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February 1, 2016

VIA EMAIL & U.S. MAIL

Members of the Planning Commission
San Luis Obispo County Planning Commission
976 Osos Street, Room 300
San Luis Obispo, CA 93408

Attention: Ramona Hedges, Planning Commission Secretary

Re: Phillips 66 Rail Spur Extension Project

Dear Commissioners:

On behalf of Phillips 66 Company, I would like to begin by thanking the County staff for the substantial effort that must have been required to produce the Final Environmental Impact Report (FEIR) (December 2015) and staff report (January 2016) for the Company's Rail Spur Extension Project. Despite this effort, however, there are several points on which the FEIR and staff report do not state a clear conclusion, or suggest conclusions contrary to law. There also are a few points on which Phillips 66 disagrees with the FEIR and staff report. This letter will provide comments on the FEIR, and the staff report for the Planning Commission hearing scheduled for February 4-5, 2016, with respect to four primary topics: federal preemption of state and local regulation of railroads; Environmentally Sensitive Habitat Areas (ESHA); coastal access; and the Project's consistency with County policies.

The company looks forward to the hearing on February 4-5, when these issues can be explored more fully. In particular, we anticipate that the Planning Commission will be eager to discuss the Reduced Rail Deliveries Alternative. This alternative will reduce all impacts associated with on-site Project activities to less than significant.

EXECUTIVE SUMMARY

Federal Regulation Of The Railroads Preempts Local Regulation

Phillips 66 proposes to extend the existing rail spur at its Santa Maria Refinery in order to be able to receive unit trains delivering crude oil. While this Project will allow the company to participate more effectively in the competitive crude oil markets throughout North America, it will not result in trainloads of Bakken crude oil coming into San Luis Obispo County because the Refinery is not designed to process large quantities of light crude oils such as those that have been involved in a number of rail accidents in the past three years. Rather, the Santa Maria Refinery refines primarily heavy crude oils, and the types of crude oil received at the Refinery will not change substantially after the Rail Spur Extension Project is completed.

Although the Project will not bring unit trains of light crude to the refinery, risk of accident is clearly at the top of the minds of staff and the community. Thus, the current federal programs regulating rail safety are an important context for the Planning Commission's review of this project. The Federal Railroad Administration, together with the Pipeline and Hazardous Materials Safety Administration, administer programs regulating the design of locomotives, tank cars, track, breaking systems, signal systems, crossings, maintenance and work practices, and speed limits and routes, among other things. The FEIR identifies no fewer than 14 regulatory actions taken just in the past 18 months to enhance the safety of rail transportation of crude oil. The federal programs aim for a consistent set of standards across the country, in order to facilitate a safe and efficient rail transportation network. There is robust enforcement of these laws by both the federal agencies, and by the California Public Utilities Commission, under a provision of federal law that allows states to participate in enforcement of federal rail safety laws.

Given the importance of rail transportation to the national economy, for more than one hundred years the federal government has preempted local control over the railroads. In 1995, Congress strengthened the historical preemption with the adoption of the Interstate Commerce Commission Termination Act (ICCTA), which created the Surface Transportation Board as the sole authority regulating the construction, operation and abandonment of railroads. ICCTA, together with the laws administered by the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and other federal agencies, fully occupy the regulatory field with respect to railroad design, operation, equipment and safety. State and local governments are precluded from regulating the railroads directly, or from taking actions that interfere with the operation of the railroads under federal law. This includes attempting to regulate rail operations indirectly by imposing limitations or conditions on rail terminals or customers aimed at changing or controlling the mainline rail operations, or that impose a burden on a customer for accessing the interstate rail network. Accordingly, mitigation measures in the FEIR aimed at altering mainline transportation of crude oil to the Santa Maria Refinery, or that

would impose costs or burdens on Phillips 66 tied to the impacts of mainline rail transportation, are preempted and cannot be imposed by the County.

Environmentally Sensitive Habitat Areas

With respect to impacts on the Refinery site itself, Phillips 66 was dismayed to learn for the first time in the Staff Report that staff classifies the Project site as an Unmapped Environmentally Sensitive Habitat Area (ESHA). This is a reversal of the conclusions expressly stated in the Draft EIR and Revised Draft EIR. Declaring the site to be ESHA at this late date also is flatly contrary to the County code.

Under the County's Coastal Zone Land Use Ordinance (CZLUO), additional requirements must be met if a project is located on ESHA. ESHA may be designated one of two ways. Mapped ESHA refers to areas that contain certain sensitive habitat and that are depicted as combining designations on the County's zoning land-use maps. Mapped ESHA on the Phillips 66 property occurs only west of the UPRR railroad property. Everyone agrees that there is no mapped ESHA in the Project area (east of the UPRR railroad property).

The CZLUO provides limited power to designate Unmapped ESHA. With respect to a specific parcel and development proposal, the County may designate an area as Unmapped ESHA only "***at or before the time of application acceptance,***" based on the best information available to it at that time. The history behind this provision shows that it was intended to strike a balance between the desire to identify sensitive areas that had not yet been mapped, and the need for an orderly and predictable application process. The County accepted the Rail Spur Extension Project application in July 2013, more than two and one-half years ago, and the County's opportunity to designate Unmapped ESHA on the Project site ended at that time.

Yet in the summer of 2015, it appears that County staff collaborating with staff of the California Coastal Commission reconsidered its prior conclusion. Applying planning guidance developed by the Coastal Commission long after the Phillips 66 application was accepted, County staff concluded that the Project site is Unmapped ESHA, and recommends that the Project should be denied on that basis. County staff urges the Planning Commission to act contrary to the County's own ordinance both in timing and in the legal test to be applied. Ironically, this outcome would be to the detriment of biological resources in the vicinity. The FEIR concludes that the Project site is highly disturbed and degraded from decades of agricultural and industrial use, yet mitigation measures would require Phillips 66 to compensate for loss of that habitat at a greater than 1:1 ratio by restoring habitat at other locations on the Phillips 66 property. This means that ***the project will cause a net increase in the amount of high quality habitat on the Phillips 66 property.*** This benefit will not occur if the Project is denied.

The Planning Commission should adhere to the standards and deadlines in the CZLUO, and confirm the July 2013 conclusion that there is no Unmapped ESHA in the Project site.

Vertical Coastal Access

Chapter 9 of the FEIR reviews potential environmental impacts from various hypothetical approaches to providing vertical coastal access across the Phillips 66 property. This is not part of the Phillips 66 Rail Spur Extension Project. Rather, it arises out of the Phillips 66 Throughput Increase Project that was approved by the Planning Commission on December 3, 2012. The Throughput Increase Project was approved with a condition requiring that the company comply with the vertical coastal access provisions of the CZLUO. As discussed at the 2012 hearing, Phillips 66 believes that the exemptions from coastal access apply to this site, specifically, that access at this location would be contrary to protection of public safety and fragile coastal resources. Phillips 66 subsequently submitted a report detailing how access at its location would create risks to public safety and fragile coastal resources. Chapter 9 of the FEIR is intended to assist the Planning Commission in making a decision regarding the applicability of the exemptions to the public access requirement.

With respect to public safety, the Union Pacific Railroad tracks divide the Phillips 66 property. There is no safe crossing at this location, and UPRR does not consent to public access across their tracks. Improvement of public access through parking lots and roads or trails would simply encourage people to come to an unsafe location. The overpasses sketched in the FEIR are fictitious because they would require an easement or right of way from UPRR, and UPRR does not consent to public access at this location.

With respect to the protection of fragile coastal resources, the FEIR confirms that development of public access at this location would result in the loss of sensitive habitat. Virtually the entire Phillips 66 property west of the UPRR tracks is Mapped ESHA, and all three hypothetical public access scenarios reviewed in the FEIR would result in loss of and other impacts to habitat.

We request that the Planning Commission adopt a resolution finding that the Throughout Increase Project Condition 17 has been met by application of the exemptions. Specifically, we request that the Planning Commission find that vertical public access is not required at this location because it would not be consistent with protection of public safety and fragile coastal resources.

Consistency With County Policies

Exhibits A and B of the staff report present staff's view that the Project would be inconsistent with the County's General Plan and Ordinances, and should be denied on that basis. We believe the facts and the law require a different outcome, and that the Project can be approved as consistent.

Exhibit B evaluates consistency with respect to mainline rail operations. Due to the preemptive effect of federal regulation of the railroads, the Planning Commission should not consider Exhibit B in reaching a decision on the Rail Spur Extension Project. The

UPRR operates subject to federal law, and is authorized to haul crude oil in tanker cars along the mainline. The County may not deny the Project because it objects to the impacts associated with operation of the national rail network, or that portion within the County.

Exhibit A lists County policies with which staff claims the Project will be inconsistent. By and large, the staff assessments in Exhibit A turn on the issue of Unmapped ESHA. Because the staff recommendation on Unmapped ESHA is contrary to the County's own ordinance, its assessments on Exhibit A are unsupportable. With respect to the County policies regarding compatible land uses and open space, after implementation of the Project, ***there will still be a ½ mile buffer*** between the Refinery operations and the nearest resident. The Reduced Rail Delivery Alternative (3 trains per week rather than 5 trains per week) will eliminate the potentially significant impacts associated with diesel exhaust from trains and other equipment operating in and around the Refinery. Accordingly we believe the staff's assessment of consistency with County policies is incorrect and unfounded.

Even if the Project is not consistent with every applicable individual land use policy, the Project can still be found consistent with the General Plan. Under the legal standard governing consistency determinations with land use plans, a project must only be in "harmony" with the applicable land use plan to be consistent with that plan. An agency applying a land use plan to a project is expected to "weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purpose."

We request that the Planning Commission approve the project, finding that it is in harmony with the plan's policies and purpose.

I. THE FEDERAL GOVERNMENT—NOT THE COUNTY—REGULATES MAINLINE RAIL OPERATIONS.

The issue attracting the most comment and attention in the FEIR and the staff report is not the fairly limited changes at the Refinery itself; rather, it is concerns regarding trains traveling across the county, the state or beyond. These concerns fall in two categories: the air emissions from the train locomotives, and the possible consequences in the event of a rail accident. As important as these questions are, they are not before the Planning Commission in this Project. The United States Constitution and federal law places those questions in the hands of the federal government. And the federal government has established comprehensive programs that regulate the railroads in a way that is consistent across the country.

A. The Comprehensive Federal Regulatory Program.

One only has to skim the FEIR to appreciate the breadth of federal laws regulating railroad safety. FEIR pages 4.7-18 to 4.7-31 briefly summarizes regulatory programs administered by two of the primary federal agencies with authority over railroads: the Federal Railroad Administration (FRA), and the Pipeline and Hazardous Materials Safety Administration

(PHMSA), both within the Department of Transportation. In addition, the National Transportation Safety Board reviews rail accidents and makes recommendations to the FRA and PHMSA. FEIR p. 4.7-19. The Secretary of Homeland Security also consults with the Department of Transportation in the development of regulatory programs. 49 USC 20103(a). Other programs regulating railroads are adopted pursuant to the Clean Air Act, Clean Water Act, Occupational Safety and Health Act, Superfund and other laws. But naming the federal laws and agencies doesn't even scratch the surface. Altogether, the federal laws direct a comprehensive program of federal regulation of railroad track, locomotives, tank cars, routes, crossings, speed limits, signals, horns, staffing, operating practices, labeling, worker training, emergency response planning and training, inspections, and much more, encompassing hundreds of pages of detailed requirements.

The federal government regularly reviews and updates railroad safety standards. The FEIR lists no fewer than 14 regulatory actions taken just within the past 18 months to enhance railroad safety, and in particular the safety of rail transport of crude oil. FEIR p. 4.7-23. The enhancements concern tanker car design, the types of tanker cars that may be used to transport different types of crude oil, route selection, reduced operating speeds, disclosures to qualified state and local first responders, track and line inspections, enhanced braking systems, notifications to state and local first responders, and increased training – including tuition assistance – for state and local first responders.

The federal government also has a rigorous inspection and enforcement program. On January 20, 2016, the FRA announced that its 2015 enforcement of railroad safety regulations "led to the highest-ever civil penalty collection rate in the agency's 50-year history." See https://www.fra.dot.gov/eLib/Details/L17323. (The CPUC's enforcement efforts are summarized in its Annual Rail Safety Report for fiscal year 2014-2015, available at www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=8231.)

UPRR, the railroad that will serve the Phillips 66 Rail Spur Extension Project, is subject to this comprehensive federal regulatory scheme. In a letter commenting on the Revised Draft EIR for Phillips 66's Rail Spur Extension Project, Ms. Melissa Hagan of UPRR described the company's investment in safety and emergency preparedness, as well as the company's safety performance. From 2007-2013, UPRR spent more than $21.6 billion in capital investment in its infrastructure. See FEIR, Comment UPRR-02. As further explained in that comment:

> 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:
>
> - UP 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.
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> ***
>
> 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 seventy-nine percent from 1980 and down forty-two percent from 2000; the employee injury rate was down eighty-four percent from 1980 and down forty-seven percent from 2000; and the grade crossing collision rate was down eighty-one percent from 1980 and down forty-two percent from 2000.

The comment also details the efforts that UP makes to communicate with train fire departments and other emergency responders along its lines: "UP 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." FEIR Comment UPRR-02.

Attachment 1 includes additional information from UPRR regarding its performance, safety record, and implementation of some of the key equipment upgrades required by recent changes to federal regulatory programs. The company was scheduled to spend another $4.3 billion in 2015 alone on additional infrastructure investments. The materials also describe how UPRR works with 184 fire departments along its lines in California, training more than 3,900 emergency responders in the state since 2010.

B. Federal Law Preempts State and Local Regulation of Mainline Rail Operations.

The County does not have authority to regulate mainline rail operations. This includes direct regulation (e.g., adopting an ordinance telling the railroad how to operate) as well as indirect regulation through limiting access to the railroad or burdening access in ways that affect rail transportation in interstate commerce. The relevant law on preemption is documented in three letters contained in the FEIR:

- My letter of January 17, 2014 to Whitney McDonald in the County Counsel's office (found in the EIR as an attachment to Comment Letter AB-01).
- My letter of November 24, 2014 to Murry Wilson commenting on the Revised DEIR (found in the FEIR as Comment Letter AB-01).
- Letter from Melissa Hagan of Union Pacific Railroad (UPRR or UP) to Murry Wilson dated November 24, 2014 (found in the FEIR as Comment Letter UPRR-01.

Rather than repeat the extensive legal analysis presented in those letters, we hereby incorporate them by reference, and summarize the most important points below.

First, federal law preempts not only local efforts to regulate the construction of railroads, but also the regulation of **railroad operations**. The Interstate Commerce Commission Terminal Act (ICCTA) states:

> The jurisdiction of the [Surface Transportation] Board over—
>
> **(1)** **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; **and**
>
> **(2)** the construction, acquisition, **operation**, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, **is exclusive**. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and **preempt the remedies provided under Federal or State law**.

49 U.S.C. § 15051(b). The United States Supreme Court characterized federal regulation of the railroads as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co*., 450 U.S. 311, 318 (1981). Other courts have frequently quoted the decision in *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996): "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."

Second, federal judicial decisions confirm that preemption is not just limited to operations conducted by the railroad on the mainline, but also extends to local efforts to regulate terminals and customers in ways that burden the rail network or rail transportation. As quoted above, the ICCTA gives federal agencies exclusive authority over not only the mainline, but also spur tracks, industrial tracks and related facilities. ICCTA "categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations." *United States Environmental Protection Agency—Petition for Declaratory Order*, STB Decision Docket

No. FD 35803, at 7; see also *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Decision Docket No. FD 35861, at 8 (stating same). Judicial decisions demonstrate that local governments cannot use their local police power or land use authority over terminals or transloading facilities as a means of circumventing preemption. If they exercise those powers in a manner that interferes with mainline rail transport, their actions are preempted even if they are directed at the terminal or a customer rather than the railroad. For example, in *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010) a city that objected to the increase in rail delivery of ethanol to a transloading terminal facility within its boundaries adopted a new ordinance regulating and requiring permits for the local distribution of ethanol by surface tanker trucks. The ordinance was struck down by the courts because by regulating and limiting the trucks engaged in local distribution, the ordinance directly affected and limited the railroad's ability to ship goods by rail. ***The FEIR states that the County recognizes these legal authorities.*** (See FEIR, Response to Comment UPRR-04.)

In addition to preemption under the ICCTA, the Federal Railroad Safety Act also includes an express preemption provision. State agencies such as the California Public Utilities Commission may participate in enforcing federal law pursuant to the Federal Railroad Safety Act, provided they submit annual certification to the Secretary of Transportation regarding their qualifications to do so. 49 USC § 20105. Beyond inviting participation in enforcement of federal laws, the act states: "Laws, regulations, and orders released to railroads safety and laws, regulations and orders related to railroad security shall be nationally uniform to the extent practicable." 49 USC § 20106(a)(1). States have limited authority to adopt or enforce their own regulations regarding railroad safety of security only until such time as the federal government prescribes a regulation covering the same subject matter, or to address a local safety or security hazard in a manner that is not incompatible with federal regulations and that does not unreasonably burden interstate commerce. 49 USC § 20106(a)(2). Express preemption provisions are also contained in the Clean Air Act with respect to locomotive engines and emissions. 42 USC §§ 209, 213.

Third, the State of California has long recognized the expansive scope of federal preemption. For example, the California Air Resources Board expressly recognized federal preemption in negotiating agreements with railroad companies in 1998 and 2005 addressing air emissions from railroad operations. These agreements not only acknowledged preemption, but explained why it is necessary and beneficial For example, the 1998 agreement stated:

> The interconnected nature of the rail network and the ability of locomotives to travel freely throughout the country allow for efficient deployment of locomotives to meet customer needs. Segmentation of the national locomotive fleets into multiple geographic areas would be very burdensome for the railroads because of the very high capital costs of the additional locomotives needed to establish area-specific locomotive fleets, creation of inefficient operations, and delay of time-sensitive customer shipments. A

> patchwork of different state and local programs would be an inefficient, costly and time consuming disruption of interstate commerce.

See Attachment 2, 1998 Railroad Memorandum of Mutual Understandings, pp. 4-5. Similarly, the 2005 agreement stated:

> It has been widely recognized that railroads need consistent and uniform regulation and treatment to operate effectively. A typical line-haul locomotive is not confined to a single air basin and travels throughout California and into different states. The U.S. Congress has recognized the importance of interstate rail transportation for many years. The Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Termination Act and many other laws establish a uniform federal system of equipment and operational requirements. The parties recognize that the courts have determined that a relatively broad federal preemption exists to ensure consistent and uniform regulation. Federal agencies have adopted major, broad railroad and locomotive regulatory programs under controlling federal legislation.

See Attachment 3, 2005 ARB/Railroad Statewide Agreement, p. 25, Attachment C, ¶ 8

The California Attorney General also has acknowledged federal preemption of regulation of the railroads in briefs dealing with CEQA matters in particular. See Attachment 4, A*pplication of California High Speed Rail Authority for Leave to File Amicus Curiae Brief and [Proposed] Amicus Curiae Brief in Support of Respondents* in *Friends of Eel River v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority, Case No. S222472*, currently pending before the California Supreme Court. See also Attachment 5, Supplemental Letter Brief filed August 9, 2013, in the matter of *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, No. C070877, at p. 3. "Courts and the STB [Surface Transportation Board] uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate."

