BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36036

REPLY OF BENICIANS FOR A SAFE AND HEALTHY COMMUNITY, CENTER FOR BIOLOGICAL DIVERSITY, COMMUNITIES FOR A BETTER ENVIRONMENT, NATURAL RESOURCES DEFENSE COUNCIL, SAN FRANCISCO BAYKEEPER, SIERRA CLUB, AND STAND

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Table of Contents

INTRODUCTION 1

BACKGROUND 2

LEGAL FRAMEWORK 6

ARGUMENT 8

I. Valero is neither a rail carrier nor acting under the auspices of a rail carrier 8

II. Because the Project would be performed neither by, nor under the auspices of, a rail carrier, it is not subject to the Board's jurisdiction or ICCTA preemption .. 10

A. An uninterrupted line of Board and court decisions makes clear that the Board lacks jurisdiction over the Project and that ICCTA does not apply 10

B. Because Valero is not a rail carrier, it is irrelevant that the denial of the permit for the refinery Project may have indirect effects on rail traffic 15

III. The Planning Commission's denial of the permit for the refinery Project does not prevent Valero from receiving, or Union Pacific from providing, common carrier service 20

IV. The Planning Commission's reasons for denying the permit are irrelevant, and, in any case, the Commission denied the permit for many reasons that had nothing to do with Union Pacific's operations 23

V. The Board should not open a proceeding because the law is clear 29

CONCLUSION 30

INTRODUCTION

In its Petition, Valero Refining Company asks the Surface Transportation Board to exercise jurisdiction over a refinery expansion project whose only connection to rail transportation is that the refinery will receive shipments by rail. That logic, if accepted, would vastly expand the Board's jurisdiction to any facilities—such as refineries, manufacturing plants, garbage dumps, and big-box retail stores—that propose to receive or ship goods by rail. Such a drastic expansion of the Board's jurisdiction is contrary to the law and the Board's prior decisions. Accordingly, Benicians for a Safe and Healthy Community, Center for Biological Diversity, Communities for a Better Environment, Natural Resources Defense Council, San Francisco Baykeeper, Sierra Club, and Stand (together, Benicians) oppose Valero's Petition for Declaratory Order.

The Board should reject Valero's argument that the Interstate Commerce Commission Termination Act (ICCTA) preempts the Benicia Planning Commission's denial of a use permit for Valero's proposed crude oil offloading facility at its refinery in Benicia, California (the Project). ICCTA limits the Board's jurisdiction to "transportation by rail carrier." 49 U.S.C. § 10501(a). Valero, an oil refining company, is undisputedly not a rail carrier. Further, Valero would not operate the Project as an agent for, or on behalf of, Union Pacific, the rail carrier that serves the refinery property. The Planning Commission's denial of the permit therefore falls beyond ICCTA's preemptive reach and the Board's jurisdiction.

Valero nonetheless argues that the Board should assert jurisdiction over the Project because a denial would *indirectly* "manage or govern" rail transportation by

preventing Valero from building the offloading rack, thus discouraging it from requesting shipments of oil by train. But ICCTA does not compel local approval of non-carriers' projects simply because those non-carriers wish to receive rail service. The Board evaluates whether a regulation "manages or governs" rail transportation only after it first determines that the project constitutes transportation by a "rail carrier." In any case, the denial of the refinery expansion does not prevent Valero from receiving, or Union Pacific from providing, common carrier service to the refinery.

Valero also argues that the Board should assert jurisdiction over the Project because the Planning Commission was concerned about the threat of explosive oil trains. But under ICCTA, the Commission's *reasons* for denying a permit for a non-carrier project are irrelevant. And even if the Planning Commission's reasons for denying the permit were somehow germane to the ICCTA analysis, the Commission cited numerous other reasons for denying the permit—such as increased air pollution from the refinery—that had nothing to do with Union Pacific's operations.

In short, ICCTA does not apply here because Valero is not a rail carrier. The application of the law to these facts is clear, so the Board should decline to open a proceeding and deny Valero's Petition for Declaratory Order.

BACKGROUND

Valero owns and operates an oil refinery in Benicia, California, a small city in the northeast San Francisco Bay Area. Reply, Ex. A, DEIR 3-3 fig.3-1.[1] The refinery currently

[1] Exhibit A includes excerpts from the Environmental Impact Report (EIR), which (footnote continued on next page)

receives crude oil by pipeline and ship, though it receives and exports many other products by rail, including petroleum products such as isobutane, liquefied propane gas, and petroleum coke. Pet. at 8 & n.25. Under its permit with the local air district, the refinery may process up to 165,000 barrels per day of crude oil. DEIR 3-2. The refinery is a major source of air pollution in the region. DEIR 4.1-8.

In December 2012, Valero applied for a City use permit to build an offloading rack and associated facilities to unload crude oil rail tank cars. Pet., Ex. 1. To build the Project, Valero would install an offloading rack, change the use of a floating-roof tank to store crude oil, build two offloading rail spurs, construct a 4,000-foot long oil pipeline, and relocate a tank farm dike wall, among other things. Pet., Ex. 1 at 7; DEIR 1-2. These facilities would be located on Valero's own refinery property. DEIR 3-2, 3-4 & fig.3-2. The Project site is in a 100-year floodplain as mapped by the federal government, DEIR 4.8-19, and is also just feet from Sulphur Springs Creek, which flows to the Suisun Bay, part of the larger San Francisco Bay, DEIR 3-4 to 3-5 & figs.3-1 & 3-2, 4.8-1.

As proposed, Valero would operate and control the Project; Union Pacific would simply deliver tank cars to the refinery property and then turn over operation of the trains to Valero for offloading. RDEIR 2-3, 2-20 to 2-21; FEIR 2.5-31. Valero would own or lease the tank cars used to carry the oil. RDEIR 2-8. The Project would allow Valero to unload 70,000 barrels of crude oil, roughly 100 tank cars, per day. Pet., Ex. 1 at 7. Although Valero refuses to disclose the types of oil it plans to import by rail, it has

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comprises the Draft EIR (DEIR), Revised Draft EIR (RDEIR), and Final EIR (FEIR).

stated it intends to import light North American crudes (which include volatile Bakken crude from the Midwest), and it may also import heavy Canadian tar sands crudes. DEIR 3-22 to 3-24. Tar sands crude oil is one of the dirtiest types of oil on the planet.

