crude-by-rail and we take our responsibility to ship crude oil, as mandated by federal law, very seriously. UP follows the strictest safety practices and in many cases, exceed federal safety regulations. UP's goal is to have zero derailments and it works closely with the federal Department of Transportation (DOT), the Federal Railroad Administration (FRA), the Pipeline and Hazardous Materials Safety Administration (PHMSA), the Association of American Railroads (AAR) and our customers to ensure it operates the safest railroad possible.

Safety is UP's top priority. The only effective way to ensure safety is through comprehensive federal regulation. A state-by-state, or town-by-town approach in which different rules apply to the beginning, middle, and end of a single rail journey, would not be effective. Congress agrees. Federal regulations completely preempt the application of the California Environmental Quality Act (CEQA) and the mitigation measures proposed in the comment letter drafted by SACOG staff. We encourage SACOG and its member agencies to participate in this rulemaking process.

I. Union Pacific is working closely with other stakeholders to ensure the safety of crude transportation.

Union Pacific is working diligently with federal, state and local authorities to prevent derailments or other accidents. UP spent more than $21.6 billion in capital investments from 2007-2013 continuing to strengthen our infrastructure. By doing so, it is continuously improving safety for our employees, our communities and our customers.

UP has decreased derailments 23% over the last 10 years, due in large part to our robust derailment prevention and risk reduction process. This process includes, among others, the following measures:

- Union Pacific uses lasers and ultrasound to identify rail imperfections.
- UP forecasts potential failures before they happen by tracking the acoustic vibration on wheels.
- UP performs a real-time analysis of every rail car moving on our system each time it passes a trackside sensor, equaling 20 million car evaluations per day.
- UP employees participate in rigorous safety training programs on a regular basis and are trained to identify and prevent potential derailments.

Union Pacific also reaches out to fire departments as well as other emergency responders along our lines to offer comprehensive training to hazmat first-responders in communities where we operate. Union Pacific annually trains approximately 2,500 local, state and federal first-responders on ways to minimize the impact of a derailment in their communities. UP has trained nearly 38,000 public responders and almost 7,500 private responders (shippers & contractors) since 2003. This includes classroom and hands-on training.

These efforts have paid off. The overall safety record of rail transportation, as measured by the FRA has been trending in the right direction for decades. In fact, based on the three most common rail safety measures, recent years have been the safest in rail history: the train accident rate in 2013 was down 79 percent from 1980 and down 42 percent from 2000; the employee injury rate was down 84 percent from 1980 and down 47 percent from 2000; and the grade crossing collision rate was down 81 percent from 1980 and down 42 percent from 2000.

II. The Federal Government is imposing more stringent requirements for safe transportation of crude oil.

As federal rail authorities recently explained, DOT, through the FRA and PHMSA, "continue[s] to pursue a *comprehensive, all-of-the-above approach* in minimizing risk and ensuring the safe transport of crude oil by rail." Department of Transportation, *Federal Railroad Administration's Action Plan for Hazardous Materials Safety* at 1 (May 20, 2014), available at http://www.fra.dot.gov/eLib/details/L04721. These efforts include not only scores of regulations governing the safe transportation of hazardous materials, including oil products, found in 49 C.F.R. Parts 171 to 180, but also a host of equipment and operating rules promulgated by FRA, as well as voluntary agreements and Emergency Orders issued over the past year in response to oil spills.

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Voluntary Agreement

On February 21, 2014, the nation's major freight railroads and the DOT agreed to a rail operations safety initiative that established new operating practices for moving crude oil by rail. Under the industry's voluntary efforts, railroads are:

- Increasing the frequency of track inspections using high-tech track geometry readers.
- Equipping crude trains with either distributed power or two-way telemetry end-of-train devices. These technologies allow train crews to apply emergency brakes from both ends of the train in order to stop the train faster.
- Using new rail traffic routing technology (the Rail Corridor Risk Management System (RCRMS)) to aid in the determination of the safest and most secure rail routes for trains with 20 or more cars of crude oil.
- Lowering speeds to no more than 40 miles-per-hour in the 46 federally-designated high-threat-urban areas and no more than 50 miles per hour in other areas.
- Working with communities to address location-specific concerns that communities may have.
- Increasing trackside safety technology by installing additional wayside wheel bearing detectors if they are not already in place every 40 miles along tracks with trains carrying 20 or more crude oil cars, as other safety factors allow.
- Increasing emergency response training and tuition assistance.
- Enhancing emergency response capability planning.

These voluntary actions are already being implemented.

Emergency Orders

In a February 25, 2014 Emergency Order, the DOT ordered certain changes in the way petroleum crude oil is classified and labeled during shipment, emphasizing that "with regard to emergency responders, sufficient knowledge about the hazards of the materials being transported [is needed] so that if an accident occurs, they can respond appropriately." February 25, 2014 Emergency Order at 13. And in its May 7, 2014 Emergency Order, the DOT ordered railroads transporting large quantities of crude oil to notify state authorities of the estimated number of trains traveling through each county of the State, provide certain emergency response information required by federal regulations (49 C.F.R. Part 172, subpart G) and identify the route over which the oil will be transported.