California acknowledged federal preemption yet again when addressing that most relevant topic of rail transportation of crude oil. The California's Interagency Rail Safety Working Group stated, in a publication cited in the FEIR on other points: "The federal government has primary authority over railroad safety," and "Federal law governs most major aspects of rail transport, and preempts most state regulation." (Attachment 6, *Oil by Rail Safety in California*, June 10, 2014, pages 1, 5.) According to the report, the State, through the California Public Utilities Commission, shares authority with the federal government to enforce the federal safety laws and certain state safety rules, and state and local agencies

take the lead in emergency planning, preparedness and response. (*Id*., p. 1.) The report identified what it described as gaps or deficiencies in the regulatory program.[1] However, while it listed the numerous crude by rail projects undergoing review by local agencies – including the Phillips 66 Santa Maria Refinery project[2] – nowhere did the report suggest that local lead agencies are in a position to fill these gaps. Rather, the report recommended that the California Legislature provide additional funds for CPUC inspectors and for emergency preparedness and response. Clearly mindful of the scope of federal preemption, the report's other recommendations were phrased as requests to federal agencies to enhance their efforts, or requests to railroads to take certain actions. For example, the report recommended:

- The California Office of Emergency Services (OES) "should request that railroads provide a complete inventory of their firefighting and spill recovery resources to the state. (Report, p. 9.)
- OES "should request that the railroads provide 'Worst Case Scenario' plans for responding to a multi-car incident in any part of California." (*Id.)*
- "CPUC and OES should request that Class I railroads operating in California establish a system where emergency responders can securely log-in and access the daily location and status of rail cars and train consists". (Report, p. 11.)
- "The CPUC should request that the DOT [federal Department of Transportation] move expeditiously to finalize new and retrofitted tank car regulations that will result in a more rapid phase out of DOT 111 tank cars." (Report, p. 12)
- "The CPUC should request that the FRA [Federal Railroad Administration] identify routes that crude oil trains are expected to run on without PTC [positive train control] in California under current requirements and consider requiring the implementation of Positive Train Control on these routes." (*Id.*)
- "The CPUC should request that the FRA require electronically-controlled brake technology on crude oil trains." (Report, p. 13.)

The state agencies participating in the Interagency Rail Safety Working Group clearly understood the limits of their authority in light of preemptive federal law. These same limits apply to San Luis Obispo County.

In reviewing other crude by rail projects in California, other lead agencies have concluded that they are preempted from regulating the mainline rail operations or imposing mitigation for mainline impacts. For example, in 2014, Kern County concluded it was preempted from imposing mitigation measures directed at impacts from mainline rail activities supporting the project. See Attachment 7, Excerpts from the Final EIR for the Alon

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[1] Given the numerous actions taken by regulatory agencies in the past 18 months, the report's conclusions do not reflect the current state of regulation of crude by rail transportation.

[2] Report, p. 1.

Bakersfield Refinery Crude Flexibility Project, SCH# 2013091062, certified by Kern County on September 9, 2014. The recently released Final EIR and staff report from the City of Benicia reach a similar conclusion with respect to Valero's proposed Crude By Rail Project, scheduled to be heard by the city's Planning Commission on February 8, 2016. See Attachment 8, Revised Draft EIR for Valero's Crude By Rail Project, Appendix G; and Attachment 9, Staff Report to Planning Commission dated January 28, 2016 re Valero Crude By Rail Project.

The County's staff report for the Phillips 66 Project states that "federal law would *likely* limit the ability of the County to regulate the type and design of locomotives since they are owned and operated by UPRR to transport goods throughout the nation and because regulation of the types of locomotives that could be used for this project would likely interfere with interstate commerce." Staff Report p. 13. There is no justification for the staff to continue to pretend that there is uncertainty on this point. The federal law is clear. Staff has never identified any law or judicial decision that calls this into question. In short, federal law preempts all questions raised with respect to the proposed Project dealing with locomotive design, tanker car design, track design, and safety equipment for mainline operations, including such things as positive train control. Federal law also fully preempts all questions raised with respect to the proposed Project dealing with mainline rail operations, including routes, speed limits, and information disclosures to first responders. Again, staff has never identified any law or judicial decision suggesting to the contrary.

The FEIR portrays federal preemption over on-site Project components as uncertain. The staff report goes further, stating: "[I]t is clear that for the activities performed within the Santa Maria Refinery (SMR) site the County is not preempted by federal law since these activities would not occur on UPRR property and would not involve infrastructure or trains operated by UPRR." On this point, the staff report and FEIR are again incorrect. The FEIR describes the train unloading sequence at pages 2-26 to 2-27, and clearly discloses that the UPRR locomotives that deliver the train to the site are the same locomotives that will position the tanker cars for unloading, and will maneuver the tanker cars throughout the time that they are on-site. These locomotives are an integral part of interstate commerce – the tanker cars cannot arrive without the locomotives – and their status under federal law does not change when they cross the property boundary. In addition, their brief stay on Phillips 66's property does not give the County power over the locomotives and their impacts in ways that would otherwise be preempted by federal law.

The FEIR seems to be premised on the belief that if a mitigation measure is phrased as a requirement imposed on Phillips 66 rather than directly on the railroad, then preemption is less likely, even if the purpose and effect of the mitigation measure are the identical. This is an incorrect understanding of the law. In many cases, terminal operators have asserted – and courts have agreed – that activities associated with receiving trains and unloading cargo at terminals clearly fall within the federal preemption. See, for example, the *Norfolk Southern Railway Company v. City of Alexandria* case described above. Here in California, this view has been documented by the attorneys representing Valero with respect to its

crude by rail project in the City of Benicia. See Attachment 10, Letter from John Flynn of Nossamon LLP to Amy Million, City of Benicia, September 15, 2014, p. 6. In my letter of January 17, 2014 at page 8, I stated that in the specific facts of this case Phillips 66 would accept state and local regulation of the construction and operation within the Refinery site, so long as it is conducted in a way that does not infringe on federal preemption of the regulation of railroad operations. Specifically, I explained:

> Federal preemption affects the review and permitting in three important ways. First, the impacts from mainline rail operations should not be subject to CEQA conclusions regarding significant impacts. Likewise, the impacts of operations on the mainline may not be considered in deciding whether to approve or disapprove the proposed project. Finally, project approval may not be conditioned on implementation of mitigation measures or alternatives aimed at reducing impacts of mainline operations, or that would otherwise burden such transportation.

This remains Phillips 66's position.

C. Federal Law Preempts Many Mitigation Measures in the FEIR.

Ultimately, it is the job of the lead agency's decision-making body (here, the Planning Commission) to decide whether mitigation is feasible. Preempted mitigation measures are not feasible and should be rejected. Accordingly, in considering the Project, the Planning Commission should clearly identify which mitigation measures are preempted. This includes all measures that directly or indirectly regulate the equipment, operations, routes etc. of mainline rail network; measures that require Phillips 66 to enter into a contract with Union Pacific Railroad (UPRR) or that specify the terms of any such contract; and measures that impose costs or other burdens on Phillips 66 tied to the mainline rail operations and their impacts.

The CEQA Guidelines confirm that a lead agency's authority to require mitigation is limited by the United States Constitution. (CEQA Guidelines, §§ 15041(a), 15126.4(a)(4).) Additionally, where an EIR determines that a project may cause significant adverse impacts, CEQA requires only that the lead agency impose "feasible" mitigation measures to reduce the potential impacts. (*See* Pub. Res. Code §§ 21002, 21081.) "Feasible" is defined in the CEQA Guidelines as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, ***legal***, social, and technological factors." (CEQA Guidelines, § 15364, emphasis added.) Again, imposing mitigation measures that are preempted by federal law would be contrary to the U.S. Constitution. Thus, the preempted mitigation measures would be legally infeasible and would not be required mitigation under CEQA.

Judicial decisions applying CEQA confirm that the Planning Commission—not the FEIR—is ultimately responsible for determining whether a mitigation measure is feasible.

For example, in *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 999, the court evaluated a lead agency's analysis of feasible alternatives and held that "[w]hile it is up to the EIR preparer to identify alternatives as potentially feasible, the decision-making body may or may not reject those alternatives as being infeasible when it comes to a project approval." The same is true of mitigation measures. The *Native Plant Society* court further held that "[l]ike mitigation measures, potentially feasible alternatives are suggestions which may or may not be adopted by the decisionmakers," and the "[r]ejection [of alternatives] by the decision-makers does not undermine the validity of the EIR's alternatives analysis." (*Id.*; *see also No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256, holding "[t]he EIR is required to identify possible ways to minimize significant effects," and "[m]itigation measures are suggestions which may or may not be adopted by the decision makers." Thus, the Planning Commission must make the final determination as to whether certain mitigation measures are feasible to impose on the Project, and a finding of infeasibility will not undermine the adequacy of the FEIR as an informational document.

For the reasons explained further above in Section I.B., many of the mitigation measures presented in the FEIR are preempted by federal law under the Supremacy and Commerce Clauses of the U.S. Constitution and therefore cannot be imposed by the County. The following measures are fully preempted and must be rejected in their entirety: AQ-3; AQ-5; BIO-11; CR-6; HM-2a; HM-2b; HM-2c; text following HM-2d; PS-4a; PS-4b; PS-4c; PS-4d; PS-4e; TR-4; and WR-3. The following measures are preempted to the extent they require mitigation for impacts from mainline rail activities, and must be edited to remove the preempted requirements: AQ-2a; AQ-4a; AQ-6; AQ-8; and N-2a. Attachment 11 to this letter presents more detail regarding the preempted mitigation measures.

D. The Reduced Rail Deliveries Alternative.

The Revised Draft EIR presented the Reduced Rail Deliveries Alternative as a means of avoiding or reducing impacts from mainline rail operations, including locomotive emissions and other impacts. But it would be impermissible for the Planning Commission to approve the Reduced Rail Deliveries Alternative in lieu of the Proposed Project in order to reduce mainline rail impacts. As described in my letter of November 24, 2014, due to federal preemption, local governments do not have the authority to restrict a shipper's access to the interstate rail network because they object to the impacts from the mainline rail operations. (*See* FEIR, Comment AB-11.)

The FEIR now presents additional analysis that puts the Reduced Rail Deliveries Alternative in a different light. Specifically, the revised Health Risk Assessment in the Final EIR (FEIR Appendix B.2) demonstrates that with the Reduced Rail Deliveries Alternative, all impacts from equipment and operations under the jurisdiction of the County (i.e., the non-preempted equipment and activities) would be reduced to less than significant. (*See* FEIR pp. 5-51 to 5-63, and 5-69.) The FEIR does not identify any Class I impacts from the Reduced Rail Deliveries Alternative other than those associated with

mainline rail operations.[3] Accordingly, the County may consider approval of the Reduced Rail Deliveries Alternative as a means of reducing impacts under its regulatory authority, and Phillips 66 would not object to such an approval on preemption grounds, provided the approval does not include the impermissible, preempted mitigation measures identified in Attachment 11.[4]

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[3] The staff report states that on-site emissions from the Reduced Rail Delivery Alternative would exceed a DPM significance threshold of 1.25 pounds per day. Staff Report, p. 21. However, 1.25 pounds appears to be an arbitrary and irrelevant value. The FEIR references the April 2012 SLOCAPCD CEQA Air Quality Handbook as the source for the 1.25 pounds-per-day threshold. FEIR p. 4.3-34. The SLOCAPCD in turn references another document – the Carl Moyer Program Guidelines – as the origin of the 1.25 pound per day threshold. See Attachment 12, SLOCAPCD CEQA Air Quality Handbook, p. 3-4. Yet there is no mention of any such threshold in the Carl Moyer Program Guidelines, which relate to the administration of certain grants by the California Air Resources Board and have no connection whatsoever to CEQA. Due to its length and irrelevance, the Carl Moyer Program Guidelines are not attached, but can be found at http://www.arb.ca.gov/msprog/moyer/guidelines/2011gl/2011cmpgl_20151218.pdf. The document contains no discussion of CEQA, contains no emissions thresholds established to protect public health, and uses the word 1.25 only four times, for completely unrelated purposes. See Carl Moyer Guidelines at pages 13-11, 13-1, 13-14, and G-3. As a practical matter, the 1.25 pound per day value can be applied as a screening threshold that triggers additional, more sophisticated analysis. See, e.g., SLOCAPCD CEQA Air Quality Handbook p. 3-5: "Diesel particulate matter (DPM) is seldom emitted from individual projects in quantities which relate to local or regional air quality attainment violations. DPM is, however, a toxic air contaminant and carcinogen, and exposure [to] DPM may lead to increased cancer risk and respiratory problems." For projects that emit more than 1.25 lbs/day of DPM, "[i]f sensitive receptors are within 1,000 feet of the project site, a Health Risk Assessment (HRA) may also be required." This is precisely what occurred in this case. The FEIR evaluates DPM as a toxic air contaminant (FEIR pp. 4.3-21-24; 4.3-64 to -68; 5-56 to 5-59), and demonstrates that the health risk associated with DPM from on-site activities would be reduced to less than significant as a result of the Reduced Rail Delivery Alternative (FEIR pp. 5-56 to 5-59). The assertion in the staff report that the DPM from on-site activities "would contribute to the localized PM10 emissions, which already exceed the State PM10 air quality standard" (Staff Report p. 21) is disingenuous if not flatly wrong. The FEIR concludes that "rail spur operations are not anticipated to contribute to additional exceedances" of the state standard because the meteorological conditions causing the current exceedances (i.e., strong winds out of the northwest) would actually "produce substantial dispersion of the diesel PM emissions from the project site." FEIR p. 4.3-53.

[4] As described above, other terminals have asserted that federal law preempts local regulation of terminals or unloading facilities as well as mainline rail operations. We agree this is generally a correct statement of law. But in the specific circumstances of this Project,

The County's consideration of the Reduced Rail Deliveries Alternative will not require further environmental review under CEQA. The Reduced Rail Deliveries Alternative is identical to the proposed project, except under this alternative, the Refinery would receive only a maximum of three train units per week (with up to 150 trains per year) instead of the proposed five trains per week (with up to 250 trains per year). The FEIR already evaluates the potential environmental impacts of this alternative and concludes all impacts from this alternative under the County's jurisdiction would be reduced compared to the proposed Project. Environmental documents need not be revised when a project is modified to reduce a project's potential environmental impacts. (See *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* ("*Western Placer*") (2006) 144 Cal.App.4th 890, 902-03; *Dusek v. Anaheim Redevelopment Agency* ("*Dusek*") (1985) 173 Cal.App.3d 1029, 1041; see also *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199 [holding "[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision to the original proposal"].)

For example, in *Western Placer*, the Court upheld an EIR after the County revised a proposed mining project to lessen its environmental impacts. (*Western Placer*, *supra*, 144 Cal.App. at p. 902-03.) The County did not incorporate that modification into a revised project description and did not recirculate the final EIR for that project. Yet the Court upheld the County's environmental review, holding that challengers to the project pointed to "no provision in CEQA or the Guidelines, and we have found none, that requires all changes made to a project after the final EIR is released but prior to certification to be included in the EIR." (*Id.* at p. 899.) As the *Western Placer* Court highlighted, the public agency was able to work with the project applicant and the public to identify ways in which the environmental damage from the proposed mining project could be avoided or significantly reduced, and through that process "CEQA fulfilled its purpose." (*Id.* at p. 905.) The *Western Placer* Court further held that "CEQA did not require the [public agency] to delay the project further in order to evaluate the new project's reduced impacts on the environment." (*Id.*)

In *Dusek*, the Court similarly upheld an EIR and project approvals to demolish a historic hotel after the public agency approved a project that was a reduced version of what was contemplated in the EIR. The Court noted that the EIR's project description was much broader than the project ultimately approved, but the EIR still addressed the environmental consequences of demolishing the hotel. (*Dusek*, *supra*, 173 Cal.App.3d at p. 1041.) As the Court held, the EIR fully analyzed the portion of the project ultimately approved – demolition of the hotel. The Court further held, "CEQA does not handcuff decisionmakers in the manner proposed by the [petitioners of the project]." (*Id.*) The Court continued, the

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Phillips 66 has elected not to assert preemption with respect to an alternative aimed at reducing impacts from activities conducted the Refinery site.

project approved "need not be a blanket approval of the entire project initially described in the EIR. If that were the case, the informational value of the document would be sacrificed. Decision-makers should have the flexibility to implement that portion of the project which satisfies their environmental concerns." (*Id.*)

Like the reduced projects considered in *Western Placer* and *Dusek*, the Reduced Rail Deliveries alternative is a reduced version of a project that was already fully analyzed in the FEIR. CEQA gives a lead agency the flexibility to implement a portion of a project contemplated in an EIR to satisfy that lead agency's environmental concerns. The Reduced Rail Deliveries Alternative is exactly the same as the proposed project in the FEIR, but will lead to no significant environmental impacts as a result of equipment and activities on the Refinery site. Thus, further environmental review of the Reduced Rail Deliveries Alternative is not required.

II. THE COUNTY'S ESHA PROVISIONS DO NOT BAR PROJECT APPROVAL.

The County's ordinances impose additional requirements for approval of development in an Environmentally Sensitive Habitat Area (ESHA), but these provisions do not bar approval of the Rail Spur Extension Project. The FEIR correctly states that there is no "Mapped ESHA" on site, but confusingly alludes to the "potential" for Unmapped ESHA and to EHSA as defined by Coastal Commission guidelines that do not apply to the County's decision on this Project. The staff report goes a step further and wrongly declares—contrary to fact and law—that the site should be designated as Unmapped ESHA. There is no basis for concluding at this late stage of the permitting process that there is Unmapped ESHA on the Project site. Even if ESHA were present, and contrary to the staff report's assertion, the Planning Commission still can find the Project consistent with the additional ESHA-related requirements in the County's ordinance.

A. There Is No Basis for Designating the Site As ESHA.

1. Legal Background[5]

Under the County's ordinances, there are only two kinds of ESHA that the County has the power to designate on a parcel in the coastal zone: "Mapped ESHA" and "Unmapped ESHA." The County's Coastal Zone Land Use Ordinance (CZLUO) provides specific

[5] On August 13, 2015, we submitted a letter to Deputy County Counsel, Ms. Whitney McDonald, detailing the reasons the Project site cannot be designated "Unmapped ESHA." The letter was not included or referenced in the FEIR. Accordingly, the 2015 letter is Attachment 13 to today's letter in order to ensure its consideration and inclusion in the record. We urge the Commission to review the letter for a comprehensive overview of the scientific and legal reasons why the Project site cannot be designated as Unmapped ESHA.

definitions for these two legal concepts. CZLUO § 23.11.030. Both concepts are defined in terms of science (the presence of certain biological resources) and legal process. Simply put, a parcel that satisfies neither definition cannot be found to contain ESHA. There is no other kind of ESHA defined or recognized by the CZLUO, which is the sole authority on ESHA in the County's coastal zone.

Mapped ESHA refers to areas that contain certain sensitive habitat ***and*** that are depicted as combining designations on the County's zoning land-use maps. The combining designations are special overlay categories that clearly identify where more detailed project review is needed to avoid adverse environmental impacts. (FEIR p 4.8-2.) Mapped ESHA on the Phillips 66 property occurs only west of the UPPR railroad property. There is no mapped ESHA in the project area (east of the UPRR railroad property).

In areas that are not mapped as ESHA as part of the combining designations on the zoning maps, the County's ordinance provides limited power to designate Unmapped ESHA. The ordinance specifies an unambiguous deadline by which an Unmapped ESHA designation must be made with respect to a specific parcel and development proposal. County staff can designate an area as Unmapped ESHA only "***at or before the time of application acceptance,***" based on the best information available to it at that time. CZLUO § 23.11.030 (emphasis added). This definition was carefully crafted to strike a balance between (1) the need to protect sensitive habitat and (2) the need to protect both project applicants and the County against an unpredictable and burdensome permitting process. The FEIR purports to apply the portion of the definition of Unmapped ESHA dealing with the presence of biological resources, but ignores the portion of the definition dealing with legal process and timing, even though the latter has always been viewed as critical to achieving the balance desired by the County in adopting the ESHA provisions. (*See* FEIR p. 4.4-26.)