The City's municipal code requires Valero to obtain a use permit before building the Project. DEIR 1-7. Valero also must obtain grading and building permits from the City, and, due to the local air pollution that may be associated with the refinery expansion, a permit from the local air district and a revision to its Title V Clean Air Act permit. DEIR 1-7. These discretionary decisions trigger the California Environmental Quality Act (CEQA). Cal. Pub. Res. Code § 21080(a).

The goal of CEQA is to "inform the public and its responsible officials of the environmental consequences of their decisions before those decisions are made." *Marin Mun. Water Dist. v. KG Land Cal. Corp.*, 235 Cal. App. 3d 1652, 1660 (1991). To effect that policy, an agency with discretionary approval authority over a project must prepare an environmental impact report (EIR) when there is a "fair argument" that the project may cause significant environmental impacts. *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310, 319 (2010). The EIR must analyze all environmental impacts (including indirect and cumulative impacts), and incorporate all feasible mitigation measures for those impacts. Cal. Pub. Res. Code §§ 21002.1, 21061; Cal. Code Regs. tit. 14, §§ 15130, 15358.

Here, CEQA requires the City to analyze and, where feasible, mitigate not only the direct impacts of constructing the offloading racks, but also the indirect impacts of transporting and refining the oil. *See Marin Mun. Water Dist.*, 235 Cal. App. 3d at 1661

(explaining that EIRs must evaluate "secondary or indirect consequences," which "may be several steps removed from the project in a chain of cause and effect" (internal quotation marks omitted)). That analysis is required even if some mitigation measures are legally infeasible due to federal preemption or other reasons. [2] *See City of Marina v. Bd. of Trustees of the Cal. State Univ.*, 39 Cal. 4th 341, 356 (2006).

The City released a Draft EIR, Revised Draft EIR, and Final EIR in 2014, 2015, and 2016, respectively. Many members of the public (including Benicians), the California Attorney General, and other government entities submitted comments explaining why the EIR was legally inadequate. Among other things, they explained that the EIR failed to properly analyze the potential increased air pollution and greenhouse gas emissions at the refinery, biological and water-quality impacts on Sulphur Springs Creek, and flood hazard impacts at the offloading rack. *See, infra*, pages 25-27.

In February 2016, after four nights of hearings, the Benicia Planning Commission unanimously denied the permit for the Project. Pet., Ex. 4 at 3, 5-6. Although the Commission was concerned about the hazards posed by oil trains, it was also concerned about a wide range of "on-site" impacts that had nothing to do with Union Pacific's operations. It cited air pollution from the refinery, biological impacts of the Project's construction near Sulphur Springs Creek, and hazards of building the Project in a 100-

[2] Because the Planning Commission denied the permit for the Project, any hypothetical mitigation measures the City could impose are not at issue here. In any case, ICCTA would not preempt any mitigation measures imposed on Valero as part of a conditional approval of the permit for the same reasons it would not preempt an outright denial of the permit.

year floodplain. Pet., Ex. 4 at 4-5. The Planning Commission ultimately found that the Project would be inconsistent with the City's General Plan and "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." Pet., Ex. 4 at 5.

Valero appealed the Planning Commission's decision to the City Council, which held a series of hearings on the Project in the spring of 2016. The California Attorney General commented specifically on the preemption issue, explaining that ICCTA does not apply to the Project because Valero is not a rail carrier. Reply, Ex. B at 1, 3-4. On April 19, 2016, after Valero requested time to seek a declaratory ruling from the Board, the City Council deferred its decision on the Project until September 20, 2016. *See* Reply, Ex. C at 135, 150-52. Valero filed its Petition on May 31, 2016—seventy-seven days after Valero first requested that the City Council defer its decision. *See* Reply, Ex. D at 114. In its Petition, Valero asks the Board to declare that the City's authority over the Project is preempted by ICCTA.[3] Pet. at 1.

LEGAL FRAMEWORK

ICCTA grants the Board "jurisdiction over transportation by rail carrier." 49 U.S.C. § 10501(a); *see also id.* § 10501(b) ("[J]urisdiction of the Board over . . .

[3] Valero's Petition also discusses other projects not relevant to this proceeding. Pet. at 3-7; *see also* Letter from Jocelyn Thompson, Alston & Bird, to Cynthia T. Brown, STB (July 7, 2016) (discussing a different refinery project). Those projects, and their accompanying records, are not before the Board. Because the preemption inquiry is fact specific, the Board should decline to issue any rulings on other projects.

transportation by rail carriers . . . is exclusive."). As the statute's plain language makes clear, a project must *both* constitute "transportation" *and* be performed "by rail carrier" to come within the Board's jurisdiction and trigger federal preemption. *See N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71-72 (2d Cir. 2010); *SEA-3, Inc.—Pet. for Declaratory Order*, Docket No. FD 35853, 2015 WL 1215490, at *4 (STB Mar. 17, 2015).

ICCTA defines "rail carrier" to mean "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). "A common carrier railroad," in turn, "is a well-understood concept . . . [that] refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation." *Rail-Term Corp.—Pet. for Declaratory Order*, Docket No. FD 35582, 2013 WL 6078414, at *6 (STB Nov. 19, 2013) (internal quotation marks omitted). "Whether a particular activity is considered part of transportation *by rail carrier* under section 10501(b) is a case-by-case, fact-specific determination." *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012) (internal quotation marks omitted). To qualify, an activity must be performed directly by, or "under the auspices of," a rail carrier. *SEA-3*, 2015 WL 1215490, at *4.

Whether a project constitutes "transportation by rail carrier" is a threshold inquiry in any ICCTA preemption analysis. If local government action does not target "transportation by rail carrier," then the Board lacks jurisdiction over the project, and ICCTA preemption does not apply. *See N.Y. & Atl. Ry. Co.*, 635 F.3d at 71-75; *SEA-3*, 2015 WL 1215490, at *4-5. If, and only if, ICCTA applies does the Board proceed to

examine the scope of federal preemption. *See Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 532; *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 246, 252 (3d Cir. 2007).