Proposed Regulations

On July 23, 2014, the PHMSA proposed enhanced tank car standards, a classification and testing program for crude oil and new operational requirements for trains transporting such crude that include braking controls and speed restrictions. PHMSA proposes the phase out of older DOT 111 tank cars for the shipment flammable liquids, including most Bakken crude oil, unless the tank cars are retrofitted to comply with new tank car design standards. We encourage SACOG to participate in this rulemaking process.

The federal proposal includes:

- Better classification and characterization of mined gases and liquids
- Rail routing risk assessment
- Notification to State Emergency Response Commissions
- Reduced operating speeds
- Enhanced braking
- Enhanced standards for both new and existing tank cars

As the federal government's existing regulations, recent emergency orders, the voluntary agreements and the new regulatory proposals make abundantly clear, regulation of crude transportation is extremely detailed and complex. Union Pacific is actively participating in the efforts to finalize the new regulations and encourages SACOG and its member agencies to do the same. By jointly working to enhance safety we can ensure that the most effective regulations are adopted.

III. A uniform federal regulatory program is essential to ensure the safe transportation of crude oil.

As the complex regulatory program described above illustrates, clear and uniform federal regulation is needed to ensure that crude oil continues to be transported safely. With respect to rail transportation, federal law preempts most state and local regulation of rail activities.

Uniform standards and rules for railroad operations allow the efficient movement of goods among the states. If each state or local community were allowed to impose its own regulations on railroad operations, rail transportation could grind to a halt, because train crews would need to apply different rules or perhaps use different equipment as they move from place to place.

As stated by the U.S. Congress:

> Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

The U.S. Congress went on to state that

> federal regulation of railroads is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

Congress has therefore established federal preemption under several statutes governing rail transportation. As the U.S. Solicitor General has explained, Congress recognized that the federal government has "diverse sources of statutory authority . . . with which to address rail safety issues," and therefore "preemption had to apply to regulations issued" under any of those sources, for "otherwise, the desired uniformity could not be attained." Brief for United States as Amicus Curiae at 6, *Public Util. Comm'n of Ohio v. CSX Transp., Inc.*, 498 U.S. 1066 (1991) (No. 90-95), *available at* http://www.justice.gov/osg/briefs/1990/sg900560.txt; *see also* H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970) ("[S]uch a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government.")

Preemption under ICCTA

In 1996, Congress passed the Interstate Commerce Commission Termination Act (ICCTA), which broadened the preemptive effect of federal law and created the federal Surface Transportation Board ("STB"). The driving purpose behind ICCTA was to keep "bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate." H.R.Rep. No. 104-331, at 93, reprinted in 1995 U.S.C.C.A.N. 793, 805 (emphasis added).

Congress vested the STB with broad authority over railroad operations. Indeed, STB has "exclusive" jurisdiction over "(1) transportation by rail carriers . . . and (2) the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities." 49 U.S.C. § 10501(b).

"Transportation" by rail carriers broadly includes:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. 49 U.S.C. § 10102(9)(emphasis added).

Further, ICCTA contains an express preemption clause: "the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law." 49 U.S.C. § 10501(b). "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." (*CSX Transp., Inc. v. Georgia Public Serv. Com'n* (N.D.Ga. 1996) 944 F.Supp. 1573, 1581 (CSX).) This provision continues the historic extensive federal regulation of railroads. (*Fayard v. Northeast Vehicle Services, LLC* (1st Cir. 2008) 533 F.3d 42, 46; see *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile* (1981) 450 U.S. 311, 318 ["The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes."].)

Over the years, many courts have addressed challenges by state and local authorities seeking to regulate some aspect of rail operations. The courts have consistently upheld Congress's intention that no such regulation can be allowed. As one court stated, "freeing the railroads from state and federal regulatory authority was the principal purpose of Congress" in adopting ICCTA. *Wisconsin Central Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1015 (W.D.Wis. 2000).

Preemption under the Federal Railroad Safety Act

Congress directed in the Federal Railroad Safety Act ("FRSA") that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish that objective, Congress provided that a State may no longer "adopt or continue in force a law, regulation, or order related to railroad safety" once the "Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2). State or local hazardous material railroad transportation requirements may be preempted under the FRSA without consideration of whether they might be consistent under the Federal hazmat law. *CSX Transportation, Inc. v. City of Tallahoma*, No. 4-87-47 (E.D. Tenn. 1988); *CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608 (D. Ohio 1988), affirmed, 901 F.2d 497 (6th Cir. 1990), cert. denied 111 S.Ct. 781 (1991).

Under Section 20106(a)(2), these DOT regulations and orders preempt state and local regulations relating to the same subject matter. The text of § 20106 is unambiguous. It plainly states that the terms of § 20106 govern the preemptive force of all DOT regulations and orders related to rail safety. DOT has recognized that "[t]hrough [the Federal Railroad Administration] and [the Pipeline and Hazardous Materials Safety Administration], DOT comprehensively and intentionally regulates the subject matter of the transportation of hazardous materials by rail . . . .