The history of the Unmapped ESHA definition clearly establishes that both the County and the Coastal Commission believed any designation of Unmapped ESHA would need to be made early in the application process. For example, on February 2, 2001, when the Coastal Commission and the County were just starting to discuss updating the County's Local Coastal Plan (LCP) to include an Unmapped ESHA power, the Coastal Commission recommended a very involved process (ultimately rejected) whereby the Coastal Commission and other agencies would "review" the County's and applicant's final on-site biological reports and ESHA delineations "before applications for development in or adjacent to ESHA are filed as complete" so as not to impose "undue delays in the development review process."[6] In a July 12, 2001 report, the Coastal Commission revised its recommendation to suggest that any such review by it and other agencies be completed within 14 days of receipt—again so as not to impose "undue delays in the development

[6] *See* http://documents.coastal.ca.gov/reports/2001/2/Th5b-2-2001.pdf at p. 124. A copy of relevant pages from this document is attached to this letter as Attachment 14.

review process."[7] The County agreed with the Coastal Commission about the need for early decisions regarding designation of Unmapped ESHA, "underscor[ing] the importance of identifying ESHA issues early in the review process."[8] Thus, both the Coastal Commission and the County agreed the designation of any Unmapped ESHA should be done very early in the application-review process. The two agencies had different views about *how* to conduct the on-site study for Unmapped ESHA, with the Coastal Commission calling for a more costly and lengthy process, and the County insisting on a more streamlined process. But at all times, the Coastal Commission and the County shared the same aversion to imposing undue delays and costs in the application review process.

Ultimately, the Coastal Commission certified the County's language, which allows Unmapped ESHA designations to be made only "at or before the time of application acceptance." CZLUO § 23.11.030. This compromise language is consistent with the Coastal Commission's and County's oft-repeated goal of ensuring that such designations be made early on in the application process and that the Unmapped-ESHA power not impose undue delays on the application review process. The result is a predictable and reliable application review process, not just for applicants, but for the County as well. The existence of a strict legal deadline for designating Unmapped ESHA insulates the County from later claims that it could have or should have undertaken on-site inspections, studies, and analyses throughout every stage of application review—which often spans many years, as it does in this case.

In sum, the purpose and text of the Unmapped ESHA provision make clear that the County can designate Unmapped ESHA on a parcel only at or before the time it accepts an application for a development project as complete. The definition promotes the County's and Coastal Commission's twin goals of ensuring protection for unmapped sensitive habitat while simultaneously protecting the rights of applicants and the interests of the County. Implementation of the Unmapped ESHA provision must be consistent with both goals.

2. The FEIR's Discussion on ESHA

The FEIR concludes the Project site has no Mapped ESHA. (FEIR at 4.4-26.) We agree.

With respect to Unmapped ESHA, the Revised Draft EIR explicitly states that staff found no Unmapped ESHA on the site at or before the time that it accepted Phillips 66's application as complete on July 12, 2013. (*See* Revised Draft EIR at 4.4-24.) We agree with this conclusion as well. The "no Unmapped ESHA" finding was and continues to be supported by the best available information supplied by Phillips 66 and corroborated by County staff before application acceptance in July 2013. While the FEIR omits the explicit

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[7] *See* http://www.coastal.ca.gov/recap/slo/slo-esha.pdf, at p. 138-39. A copy of relevant pages from this document is attached to this letter as Attachment 15.

[8] *See id.* at p. 134.

statement that staff found no Unmapped ESHA present on the Project site at or before the Project application was accepted as complete, it does not contradict the Revised Draft EIR on this point. Thus, all the information in the Revised Draft EIR and the FEIR is consistent: Using the best available information, the staff found no Unmapped ESHA on the Project site at or before the time it accepted the application for the Rail Spur Extension Project, which is the only relevant time period for this Project.

Unfortunately, the FEIR then introduces confusion through vague references to categories of ESHA that the CZLUO does not recognize. Those references may mislead the Planning Commission to believe that it should designate the project site as Unmapped ESHA, despite the fact that the time for making such a designation expired 2-1/2 years ago.

The FEIR states that the site "***appears*** to meet the definition of Unmapped ESHA" (FEIR at 4.4-31 (emphasis added)), and that some of the more recent information "***suggests*** the ***potential*** for Unmapped ESHA" (FEIR at 4.4-26 (emphasis added)).[9] But under the CZLUO, a site either does or does not have Unmapped ESHA, and an Unmapped ESHA designation has legal consequence only if it is made at or before the time the application is accepted. There is no basis in the law for treating a parcel as Unmapped ESHA based on suggestions of its potential, particularly where such suggestions arise years later. The only possible legal relevance of the FEIR's references to "apparent," "suggested," or "potential" ESHA is that they highlight the fact that even as late as December 2015 when the FEIR was released, the staff could provide no findings supporting a determination of Unmapped ESHA within the parameters of the County's ordinance. Beyond that, the FEIR's vague inferences regarding ESHA have no legal effect.[10]

The FEIR also states that "the site was evaluated to determine whether ESHA is present, per the ESHA Identification guidance of the California Coastal Commission (July 31, 2013)." (FEIR at 4.4-30.) The FEIR is referring to the Commission's "LCP Update Guide," which advises cities and counties about ways to update their LCPs to maximize ESHA protection.[11] After some discussion about the Coastal Commission's guidelines,

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[9] In the Land Use chapter, the FEIR states more definitively that "unmapped ESHA was determined to be present" (*see* p. 4.8-19), but refers the reader to Section 4.4.4 of the EIR for a discussion of that determination. Section 4.4.4 contains only the vague references to suggestions of potential ESHA, and to time periods not relevant under the County's ordinance. Accordingly, there is no evidence in the FEIR supporting the statement in the Land Use chapter.

[10] The more recent information giving rise to suggestions of potential Unmapped ESHA may be relevant to a ***future*** application affecting the Phillips 66 Refinery site, ***if*** additional analysis leads the County to definitively designate Unmapped ESHA at or before the time of acceptance of such a future application. But it has no bearing on the Rail Spur Extension Project.

[11] http://www.coastal.ca.gov/lcp/LUPUpdate/LUPGuidePartI_4_ESHA_July2013.pdf.

the FEIR finds that the project "meets the definition of ESHA as defined in the guidelines set forth by the California Coastal Commission for defining ESHA." FEIR at 4.4-31. There are several fatal problems with this analysis.

First, the CZLUO, a part of the County's certified LCP, is the *only* legal authority for making ESHA determinations in the County's coastal zone. No other authority, including informal guidelines issued by another agency, governs the designation of ESHA within the County's jurisdiction. Pub. Res. Code § 30603(b)(1) (any appeal to Coastal Commission must be based on violation only of LCP and public-access policies of Coastal Act); *Security National Guarantee, Inc. v .Cal. Coastal Comm'n*, 159 Cal.App.4th 402, 422-23 (2008) (a local government's certified LCP exclusively governs over those issue as to which it speaks). Second, the Coastal Commission guidelines that the FEIR invokes do not even purport to be legally binding or relevant here. They constitute the Coastal Commission's guide for cities and counties that are updating their LCPs—not for those municipalities that are applying certified LCPs to particular projects. Third, reliance on the Coastal Commission's LCP Update Guide to designate Unmapped ESHA on the site would violate section 23.11.030 of the CZLUO, which required staff to make a definitive finding on Unmapped ESHA on the Rail Spur Extension Project site no later than July 12, 2013—*before the Coastal Commission's LCP Update Guide was even published*. For these reasons, the Planning Commission should give no weight to the FEIR's conclusions on the ESHA issue, as analyzed using the Coastal Commission's LCP Update Guide.

3. Staff Report's Recommendation on Unmapped ESHA

Nor should the Planning Commission accept the staff report's even more confused treatment of the Unmapped ESHA issue. The staff report acknowledges the deadline imposed by the CZLUO's "unmapped ESHA"—namely, that an Unmapped ESHA designation must be made "at or before the time of application acceptance." And the staff report concedes that the deadline was the product of efforts by the County and the Coastal Commission to designate any Unmapped ESHA on a parcel "at the earliest possible point in processing a coastal permit." (Staff Report, Exh. A at 1.) But then the staff report proceeds to recommend the Project site for Unmapped ESHA designation—2-1/2 years after application acceptance. The staff report justifies its circumvention of the legal deadline on several flawed grounds that the Planning Commission should reject.

First, the staff report claims that it is "often" impossible for staff to satisfy the legal deadline for making Unmapped ESHA determinations, because Department staff have only "limited, if any, information" at or before the time of application acceptance. (Staff Report, Exh. A at 1.) The implication is that staff is at the mercy of a deadline that it cannot control. But that is simply untrue.

The "Unmapped ESHA" definition dictates that a decision on Unmapped ESHA must be made by the time the application is accepted as complete, but staff itself determines when to accept an application as complete. In this important sense, staff is in control of the

deadline. As long as staff has assessed an application as incomplete, the time for making an Unmapped ESHA determination remains open. But as soon as staff accepts the application as complete, that date becomes the deadline for making Unmapped ESHA determinations. Thus, if staff believes that an application is not supported by the best available information concerning the presence or absence of Unmapped ESHA on a site, it has the option of not accepting the application as complete and specifying what information is necessary for the application's acceptance. Gov't Code § 65943. Put differently, nothing in section 23.11.030 or any other provision requires staff to ***accept*** applications that are incomplete—including applications that lack sufficient information to decide the Unmapped ESHA issue. Section 23.11.030's twin mandates that any Unmapped ESHA determination be made "at or before the time of application acceptance" ***and*** be based on the "best available information" always can (and must by law) be satisfied.

Second, the staff report attempts to excuse its untimely Unmapped ESHA declaration with the explanation that it is difficult to make early Unmapped ESHA determinations because often "technical studies pertaining to ESHA have yet to be prepared or peer reviewed." (Staff Report, Exh. A at 1.) The "Unmapped ESHA" definition does not impose a qualitative requirement on the kind of information that is necessary to make the determination. It only requires the "best ***available*** information," not the best information that could be created or compiled at some future time. CZLUO§ 23.11.030 (emphasis added). Nor does the definition equate "best available information" with "peer-reviewed studies," as the staff wrongly assumes. The best information available at or before the time of application acceptance could be a peer-reviewed study, or it could just as validly be multiple comprehensive studies of the project site undertaken by the applicant's consultant (as in this case). To interpret section 23.11.030 as requiring staff to wait until it has the best possible information, or until it has a "peer reviewed" study, is to add words to the definition of "Unmapped ESHA," while simultaneously deleting the clear deadline it imposes. And that misinterpretation undoes the careful, common-sense balance that the ordinance strikes between the need to protect actual sensitive habitat (using the best current information "available"), without unduly burdening the application-review process (by insisting that any Unmapped ESHA determination be made "at or before the time of application acceptance.")

As staff acknowledges, Phillips 66 ***did*** prepare and submit no fewer than three comprehensive technical studies characterizing, quantifying, and mapping the ecological resources of the project site prior to application acceptance in July 2013. [12] These studies

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[12] Phillips 66 submitted to staff its "Wildlife and Habitat Assessment" on March 10, 2013, and its "Biological Assessment" and "Botanical Assessment" on June 13, 2013. Before application acceptance, staff had over *four* months to review the first study, and one month to review the second and third studies. Those studies satisfied all of the County's stringent requirements for biological surveys—both at the time they were undertaken and today. The County's Guidelines for Biological Resources Assessment, 2015 (2016 Draft) do not specify a particular vegetation classification scheme to be followed by biological

were prepared following the County's robust and comprehensive Guidelines for Preparing Biological Resources Studies. The descriptions of the plant community characteristics and wildlife resources provided in those studies are entirely consistent with the subsequent studies provided by the County's consultants and presented in the FEIR. Phillips 66's studies clearly constituted the best available information necessary to make an Unmapped ESHA determination by that time. But staff remarkably dismisses those studies on the grounds that they were not "peer reviewed by the EIR consultant and fully vetted during the Draft EIR public review process" under CEQA. *Id.* But staff confuses what is necessary for an Unmapped ESHA determination and what is necessary for adequate EIR review under CEQA. Importantly, nothing in CEQA requires that the determination of "Unmapped ESHA"—a special creature of the County's ordinance—be based on peer-reviewed studies. While CEQA may require that EIRs provide the most accurate information about a project and its potential impacts, it does not require that particular *legal conclusions* be drawn, like whether certain facts justify designating an area as "Unmapped ESHA." *Banning Ranch Conservancy v. City of Newport Beach*, 236 Cal. App. 4th 1341, 1359 n.13 (2015) (holding that CEQA did not require city to identify ESHA (a "legal conclusion") in its EIR).[13]

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consultants. Currently, there are several classification systems in widespread use by biological experts, including the Holland plant community classification system used in the technical reports submitted by Phillips 66. The County has approved other projects reviewed using the Holland classification system as recently as 2015. For example, the Mitigation Monitoring Plan for the 33 acre expansion of the Hanson Santa Margarita Quarry (SCH# 2013061051) requires compensation ratios of 1:1 or 3:1 based on the Holland plant communities of oak woodland, riparian woodland, northern mixed chaparral and chamise chaparral. (See http://www.slocounty.ca.gov/Assets/PL/environmental/HansonAggregatesFIER/Appendix+A+Mitigation+Monitoring+Plan.pdf .) Staff's recent vegetation findings purport to follow vegetation-type schemes that the County's survey requirements do not mandate. (*See, e.g.*, Staff Report, Exh. A at 5, identifying "sensitive vegetative communities" on the Project site based on the vegetation classification system described in "A Manual of California Vegetation," which is not prescribed by the County's survey requirements). A desire to transition to a different classification system 2 ½ years after the deadline for deciding Unmapped ESHA does not justify failure to meet that deadline.

[13] In addition to being legally groundless, the staff report's suggestion that the Unmapped ESHA decision took 2-½ years because it needed to be peer reviewed is not factually credible. Certainly, the County's expert technical consultants reviewed the technical reports of Phillips 66's expert biologists and botanists in order to prepare the Draft EIR, which was released for public review in November 2013. If peer review were not conducted prior to release of the Draft EIR, certainly it occurred in the ten-month interval between January and October 2014, when the Draft EIR was being re-written. Yet both documents expressly concluded that the Project site contained no Unmapped ESHA. The only possible conclusion supported by the facts is that during the first two or more years of permit evaluation and environmental review, the expert opinion of the County's staff

Third, the staff report asserts that abiding by the deadline imposed by the "Unmapped ESHA" definition would be "inconsistent with the Local Coastal Program because it would not include the best available data." But the report has it exactly backwards: To ignore the deadline is to violate the ordinance's definition, which the Coastal Commission certified as part of the County's LCP. The staff report's concern is based on an imagined conflict between the requirement that Unmapped ESHA determinations be made at or before the time of application acceptance and the requirement that it be based on the best available information. The definition does not present these two requirements in the disjunctive (i.e., "either … or"), leaving it to staff's discretion to decide that the "best available information" mandate always trumps the deadline—as staff has done in this case. Rather, the requirements are in the conjunctive so that both must be satisfied. And, as a practical matter, they ***can*** be: Unmapped ESHA determinations must be made based on the best information available at or before the time of application acceptance.

Fourth, the staff reports remarkably claims that it somehow was *Phillips 66*'s fault that staff could not comply with the deadline imposed by the "Unmapped ESHA" definition. The staff report states that, upon filing its application (May 2, 2013), Phillips 66 requested and staff agreed to a "facilitated" schedule that would culminate in a Planning Commission hearing within 14 months. (Staff Report, Exh. A at 2.) Setting aside the fact that this schedule was not met, staff merely committed to process the application approximately by the deadline for County action established by CEQA and the Permit Streamlining Act. *See* Pub. Res. Code § 21100.2 (EIR must be completed within twelve months); Gov't Code § 65950 (lead agency must act on project within 180 days of certification of EIR). This is not expedited review or special treatment; it is compliance with the law.

Even if the staff report's recitation of purported facts were correct, staff never told Phillips 66 that it would ignore the legally mandated deadline for determining Unmapped ESHA, let alone as a condition of complying with CEQA and Permit Streamlining Act deadlines. Phillips 66 asked for timely CEQA review. It did not ask for the Unmapped ESHA question to be postponed until the very end of the CEQA review process.

Fifth, staff seems to be operating under the misimpression that the California Coastal Commission was the author and is the chief implementer of the Unmapped ESHA ordinance. In its report, staff incorrectly asserts that it was the *Coastal Commission* who "includ[ed]" the "Unmapped ESHA" definition in the CZLUO, and that the Coastal Commission's "intent . . . is to ***require*** the Department to determine on a project-by-project basis . . . whether Unmapped ESHA is present . . . ." (Staff Report, Exh. A at 1 (emphasis added)). In the same vein, the staff report goes on to tout a Coastal Commission visit to the Project site on May 27, 2015, and the fact that the Coastal Commission

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and its own consultants was that the Project site contains no Unmapped ESHA. The law has not changed in the past six months. The biological resources have not changed in the past six months. The conclusion on Unmapped ESHA should not have changed.

"corroborate[d]" staff's "Unmapped ESHA" determination. (*Id.* at 2.) Staff invited the Coastal Commission to do a joint site visit. It is now clear that the Coastal Commission influenced, if not outright ordered, staff to designate the Project site as "Unmapped ESHA." (Staff Report, Exh. D (Coastal Commission letter expressing its "understanding" (i.e., *expectation*) that County staff "is to . . . consider[] [the habitat on the Project site] an environmentally sensitive habit area").)

The Planning Commission should vigilantly guard the County's jurisdiction against inappropriate, if not unlawful, encroachment by outside agencies. The Coastal Commission has no authority to "include" any law in a local government's Local Coastal Program, let alone "require" the County or its staff to do its bidding. Quite the contrary, "[t]he precise content of each local coastal program shall be determined by the local government." Pub. Res. Code §§ 30500(c), 30512.2 ("[T]he commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan."). Equally important, once there is a certified LCP, the local government is the agency responsible for the LCP's implementation—not the Coastal Commission, let alone its staff. *Yost v. Thomas*, 36 Cal. 3d 561, 574 (1984) (has "wide discretion . . . to determine how to implement certified LCPs). At present, the Project is within the County's original permitting authority, and the County has the exclusive right and obligation to apply its own laws as written, including the ordinance defining "Unmapped ESHA."

The Coastal Commission is also bound by the Unmapped ESHA provision in the County's LCP because it certified the provision under the California Coastal Act. The Coastal Commission may no longer like the "Unmapped ESHA" definition that it certified several years ago. It may wish there were no deadline for determining Unmapped ESHA. But the Coastal Commission cannot—and should not—use its authority to influence or direct staff in staff's interpretation and application of the LCP in a manner contrary to the clear language and original legislative intent. If the Coastal Commission has an issue with the Unmapped ESHA definition, it can recommend an amendment or appeal to the California Legislature for a change to the California Coastal Act. Until then, the Coastal Commission and County staff should acknowledge the Coastal Commission's very limited ***appellate*** jurisdiction. In 2012, the Court of Appeal took the Coastal Commission to task for its unlawful attempt to amend a local government's LCP, holding:

> The Coastal Commission cannot "diminish or abridge the authority of a local government to adopt ... the precise content of its land use plan." ([Pub. Res. Code] § 30512.2, subd. (a).) Development review authority can no longer be exercised by the Coastal Commission and is "delegated to the local government that is implementing the local coastal program," with limited rights of appeal to the Coastal Commission. (§§ 30519, 30603.) Indeed, if the Coastal Commission determines that a certified LCP is not being carried out in conformity with a policy of the Coastal Act, the Coastal Commission's power is limited to recommending amendments to the local

> government's LCP; and if the local government does not amend its LCP, the Coastal Commission's only recourse is to recommend legislative action. (§ 30519.5.)[14]

City of Malibu v. Cal. Coastal Comm'n, 206 Cal. App. 4th 549, 563 (2012).

To summarize, the deadline for making an "Unmapped ESHA" determination was July 12, 2013, when the staff chose to accept Phillips 66's application. County staff did *not* find "Unmapped ESHA" on the Project site at or before application acceptance, based on the best information available at that time—namely, comprehensive environmental studies submitted by Phillips 66 that were prepared by biologists on the County's approved consultant list and in full conformance with the County's guidelines for biological report preparation. Regardless of what the Coastal Commission may think the County should do, the ordinance bars reconsideration of the Unmapped-ESHA issue at this late date. *See also* Pub. Res. Code § 30604(b) ("After certification of the local coastal program, a coastal development permit shall be issued if the issuing agency or the commission on appeal finds that the proposed development is in conformity with the certified local coastal program."); *Douda v. Cal. Coastal Comm'n*, 159 Cal. App. 4th 1181, 1192 (2008) ("[A]n issuing agency cannot deviate from a certified local coastal program and designate an additional environmentally sensitive habitat area.")