There is a strong presumption against preemption in cases involving "zoning and health and safety regulation." *See Fla. E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1328-29 (11th Cir. 2001). Because of that presumption, the party contending that preemption applies has the burden of persuasion. *Id.* at 1329.

ARGUMENT

I. Valero is neither a rail carrier nor acting under the auspices of a rail carrier

It is undisputed that Valero, not Union Pacific, would construct, own, and operate the Project. RDEIR 2-3; FEIR 2.5-31. Valero is not a "rail carrier." It does not "hold[] itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation." *Rail-Term Corp.*, 2013 WL 6078414, at *6 (internal quotation marks omitted). Nor has it obtained a license from the Board to operate as a rail carrier. *See* 49 U.S.C. §§ 10901, 10902; *Hi Tech Trans, LLC – Pet. for Declaratory Order – Newark*, STB Finance Docket No. 34192 (Sub-No. 1), 2003 WL 21952136, at *5 n.12 (STB Aug. 14, 2003) ("There are formal procedures that must be followed to obtain authority as a rail carrier from the Board."). Indeed, Valero characterizes itself as a recipient, rather than a provider, of rail carrier service. *See* Pet. at 12-14. The Project would therefore not "be performed" by a "rail carrier." *See SEA-3*, 2015 WL 1215490, at *4.

Valero also would not operate the Project under a rail carrier's auspices. Activities are performed under a rail carrier's auspices when "the rail carrier holds out

its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations." *SEA-3*, 2015 WL 1215490, at *4; *see, e.g.*, *City of Alexandria – Pet. for Declaratory Order*, STB Finance Docket No. 35157, 2009 WL 381800, at *4 (STB Feb. 17, 2009). Here, Valero "would not be acting as an agent of [Union Pacific], and . . . [Union Pacific] would not control the operation of the unloading facilities." FEIR 2.5-31. Union Pacific admits that "[t]he [P]roject is being conducted under the auspices of Valero and not Union Pacific." Letter from Raymond A. Atkins, Union Pacific Railroad Co., to Cynthia T. Brown, STB, at 3 (June 17, 2016) [hereinafter Union Pacific Letter].

These concessions establish that the Project would not be performed under Union Pacific's auspices, and thus eliminate the need for further inquiry into this issue. *See SEA-3*, 2015 WL 1215490, at *4. Nonetheless, additional scrutiny of the record confirms this conclusion. For example, Valero would construct the Project entirely within its own property, *see* DEIR 3-2, 3-4 & fig.3-2; Valero would own or lease the tank cars used to deliver crude oil to the refinery, RDEIR 2-8; and Valero would maintain the "new equipment, pipelines, and associated infrastructure as well as new and realigned segments of existing railroad track within the Refinery boundary," RDEIR 2-3. And there is no evidence that Union Pacific would have contractual liability for the Project; that Union Pacific would hold out Valero's expanded refinery operations as part of Union Pacific's own services; that Union Pacific would set rates or receive fees for Valero's expanded refinery operations; that entities other than Valero would use the expanded refinery; or that the Project would advance Union Pacific's public functions

rather than Valero's private interests alone. *Cf., e.g., Tex. Cent. Bus. Lines Corp.*, 559 F.3d at 531-32; *Fla. E. Coast Ry. Co.*, 266 F.3d at 1336; *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *3-4. "The facts of this controversy are not in dispute," Union Pacific Letter at 2, and confirm that Valero would not act under Union Pacific's auspices.

II. Because the Project would be performed neither by, nor under the auspices of, a rail carrier, it is not subject to the Board's jurisdiction or ICCTA preemption

A. An uninterrupted line of Board and court decisions makes clear that the Board lacks jurisdiction over the Project and that ICCTA does not apply

Because Valero's Project does not constitute transportation by a "rail carrier," the Board lacks jurisdiction over the Project, and ICCTA does not preempt the denial of the use permit for the Project. *See* 49 U.S.C. § 10501(a). In its recent *SEA-3* decision, the Board—under facts virtually identical to the ones here—reaffirmed that transportation "by rail carrier" is a prerequisite for Board jurisdiction and ICCTA preemption.

In that case, SEA-3, Inc., a non-carrier, sought to construct additional rail berths at its propane transloading facility.[4] *SEA-3*, 2015 WL 1215490, at *1. Pan Am Railways, a rail carrier, provided rail service to SEA-3's facility, and the expansion would have enabled Pan Am to deliver additional propane to the facility. *Id.* After the local planning board approved SEA-3's expansion project, the neighboring City of Portsmouth sought to overturn the approval, or, in the alternative, to require a study of the rail effects of the project. *Id.* at *2. SEA-3 argued that Portsmouth was "attempting to regulate rail

[4] "Transloading is the transfer of commodities between rail cars and trucks, a process used when the ultimate destination of a commodity is not served by a railroad." *Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 528.

transportation by Pan Am," *id.* at *3, and that "any attempts by localities or states to direct rail traffic or impose preclearance requirements on transload facilities are federally preempted under § 10501(b)," *id.* at *2.

Rejecting SEA-3's arguments, the Board held that it lacked jurisdiction over SEA-3's project and that SEA-3 had failed to demonstrate that ICCTA applied. *See id.* at *4-5. The Board explained that its jurisdiction only "extends to rail-related activities . . . if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier's agent, or the rail carrier exerts control over the third party's operations." *Id.* at *4. "The record presented to the Board in this case," the Board explained, "does not demonstrate that SEA-3 is a carrier or that it is performing transportation-related activities on behalf of Pan Am or any other rail carrier at the transload facility." *Id.*

Here, as in *SEA-3*, there is no evidence that the activities at issue would be "performed by a rail carrier." *See id.* On the contrary, the record clearly demonstrates that Valero, a non-carrier, would singlehandedly build and operate the Project. RDEIR 2-3; FEIR 2.5-31. Likewise, there is no evidence that a rail carrier would be "hold[ing] out its own service through a third party that acts as the rail carrier's agent" or "exert[ing] control over the third party's operations." *See SEA-3*, 2015 WL 1215490, at *4. Instead, Valero has expressly denied any agency relationship with Union Pacific, and Union Pacific "would not control the operation of the unloading facilities." FEIR 2.5-31. The record here, as in *SEA-3*, precludes a finding that the Board has jurisdiction or that ICCTA applies.