These regulations leave no room for State . . . standards established by any means . . . dealing with the subject matter covered by the DOT regulations." 74 Fed. Reg. 1790 (Jan. 13, 2009).

Preemption under the Pipeline Safety Improvement Act

The Pipeline Safety Improvement Act, which created the PHMSA, includes an express preemption provision prohibiting any state or local agency from regulating "the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. §5125. Thus, any mitigation measure restricting or specifying the type of equipment to be used in transporting crude by rail is expressly preempted.

DOT has stated that "[t]hrough [the Federal Railroad Administration] and [the Pipeline and Hazardous Materials Safety Administration], DOT comprehensively and intentionally regulates the subject matter of the transportation of hazardous materials by rail . . . . These regulations leave no room for State . . . standards established by any means . . . dealing with the subject matter covered by the DOT regulations." 74 Fed. Reg. 1790 (Jan. 13, 2009).

IV. Neither SACOG nor its member agencies has authority to impose the mitigation measures or conditions proposed in the draft Comment Letter on Valero Crude by Rail Project Environmental Impact Report.

The courts have found that ICCTA preempts state and local environmental, land use and planning regulations. For example, in *City of Auburn*, the Ninth Circuit affirmed STB's ruling that local environmental review regulations could not be required for BNSF's proposal to reacquire and reactivate a rail line. 154 F.3d 1025, 1031 (9th Cir. 1998). The court found that the State of Washington's environmental review statute – a statute that is similar to CEQA – could not be applied to a rail project. Similarly, the Second Circuit found that ICCTA preempted a state requirement for a railroad to obtain a pre-construction environmental permit for a transloading facility because it would give the local governmental body the ability to deny or delay the right to build the facility. *Green Mountain Railroad Corporation v. State of Vermont*, 404 F.3d 638, 641-45 (2d Cir. 2005). In effect, the court found that if a permit allowed the state or local agency to exercise discretion over the rail project, that permit requirement would be preempted.

The California Court of Appeal laid out this same logic in its recent decision in *Town of Atherton v. California High Speed Rail Authority* (filed July 24, 2014), stating:

> [S]tate actions are 'categorically' or 'facially' preempted where they 'would directly conflict with exclusive federal regulation of railroads.' [Citations.] Courts and the STB have recognized 'two broad categories of state and local actions' that are categorically preempted regardless of the context of the action: (1) 'any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability

> to conduct some part of its operations or to proceed with activities that the [STB] has authorized' and (2) 'state or local regulation of matters directly regulated by the [STB]—such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.' [Citations.] Because these categories of state regulation are 'per se unreasonable interference with interstate commerce,' 'the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.'

The California Attorney General endorsed this application of the law and specifically argued that "[c]ourts and the STB uniformly hold that the ICCTA preempts state environmental pre-clearance requirements such as those in the California Environmental Quality Act (CEQA)." Letter dated August 9, 2013 from Attorney General Kamala Harris to the Hon. Vance W. Raye, Presiding Justice, California Court of Appeal for the Third District at 3.

Additional cases and STB decisions that have struck down state and local environmental and land use regulations include: *Norfolk Southern Railway Company v. City of Austell*, 1997 WL 1113647, *6 (N.D.Ga. 1997) ("ICCTA expresses Congress's unambiguous and clear intent to preempt [city's] authority to regulate and govern the construction, development, and operation of the plaintiff's intermodal facility"); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D. Minn. 1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by [ICCTA]."); *Norfolk S. Ry. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. 1997) (local zoning and land use regulations preempted); *Village of Ridgefield Park v. New York, Susquehanna & W. Ry.*, 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted); *Burlington Northern and Santa Fe Ry. v. City of Houston*, S.W.3d, 2005 WL 1118121 (Tex. App. 2005) (interpretations of state condemnation law that would prevent condemnation of city land required for construction of rail line preempted).

The *Atherton* court noted that state and local agencies may exercise authority over the development of railroad property to the extent that such regulations:

> can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

The limited exception for routine, non-discretionary permits to meet building and electrical codes is not relevant here. Instead, the cases have clearly established that state and local agencies have no authority to impose permitting or land use requirements that "would give the local governmental body the ability to deny or delay the right to build the facility."

V. Conclusion

Like the transloading facility in the *Green Mountain* case and the intermodal facility in the *Norfolk Southern* case, the proposed loading rack and tracks at the Valero Refinery are essential components of rail transportation. As noted above, "transportation" includes a "yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership. . ." as well as "receipt, delivery, elevation, transfer in transit, . . . storage, [and] handling" of goods. Valero's proposed project falls squarely within the scope of this definition and the Congress and the courts have made it abundantly clear that "no state or local governmental agency may delay or deny the right to build" such a facility.

As noted above, Union Pacific supports the federal regulatory efforts to ensure that crude transportation is carried out safely. We encourage SACOG and its member agencies to participate in the rulemaking process. Neither SACOG nor its member agencies can go it alone—federal law and common sense demand that a uniform national approach be adopted and applied to ensure safety.

Regards,

UNION PACIFIC RAILROAD COMPANY

Melissa Hagan

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cc: Ms. Amy Million, City of Benicia Planning Commission