4. Fairness and Public Policy Considerations Militate Against a Belated Unmapped ESHA Designation

In addition to the requirements of the law, basic fairness and sound public policy dictate a finding of "no Unmapped ESHA" on the Project site. Phillips 66 relied both on the clear language of the Ordinance and on staff's "no Unmapped ESHA" representations to proceed with its application, after the County accepted it in July 2013. In so doing, Phillips 66 invested significant amounts of time and money to work towards project approval.

The belated emergence of new and legally unauthorized concepts—"potential" Unmapped ESHA or ESHA as defined by the Coastal Commission's LCP Update Guide—could result in new, unwarranted obstacles or burdens on development of the land. This is especially so if the Planning Commission treats a belated suggestion of these unauthorized categories of ESHA the same as a designation of actual Unmapped ESHA made "at or before the time of application acceptance," as required by the ordinance. Such a reversal on the "Unmapped ESHA" issue would be unfair to Phillips 66 and to those who have worked diligently over the past 2-1/2 years to see this application through to a final EIR. Phillips 66 has spent several million dollars on application preparation, processing, and EIR preparation. The Declaration of Mr. Bill Schroll itemizes the costs incurred by Phillips 66

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[14] Despite its significant involvement and influence in this Project, the Coastal Commission is inexplicably omitted from the list of agencies and individuals with whom staff consulted during the EIR.

subsequent to application acceptance in July 2013. *See* Attachment 16, p. 4, ¶ 15. Of the total amount, approximately $1,423,898 was paid directly to the County. The deadline in the ordinance for designating Unmapped ESHA was designed precisely to avoid imposing these costs on applicants on sites where the presence of ESHA would preclude or constrain development.

The Planning Commission also should consider the general public policy implications of belatedly designating parcels as Unmapped ESHA. Such a belated designation in this case will set a dangerous policy precedent for future applicants. As discussed above, the Ordinance's deadline protects the rights of project proponents and the interests of the County. It guarantees an orderly and predictable permit process that permit applicants and County staff can both rely on. A contrary rule permitting the County to make Unmapped ESHA designations *at any time*—including at the very end of the application review process, in the Final EIR—would wreak havoc on that orderly and predictable permit process. Sound public policy demands that an applicant know early in the process whether and how the ESHA provisions in the CZLUO may affect the feasibility or design of the project site *before* expending years and millions of dollars trying to secure authorization.

B. The Planning Commission May Approve the Project Even if the Site Could Be Designated As Unmapped ESHA.

The FEIR omits any discussion of the consequences of an Unmapped ESHA designation to Project approval. But even if there were Unmapped ESHA in or adjacent to the Project site, the Planning Commission may still approve the Project consistent with the County's LCP. Indeed, the LCP affirmatively supports certain developments, including the Project, in and around alleged ESHA.

Section 23.07.170 of the CZLUO clearly contemplates that development can occur in or adjacent to ESHA. For example, subsection (a) sets forth the requirements for "[a] land use permit application for a project on a site located within or adjacent to an Environmentally Sensitive Habitat"; if a project in or near ESHA were categorically prohibited, no such application process would be needed. Similarly, subsection (b) sets forth the required findings before the County may grant "[a]pproval of a land use permit for [such] a project." And subsection (e) requires that development in or adjacent to ESHA "shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values," establishing that projects with less-than-significant impacts on habitat values are allowed.

Against this permissive backdrop, section 23.07.170(e) contains a nonexclusive list of "[c]ircumstances in which a development project would be allowable within an ESHA." The list illustrates the kinds of projects approvable in ESHA and the relevant conditions of approval. Among these are projects that involve "habitat creation and enhancement," like Phillips 66's Rail Spur Extension Project.

Under section 23.07.170(e), where a project "results in an unavoidable loss (i.e., temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant…. Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ('same-kind') and within the same biome ('same-system'), and shall be permanently protected by a deed restriction or conservation easement."

Phillips 66 has proposed and the EIR requires on-site restoration of dune habitat ("same-kind"); Phillips 66 has prepared a dune habitat restoration plan; and Phillips 66 has identified a suitable location on its property ("same-system") to implement the restoration. The proposed on-site native habitat restoration meets or exceeds the 2:1 replacement ratio specified in the EIR (Mitigation Measure BIO 5-a), and results in *a net increase in high quality native dune habitat on the Phillips 66 property following development of the Project.* Indeed, the habitat that would be created would be of much better quality than that impacted by Project construction. According to the FEIR, the Project site "has been highly disturbed and degraded from agricultural, industrial, and human activities for several decades … Removal of agricultural practices and large-scale restoration efforts would be necessary to restore the functions and values to the area." FEIR p. 4.4-31.[15] In other words, the acreage that will be adversely impacted by the Project is not currently functioning effectively as habitat.

Moreover, the County's Coastal Plan Policies affirm the vital economic importance of the energy-development industry, including refineries like Phillips 66 that are "coastal-dependent." A "Coastal-Dependent Development or Use" is "[a]ny development or use that requires a permanent location on or adjacent to the ocean." Coastal-dependent development has "priority" over other development on the coast, and "shall be encouraged to . . . expand within existing sites and shall be permitted reasonable long-term growth." County of San Luis Obispo, Coastal Plan Policies (Revised April 2007), Chapter 4, at 4-1 (quoting Public Resources Code sections 30001.5, 30255, and 30260). Importantly, "where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of [the Coastal Act], they may nonetheless be permitted . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible." *Id.* at 4-1 to 4-2 (quoting Public Resources Code section 30260).

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[15] See also FEIR p. 4.4-40: "Short term impacts to these sensitive communities vegetation types … would not be considered significant due to the lack of quality within the vegetation type. Specifically, the degraded condition of the habitat type has resulted from decades of livestock grazing and industrial land use practices."

Regarding the threshold criterion, the Project clearly is "coastal dependent" because it must occur within the coastal zone, where both the Refinery and the mainline rail to which the rail spur is connected are located. In addition, the Project is inextricably tied to a facility (the Refinery) that is itself coastal dependent, as evidenced by the fact that the Refinery operates under a National Pollutant Discharge Elimination System ("NPDES") permit for outfall into the Pacific Ocean. The FEIR demonstrates that alternative Project locations are infeasible or more environmentally damaging.[16]

Barring the Project would seriously undermine the public welfare, meeting the second criterion in Section 30260. Extending the rail spur is critically important to Phillips 66 securing a competitively priced crude supply for the Refinery, thereby supporting approximately 200 permanent jobs provided by the Refinery. The Refinery is also a link in the manufacturing chain necessary to meet the energy needs of "hundreds of thousands of consumers," and the Project will allow the Refinery to remain competitive and viable under increasingly challenging business conditions. Coastal Plan Policies, *supra*, at 4-5.

With respect to the third criterion, the County's Coastal Policies state that "when new sites are needed for industrial or energy related development, expansion of facilities on existing sites or on land adjacent to existing sites shall take priority over opening up additional areas or the construction of new facilities" and that "adverse environmental impacts from the siting or expansion of coastal-dependent industrial or energy developments shall be mitigated to the maximum extent feasible." Coastal Plan Policies, *supra*, at 4-6 (Policy 1). The Rail Spur Extension Project clearly conforms to this policy, as it involves the expansion of an existing facility on an existing site, and incorporates generous mitigation for adverse environmental impacts. The FEIR contains numerous mitigation measures designed to avoid or lessen any environmental impacts. In this regard, both CEQA and the Coastal Act require feasible mitigation. Here, the Project goes beyond mitigating for biological resources impacts and actually *results in a net increase of native habitat*.

Finally, even if there were Unmapped ESHA in or near the Project area, denial of the Project on that basis would subject the County to claims of unconstitutional taking of property. Under the Fifth and Fourteenth Amendments to the United States Constitution, government action that takes private property without just compensation is unconstitutional. Government can effect an unconstitutional taking by regulation—for example, by declaring property to be undevelopable ESHA. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *McAllister v. California Coastal Comm'n*, 169 Cal. App. 4th 912, 937-38 (2008). Neither the Coastal Act nor the County's CZLUO authorizes permit actions that result in uncompensated takings. To the contrary, such actions are expressly prohibited. CZLUO § 23.07.17(e)(2); *see also* Pub. Res. Code § 30010 (declaring that the Coastal Act "shall not be construed as authorizing the

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[16] Section 5 of the FEIR discusses alternative modes of transportation and alternative sites for a rail unloading facility. None were found to be feasible alternatives that would reduce impacts compared to the proposed Rail Spur Extension Project.

commission . . . or local government acting pursuant to this [Act] to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor."). Consequently, if designating an area as ESHA threatens an uncompensated taking, the constitutionally appropriate action is for the agency to allow the parcel to be developed enough to avoid a taking. The FEIR repeatedly describes the Project site as "highly disturbed and degraded" from decades of agricultural, industrial and human activities. (FEIR p. 4.4-31.) Given the Project's modest impact to biological resources on the site, and the extent to which it mitigates for impacts to environmental values, there is little question that these takings considerations militate in favor of Project approval.

III. COASTAL ACCESS.

The FEIR discusses the issue of vertical public access in the Executive Summary and in Chapter 9. In some places, the discussion is accurate, but in other places certain statements are confusing or unclear if taken in isolation. Our comments below are intended to clarify the discussion.

First, it is important for the Planning Commission to understand that coastal access is not a component of the proposed Rail Spur Extension Project. Because preparation of the EIR for the Rail Spur Extension Project was underway, County staff expanded the Rail Spur EIR to include Chapter 9, which contains environmental review of several hypothetical approaches to public access. Phillips 66 is not expecting the Planning Commission to approve any particular approach to public access as part of the decisions on the Rail Spur Extension Project. Indeed, Phillips 66 has provided evidence showing that public access is not appropriate at this location, and would be contrary to County policies.

The public access question first arose several years ago in conjunction with approval of an independent Phillips 66 project, the Throughput Increase Project. In approving the Throughput Project, the County imposed a condition requiring Phillips 66 to comply with CZLUO Section 23.04.420 regarding public access. The condition required compliance with the ordinance. The condition did not direct the company to offer to dedicate public access because the County had not yet determined whether public access is required under the ordinance for the Throughput Increase Project.[17] The condition required that construction for public access, ***if required***, must be completed within 10 years of the effective date of the Throughput Project permit, or at the time of approval of any

[17] The FEIR states in the Executive Summary that Phillips 66 was "required" to provide "vertical public access from State Route 1 to their western property." FEIR at ES-20. Likely that was shorthand for the more complicated facts described in this letter and elsewhere in the FEIR, but it could benefit from clarification.

subsequent use permit approved at the Refinery site, whichever occurs first.[18] Recordings of the Planning Commission discussion on the Throughput Increase Project demonstrate that the Planning Commission fully understood that the threshold question of ***whether*** a dedication of public access was required had not yet been decided. See Attachment 17, Informal Transcription of Excerpts of Planning Commission Hearing of December 3, 2012.

Phillips 66 preferred to make an offer to dedicate public access (OTD) only after the County examined the criteria for requiring public access in the Section 23.04.420, including the exceptions in the ordinance, and determined that the ordinance required a dedication of public access notwithstanding the features of the Throughput Increase Project and the site. However, County staff preferred to receive the OTD and hold it until the applicability of Section 23.04.420 could be fully assessed. County staff explained that in the event the County determined no public access is required by the ordinance, it will reject and return the OTD. County staff advised Phillips 66 that the County would not issue the Notice to Proceed authorizing the company to proceed with the Throughput Increase Project until the County received the OTD. In an effort to move its Throughput Project forward, Phillips 66 agreed to give the OTD before the County determined the applicability of the access requirement, on the County staff's express assurances that the County will not accept the OTD unless and until it has made the legally required findings—and that the County will reject the OTD in the event the findings cannot be made.

Those legally required findings are found in CZLUO section 23.04.420(c). That section states generally that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects," but that access is not to be required if it "would be inconsistent with public safety" or "the protection of fragile coastal resources."

The County has yet to make the required findings that access would be consistent with public safety and the protection of fragile coastal resources.[19] Without such findings, the County cannot accept the OTD. The FEIR states that the analysis in Chapter 9 is intended to assist the Planning Commission in making these decisions. (FEIR p. ES-20.) In addition, Phillips 66 has submitted a report to the County demonstrating that both exceptions apply to its site.

The FEIR acknowledges the environmental problems that would be created by a public access trail on Phillips 66's property. Any public access route across the portion of the

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[18] Staff Report for Planning Commission Hearing on Santa Maria Throughput Increase Project (Meeting Date: Dec. 13, 2012) (acknowledging that public access would be constructed only "if required").

[19] *See* FEIR p. ES-20: "Construction of the vertical coastal access would only be required if the County finds that coastal access for this location is consistent with the requirements of Section 23.04.420 of the Coastal Zone Land Use Ordinance."

Phillips 66 property west of the railroad tracks would have to traverse Mapped ESHA: "[T]he entire area located west of the UPRR tracks is within the Terrestrial Habitat ESHA designation, pursuant to the LCP." (FEIR p. 9-33.) All three public access options would result in the loss of high quality, sensitive habitat in order to create parking lots for visitors' cars, and to expand the existing, narrow dirt track or replace it with a two lane road. Overpasses for crossing the railroad tracks would also cause substantial loss of high quality habitat. One can only marvel at the irony of proposed Mitigation Measure BIO-3, which would impose on Phillips 66 an obligation to relinquish use of 53 ***additional*** acres of its property (even more, if needed to achieve a 2:1 acreage replacement ratio), on which the company would be required to restore or enhance habitat to compensate for the high quality ESHA that would be lost to public access. (*See* FEIR p. 9-29; for some species, replacement ratios would be even higher.) The company would be required to dedicate an open space easement or conservation easement over these additional acres as well (Mitigation Measure BIO-3.g.), dramatically inflating the amount of property that would be "taken" from the company through a public access project.[20]

Finally, the FEIR acknowledges that public access threatens sensitive habitats because the visitors may stray from the path and trample rare and sensitive plants. The FEIR describes (at p. 9-31) the very poor condition of this land prior to excluding the public in 1998:

> Prior to 1997, an extensive trail network and associated erosion, dune destabilization, and weed dispersal was occurring in the vegetated dune areas on the SMR property. Around 1998, this area of the SMR was fenced to prevent uncontrolled access and has been managed through an agreement with CSPR to exclude general public use. Through the efforts of CSPR and the Land Conservancy of San Luis Obispo County, with the support of Phillips 66, invasive plant species have been reduced in the buffer zone area, and native plant communities and native dune stabilization have been enhanced."

Over the past 20 years, Phillips 66 has been a careful custodian of the biological resources on its property. Through hard work and substantial human and economic resources, this habitat has been restored and is thriving. The FEIR acknowledges the threat to these resources if public access returns. (E.g., sensitive species "could be impacted … from users straying from the designated path into areas that have sensitive wildlife species." FEIR p. 9-40; see also p. 9-60.) The FEIR does not identify any effective means of preventing a relapse of these sensitive lands to a disturbed and degraded state. Altogether,

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[20] The Throughput Increase Project involved no physical modifications to the Refinery or the surrounding land, and no changes in operation that would have any effect whatsoever on public access. Accordingly, imposing any of these public access requirements on the company would constitute a taking of property. *See* discussion in section II.B., above, for a discussion of unconstitutional takings.

public access at this location would unquestionably undermine protection of fragile coastal resources, particularly west of the UPRR railroad tracks.

Because a CEQA document must focus on the environmental consequences of an action, the FEIR sidesteps the most important public safety issue associated with public access at this location: how people would move from the eastern portion to the western portion of Phillips 66's property. Public access across Phillips 66 property cannot physically provide the public access to the shore because the Phillips 66's property is bisected by the UPRR tracks. UP owns this intervening land, and Phillips 66 has no right to give the public permission to cross it. See Attachment 18, Letter from Ms. Kristen Kopp of Phillips 66 to Ms. Jessica Reed of the Coastal Commission dated January 23, 2015; and Attachment 19, Letter from Ms. Whitney McDonald, Deputy County Counsel, to Ms. Jessica Reed of the Coastal Commission dated March 23, 2015. UP has stated that will not agree to at-grade public access at this location,[21] and Phillips 66 has no authority to force UP to submit to at-grade public access across its private property. Thus, any public access that could be granted by Phillips 66 would be *discontinuous* and *inherently unsafe*. The Hazards section of the FEIR reveals that nearly all fatalities involving railroad accidents or incidents involve trespassers (*see* Table 4.7.2, pp. 4.7-4 to 4.7-13), so inviting public access across the Phillips 66 property would create a real public safety risk that Phillips 66 itself has no ability to mitigate.

The FEIR sidesteps the public safety risks by conjuring two versions of an overpass. But even the elevated, grade-separated crossings described in the Final EIR would require UP's agreement and cooperation, neither of which UP has indicated it is willing to provide. Thus, continuous public access from State Route 1 to the coast is a practical ***impossibility***. Public access would at most extend from State Route 1 to the UP railroad tracks, from which point the public would have no lawful or safe way to access Phillips 66's property west of UP's railroad tracks.

The right to cross another's private property typically takes the form of an easement. An easement is a property right, and UPRR is under no obligation to grant such an easement. Moreover, nothing in the Coastal Act or any other law authorizes the County to compel one landowner (Phillips 66) to acquire a new property interest (an easement from UPRR) for the sole purpose of then dedicating that property interest to the public. If the County determines that public access at this location is consistent with CZLUO section 23.04.420(c), then the County itself must pursue an easement on its own, and any

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[21] See letter from Melissa Greenidge of Randolph Cregger & Chalfant, attorneys for UPRR, to James Anderson of Phillips 66 dated August 6, 2013, which is included as part of Attachment 18: "Union Pacific understands that the County has conditioned the approval of its Land Use Permit on the requirement that Phillips 66 provide public coastal access over its parcel. To do so, however, Phillips 66 would have to provide access over railroad tracks owned by Union Pacific. Union Pacific does not consent to use of its property for public access."

construction costs (e.g., for an elevated crossing) or operational costs (e.g., for an escort) needed to ensure public safety in crossing the railroad tracks will be the responsibility of the County, not Phillips 66, because the hazards of such a crossing are wholly unrelated to the Phillips 66 property or the Throughput Increase Project.

Finally, even if the County could make the relevant findings under section 23.04.420, it still would have to establish that the dedication bears an "essential nexus" and "rough proportionality" to the impacts of the project. This is a federal constitutional requirement applicable to all permit conditions. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring the permit authority to establish an "essential nexus" between permit conditions and a project's impact); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring the permit authority to establish "rough proportionality").

We continue to believe that the County would be unable to make the requisite showing under *Nollan* and *Dolan*. Indeed, the only way for the County to *constitutionally* justify public-access condition would be to show that the Throughput Project would adversely affect or destroy ***existing*** public access. But construction was not required for the Throughput Increase Project. And even the County recognized that the Throughout Project would have no such impacts.[22] Because the Throughput Project had no such adverse effect, the County cannot constitutionally condition that project on the dedication of public access across Phillips 66's property. The same is true for the Rail Spur Extension Project, although the FEIR does not separately analyze the public access impacts of the Rail Spur Extension Project. The FEIR does not provide any evidence that either project adversely affects public access in a manner that could justify the condition requiring an OTD.

IV. THE PROJECT IS CONSISTENT WITH APPLICABLE COUNTY LAND USE POLICIES.

The Project is consistent with the applicable policies in the County's General Plan. Appendix G of the FEIR provides a preliminary analysis of the Project's consistency with the General Plan and other applicable land use ordinances. Appendix G states that the Project will be either "potentially consistent" or "potentially inconsistent" with the applicable polices in the County's General Plan. (*See* Appendix G, pp. G-2 through G-49, G-79 through G-84.) For those policies with which the Project is identified as being "potentially consistent," there is substantial evidence in the FEIR and remainder of the administrative record that the Project unquestionably will be consistent with those policies.