Valero clings to the dictum in *SEA-3* that if any "state or local entity were to take actions . . . that interfere unduly *with Pan Am's common carrier operations*, those actions would be preempted under § 10501(b)." 2015 WL 1215490, at *6 (emphasis added); *see* Pet. at 19. But that dictum merely stands for the unremarkable proposition that state or local regulation of "transportation *by rail carrier*" would fall within the Board's jurisdiction and be subject to § 10501(b) preemption. That hypothetical situation is not present here, as the Project would not be "performed by, or under the auspices of, a 'rail carrier.'" *SEA-3*, 2015 WL 1215490, at *4. Similarly, in its letter to the Board, Union Pacific makes much of the proposition that state and local regulation may be preempted even if "a non-carrier seeks the permit." Union Pacific Letter at 3. But that proposition goes no further than the familiar principle that a non-carrier's project may fall within the Board's exclusive jurisdiction if it is performed "under the auspices of" a rail carrier. *SEA-3*, 2015 WL 1215490, at *4. Those auspices are not present here.

While *SEA-3* is decisive on these facts, numerous other court and Board decisions are in accord. In *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), the Third Circuit dismissed as "untenable" and "meritless," *id.* at 310, a claim virtually identical to Valero's claim here. The company Hi Tech, a non-carrier, operated a waste loading facility at a railroad's rail yard. *Id.* at 298, 308. At the facility, Hi Tech unloaded trucks carrying trash, and then transferred the trash into railcars for shipment to disposal facilities. *Id.* at 299. Hi Tech claimed that ICCTA preempted the application of state solid waste regulations to the facility. *Id.* at 297. Dismissing Hi Tech's contention, the Third Circuit held that "the most cursory analysis of Hi Tech's operations reveals that

its facility does not involve 'transportation by rail carrier.' The most it involves is transportation '*to* rail carrier.'" *Id.* at 308. The court concluded that the "mere fact that the [railroad] ultimately uses rail cars to transport the . . . debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.'" *Id.* at 309.

Both the Board and other courts have since affirmed "that there is, indeed, a difference between transportation *to* a rail carrier and transportation *by* a rail carrier." *N.Y. & Atl. Ry. Co.*, 635 F.3d at 72-73 (emphases added); *see, e.g.*, *J.P. Rail, Inc. v. N.J. Pinelands Comm'n*, 404 F. Supp. 2d 636, 650-52 (D.N.J. 2005); *CFNR Operating Co. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1118-19 (N.D. Cal. 2003); *Tri-State Brick & Stone of N.Y., Inc. & Tri-State Transp. Inc. – Pet. for Declaratory Order*, STB Finance Docket No. 34824, 2006 WL 2329702, at *2, *6 (STB Aug. 11, 2006). The Board and courts have likewise recognized that the same difference exists between transportation "*from* a rail carrier" and transportation *by* a rail carrier. *See Tri-State Brick & Stone of N.Y., Inc. v. City of New York*, No. 05 Civ 7561 GBD, 2007 WL 735023, at *2 (S.D.N.Y. 2007); *see, e.g.*, *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *4. The decisions are consistent with the "cardinal principle of statutory construction . . . to give effect, if possible, to every . . . word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted); *see also Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) ("When a federal law contains an express preemption clause, we focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." (internal quotation marks omitted)).

Here, the facts clearly demonstrate that the Project involves nothing more than transportation "from" a rail carrier. Union Pacific's sole connection to the Project would be its delivery of crude oil to the refinery. *See* RDEIR 2-3, 2-20 to 2-21; FEIR 2.5-31; Pet. at 2. Union Pacific's transportation of goods to Valero's Project is insufficient to "morph" Valero's activities into "transportation *by* rail carrier" within the Board's exclusive jurisdiction. *See* 382 F.3d at 309 (emphasis added).

SEA-3 and *Hi Tech Trans* demonstrate that the regulation of "transportation by rail carrier" is a prerequisite for any ICCTA preemption analysis. As the Second Circuit put it, "Both the courts and the STB . . . *consistently find* that to fall within the STB's exclusive jurisdiction, the facility or activity must satisfy both the 'transportation' and 'rail carrier' statutory requirements." *N.Y. & Atl. Ry. Co.*, 635 F.3d at 72 (emphasis added); *see, e.g.*, *Fla. E. Coast Ry. Co.*, 266 F.3d at 1336-37; *Tri-State Brick & Stone of N.Y.*, 2007 WL 735023, at *1-2; *Grafton & Upton R.R. Co. v. Town of Milford*, 417 F. Supp. 2d 171, 175-79 (D. Mass. 2006); *J.P. Rail*, 404 F. Supp. 2d at 649-52; *CFNR Operating Co.*, 282 F. Supp. 2d at 1118-19; *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *3-4; *Devens Recycling Ctr., LLC – Pet. for Declaratory Order*, STB Finance Docket No. 34952, 2007 WL 61948, at *2-3 (STB Jan. 10, 2007); *Tri-State Brick & Stone of N.Y.*, 2006 WL 2329702, at *3-6; *Town of Milford – Pet. for Declaratory Order*, STB Finance Docket No. 34444, 2004 WL 1802301, at *2-3 (STB Aug. 12, 2004); *Hi Tech Trans*, 2003 WL 21952136, at *3-5. In sum, because Valero's refinery Project does not constitute transportation "by rail carrier," ICCTA does not apply and the Board does not have jurisdiction.