For those policies with which the Project is identified as being potentially inconsistent, we believe there is substantial evidence that supports a finding of consistency. Those policies

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[22] http://slocleanair.org/images/cms/upload/files/4_8_Other%20Issue%20Areas.pdf ("The Proposed Project would not increase the demand for parks or trails or affect the access to recreational area[s] . . . .").

with which the Project will be consistent are detailed in Attachment 20, Project Consistency with County Policies.

Even if the Project is not consistent with every applicable individual land use policy, the Project can still be found consistent with the General Plan. Under the legal standard governing consistency determinations with land use plans, a project must only be in "harmony" with the applicable land use plan to be consistent with that plan. (*See Sequoyah Hills Homeowners Assn. v. City of Oakland* ("*Sequoyah Hills*") (1993) 23 Cal.App.4th 704, 717-18.) "Because policies in a general plan reflect a range of competing interests," an agency applying a land use plan to a project "must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purpose." (*San Franciscans Upholding the Downtown Plan v. the City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678.)[23]

As the Court further explained in *Sequoyah Hills*, "state law does not require an exact match between a proposed subdivision and the applicable general plan." (*Sequoyah Hills Homeowners Assn., supra,* 23 Cal.App.4th at p. 717.) To be "consistent" with a general plan, a project must be "compatible with the objectives, policies, general land uses, and programs specified in the applicable plan," meaning, the project must be "in agreement or harmony with the applicable plan." (*Id.* at pp. 717-18; *see also Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406; *San Franciscans Upholding the Downtown Plan, supra,* 102 Cal.App.4th at p. 678.) Further, "[a]n action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817.)

In sum, a project need not be consistent with every applicable policy in a general plan for that project to be consistent with the general plan. The analysis in Appendix G and in Attachment 20 to this letter show that the Project will further the overall objectives and policies of the County's General Plan and will not obstruct their attainment. Given the competing interests within one general plan, the County has discretion to weigh and balance those competing interests and can consider the Project in light of the General Plan's overall purpose.

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[23] The FEIR seems to have taken this very approach in assessing the consistency of the coastal access alternatives with the County policies. For example, the FEIR states: "[T]he introduction of increased human activity in the natural dune setting would create the increased potential for conflicts with the sensitive plant and wildlife species that currently exist at the site. Widening of the current access road would result in impacts to Mapped ESHA since most of the area west of the UPRR railroad tracks is Mapped ESHA… These impacts must be balanced against the potential benefit of providing public coastal access in this area to determine if development of the Coastal Access Project would be feasible at this location pursuant to CZLUO Section 23.04.420." FEIR p. 9-60.

V. OTHER COMMENTS ON THE FEIR.

A. The FEIR Discloses All Changes to the Refinery Operations as a Result of the Rail Spur Extension Project.

Section 2.6 of the FEIR provides an overview of the crude refining process, and correctly states that this process will not change as a result of the Project. Section 2.6 discusses the Refinery's design, types and sources of crude oil refined in recent years, and the characteristics of crude oils that may be delivered via unit trains as a result of the Project.

Comment ABJC-06 notes Phillips 66 corporate statements that the company aims to deliver what it calls "advantaged crudes" to its refineries, and suggests that the Rail Spur Extension Project is actually part of larger changes in the crude oil slate to be refined at the Santa Maria Refinery that have not been analyzed. (See also Comment ABJC-32.)

The response to Comment ABJC-06 correctly notes that the Rail Spur Extension Project does not involve any changes to the Refinery operating equipment that would allow a shift in the properties of the crude slate that the refinery is capable of refining. The Declaration of Mr. Bill Schroll confirms that the information in the FEIR is accurate and complete. (See Attachment 16, ¶ 12.)

In addition, Mr. Schroll explains the term "advantaged crude", as it is used by Phillips 66. In short, it simply means crude that can be delivered to a particular refinery at less cost than the delivered cost of benchmark Brent crude. (Schroll Declaration ¶ 7.) The Declaration of Ms. Maureen McCabe (Attachment 21) further notes that the Santa Maria Refinery is already operating nearly 100% advantaged crude. (McCabe Declaration ¶ 10.) Thus, there is no basis for the commenter's suspicions that the Rail Spur Extension Project will result in an undisclosed and unanalyzed shift in the Refinery's crude slate in order to achieve the company's objective of using cost advantaged crude oil.

B. CEQA Review Has Not Been Impermissibly Piecemealed.

CEQA requires that an EIR analyze the entire project. A lead agency may not chop a larger project into smaller parts to avoid environmental review. Where environmental review is impermissibly chopped into smaller pieces, it is often referred to as "piecemealed" review.

ABJC-31 asserts that the Rail Spur Project is part of the Throughput Increase Project approved in 2013 and, therefore, the two projects should have been evaluated in a single EIR. This comment is premised on the belief that the processing rates approved in the Throughput Increase Project "could not be achieved but for the Rail Spur Project."

The premise is wrong. The Response to ABJC-31identifies many potential local sources of crude oil as well as transportation options that have and can continue to deliver crude to the Refinery from outside the region in amounts exceeding the processing rates approved in the Throughput Increase Project. In addition, the Declaration of Mr. Bill Schroll also dispels the premise in Comment ABJC 31 that the refining rates approved in the

Throughput Increase Project cannot be achieved without the Rail Spur Extension Project. In fact, the approved processing rates have been achieved already. (Schroll Declaration ¶ 13.)

C. Detailed Comments on FEIR Mitigation Measures.

Attachment 22 is a table with comments on several additional mitigation measures and other parts of the FEIR.

Again, we appreciate the effort that the County staff has expended in reviewing the proposed Rail Spur Extension Project, and look forward to the hearing on February 4-5, 2016.

Very truly yours,

ALSTON & BIRD LLP

Jocelyn Thompson

JNT
Attachments

cc: Ryan Hostetter
Whitney McDonald

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List of Attachments

Attachment	Document	Relevance
1	Union Pacific Railroad Materials Regarding Rail Safety	Preemption
2	Railroad Memorandum of Mutual Understandings and Agreements, 1998	Preemption
3	Air Resources Board/Railroad Statewide Agreement, 2005	Preemption
4	Amicus Brief of California High Speed Rail Authority in *Friends of Eel River v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority, Case No. S222472*	Preemption
5	Supplemental Letter Brief of California High Speed Raul Authority in the matter of *Town of Atherton v. California High Speed Rail Authority*, Case No. C070877, filed August 9, 2013	Preemption
6	California Interagency Rail Safety Working Group report: Oil by Rail Safety in California, June 10, 2014	Preemption
7	Alon Crude Flexibility Project, Excerpts from Draft EIR, (unchanged in Final EIR certified by Kern County September 9, 2014)	Preemption
8	Valero Crude By Rail Project, Revised Draft EIR Appendix G (unchanged in Final EIR dated January 2016)	Preemption
9	City of Benicia Planning Commission, Staff Report dated January 28, 2016, regarding Valero Crude By Rail Project	Preemption
10	Letter from John Flynn of Nossamon LLP to Amy Million, City of Benicia, September 15, 2014	Preemption
11	List of Preempted Mitigation Measures	Preemption
12	San Luis Obispo County Air Pollution Control District CEQA Air Quality Handbook, April 2012, Excerpt	Air Quality; County Policies
13	Letter from Mr. Paul Beard of Alston and Bird to Deputy County Counsel, Ms. Whitney McDonald, dated August 13, 2015	ESHA

Attachment	Document	Relevance
14	California Coastal Commission Staff, "Executive Summary: Preliminary Report on the Periodic Review of the San Luis Obispo County LCP" (February 2, 2001).	ESHA
15	California Coastal Commission, "Preliminary Report. Periodic Review of the San Luis Obispo County Certified Local Coastal Program, Exhibit A in Report of July 12, 2001 (As Revised to Incorporate Errata/Clarifications of the July 12, 2001 Action).	ESHA
16	Declaration of Mr. Bill Schroll dated January 29, 2016	ESHA; Project Description
17	Informal Transcription of Excerpts of Planning Commission Hearing of December 3, 2012	Coastal Access
18	Letter from Ms. Kristen Kopp of Phillips 66 to Ms. Jessica Reed of the Coastal Commission dated January 23, 2015.	Coastal Access
19	Letter from Ms. Whitney McDonald, Deputy County Counsel, to Ms. Jessica Reed of the Coastal Commission dated March 23, 2015	Coastal Access
20	Project Consistency with County Policies.	County Policies
21	Declaration of Ms. Maureen McCabe dated February 1, 2016	Project Description
22	Additional Detailed Comments on the FEIR	Various

ATTACHMENT 1

Crude Oil by Rail in California

Union Pacific in CA 2014 Fast Facts

Miles of Track..... 3,267

Capital Investment ..... $432 million

Total Carloads..... 3,313,191
(originated or terminated)

Crude Oil Carloads.....13,227

First responders 3,935
trained by Union Pacific
since 2010

Supporting California's Energy Infrastructure

Union Pacific shipped approximately 141,000 carloads of crude oil on our 23-state network in 2014. Crude oil currently represents about 1 percent of our business in California. This amounts to 1,000 – 1,200 carloads of crude oil monthly.

The crude oil Union Pacific moves through California originates in California, Canada and Utah. We do not move any crude oil in California originating from the Bakken region.

Union Pacific moves crude oil in California two ways:

- On "manifest" trains with tank cars carrying crude oil interspersed with other commodities in box cars, hopper cars, etc.
- On "unit trains" made up of 80 -100+ cars with the same product in every car.

We move crude oil along our coast route between Los Angeles and the Central Coast, a service we have safely provided for decades. We also move crude oil on our I-5 corridor running from California's northern border to the Los Angeles region through the Central Valley. We do not currently move any crude oil in the Bay Area.

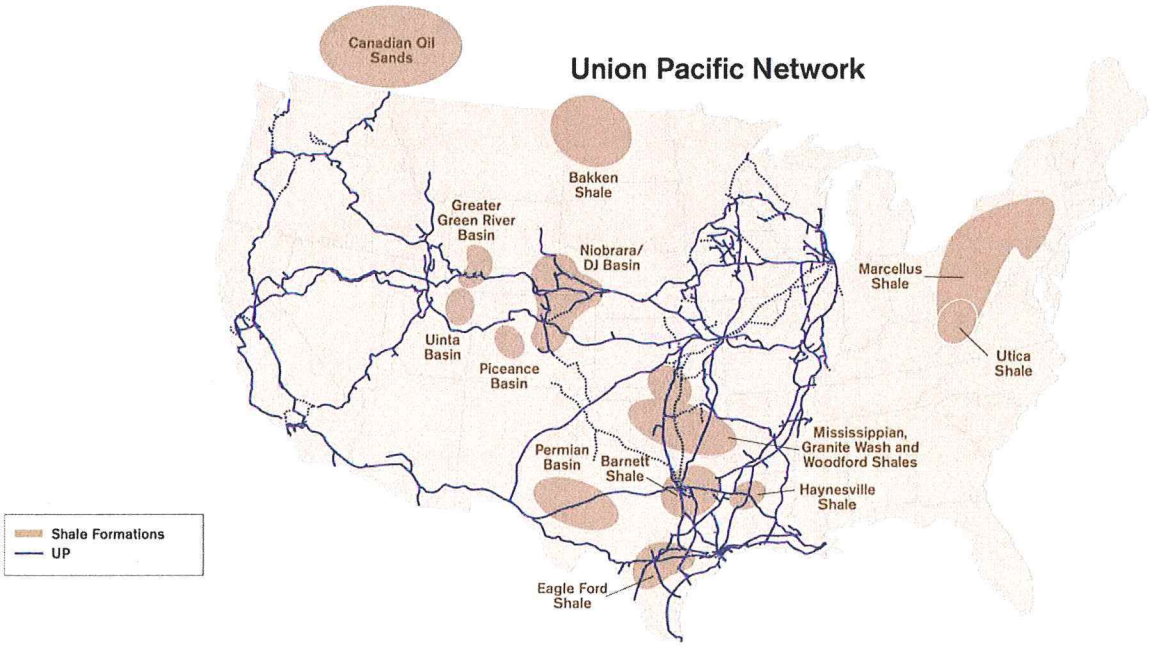
Preventing Derailments

Union Pacific works diligently to prevent derailments and other accidents. We spent more than $31 billion in private capital investments from 2005-2014, and plan to spend a record $4.3 billion in 2015 continuing to strengthen our infrastructure. Doing so helps us improve safety for our employees, communities and customers.

We decreased derailments 38 percent during 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:

- Developing and using the latest technology such as lasers and ultrasound to identify rail imperfections.
- Forecasting potential failures before they happen by tracking acoustic wheel vibrations.
- Performing 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.
- Conducting rigorous safety training programs on a regular basis to help employees identify and prevent potential derailments.

February 2015



Preparing California's First Responders

Our goal is the same as our customers' and the communities' in which we operate: to deliver every tank car safely while at the same time being prepared to respond in the case of an accident. We take our responsibility to ship crude oil, as mandated by federal law, seriously. Union Pacific follows strict safety practices and in many cases exceeds federal safety regulations.

We work with 184 fire departments along Union Pacific rail lines in California. We work with fire departments and other emergency responders along our network to offer comprehensive hazmat response training in communities where we operate. Union Pacific trained more than 3,900 emergency responders across California since 2010. This includes classroom and hands-on training in tank car anatomy, hazmat shipping documentation and equipment securement.

Union Pacific has significant response resources located in California for the unlikely event of a crude oil spill or other hazmat-related incident. We have access to more than 176,000 feet of containment boom in the state, chemical transfer trucks, fire fighting foam, fire fighting trailers and more.

To provide additional information to emergency response professionals for training and response purposes, we are introducing AskRail,™ a new real-time mobile application produced by the Association of American Railroads. Once first responders download the AskRail app onto their mobile device, they can search by rail car identification number to identify the commodity inside the tank car. AskRail supplements existing response processes for hazardous materials-related incidents.

UNION PACIFIC

Hazardous Materials Management Group

The Union Pacific Hazardous Materials Management Group (HMM) consists of experts in hazardous material transportation safety, securement and response. The HMM team understands that communities are concerned about the risks associated with hazmat shipment by rail. Providing safe and fuel efficient freight transportation is how Union Pacific is participating in America's energy evolution.

We haul products related to the entire energy sector including wind, solar, coal, ethanol and crude oil. We take our responsibility to ship crude oil, as mandated by federal law, seriously. Our goal is the same as our customers and the communities in which we operate: to deliver every tank car safely while at the same time being prepared to respond in the case of an accident.

The HMM Group is part of Union Pacific Railroad's Safety Department. Its primary focus is the safety of all Union Pacific employees, the residents of communities where we operate trains and our customers. This team of experts has a four-part mission:

- **Prevention** – Prevent releases of hazardous materials in transportation
- **Preparedness** – Develop internal and external assets for hazmat education, response and recovery
- **Response** – Respond to incidents to protect health and minimize harm to the environment
- **Recovery** – Restore normal rail operations as quickly as possible in the event of an incident

PREVENTION

Union Pacific's HMM team members regularly inspect tank cars moving on the Union Pacific network. In each inspection, an HMM team member examines fittings, markings, safety appliances and waybills. Union Pacific's HMM managers annually perform thousands of these inspections. HMM conducts tank car inspection blitz programs throughout the year in which Union Pacific managers, outside contractors, customers and regulators work together to inspect a large number of tank cars in a defined geographic area. High volume crude oil locations are chosen for tank car inspection blitz programs, with 10 to 16 blitzes performed annually across the Union Pacific network.

HMM is responsible for training Union Pacific employees about hazardous materials safety. U.S. Department of Transportation-defined "hazmat employees" are required to be trained in the safe handling of hazardous materials. Union Pacific train crews are required to carry a copy of Instructions for Handling Hazardous Materials while operating a train carrying hazmat. This is a reference guide published by HMM.

If Union Pacific inspections identify a shipper with recurring issues, HMM will provide onsite training for proper tank car securement to ensure the shipper is educated in best practices for preparing hazardous materials shipments.

PREPAREDNESS

Preparation is critical to an appropriate incident response. HMM develops the Union Pacific Hazardous Materials Emergency Response Plan (HMERP), a performance based plan that provides guidance about reporting a release as well as a list of training requirements for those responding to an incident. Each of the 22 operating divisions at Union Pacific undergoes an annual unannounced drill to ensure all aspects of the HMERP are in place and being followed by Union Pacific employees. The requirements, including drills and exercises, for specific plans for large oil storage tanks are managed by HMM.

A safety training event for local first responders.

PREPAREDNESS *(continued)*

Providing no-cost training to public responders is Union Pacific's most substantial preparedness effort. Having cataloged every fire department that may respond to an incident along the Union Pacific network, HMM team members reach out to fire departments on an annual basis to offer training or information to assist fire departments in their preparation for a potential incident. Training consists of classroom and hands-on activities using a specially-designed training trailer or training tank car. Trainees learn how to contact the railroad during an emergency, how to read shipping documentation, derailment safety considerations and what assets the railroad can provide in the event of an incident. HMM performs large scale training events in collaboration with Union Pacific's partners in TRANSCAER (Transportation Community Awareness and Emergency Response).

RESPONSE

The response process used by HMM is designed to be easily incorporated into public response incident command structure. This process requires analyzing the problem, planning the response, implementing the plan, and evaluating and adjusting the response as necessary. Union Pacific's Response Management Communication Center (RMCC) is an around the clock security response center where critical call dispatchers manage calls from the public, law enforcement and others who are reporting emergencies and other incidents on Union Pacific's 32,000-mile network. RMCC follows all regulations regarding notification of local, state and federal agencies in the event of an accident and works closely with first responders throughout an incident.

Union Pacific has 30 highly trained hazardous materials responders. We rely on a network of private response contractors who are carefully vetted and audited on an annual basis to ensure a constant state of readiness. Most of these contractors are qualified with fire fighting or United States Coast Guard Oil Spill Recovery Organization (OSRO) certifications. OSRO-certified contractors have demonstrated expertise and equipment to handle oil spills on land and water. Contractors have access to the equipment (boats, boom, skimmers, vacuum trucks, storage tanks, heavy equipment) necessary to respond to a hazardous materials incident.

To supplement the response, HMM has air monitoring contractors who can be quickly deployed to provide real-time data to public responders. Union Pacific works closely with community leadership throughout the response process. Additionally, HMM can deploy contractors who are subject-matter experts in toxicology, industrial hygiene, medicine, nursing and environmental protection. These specialty contractors can work in the communities impacted by an incident and in concert with first responders to ensure a safe response.

HMM invested in response equipment in the form of firefighting trailers, foam caches, air monitoring equipment and specialty tools to ensure resources are readily available.

RECOVERY

Once an incident has been stabilized, recovery begins. If a tank car has been damaged and cannot travel safely on the railroad, the contents must be transferred to an undamaged car. Union Pacific is the only railroad that owns and operates all of the equipment necessary to transfer any liquid or compressed gas from one tank car to another. Once the tank car is liquid free, HMM will clean and purge the damaged car to ensure it can be safely repaired or dismantled.

Once all hazardous materials have been removed from the incident site, HMM will transition the project to the Union Pacific Site Remediation Group for remediation and closure with regulatory agencies.

The final aspects of recovery include a debriefing with the public responders and an internal post-incident analysis. These activities are an invaluable means of improving the group's overall capability to respond to a hazmat-related incident.

Union Pacific in California

2013 FAST FACTS

Miles of Track	3,267
Annual Payroll	$429 million
In-State Purchases	$228.4 million
Capital Investment	$326.7 million
Employees	4,860
U.S. Jobs Supported*	21,870

**Each American freight rail job supports 4.5 jobs elsewhere in the U.S. economy. (Association of American Railroads)*

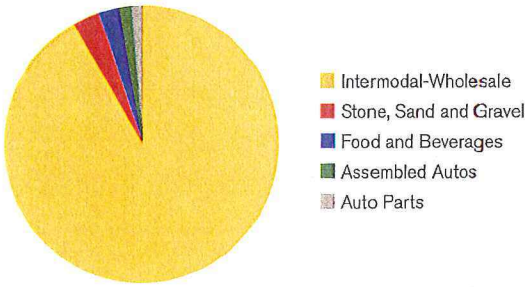
RAIL CARS ORIGINATED IN CALIFORNIA

2009	1,311,240
2010	1,479,134
2011	1,433,992
2012	1,472,503
2013	1,492,707

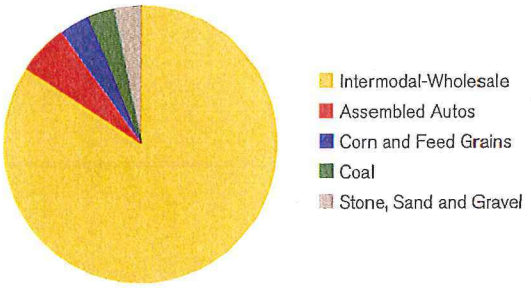
RAIL CARS TERMINATED IN CALIFORNIA

2009	1,333,356
2010	1,510,454
2011	1,512,473
2012	1,502,165
2013	1,546,782

TOP FIVE COMMODITIES SHIPPED IN 2013 (BY VOLUME)



TOP FIVE COMMODITIES RECEIVED IN 2013 (BY VOLUME)



Union Pacific in California

In California, Union Pacific serves the rich agricultural central valley, the Port of Oakland and the San Francisco Bay area, as well as the Los Angeles metropolitan area with its two major ports at Los Angeles and Long Beach.

Along the West Coast, the "I-5/Hwy 99 Corridor" offers the most efficient north-south transportation service to freight customers in all three Pacific Coast states. This service ties to main east-west corridors at Portland, Oakland and Los Angeles.

In Northern California, Union Pacific handles import-export automobile traffic at Benicia. In Southern California, Union Pacific serves major automobile distribution centers. Union Pacific trains carry extensive varieties of import-export traffic through its Intermodal

Container Transfer Facility (ICTF) near the Los Angeles-Long Beach harbors. The railroad also moves chemicals and manufactured goods, as well as fruits, vegetables and canned goods in the Golden State.

Union Pacific played a key role in the Alameda Corridor project, along a 21-mile route connecting the Los Angeles/Long Beach harbor complex to downtown Los Angeles rail yards. Completed in 2002, this $2 billion-plus construction effort improved safety and vehicle traffic flow by eliminating 209 grade-level street/rail crossings and doubled the speed of freight trains using the corridor.

Union Pacific operates intermodal facilities in Oakland, Stockton, Long Beach and Los Angeles. Other terminal operations are located in Roseville, Lathrop, Commerce, West Colton and Yermo. Daily Amtrak services as well as extensive commuter trains operate on Union Pacific track throughout the state.

Union Pacific's capital investment in California from 2009 to 2013 was more than $1.4 billion.

Supporting the communities we serve

In 2013, Union Pacific provided more than $1.4 million to California charitable organizations such as the Boys & Girls Club, Museum of Latin American Art and The Salvation Army. These charities were reached through a combination of the Union Pacific Foundation, matching gifts and corporate contributions. The Union Pacific Foundation is the primary philanthropic arm of Union Pacific Corporation and has distributed funds since 1959 to qualified organizations in communities served by Union Pacific.

America's premier railroad

Union Pacific Railroad is the principal operating company of Union Pacific Corporation (NYSE: UNP). One of America's most recognized companies, Union Pacific Railroad connects 23 states in the western two-thirds of the country by rail, providing a critical link in the global supply chain. From 2007-2013, Union Pacific invested more than $21.6 billion in its network and operations to support America's transportation infrastructure. The railroad's diversified business mix includes Agricultural Products, Automotive, Chemicals, Coal, Industrial Products and Intermodal. Union Pacific serves many of the fastest-growing U.S. population centers, operates from all major West Coast and Gulf Coast ports to eastern gateways, connects with Canada's rail systems and is the only railroad serving all six major Mexico gateways. Union Pacific provides value to its roughly 10,000 customers by delivering products in a safe, reliable, fuel-efficient and environmentally responsible manner.

CONTACT US

24-Hour Emergency Hotline – Response Management: (888) 877-7267

To report rough crossings or crossings obscured by vegetation (non-emergency only): (916) 789-6114

Corp. Headquarters: (402) 544-5000 or (888) 870-8777

Liisa Lawson Stark, Public Affairs, N. Calif.:
(916) 789-5957
LLSTARK@up.com

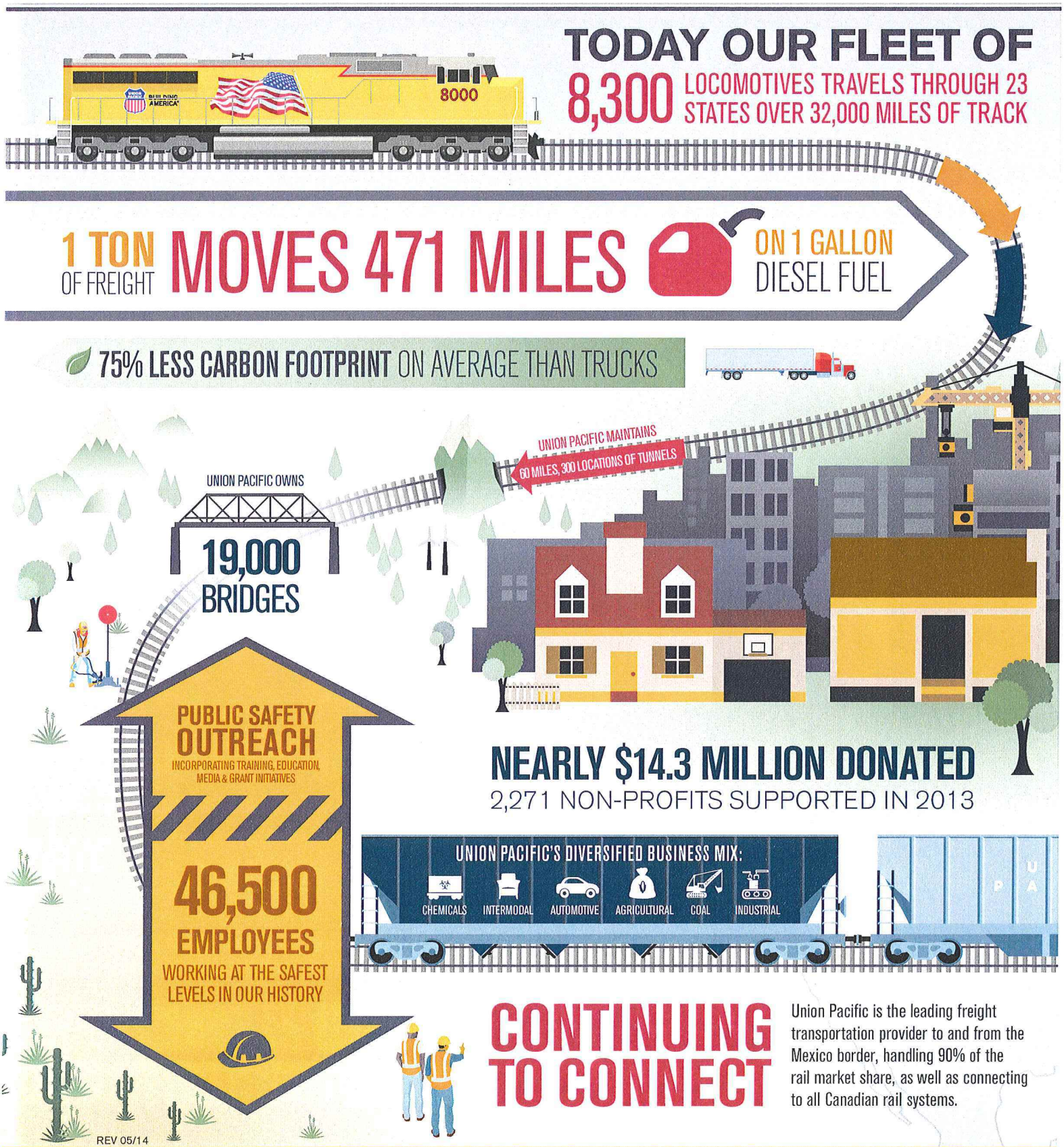
Lupe Valdez, Public Affairs, S. Calif.: (626) 935-7617
LCVALDEZ@up.com

Andy Perez, Ports of Long Beach, Los Angeles, Oakland and Alameda County: (562) 490-7051

Aaron Hunt, Media Relations: (916) 789-6019

Union Pacific

Backed by more than 150 years of experience, we're inspired to continue Building America.



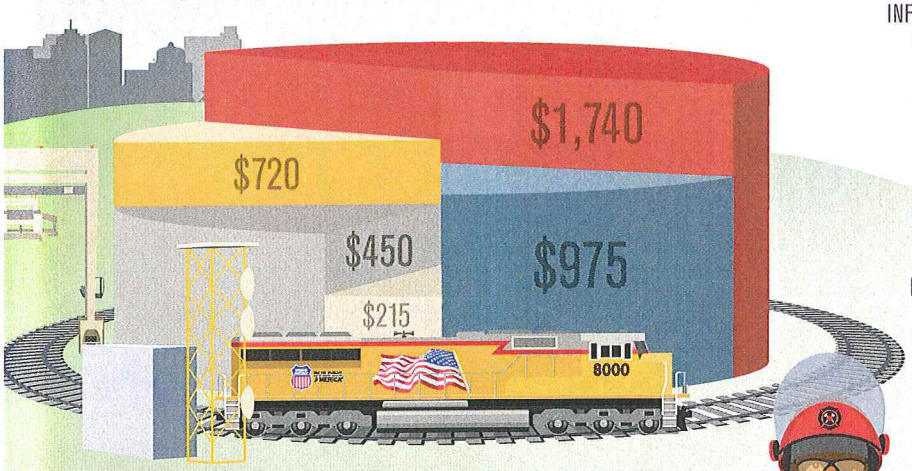
BUILDING AMERICA®

Strengthening America's Rail Infrastructure

From 2003-2013, **Union Pacific reduced crossing accidents by 15 percent and reportable train derailments by 23 percent.**

$4.1 BILLION 2014 CAPITAL PLAN

(IN MILLIONS)



- INFRASTRUCTURE REPLACEMENT **42%**
- LOCOMOTIVES & EQUIPMENT **24%**
- CAPACITY / COMMERCIAL FACILITIES **18%**
- POSITIVE TRAIN CONTROL **11%**
- TECHNOLOGY / OTHER **5%**

2013 BRIDGE INSPECTIONS

38,600 BRIDGE INSPECTIONS

100 UNDERWATER INSPECTIONS

5,300 LARGE CULVERT INSPECTIONS

FIRST RESPONDERS TRAINED SINCE 2003

45,500

MORE THAN **2 MILLION** SIGNAL & DETECTION DEVICE INSPECTIONS IN 2013

20 MILLION TRACKSIDE EVALUATIONS PER DAY

500,000 WHEELS CHECKED ANNUALLY

ULTRASONIC WHEEL DEFECT DETECTOR

DEVELOPED BY UNION PACIFIC, WORLD'S FIRST FACILITY

5.7 MILLION MILES OF VISUAL TRACK INSPECTION IN 2013

211,000 MILES OF ELECTRONIC TRACK INSPECTIONS IN 2013

UNION PACIFIC BUILDING AMERICA®

Our Commitment to Safety

Overview

BNSF and Union Pacific are committed to safety and our record reflects it. More than 99.997% of rail shipments of hazardous materials reach their destination without a release caused by a train accident. In fact, 2014 was the railroads' safest year ever. We at Union Pacific and BNSF are proud of our safety improvements, and we are constantly working to develop and implement new technologies and operating practices to further improve rail safety.

Moving Crude Oil Safely

BNSF and Union Pacific devote enormous resources to enhancing the safety of moving crude oil and other hazardous materials by rail. Our efforts in this regard fall into three broad categories:

- Risk reduction
- Accident mitigation
- Emergency response

Risk Reduction

Our goal is zero accidents, which is why we're always looking for ways to reduce risk, including:

- **Reinvestments.** The railroads have invested nearly $115 billion in the past five years.
- **Inspections.** Union Pacific and BNSF inspect tracks and bridges more often than required by FRA. These inspections include state-of-the-art technology to detect internal and external flaws in the rail and track structure. For main line tracks on which trains carrying at least 20 carloads of crude oil travel, the railroads have agreed to perform at least one more internal rail inspection each calendar year than the new FRA regulations require. In addition, the railroads will conduct at least two automated comprehensive track geometry inspections each year on main line routes over which trains with 20 or more loaded cars of crude oil are moving, something FRA regulations do not require.
- **Defect detectors.** As of July 2014, specialized track side "hot box" detectors have been installed at least every 40 miles along routes with trains carrying 20 or more cars containing crude oil. These detectors help prevent accidents by measuring if wheel bearings are generating excessive heat and therefore are in the process of failing.
- **Routing model.** The rail industry and several federal agencies have developed the Rail Corridor Risk Management System (RCRMS), a sophisticated statistical routing model designed to help railroads analyze and identify the overall safest and most secure routes for transporting highly hazardous materials. Major U.S. railroads are now using the RCRMS for trains carrying at least 20 carloads of crude oil.
- **Speed restrictions.** In August 2013, railroads self-imposed a 50-mph speed limit for trains carrying 20 or more carloads of crude oil. As of July 2014, if a train is carrying at least 20 cars of crude oil and at least one of those cars is an older "DOT-111" car, that train will travel no faster than 40 mph when travelling within one of the 46 nationwide "high threat urban areas" designated by the Department of Homeland Security.
- **Train braking.** As of April 1, 2014, trains operating on main line tracks carrying at least 20 carloads of crude oil have technologies that allow train crews to apply multiple emergency brakes simultaneously in order to stop the train faster.

Accident Mitigation

In addition to our efforts to prevent accidents from occurring, BNSF and Union Pacific, along with the rest of the rail industry, take numerous steps to mitigate the impacts of accidents should they occur:

- **Increased Tank Car Safety Standards.** The rail industry has long supported increased tank car safety standards. In November 2013, the rail industry called on PHMSA to adopt even more stringent standards for new tank cars used to transport crude oil and ethanol and for aggressively retrofitting or phasing out of tank cars used to transport crude oil or ethanol.
- **Tank Car Classification.** The railroads support the pursuit of proper classification and labeling of petroleum crude oil in tank cars by shippers prior to transport. This is essential to ensuring that first responders are able to safely and appropriately respond in the event of an accident.

Emergency Response

Union Pacific and BNSF have extensive emergency response functions to assist communities in the event of an incident involving crude oil or other hazardous materials:

- Teams of full-time personnel whose primary focus is hazmat safety and emergency response, as well as environmental, industrial hygiene, and medical professionals available at all times.
- The railroads maintain networks of hazmat response contractors and environmental consultants, strategically located throughout their service areas who are on-call at all times.
- The railroads have comprehensive "standard of care" protocols that ensure that impacts to the community are addressed promptly and professionally.

Each year, the railroads actively train well over 20,000 emergency responders throughout the country. These include safety trains that travel and allow for hands-on training for local first responders, visits to local firehouses, tabletop drills and self-study courses for emergency responders.

The railroads also support our nation's emergency response capability through the Security and Emergency Response Training Center (SERTC), a world-class facility in Pueblo, Colorado, that is operated by the Transportation Technology Center, Inc. (TTCI). Since its inception in 1985, SERTC has provided in-depth, hazmat emergency response training to more than 50,000 local, state, and tribal emergency responders and railroad, chemical, and petroleum industry employees from all over the country.

BNSF and Union Pacific, with the rest of the rail industry, are also committed to providing:

- **Crude-By-Rail Response Training.** $5 million to develop a specialized crude-by-rail training and tuition assistance program for local first responders.
- **Information to State Agencies.** For years, railroads have provided appropriate authorities, upon request, with information about hazardous materials transport. On May 7, 2014, the U.S. Department of Transportation issued an emergency order requiring railroads operating trains containing large amounts of Bakken crude oil to notify state emergency response commissions.
- **Real-Time Data for First Responders.** The railroads have developed ASKRAIL, an invitation-only app designed for first responders who are dealing with an incident to get the information they need to respond appropriately.
- **Emergency Response Inventory.** Includes locations for the staging of emergency response equipment and contact information.
- **Accident Remediation.** Emergency responders have control of railroad hazardous materials accidents, but railroads provide the resources for mitigating the accident. Railroads also reimburse local emergency agencies for the costs of materials the agencies expend in their response efforts.

BUILDING AMERICA®

BNSF RAILWAY

WSPA Western States Petroleum Association

American Chemistry Council

Hazardous Materials Emergency Response Equipment on Display
(Note: Additional equipment is utilized but is not on display today)
Tuesday, February 24
California State Railroad Museum

UNION PACIFIC RAILROAD

UP Training Tank Car
Union Pacific's Training Tank Car (DOT 111) contains a variety of valve housings which a responder may encounter when responding to a tank car related incident. The tank car provides hands-on training and can simulate valve leaks, with the use of air and water. The interior of the tank contains close-up valves which can be viewed by emergency responders during training with Union Pacific. In addition, safety appliances are shown during training, and participants receive specialized instructions on working around tank cars and other types of on-rail equipment.

UP Transfer Truck
Union Pacific Railroad is the only Class 1 railroad that has internal transfer capabilities. Our company currently owns two Transfer Trucks, which are located in West Colton, CA and Ft. Worth, TX. These trucks provide the capability to transfer products transported in tank cars in the event of a derailment or other incident when deemed necessary for public safety, or protection of the environment and property. The Transfer Truck contains a variety of pumps and other equipment, which allows for the transfer of both liquids and gasses from a damaged rail car to another rail car. The Transfer Truck can also conduct other operations when product removal is necessary.

UP Positive Train Control (PTC) Training Trailer
Union Pacific's PTC Training Trailer is a mobile simulation system used to train locomotive engineers and conductors. PTC is a predictive collision avoidance technology that can stop a train before an accident occurs, and is designed to keep a train within authorized limits on a track and under its maximum speed limit. To accomplish this, sophisticated technology and braking algorithms will automatically bring both passenger and heavy freight trains to a safe stop. This will help prevent train-to-train collisions, over-speed derailments and casualties or injuries to the public and railway workers.

UP Foam Trailer
Union Pacific currently has 12 Foam Trailers in service, which are designed to augment the capabilities of emergency responders in the event of a liquid fire involving rail equipment. Each of these trailers are built identically and have master stream, hand-line and portable foam application capabilities. In addition, they are equipped with fire-rated pumps which allow the trailers to draft water, allowing for deployment of a 10,000 gallon portable tank. Each trailer is equipped with 275 gallons of Alcohol Resistance-Aqueous Film Forming Foam (AR-ARFF), "Pro-Pack" portable systems, and various hoses and nozzles for a variety of situations, which may be encountered during an incident.

BNSF RAILWAY

BNSF Railway Fire Trailer
The BNSF Railway Fire Trailer is equipped with 2,750 GPM (gallons per minute) pumps, two 10,000 gallon bladder tanks, and 550 gallons AR-AFF. Fire Trailers are designed to be completely mobile in remote locations. All equipment on the trailers is interchangeable with fire department apparatus. BNSF currently owns two Railway Fire Trailers, which are located in Barstow, CA and Richmond, CA. A third Fire Trailer is scheduled to come online in 2015 in Bakersfield, CA.

BNSF Air Trailer
The BNSF Air Trailer is utilized in incidents involving inhalation-hazard commodities. The trailer contains 20 Self-Contained Breathing Apparatus units, with additional psi bottles. In addition, the trailer contains Level A gear, Scott masks, airline and APR capabilities. The trailer is currently located in Rialto, CA.