B. Because Valero is not a rail carrier, it is irrelevant that the denial of the permit for the refinery Project may have indirect effects on rail traffic

Valero mistakenly urges the Board to bypass the threshold determination of whether ICCTA applies and proceed directly to determining whether the Planning Commission's permit denial "indirectly regulate[s] rail transportation," has the "effect of managing or governing rail transportation," or "unreasonably burden[s] interstate commerce." Pet. at 13-14 (internal quotation marks omitted). But the Board and courts use these tests to assess the scope (or "reach") of ICCTA preemption *only once it is clear that ICCTA applies*.

For example, in *New York Susquehanna and Western Railway Corp*., the Second Circuit considered whether ICCTA preempted state regulation of transloading activities undertaken by a railroad company. The court first examined whether the company's activities were "[c]overed" by ICCTA. 500 F.3d at 246. Only after ascertaining that the activities constituted "transportation by rail carrier" did the court decide whether the regulations would have the "effect of managing or governing" or "unreasonably burden[ing] rail carriage." *Id.* at 252-54; *see also Padgett v. Surface Transp. Bd.*, 804 F.3d 103, 107-08 (1st Cir. 2015) (deciding that activities constituted "transportation *by rail carrier*" before considering whether health and safety regulations were preempted (internal quotation marks omitted)); *Tex. Cent. Bus. Lines Corp.*, 669 F.3d at 532 (concluding that "ICCTA preemption applies" before turning to assessment of "preemption's reach").

Valero has not cited a single case in which the Board or a court examined ICCTA's preemptive scope absent "transportation by rail carrier." In *Winchester*, a non-carrier operated a warehouse in the Town of Winchester. *Boston & Maine Corp. & Springfield Terminal R.R. Co. – Pet. for Declaratory Order (Winchester)*, Docket No. FD 35749, 2013 WL 3788140, at *1 (STB July 19, 2013). The rail carrier Pan Am "provide[d] common carrier rail transportation . . . to the warehouse." *Id.* Finding that the warehouse was being used as a freight yard in contravention of municipal zoning laws, the Town "direct[ed] that all rail traffic to the warehouse immediately cease and desist." *Id.* (internal quotation marks omitted). The Board held that the Town's order regulated transportation by Pan Am—a rail carrier—because it "*prohibit[ed] all rail traffic* to the warehouse," and thus was preempted by ICCTA. *Id.* at *3 (emphasis added).

In *SEA-3*, the Board distinguished *Winchester* precisely on this ground, stating that *Winchester* involved "local regulation of the *railroad's* ability to conduct common carrier transportation." *SEA-3,* 2015 WL 1215490, at *5 (emphasis added). Likewise, in all other cases cited by Valero, the Board specifically found, or the facts made clear, that the activities included transportation by a rail carrier:

- The Board explained that *Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), "involved local regulation of transloading performed by the rail carrier or under its auspices." *SEA-3*, 2015 WL 1215490, at *5; *see also City of Alexandria*, 608 F.3d at 154 (describing the rail carrier as the "operat[or]" of the transloading facility at issue).

- The Board similarly explained that *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer*, STB Finance Docket No. 33971 (STB May 1, 2001), "involved local regulation of transloading performed by the rail carrier or under its auspices." *SEA-3*, 2015 WL 1215490, at *5.
- The Board cited *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), as a case involving "transloading and temporary storage . . . by a rail carrier." *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *3; *see also Green Mountain R.R. Co.*, 404 F.3d at 640 (acknowledging that "Green Mountain is a 'rail carrier' as defined by the Termination Act").
- The Board cited *Norfolk Southern Railway Co. v. City of Austell*, No. CIVA1:97-CV-1018-RLV, 1997 WL 1113647 (N.D. Ga. Aug. 18, 1997), as a case in which "jurisdiction was found and local regulations relating to transportation facilities preempted only when those facilities have been operated or controlled by a rail carrier." *Hi Tech Trans, LLC*, 2003 WL 21952136, at *4; *see also City of Austell*, 1997 WL 1113647, at *1 (characterizing the plaintiffs as "common carriers by rail").
- In *City of Auburn v. United States*, 154 F.3d 1025, 1028 (9th Cir. 1998), Burlington Northern and Santa Fe Railway, a rail carrier, claimed that ICCTA preempted local permitting for its rail line.
- In *CSX Transportation, Inc. – Petition for Declaratory Order,* STB Finance Docket No. 34662, at *2 (STB Mar. 14, 2005), the city passed an act that "would ban transportation of" certain hazardous substances and "any rail car that is 'capable of containing' such materials" within a certain geographical area.

Valero nonetheless urges the Board to apply the "managing or governing" test from these rail carrier cases to non-carrier projects if a denial would *indirectly* affect rail traffic. Pet. at 13-14. But it is irrelevant that denial of a non-carrier project would indirectly affect rail traffic. In *SEA-3*, for example, the City of Portsmouth's success in blocking SEA-3's proposed expansion of its propane transload facility would have had the effect of preventing Pan Am from increasing propane deliveries to the facility. *See* 2015 WL 1215490, at *1-2. That effect was irrelevant to the Board's conclusion that ICCTA did not preempt Portsmouth's actions. *See id.* at *3-4. Similarly, in *Hi Tech Trans*, New Jersey's order that Hi Tech "cease and desist" operations at its waste transloading facility would have effectively halted rail shipments of waste to the facility. *See* 382 F.3d at 300-01. Again, that effect was irrelevant to the Third Circuit's conclusion that ICCTA did not preempt the state regulations. *See id.* at 308-09. Indeed, this is the same fact pattern in every case in which the Board or a court found that the regulation was of a non-carrier. *See, e.g.*, *N.Y. & Atl. Ry. Co.*, 635 F.3d at 68-69; *Fla. E. Coast Ry. Co.*, 266 F.3d at 1326-27; *Tri-State Brick & Stone of N.Y.*, 2007 WL 735023, at *1-2; *Grafton & Upton R.R. Co.*, 417 F. 2d at 172-73; *J.P. Rail,* 404 F. 2d at 642-43, 646; *CFNR Operating Co.*, 282 F. Supp. 2d at 1116; *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *1; *Town of Milford*, 2004 WL 1802301, at *1-2. Thus, it cannot be that ICCTA preempts a local government's regulation of a *non-carrier's* actions simply because that regulation would effectively (but indirectly) lead to less train traffic.

Union Pacific argues, without offering any evidence, that state and local governments are, with "increasing frequency," using conditions imposed on non-

carriers to regulate the railroads. Union Pacific Letter at 1; *see also* Letter from Theodore K. Kalick, Canadian National Railway Co., to Cynthia T. Brown, STB (July 5, 2016); Letter from Peter J. Shudtz, CSX Corp., to Cynthia T. Brown, STB (July 1, 2016). Similarly, Valero complains that local or state governments have exercised regulatory authority over other proposed refinery projects across the country. Pet. at 3-7. Rather than being a new "patchwork of state and local rules" that is "unsustainable," Union Pacific Letter at 1, such state and local regulation of non-carrier operations has long existed without significant repercussions. Fifteen years ago, the Eleventh Circuit declared that "[a]llowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared 'balkanization' of the railroad industry" because "[u]nlike direct regulation of railroads" regulation of non-carriers does not burden railroads "with the patchwork of regulation that motivated the passage of the ICCTA." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1339; *see also Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) ("The fact that laws may differ from state to state is not, on its own, cause for . . . preemption.").

This result is also consistent with Congress's will. "Congress intended the transportation and related activities undertaken by rail carriers to benefit from federal preemption but did not mean such preemption to extend to activity related to rail transportation undertaken by non-rail carriers." *Grafton & Upton R.R. Co.*, 417 F. Supp. 2d at 176; *see id.* at 176-77 (rejecting a railroad company's "assertion that it would have been 'the truly affected entity'" with respect to a town's prohibition of a non-carrier's development of a rail yard). Put another way, ICCTA does not preempt local regulation

of a non-carrier's activities, even if it would preempt regulation of the same activities when undertaken by a rail carrier. *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1336-37; *Grafton & Upton R.R. Co.*, 417 F. Supp. 2d at 176.

Besides being contrary to the plain language of the statute, interpreting ICCTA to cover non-carrier activities would add innumerable disputes to the Board's already crowded docket. *See Hi Tech Trans*, 382 F.3d at 309. If Valero's "reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier." *Id.* That would subject a wide range of commercial and industrial facilities—such as refineries, manufacturing plants, garbage dumps, and big-box retail stores—to the Board's jurisdiction. The Board should "not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly." *Id.*; *accord CFNR Operating Co.*, 282 F. Supp. 2d at 1118-19. The law is clear that the Board need not, and should not, delve into an inquiry of the purported effects of the Planning Commission's permit denial.

III. The Planning Commission's denial of the permit for the refinery Project does not prevent Valero from receiving, or Union Pacific from providing, common carrier service

Contrary to Valero's claim, Pet. at 12-13, 18, the Planning Commission's denial of the use permit for the Project does not affect Valero's ability to receive common carrier service or prohibit Union Pacific from providing that service. Valero, citing 49 U.S.C. § 11101(a), argues that the denial of the Project impedes its "right" to common carrier service, *see* Pet. at 14, but that section states only that a "rail carrier" providing

transportation or service "shall provide the transportation or service on reasonable request." It says nothing about whether a local government can deny, under its zoning laws, a non-carrier project that merely has an incidental relationship to transportation by a rail carrier. The only regulation at issue here is the City's use permit for Valero's offloading rack and related facilities on the refinery property. The Planning Commission's denial of that permit does not affect Union Pacific's provision of rail service to and from the refinery.

Thus, regardless of whether the Project is built, Valero may continue to import and export products via rail, as it currently does. *See* Pet. at 8 n.25; *see also* RDEIR 2-3. Indeed, Valero could request and receive crude oil tank cars at the refinery even if the Project is never built. That Valero could not offload and store the crude oil—either efficiently or perhaps at all—without the proposed refinery modifications might discourage Valero from requesting such service, but it in no way prohibits Valero from making, or Union Pacific from fulfilling, the request. The denial of the permit for the refinery Project "alters the incentives, but does not dictate the choices." *See Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (internal quotation marks omitted).

In *Tri-State Brick and Stone of New York*, the Board confronted—and rejected—an argument that mirrors Valero's argument here. In that case, petitioner non-carriers operated a transloading facility at a rail yard owned by the City of New York. 2006 WL 2329702, at *1-2. A railroad provided "rail service up to and into the [yard]." *Id.* at *2. When the city sought to evict petitioners from the yard, petitioners argued that the city could not interfere with their right to service from the railroad. *Id.* at *5. The Board

dismissed petitioners' contention, finding that the city's eviction of "a noncarrier occupant over whose activities the Board has no jurisdiction" did not interfere with common carrier service. *Id.* While recognizing that the petitioners could "demand service upon reasonable request," the Board stated that "that is not the issue here." *Id.* As the Board discerned, "Petitioners' concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard . . . is being interrupted." *Id.*

Here, as in *Tri-State*, Valero's true concern is not interference with rail service to its refinery property, but rather interference with its desired use of the property. And as in *Tri-State*, the Planning Commission is not interfering with rail service "by using state or local laws to [prevent property use by] *a noncarrier . . . over whose activities the Board has no jurisdiction*." *See id.* (emphasis added); *see also SEA-3*, 2015 WL 1215490, at *5 (rejecting an argument that restrictions on non-carrier SEA-3's propane transloading facility would "impose restrictions on SEA-3's ability to use, and Pan Am's ability to provide, rail transportation").

Valero also cites the Board's *Winchester* decision to support its argument that the Planning Commission has denied it common carrier service, *see* Pet. at 14, but the facts in *Winchester* are materially distinguishable. In *Winchester*, the Board held that the "Town's orders *prohibiting all rail traffic* to the warehouse conflict with the federal right of [the non-carrier warehouse operator] to request common carrier service and the federal obligation of Pan Am, a rail common carrier, to provide that service." 2013 WL 3788140, at *3 (emphasis added). Here, in contrast, the Planning Commission's denial of a permit for the refinery Project does not constitute a prohibition on any rail traffic—

much less a prohibition on *all* rail traffic—to Valero's refinery. In sum, the Planning Commission's denial of the Project permit does not deny Valero's ability to receive, or Union Pacific's ability to provide, common carrier service to the refinery.