BNSF Geometry Truck
The Hi-Rail Geometry Truck is Ford F550 truck with a used for track inspections. It uses a lateral load axle capable of producing 2400 pounds of load against rails for gage measurement during inspections. The truck utilizes a laser-based, non-contact system to test rail gage and uses an inertia system for measuring rail cross level, alignment and surface. Designed by BNSF, the testing software allows for real-time inspection information to be monitored by BNSF defect and production teams. The Geometry Truck is owned and operated by BNSF.

NRC ENVIRONMENTAL SERVICES EQUIPMENT

Containment Boom
The conventional oil containment boom, also known as curtain boom, is the most commonly used spill-response boom designed with semi-flexible internal foam flotation and a flexible fabric skirt. ABASCO conventional boom is available in sizes and strengths to contain spills in conditions from quiescent river waters to open ocean waves. Currently, NRC owns 81,500 feet of this type of boom in California.

Drum Skimmer
The rotary drum skimmer features interchangeable brush, disk, and drum oil-recovery banks to handle a full range of oil types and viscosities. It is compact, lightweight, easy to deploy and offers excellent recovery rates.

The skimmer and pump can both be hydraulically powered and controlled by a dual-circuit diesel/hydraulic power pack or by separate power systems. The skimming system can also be operated pneumatically using compressed air packages.

Most of these skimmers are compact and lightweight, with four lift handles for easy deployment by hand. No lift crane is required. The skimmers can be operated in 5 inches (12.7 cm) of water to draft during shallow water operations and easy bank placement. This type of skimmer is compatible with a large selection of fuel transfer pumps. Currently, NRC owns and operates 10 Drum Skimmers in California.

Weir TDS Skimmer
NRC's Foilex "Weir" Skimmers are designed for harbor, coastal and offshore oil spill recovery. They are equipped with efficient, low-speed, onboard TDS pumps that use patented Twin Disc Archimedes Screw technology that deliver up to 70% higher recovery capacity than traditional screw pumps.

This type of skimmer is constructed with a three-pontoon frame type for safe and easy deployment and stabilization during recovery operations. TDS Skimmers are hydraulically driven, powered by Foilex hydraulic power packs or by available ships' hydraulics. TDS Skimmers handle all types of spills, from light diesel fuel to heavy crude oil. Strong cutting knives in the pump intakes handle most types of debris commonly found in oil spills. Currently, NRC owns and operates 6 of these skimmers in California.

CTEH®

Air Monitoring Equipment
CTEH® maintains state-of-the art air monitoring and field analytical instruments and is capable of performing both real-time and integrated (laboratory) air sampling for a broad range of chemical compounds. Some of the real-time equipment available today includes: MultiRAE Pro 5 Gas Monitor; UltraRAE 3000 PID with chemical specific sampling tubes; AreaRAE five gas monitor with radio telemetering capabilities; and DustTrak DRX aerosol monitor.

In addition to the real-time instruments listed above, CTEH® also has portable integrated sampling pumps.

Environmental Sampling Equipment
CTEH® maintains a variety of real-time monitoring and analytical sampling equipment including: Horiba Multiparameter real-time water quality monitoring device.

Software Applications
CTEH® utilizes the following software and data management systems: RAE Systems ProRAE guardian data logging and display system; and CTEH® Projects Data Management Portal.

PATRIOT ENVIRONMENTAL SERVICES

Spill Response Trailer
The 24-foot Emergency Response Trailer is capable of supporting over 15 responders in an incident which requires personal protective equipment up to OSHA Level "C". In addition, the trailers include containment and recovery resources, confined space operations, decontamination related assets and general clean-up related tools and equipment to perform both daylight and night operations.

This type of trailer is intended for inland spill response-related activities in many geophysical environments and serves as a logistical support for stream/river/ocean response activities.

The trailers are stored in a fully equipped and maintained condition, making them available for timely incident response. They are designed to respond to hazardous, non-hazardous and trauma scene incidents, as well as multi-casualty and catastrophic disaster events.

CENTRAL CALIFORNIA TRACTION COMPANY

TRANSCAER Flat Car Training Car SSW 87679 (CCT91101)
The training flat car has the following training props and is used for hands-on training: The flat car Two LPG/Anhydrous Ammonia protective housing and valves; an Anhydrous nurse tank; a Chlorine protective housing; a general service bottom outlet valve; top manway; and an auxiliary housing and vacuum relief valve. In addition, the car contains a one ton Chlorine container prop. All props can simulate leaking, which allows for realistic training with non-hazardous substances. The C Kit and Midland Kit and the A and B kits can be applied to this car for hands on training. Up to 20 students can be accommodated with four instructors on the flat car at a time.

TRANSCAER CCT100 Caboose
The CCT100 is a caboose that was converted to a mobile classroom and is equipped to seat 25 students. It is temperature-controlled and includes a screen and power point projector for classroom training. It is also equipped with a 12,500 watt generator which provides power for the caboose and flat car at remote locations.

ATTACHMENT 2

MEMORANDUM

OF

MUTUAL UNDERSTANDINGS AND AGREEMENTS

South Coast Locomotive Fleet Average Emissions Program

July 2, 1998

MEMORANDUM

OF

MUTUAL UNDERSTANDINGS AND AGREEMENTS

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M E M O R A N D U M

OF

MUTUAL UNDERSTANDINGS AND AGREEMENTS

This MEMORANDUM OF MUTUAL UNDERSTANDINGS AND AGREEMENTS dated as of July 2, 1998 ("Memorandum"), is entered into between and among the following (collectively, the "parties"):

- California Air Resources Board ("ARB"), and

- The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, which are the Class I freight Railroads operating within the boundaries of the South Coast Nonattainment Area (individually, a "Participating Railroad", and together, the "Participating Railroads").

In order to achieve the emissions reductions contemplated herein, the parties have voluntarily arrived at the following mutual understandings and agreements:

I. MUTUAL UNDERSTANDINGS AND AGREEMENTSI

A. Locomotive Emissions Program Statement of Principles

The parties have entered into this Memorandum in recognition of the Statement of Principles - South Coast Locomotives Program ("Statement of Principles") agreed to by the U.S. Environmental Protection Agency ("EPA"), ARB, and the Participating Railroads, and dated as of May 14, 1997.

B. National Emissions Standards for Locomotives

Section 213 of the Federal Clean Air Act directs EPA to adopt emissions standards

applicable to new locomotives and new engines used in locomotives. EPA proposed regulations establishing such emission standards on February 11, 1997 (62 Fed.Reg. 6366) and promulgated the final regulation on April 16, 1998 (63 Fed. Reg. 18978) (the "Final EPA National Locomotive Rule"). EPA adopted national emission standards consisting of several tiers, applicable to remanufactured and new locomotives as specified in the Final EPA National Locomotive Rule. EPA promulgated each of these emission standards to "achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available for the locomotives or engines to which such standards apply, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology." (Clean Air Act § 213(a)(5)).

C. Participating Railroads' Affirmative Proposal for the South Coast Nonattainment Area

In 1993, the Participating Railroads proposed to EPA, ARB and others the establishment of a locomotive fleet average emissions program in the South Coast Nonattainment Area tied to promulgation of the Final EPA National Locomotive Rule and intended to accelerate introduction into the South Coast Nonattainment Area of newer, lower emitting locomotives. The Participating Railroads, EPA and ARB have since discussed improvements and refinements of the fleet average program, resulting in the mutual understandings, agreements and covenants herein. Measure M14 of the 1994 California State Implementation Plan recognizes the uniqueness of the Participating Railroads' fleet average proposal: "In essence, this fleet average requirement represents the most aggressive scrappage and replacement program of any transportation source . . .."

D. Projected Emission Reductions from 1994 California State Implementation Plan Measure M14

1. California developed and adopted the 1994 California State Implementation Plan ("1994 SIP") to attain the federal ozone air quality standard in the South Coast Nonattainment Area and certain other areas of California. EPA approved the 1994 SIP on

September 26, 1996.

2. Measure M14 of the 1994 SIP anticipates that locomotive fleets operating in the South Coast Nonattainment Area in 2010 and later will emit on average no more than the 5.5 grams per brake horsepower-hour ("g/bhp-hr") Tier 2 (2005 and later) new locomotive oxides of nitrogen ("NO_x") emission standard included in the Final EPA National Locomotive Rule. Measure M14 further states that this fleet average emission level will achieve about a two-thirds reduction in locomotive NO_x emissions from the 1994 SIP's projection of the 2010 emissions level for locomotives operating in the South Coast Nonattainment Area. As indicated in the Statement of Principles, the Parties fully expect that the locomotive fleet average emissions program specified herein, when fully implemented, will achieve the emissions reductions contemplated by M14 in 2010, beyond the reductions expected to result through implementation of EPA's national emissions standards for new locomotives and new engines used in locomotives.

E. SIP Credit for Emissions Reductions

Measure M14 was included in EPA's September 26, 1996 approval of the 1994 SIP (62 Fed.Reg. 1149 (January 8, 1997)). As stated in the Statement of Principles, EPA intends to commit to adopt regulations as necessary that would assure that the emissions reductions called for in this Memorandum are achieved from the railroads and/or, if necessary, from other national transportation sources. EPA intends to promulgate such a commitment and establish appropriate SIP credits through notice and comment rulemaking at the conclusion of the Public Consultative Process established in conjunction with approval of the South Coast attainment demonstration (see 40 C.F.R. § 52.238). In that rulemaking, EPA intends to propose adoption of the backstop commitment provision attached to the Statement of Principles.

F. Implementation Impacts on Participating Railroads

The parties understand and acknowledge that implementation of the Locomotive Fleet Average Emissions Program in the South Coast Nonattainment Area will have substantial capital cost and operational impacts on the Participating Railroads. These costs and impacts

result from the Participating Railroads' accelerated introduction into the South Coast Nonattainment Area of lower emitting locomotives, and are in addition to the impacts that will result from implementation of the Final EPA National Locomotive Rule. These impacts include: costs of purchasing additional reserve power, purchasing and installing necessary metering and monitoring equipment, and constructing, maintaining, and operating power changeout facilities; train delay due to power changeouts; and reductions in operating flexibility due to the need to concentrate lower-emitting locomotives in the South Coast Nonattainment Area.

G. Relationship with EPA's National Locomotive Emissions Standards

Under sections 209 and 213 of the Federal Clean Air Act, EPA has the exclusive authority to "promulgate regulations containing standards applicable to emissions from new locomotives and new engines used in locomotives." States and political subdivisions are prohibited from adopting or attempting to enforce "any standard or other requirement relating to the control of emissions from . . . new locomotives or new engines used in locomotives." In the Final EPA National Locomotive Rule promulgated under sections 209 and 213, EPA addressed the issue of the scope of preemption under section 209, and specified that a prohibited "other requirement" includes mandatory fleet average standards. In this Memorandum, the parties voluntarily consent to their mutual participation herein solely for the South Coast Nonattainment Area and solely for the purposes set forth herein, and further agree that the state has the authority to enter into this Memorandum. Under California law, ARB is the state agency with the appropriate jurisdiction to participate in this Memorandum.

H. Unique Features of Railroads

1. Railroads operate national locomotive fleets that travel between states daily, moving more than forty percent of the total intercity revenue ton-miles of freight in the United States. The interconnected nature of the rail network and the ability of locomotives to travel freely throughout the country allow for efficient deployment of locomotives to meet customer needs. Segmentation of the national locomotive fleets into multiple geographic areas would be very burdensome for the railroads because of the very high capital costs of the additional

locomotives needed to establish area-specific locomotive fleets, creation of inefficient operations, and delay of time-sensitive customer shipments. A patchwork of different state and local programs would be an inefficient, costly and time-consuming disruption of interstate commerce. See EPA, Proposed National Locomotive Emission Standards, 62 Fed. Reg. 6366, 6368 (February 11, 1997).

2. Because of the expense of purchasing new locomotives and the resulting economic necessity to keep them operating for as long as possible, railroads spend considerable time and money to maintain their locomotives in equivalent to new condition for at least 30 years.

3. Railroads are an environmentally efficient way to move goods. See, for example, the discussion at 62 Fed. Reg. 6368. Railroads continue to improve their efficiency and reduce emissions per ton-mile of freight moved.

4. Price is usually the significant determinant in a shipper's choice of modes or routes, with the result that railroad traffic levels and patterns are very sensitive to increases in costs. Overly stringent regulation can severely impact railroad traffic and divert international trade away from California ports.

I. Unique Features of Locomotives

1. Only two companies manufacture most of the locomotives used in the United States. Only about 500 new locomotives are manufactured for use in the United States per year. This means that railroads have a limited ability to purchase new locomotives in any particular year. In addition, the price of locomotives is high (upwards of $2.5 million each in 1997) because the manufacturers' costs must be spread over such a small production level.

2. Locomotives continue in active service for 30 to 40 years. Given proper maintenance, their NO_x emissions rates do not significantly deteriorate over time. Most locomotives are remanufactured periodically, allowing them to remain in equivalent to new condition for their entire lives. In contrast to the usual 30-40 year fleet turnover rate as noted

in Measure M14, the locomotive fleet average program for the South Coast Nonattainment Area would, in effect, result in 100 percent scrappage/replacement with the lower-emitting locomotives over 5 years from 2005-2009.

3. Technologies from other mobile sources that have been successfully applied to reduce NO_x emissions from locomotives include retarded injection timing, increased charge air cooling and increased injection pressure. However, locomotive engines cannot readily use several key cooling mechanisms (e.g., ram air and air-to-air aftercooling) that can be used on other engines to reduce NO_x emissions. Other potential NO_x emission reduction techniques also cannot be used on locomotives due to very high vibration levels, the need for all locomotive components to withstand shock loading of up to five times the force of gravity, locomotive size and weight restrictions, and air flow characteristics affecting locomotive operations in tunnels.

J. Unique Features of the South Coast Nonattainment Area

1. The South Coast Nonattainment Area has, and under any conceivable future circumstances will continue to have, unique air quality problems which require unique, exceptional solutions. Despite the great strides made in California and the South Coast to clean up the air by controlling emissions from virtually all sources of air pollution over the past several decades, the South Coast area continues to have the worst ozone problem in the country and is the only region classified as an extreme nonattainment area. From 1990 to 1992, the average number of exceedance days in each year was 134.3. The South Coast's unique air quality problems are the result of massive emissions generated within the region, exacerbated by especially adverse meteorology and topography. "Southern California . . . violates the [federal ozone] standard on almost one out of every three days--25 times more frequently than the next most polluted urban areas." EPA, Proposed Approval of the California SIP, 61 Fed.Reg. 10920, 10922 (March 18, 1996).

2. The movement of goods through the South Coast Nonattainment Area is essential to the economic vitality of the area and of the nation, and the rail transportation network in the South Coast Nonattainment Area is an essential part of the regional, national

and global transportation systems. This network already provides substantial environmental and economic benefits to the region. These benefits can increase over the long term. The parties agree that the use of rail transportation for goods movement in the South Coast Nonattainment Area is consistent with the goal of maintaining economic vitality in an environmentally beneficial manner.

II. GLOSSARY OF TERMS USED

"Adjustment" means a downward adjustment to either a locomotive's EL_i or a Participating Railroad's FA due to quantifiable and verifiable emissions reduction measures undertaken by a railroad that are not accounted for in the CL or FA. Adjustments shall be made pursuant to paragraph III.C.3 or paragraph III.D.1, as applicable.

"CL" is a locomotive's certified NO_x emission rate in g/bhp-hr, as determined pursuant to 40 C.F.R. Part 92 for the line haul duty cycle.

"Correction" means a downward mathematical change to a Participating Railroad's FA for 2010 and later years, to reflect differences between the atmospheric conditions specified in EPA's test procedure for establishing certified emission levels for locomotives pursuant to the Final EPA National Locomotive Rule and the atmospheric conditions in the South Coast Nonattainment Area, as specified in paragraph III.D.2.

"EL_i" is the NO_x emission rate in g/bhp-hr for an individual locomotive, as calculated and adjusted pursuant to subsection III.C.

"Exclusive Use" or the phrase "exclusive use of locomotives with CLs at or below the Fleet Average Target" means the use of locomotives with CLs at or below the Fleet Average Target in the South Coast Nonattainment Area by a Participating Railroad during a year such that either of the following is true: (1) 100% of the locomotives used have CLs at or below the Fleet Average Target; or (2) no less than 99.9% of the Locomotive Days of Operation are generated by locomotives with CLs at or below the Fleet Average Target.

"FA" means a Participating Railroad's fleet average NO_x emission rate, in g/bhp-hr, for locomotives operated in the South Coast Nonattainment Area, as calculated pursuant to subsection III.B.

"FAC" means fleet average emission credits, expressed in g/bhp-hr, calculated pursuant to subsection III.F.

"Final EPA National Locomotive Rule" means the final regulation promulgated by EPA on April 16, 1998 (63 Fed. Reg. 18978) establishing emission standards for new locomotives and new engines used in locomotives and appearing at Title 40, Code of Federal Regulations, Part 92, commencing at § 92.1, and addressing preemption of state and local locomotive emission standards at Title 40, Code of Federal Regulations, § 85.1603(c).

"Final FA" means a Participating Railroad's final fleet average NO_x emission rate, in g/bhp-hr, for a calendar year, after application of any adjustments and any correction to FA, and subtraction from the adjusted/corrected FA of any FAC or other emission reductions available to the Participating Railroad in accordance with this Memorandum and needed to reduce that Participating Railroad's adjusted/corrected FA. The Final FA is calculated as specified in subsection III.D.

"Fleet Average Target" means EPA's NO_x emission standard for freight locomotives manufactured in 2005 and later, for the line-haul duty cycle, or 5.5 g/bhp-hr, whichever is greater.

"Locomotive Day of Operation" means a calendar day, from midnight to midnight, during any portion of which a locomotive is operated in the South Coast Nonattainment Area.

"Locomotive Fleet Average Emissions Program" means the program established in the South Coast Nonattainment Area by the Participating Railroads pursuant to this Memorandum of Mutual Understandings and Agreements.

"Measure M14" means the control measure pertaining to locomotive emissions and adopted by the ARB on November 15, 1994, as part of the 1994 California State Implementation Plan required under the Federal Clean Air Act, and approved by EPA on September 26, 1996 (62 Fed.Reg. 1149 (January 8, 1997)), and any amendments to the control measure made to incorporate revised locomotive NO_x emission reductions expected to occur in the South Coast Nonattainment Area for the years 2005 through 2009.

"Proposed EPA National Locomotive Rule" means the proposed regulation published in the Federal Register on February 11, 1997 (62 Fed.Reg. 6366), identifying expected emission standards for new locomotives and new engines used in locomotives, and further proposing provisions to preempt state and local locomotive emission standards.

"South Coast Nonattainment Area" means the area of Los Angeles, Orange, Riverside, and San Bernardino Counties designated in 40 C.F.R. § 81.305 as of July 1, 1996 as a federal "Extreme" ozone nonattainment area and described more specifically in Appendix A.

"ULEL" means ultra-low emitting locomotive. For the purposes of this Memorandum, through 2011 a ULEL is a locomotive with an EL_i equal to or less than 4.0 g/bhp-hr, and for 2012 through 2014 a ULEL is a locomotive with an EL_i less than 3.0 g/bhp-hr.

"Year" means a calendar year beginning on January 1 and continuing until the following December 31, except as otherwise specified herein.

III. PARTICIPATING RAILROADS' FLEET AVERAGE OBLIGATIONS IN THE SOUTH COAST NONATTAINMENT AREA

A. Annual Obligation

1. In each calendar year beginning in 2010, each Participating Railroad's Final FA shall not exceed the Fleet Average Target.

2. Beginning April 1, 2011, each Participating Railroad shall annually demonstrate that it has satisfied paragraph III.A.1 for the preceding year, by calculating its FA pursuant to paragraph III.B.1 or paragraph III.B.3, and determining its Final FA pursuant to subsection III.D. As an alternative, a Participating Railroad may show that it has satisfied the definition of Exclusive Use.