IV. The Planning Commission's reasons for denying the permit are irrelevant, and, in any case, the Commission denied the permit for many reasons that had nothing to do with Union Pacific's operations

At its heart, Valero's argument is that the Planning Commission's *reasons* for denying the permit for the Project were improper. But whether a non-carrier's project constitutes transportation "by rail carrier" is an objective inquiry based solely on the nature and extent of the rail carrier's role (if any) in the project. Here, Union Pacific's attenuated relationship to the Project is inadequate to render the Project transportation "by rail carrier" within the Board's jurisdiction. The Planning Commission's reasons for denying the permit do nothing to change that.

Neither the Board nor the courts look to the local government's motivations for a particular regulation when determining whether that regulation is preempted. In *SEA-3*, the non-carrier SEA-3 alleged that the City of Portsmouth's "sole objective" in challenging the proposed expansion was "to prevent an increase in rail service to SEA-3 by blocking additional propane shipments from traveling through the City." 2015 WL 1215490, at *5; *see also id.* at *2. Indeed, given that Portsmouth was an "uprail" city, it is hard to imagine what else the city could have been concerned about. The Board did not consider Portsmouth's alleged motivations, however. Instead, consistent with the plain language of ICCTA, the Board based its determination solely on whether the project would be performed by, or under the auspices of, a "rail carrier." *See id.* at *4-5.

Similarly, in *Florida East Coast Railway Co.*, the Eleventh Circuit explained that a city's "hostile motivation" for applying its zoning and licensing ordinances to a non-carrier's gravel distribution business on a rail carrier's property was "not relevant to" the court's preemption analysis. 266 F.3d at 1339 n.12. Rather, in holding that ICCTA did not preempt the city's actions, the court relied solely on the fact that the project was proposed by a non-carrier for private gain, and not for the benefit of a common carrier in its service of the public. *Id.* at 1336. Accordingly, the Planning Commission's reasons for denying the permit are plainly "not relevant to" the touchstone for Board jurisdiction: whether the Project constitutes transportation by a rail carrier. *See id.* at 1339 n.12.

Valero's suggestion that the Board should determine whether preemption applies based on the motivations of local decision-makers is also unworkable as a policy matter. There often may be no record of why a particular agency regulates a non-carrier. The substantial record about the issues considered by the Planning Commission in this matter is the result of CEQA, which requires analysis of all project impacts, including indirect impacts; a similar record will likely not exist for many other projects, especially those in other states. Further, what influences the vote of any one decision-maker may not be what influences the vote of another, or determines the decision of the agency as a whole. The Board should continue to determine whether ICCTA applies based on the objective identity of the regulated party (is it a rail carrier, or is it not?) rather than the varied and often unknowable concerns of state and local agencies.

However, even if the Planning Commission's reasons were somehow relevant to the ICCTA analysis—which they are not—the Commission denied the permit in significant part for reasons related to the numerous impacts from *Valero's* operations at the refinery site. Those reasons are independent from any concerns about oil trains on Union Pacific's tracks. Thus, even under Valero's incorrect new "reasons" test, ICCTA does not apply and cannot preempt the denial of the use permit for the Project.

Specifically, the Project would cause significant air quality and greenhouse gas impacts by increasing emissions from the refinery. The Project would allow Valero to unload, and thus refine, up to 70,000 additional barrels of crude oil per day.[5] Pet., Ex. 1 at 7. By increasing the total amount of oil refined, the Project would increase air pollution and greenhouse gas emissions from the refinery. Furthermore, although Valero refuses to disclose the particular type of crude oil that it would import, the Project would almost certainly bring in volatile Bakken crude and/or dirty Canadian tar sands crude. *See* DEIR 3-22 to 3-24. Both of those types of crude would increase air pollution and greenhouse gas emissions at the refinery even if the total throughput remains the same. FEIR 2.5-224 to 2.5-236 (expert report explaining how changes in crude slate would affect refinery emissions).

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[5] Although the EIR claims that Valero would offset the 70,000 barrels per day brought in via rail by decreasing marine shipments by the same amount, the City would not *require* that reduction. *See* DEIR at ES-1 to ES-3, 1-1 to 1-2. And while the air district's permit limits the refinery to processing 165,000 barrels per day of crude oil, there is evidence that the refinery is currently operating at far below those levels and could thus increase the amount of oil it is refining. FEIR 3.5-16, 3.5-22; Reply, Ex. E (comment letters citing evidence that the refinery is processing only 114,443 barrels per day).

Construction and operation of the Project would also cause significant biological, water quality, and flood hazard impacts at Valero's property. The Project site is just feet from Sulphur Springs Creek, DEIR 3-4 to 3-5 & figs. 3-1 & 3-2, 4.8-1, which provides habitat for a variety of protected species, including the California red-legged frog, western pond turtle, tri-colored blackbird, yellow-headed blackbird, Suisun song sparrow, grasshopper sparrow, loggerhead shrike, yellow-breasted chat, San Francisco common yellowthroat, and short-eared owl. DEIR 4.2-27 to 4.2-28. The EIR recognized that construction of the offloading rack and other components of the Project could harm water quality in the Creek by causing sedimentation, DEIR 4.8-15, and it also stated that the noise, vibrations, visual disturbance, and increased human activity from construction could have a "substantial adverse indirect effect on nesting birds" if not properly mitigated. DEIR 4.2-28.

These "on-site" impacts were major areas of controversy during the public comment period. Benicians, the California Attorney General, and many others commented that the Project would increase air pollution and greenhouse gases at the refinery. FEIR 2.4-104, 2.4-108 to 2.4-110 (California Attorney General comments on refinery impacts); FEIR 2.5-157 to 2.5-165, 2.5-170 to 2.5-171 (Communities for a Better Environment (CBE) comments on refinery impacts); FEIR 2.5-91 to 2.5-97, 3.5-16, 3.5-21 to 3.5-22 (Benicians for a Safe and Healthy Community (BSHC) comments on refinery impacts); FEIR 2.5-195 to 2.5-205, 2.5-211, 3.5-43 to 3.5-44; Reply, Ex. E (Natural Resources Defense Council comments on refinery impacts). Two refinery experts also evaluated the EIR and found that the new crudes would lead to significant air quality

and greenhouse gas impacts at the refinery. FEIR 2.5-173 to 2.5-184, 2.5-222 to 2.5-236. Similarly, Benicians and others pointed out that the Project would cause significant biological and water-quality impacts on Sulphur Springs Creek, and would cause significant flood hazard impacts. FEIR 2.5-6, 2.5-8 (Martinez Environmental Group comments on impacts to Sulphur Springs Creek); FEIR 2.5-91 (BSHC comments on impacts to Sulphur Springs Creek); FEIR 2.5-99 to 2.5-100 (BSHC comments on flood hazards); FEIR 2.5-168 to 2.5-169 (CBE comments on impacts to Sulphur Springs Creek).

The Planning Commission was deeply concerned about these "on-site" impacts relating to Valero's operations on the refinery property. In its resolution, the Planning Commission cited these impacts as reasons to deny the permit:

- "The EIR does not disclose all information necessary for complete evaluation of the air quality impacts of the project including the makeup of the crude oil associated with this project . . . ."
- "The . . . air quality, and greenhouse gas emissions analyses are insufficient."
- "The project could potentially have negative biological impacts on Sulphur Springs Creek . . . ."
- "The project is located in the 100-year floodplain, which could increase the hazards related to an accidental spill on the property."

Pet., Ex. 4 at 4-5.[6] Although Valero suggests that some of these findings relate to off-site impacts, Pet. at 14-15, they also address concerns about on-site impacts. For example,

[6] The Planning Commission also cited numerous general problems with the environmental review process, including that the EIR did not express the independent judgment of the City, did not state the City's (as opposed to Valero's) needs and objectives, and did not explain why economic benefits would outweigh the harmful environmental impacts. Pet., Ex. 4 at 4-5.

the air quality and greenhouse gas EIR sections are insufficient both in their analysis of refinery emissions (on-site impacts) and locomotive emissions (off-site impacts). (Indeed, the ambiguity here highlights the futility of attempting to discern and categorize the motivations of decision-makers.) The Planning Commission ultimately found that the Project would be inconsistent with the City's General Plan and would be "detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of the use." Pet., Ex. 4 at 5.

Whether the Project will increase refinery emissions, and whether the offloading rack will damage Sulphur Springs Creek or cause flood hazards, are matters beyond the Board's jurisdiction.[7] These potential effects do not arise from transportation by a "rail carrier" any more than did the impacts of siting and operating the waste transloading facilities in *Hi Tech Trans*. *See* 382 F.3d at 309 (noting the "uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades"). Valero effectively concedes that these concerns are outside of the Board's jurisdiction. *See* Pet. at 16 (claiming that Valero does not seek "an order declaring that the City's permitting authority over the construction and operation of the unloading rack itself is subject to ICCTA preemption"). These

[7] Because Valero is not a rail carrier, the Board need not determine whether Valero's activities constitute "transportation." *Town of Babylon & Pinelawn Cemetery*, 2008 WL 275697, at *5 n.13. Regardless, it is clear that refining crude oil falls far outside the definition of transportation and thus is not governed by ICCTA. *See Town of Milford,* 2004 WL 1802301, at *2 (finding that "steel fabrication activities" by rail carrier "fall outside the definition of railroad transportation"); *see also Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) ("While certainly expansive, this definition of 'transportation' does not encompass everything touching on railroads.").

reasons were adequate to deny the permit under local law. *See* Benicia Mun. Code § 17.104.060. To the extent Valero disagrees, that is an issue for the City Council and state courts to decide, not the Board.

In short, even if the Board were to adopt Valero's new and unsupported "reasons" test, it should nonetheless decline to find jurisdiction over this matter because the Planning Commission denied the permit on the basis of many reasons that had nothing to do with impacts along the rail line.

V. The Board should not open a proceeding because the law is clear

When the law is clear, the Board may decline to institute a proceeding. Here, the law is clear that the Board does not have jurisdiction. Accordingly, the Board should decline to institute a proceeding. *See, e.g.*, *SEA-3*, 2015 WL 1215490, at *4 ("Where the law is clear, the Board may decline to institute a proceeding and instead provide guidance on the preemption issue presented, and it is appropriate to do so here."); *Tri-State Brick of N.Y.*, 2006 WL 2329702, at *6 ("Tri-State Transportation's activities do not rise to the status of a rail carrier. Thus, the Board does not have jurisdiction over Tri-State Transportation's activities . . . . Therefore, the petition to institute a declaratory order proceeding will be denied."); *Town of Milford*, 2004 WL 1802301, at *1 ("[T]here is no need for the Board to institute a proceeding, because it is clear that . . . the Board does not have jurisdiction over rail/truck transloading activities that are not performed by a rail carrier, or on behalf of a rail carrier . . . [and] the broad Federal preemption of section 10501(b) does not apply to activities over which the Board's jurisdiction does not extend."); *Hi Tech Trans,* 2003 WL 21952136, at *3 ("It will not be necessary for the Board

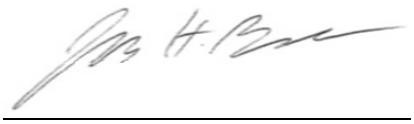
to institute a declaratory order proceeding here, because it is clear that the Board does not have jurisdiction over truck-to-rail transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services."). Further, opening a proceeding at this time would almost certainly ensure that the Board would not rule by September 20, 2016, the date the City Council is scheduled to reconvene to consider Valero's appeal.

CONCLUSION

For the foregoing reasons, Benicians respectfully request that the Board decline to institute a proceeding and deny Valero's Petition for Declaratory Order.

July 8, 2016

Respectfully submitted,



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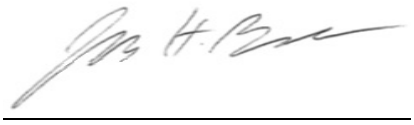

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