B. Calculation of FA

1. The formula for calculating a Participating Railroad's FA in a particular year shall be:

$$FA = \frac{\sum_{i=1}^{n} (EL_i)\ (MWhr_i)}{\sum_{i=1}^{n} (MWhr_i)} 1$$

where $MWhr_i$ = the total number of megawatt-hours an individual locomotive operated in the South Coast Nonattainment Area in the applicable year, measured at the generator, or, at the Participating Railroad's option, the number of gallons of fuel consumed by the locomotive while it operated in the South Coast Nonattainment Area.

n = the total number of locomotives the Participating Railroad operated in the South Coast Nonattainment Area in the applicable year.

For the purposes of this calculation, n may include nominal locomotive(s) to represent one or more alternative operating scenarios for a particular physical locomotive. Alternative operating scenarios may include, but are not limited to, operation of a locomotive on more than

one fuel where a different CL has been determined for the locomotive's operation on each fuel, and circumstances where a physical locomotive operates for less than an entire calendar year under a particular combination of quantifiable and verifiable emission reductions for which adjustments may be made to the EL_i or FA.

2. A Participating Railroad may use either megawatt-hours or gallons of fuel for determining any individual locomotive's $MWhr_i$, but the use of one or the other measurement for all of a Participating Railroad's locomotives is encouraged. A Participating Railroad shall be permitted to convert gallons of fuel to megawatt-hours, or vice-versa, pursuant to the procedure in Appendix B or any other formula agreed to by the parties.

3. If, for a particular year, a Participating Railroad attempts to satisfy its fleet average obligation through the exclusive use of locomotives with CLs at or below the Fleet Average Target, but is unable to satisfy the definition of Exclusive Use, the Participating Railroad may calculate its FA for that year by using the formula in paragraph III.B.1 or by using the following formula:

$$FA = \frac{\sum_{i=1}^{n} (EL_i)\ (Days_i)\ (Factor_i)}{\sum_{i=1}^{n} (Days_i)\ (Factor_i)}$$

where $Days_i$ = the total number of Locomotive Days of Operation for an individual locomotive in the South Coast Nonattainment Area in the applicable year.

n = the total number of locomotives the Participating Railroad operated in the South Coast Nonattainment Area in the applicable year.

$Factor_i$ = the locomotive horsepower weighting factor applicable to an individual locomotive, as specified in the following table:

Locomotive Horsepower	**Factor**
1999 or less	1

2000 to 2999	2
3000 or more	5

C. Calculation of EL

1. EL_i for a locomotive shall be the CL for that locomotive, unless the EL_i is adjusted pursuant to this subsection III.C.

2. Prior to 2005, the parties shall mutually agree upon default CL's for locomotive models with no CL for NO_x.

3. A locomotive's EL_i may be adjusted downward to account for quantifiable and verifiable emissions reductions not included in the CL. Adjustments to the EL_i may be made pursuant to paragraphs 2 through 5 of Appendix D.

4. When quantifiable and verifiable emissions reductions for a particular locomotive apply to only a portion of that locomotive's operations in the South Coast Nonattainment Area in a given year, the locomotive shall be treated in the fleet average calculation as two or more nominal locomotives, pursuant to paragraph III.B.1. For each nominal locomotive, a separate EL_i shall be calculated, based upon the quantifiable and verifiable emissions reductions that apply to that nominal locomotive. In calculating the FA, the megawatt-hours operated or fuel usage for each nominal locomotive shall be the number of megawatt-hours operated or gallons of fuel used under the operating conditions that apply to that nominal locomotive.

D. Calculation of Final FA

1. In lieu of adjusting each locomotive's EL_i downward under paragraph III.C.3 due to applicable quantifiable and verifiable emissions reductions not accounted for in the CL, a Participating Railroad may adjust FA for such reductions after FA has been calculated pursuant to subsection III.B, but only if the adjustment is mathematically equivalent to or less than the cumulative adjustment that would have occurred by adjusting each locomotive's EL_i.

2. If necessary to achieve the Fleet Average Target for 2010 and later, after adjusting a Participating Railroad's FA pursuant to paragraph III.D.1, if applicable, the Participating Railroad's FA or adjusted FA may be corrected downward to account for atmospheric conditions, as specified in paragraph 1 of Appendix D.

3. After making applicable adjustments and/or a correction pursuant to paragraphs III.D.1 and III.D.2, a Participating Railroad's resultant FA shall be rounded to the nearest 0.1 g/bhp-hr in accordance with Appendix C. If this adjusted/corrected FA still exceeds the Fleet Average Target, the Participating Railroad may subtract from the adjusted/corrected FA emission reductions to reduce the adjusted/corrected FA using either or both of the following:

a. A Participating Railroad may in any year subtract from its adjusted/corrected FA not more than 1.3 g/bhp-hr of FAC created prior to 2010. A Participating Railroad also may in any year subtract from its adjusted/corrected FA not more than 0.3 g/bhp-hr of emission reductions other than FAC generated under this Memorandum (with those emission reductions converted to g/bhp-hr using Table E-1 in Appendix E), provided that the 1.3 g/bhp-hr limit on the use of FAC created prior to 2010 shall be reduced by the amount of any non-FAC emission reductions subtracted pursuant to this sentence.

b. A Participating Railroad may in any year subtract from its adjusted/corrected FA any quantity of FAC created in 2010 or later.

4. The Participating Railroad's Final FA shall be the FA calculated pursuant to subsection III.B, as adjusted and, if necessary, corrected, and after subtraction pursuant to paragraph III.D.3 of any FAC or other emission reduction.

E. <u>Data Collection and Calculations</u>

1. No later than January 1, 2010, and for any year prior to 2010 for which a Participating Railroad wishes to generate FAC (other than FAC created through the use of

ULELs), each Participating Railroad shall track megawatt-hour usage or fuel consumption through the use of track-side transponders that read megawatt-hour or fuel data for all locomotives as they enter and leave the South Coast Nonattainment Area. The transponders shall be located at the South Coast Nonattainment Area borders or at a close distance past the borders. A Participating Railroad and ARB may agree to alternative means of tracking megawatt-hour usage or fuel consumption. If the Participating Railroad elects to achieve the Fleet Average Target through the exclusive use of locomotives with CLs at or below the Fleet Average Target, instead of tracking megawatt-hours or fuel consumption, that Participating Railroad shall collect data to identify all locomotives used in the South Coast Nonattainment Area for the applicable year for the purpose of demonstrating that the definition of "Exclusive Use" is satisfied or, if necessary to calculate the Participating Railroad's FA using the formula provided in paragraph III.B.3 or to document the quantity of FAC created by the use of ULELs, records specifying the number of Locomotive Days of Operation for each locomotive used in the South Coast Nonattainment Area for the applicable year.

2. Calculation of FA shall be based on all data in a Participating Railroad's possession. For FA calculations made using the formula specified in paragraph III.B.1., if such data represent less than 90 percent of a Participating Railroad's locomotives operating within the South Coast Nonattainment Area, the Participating Railroad shall use estimated data for enough missing locomotives so that the calculated FA for the year represents at least 90 percent of the Participating Railroad's locomotives operated within the South Coast Nonattainment Area. Estimation of the missing data shall be based on data for locomotives operated on similar trains within the South Coast Nonattainment Area, as provided in Appendix F.

3. The rules in Appendix C shall apply to any rounding of calculations performed in connection with this Memorandum.

F. <u>Fleet Average Emission Credits</u>

1. For the year 2010 and thereafter, a Participating Railroad may generate FAC in any year in which its Final FA (if based on FA calculated using the formula specified in paragraph III.B.1) is below the Fleet Average Target. FAC created in 2010 and later, other

than FAC created by the use of ULELs, shall be calculated as follows:

FAC = Fleet Average Target - Final FA

2. A Participating Railroad may generate FAC for emissions reductions in the 2005 - 2009 time period, as specified in this paragraph. To generate such credits, a Participating Railroad must calculate its Final FA for the year for which emissions reductions are to be credited, using the formula for FA specified in paragraph III.B.1. FAC for the 2005 - 2009 time period shall be calculated as follows:

FAC = ((l-y) x 15.4 g/bhp-hr) - Final FA,

where y = a specified percentage reduction from 1990 baseline NO_x emission levels (15.4 g/bhp-hr). For the purpose of calculating FAC pursuant to this paragraph, the percentage reductions from baseline emission levels which constitute "y" shall be as follows: 27.8% (2005), 32.9% (2006), 37.8% (2007), 41.8% (2008), and 47.8% (2009).

3. FAC shall be denominated in g/bhp-hr. FAC calculated pursuant to this subsection III.F shall be rounded to the nearest 0.1 g/bhp-hr. For purposes of generating FAC pursuant to this subsection III.F, the Final FA shall not include any correction for absolute humidity and ambient temperature levels in the South Coast Nonattainment Area.

4. FAC shall not be discounted or expire.

5. Except as otherwise provided herein, a Participating Railroad may retain FAC for its own future use and may engage in the purchase, sale, trade or other transfer of FAC with the other Participating Railroad. A Participating Railroad may acquire and use FAC from another Participating Railroad for any purpose for which FAC may be used under this Memorandum, including the use of FAC to calculate a Participating Railroad's Final FA under paragraph III.D.3 or to provide mitigation as required under paragraph IV.C.4 and Appendix E.

6. A Participating Railroad may generate FAC from the use of ULELs in any

calendar year beginning on or after the effective date of this Memorandum, through December 31, 2014. The opportunity to create FAC through the use of ULELs is provided as an incentive for the introduction of ultra-low emitting locomotives into the South Coast Nonattainment Area. Calculation of FAC created by a Participating Railroad's use of ULELs in a particular calendar year is independent of the calculation of FAC pursuant to paragraphs III.F.1 and III.F.2 and shall be performed as follows:

a. The Participating Railroad's weighted average ULEL emission rate ("w") for the year shall be calculated by using the following formula:

$$w = \frac{\sum_{i=1}^{k} (EL_i)\ (Days_i)\ (Factor_i)}{\sum_{i=1}^{k} (Days_i)\ (Factor_i)}$$

where $Days_i$ = the total number of Locomotive Days of Operation for an individual ULEL in the South Coast Nonattainment Area in the applicable year;

k = the total number of ULELs the Participating Railroad operated in the South Coast Nonattainment Area in the applicable year;

$Factor_i$ = the locomotive horsepower weighting factor applicable to an individual ULEL, as specified in the following table:

Locomotive Horsepower	**Factor**
1999 or less	1
2000 to 2999	2
3000 or more	5

b. The Participating Railroad's maximum possible FAC from the use of ULELs ("m") for the particular year shall be determined according to the following formula:

m = Fleet Average Target - w

c. The Participating Railroad's usage of ULELs in the South Coast Nonattainment Area ("u") for the particular year shall be determined according to the following formula:

$$u = \sum_{i=1}^{k} (Days_i) 4$$

where $Days_i$ = the total number of Locomotive Days of Operation for an individual ULEL in the South Coast Nonattainment Area in the applicable year;

k = the total number of ULELs the Participating Railroad operated in the South Coast Nonattainment Area in the applicable year.

d. The usage level ("s") (in Locomotive Days of Operation) at which the Participating Railroad would earn the maximum amount of FAC from the use of ULELs shall be calculated according to one of the following formulas, as applicable:

i. When the weighted average ULEL emission rate ("w") for the year is more than 3.0 g/bhp-hr and less than or equal to 4.0 g/bhp-hr,

$$s = 30000\ w - 70500$$

ii. When the weighted average ULEL emission rate ("w") for the year is equal to or less than 3.0 g/bhp-hr,

$$s = 2500\ w + 12000$$

e. The Participating Railroad's FAC from the use of ULELs for the particular year shall be determined according to the following formula, but shall not exceed m:

$$FAC = m\left(\frac{u}{s}\right)5$$

G. No Locomotive or Railroad Operating Limit

The purpose of this Memorandum is to reduce emissions from railroad operations in the South Coast Nonattainment Area consistent with Measure M14 through implementation of a locomotive fleet average emission standard; however, nothing herein constitutes, or shall be interpreted to constitute, any restriction or limit on the operation or activity of locomotives or railroads in the South Coast Nonattainment Area pursuant to their common carrier obligations under the Interstate Commerce Act, or on total railroad emissions in that area.

H. Participation in South Coast Nonattainment Area Emission Credit Trading Programs

Except as specified in this subsection, nothing herein shall impair the ability of a Participating Railroad to participate in any emission banking or trading programs effective in the South Coast Nonattainment Area, provided that "double crediting" (use of the same credits twice) shall not be permitted. Subject to the requirements of such emission banking and trading programs, a Participating Railroad may use emission credits from such programs to calculate its Final FA under subparagraph III.D.3.a, or to mitigate excess emissions pursuant to Appendix E, or may transfer FAC to other persons for use in such programs.

I. Contribution of Emission Reductions

The Participating Railroads have voluntarily undertaken the obligation to implement the fleet average program established herein. During the term hereof, each Participating Railroad hereby irrevocably contributes the resulting emission reductions (other than FAC created in accordance herewith) to the State of California for the benefit of the citizens of the South Coast Nonattainment Area.

IV. ADMINISTRATION OF THE FLEET AVERAGE PROGRAM FOR THE SOUTH COAST NONATTAINMENT AREA

A. Recordkeeping

1. Beginning in 2010, and for any year prior to 2010 for which a Participating Railroad wishes to generate FAC (other than FAC from the use of ULELs), each Participating Railroad shall keep supporting documentation showing megawatt-hour usage or fuel consumption, as appropriate, by locomotive. If the Participating Railroad elects to achieve the Fleet Average Target through the exclusive use of locomotives with CLs at or below the Fleet Average Target, the Participating Railroad shall instead keep records identifying all locomotives used in the South Coast Nonattainment Area for the applicable year, and, if necessary to demonstrate that the definition of "Exclusive Use" is satisfied or to calculate the Participating Railroad's FA using the formula provided in paragraph III.B.3, records specifying the Locomotive Days of Operation for each locomotive used in the South Coast Nonattainment Area for the applicable year. If a Participating Railroad elects to create FAC from the use of ULELs in any year, the Participating Railroad shall keep records identifying all ULELs used in the South Coast Nonattainment Area for the applicable year and the Locomotive Days of Operation for each such ULEL.

2. Each Participating Railroad shall keep supporting documentation for all FAC generated, used, retained, purchased or transferred, and for adjustments and any correction made to the fleet average calculation.

3. Records required to be retained pursuant hereto shall be kept for two years following the submittal of the report required by paragraph IV.B.1 or IV.B.3 and, for records pertaining to the generation of FAC, for two years after the FAC have been used. In any situation in which records required to be retained pursuant hereto are pertinent to a noncompliance determination or dispute resolution process proceeding in accordance with subsection IV.C, such records shall be retained for one year following (i) issuance of the final compliance determination or (ii) final resolution of the dispute, whichever is later.

4. Notwithstanding the recordkeeping and reporting requirements herein, each Participating Railroad retains all rights under law to protect confidential business information and other information protected by law from disclosure.

B. Reporting

1. By April 1, 2011, and each April 1 thereafter, each Participating Railroad shall report to ARB its Final FA for the previous calendar year. Should a Participating Railroad elect to calculate its Final FA for any year in the 2005 -- 2009 period for the purpose of generating FAC, it shall report the results of its calculation to ARB by December 31 of the following year. Should a Participating Railroad elect to generate FAC by the use of ULELs, it shall report the results of its FAC calculation to ARB by December 31 of the following year (for years 2002 through 2009) and by April 1 of the following year (for years 2010 through 2014). Reports made pursuant to this subsection IV.B shall include the information specified in Appendix F. Upon request by a Participating Railroad, ARB may, for good cause, extend the deadline for any report made pursuant to this subsection IV.B.

2. Upon reasonable request by ARB, a Participating Railroad shall provide the requesting agency with additional data or information related to the calculation of its Final FA.

3. If for any year a Participating Railroad achieves the Fleet Average Target through the exclusive use of locomotives with CLs at or below the Fleet Average Target, in lieu of calculating and submitting its Final FA for that year pursuant to subsection III.D and paragraph IV.B.1, respectively, the Participating Railroad shall submit to ARB by April 1 of the following year the list of locomotives used in the South Coast Nonattainment Area for the applicable year, their identification number, year of manufacture or remanufacture, CL, and if necessary to demonstrate that the definition of "Exclusive Use" is satisfied, the number of Locomotive Days of Operation.

4. Each Participating Railroad must include in the report submitted pursuant to paragraph IV.B.1 information regarding the source and quantity of any FAC or other emission reduction used by the Participating Railroad to achieve the Fleet Average Target or otherwise

comply with this Memorandum during the year for which the report is filed.

5. By September 30, 2002, the Participating Railroads and ARB will meet and confer to determine what constitutes sufficient information to be submitted by the Participating Railroads for the years 2002-2004 to explain the railroads' implementation plans and their progress toward meeting the Fleet Average Target in 2010 and beyond. The Participating Railroads will submit the agreed-upon information on April 1, 2003, 2004 and 2005 for each of the preceding calendar years. For calendar years 2005-2009, the Participating Railroads will submit to ARB the information submitted to EPA pursuant to a backstop commitment regulation adopted as described in subsection I.E and the Statement of Principles. In complying with this paragraph IV.B.5, the Participating Railroads shall not be subject to the mitigation and liquidated damages provisions of paragraph IV.C.4 or Appendix E.

6. All reports submitted by the Participating Railroads pursuant to paragraphs IV.B.1, 3, and 4 shall include a certification by a management-level employee with sufficient authority to act for the Participating Railroad pursuant to the terms hereof, that the report is submitted on behalf of the Participating Railroad and that the information submitted is, to the best of the railroad's knowledge and belief, true, accurate and complete, and is consistent with Appendix F.

7. The purpose of Appendix F is to provide all information necessary for a Participating Railroad to demonstrate compliance with the annual obligation set forth in paragraph III.A.1 by providing the information necessary to perform the calculations under subsections III.B, C, D, E and F, as applicable, and to provide the information required under paragraphs IV.B.1, 3 and 4, as applicable.

C. <u>Enforcement Procedure and Agreed Remedies</u>

1. The ARB is designated as the agency responsible for enforcement of the obligations undertaken by the Participating Railroads. The enforcement authorities specified herein may only be exercised by ARB. Nothing herein shall be interpreted as granting any

rights to the public or to any person not a party hereto.

2. Consultations.

a. A Participating Railroad may at any time initiate informal consultations with ARB to identify and resolve concerns or other issues regarding compliance herewith.

b. ARB may at any time initiate informal consultations with either or both of the Participating Railroads to identify and resolve concerns or other issues regarding Participating Railroad compliance herewith.

3. Completeness and Noncompliance Determinations

a.i. ARB shall review the report submitted each year by each Participating Railroad pursuant to paragraph IV.B.1, 3 and 4, as applicable. If ARB has not received such report from a Participating Railroad by April 1, ARB shall promptly notify that Participating Railroad.

ii. Within thirty days of receipt of a report submitted pursuant to paragraph IV.B.1, 3 and 4, as applicable, ARB shall notify the Participating Railroad if it determines that the report is incomplete when compared to the report elements specified in Appendix F, and shall provide the Participating Railroad a written notice of incompleteness identifying any deficiencies. Upon receipt of a notice of incompleteness issued by ARB pursuant to this clause IV.C.3.a.ii, a Participating Railroad shall have an opportunity to meet and confer with ARB regarding the completeness of the report with respect to the report elements specified in Appendix F, within 30 days of the Participating Railroad's receipt of ARB's notification. The Participating Railroad shall provide any information needed to correct any incompleteness within 30 days after its receipt of the notice of incompleteness and agreement between the Participating Railroad and ARB specifying the information needed to correct any incompleteness. If the Participating Railroad requires more than 30 days to respond, it may request,

and ARB will not unreasonably deny, a further extension. If the Participating Railroad and ARB, after consultation, do not reach agreement regarding the completeness of the report or the need for additional information, each party shall submit its position to the administrative appeals panel within 30 days of the last day of consultation for resolution pursuant to the limited dispute resolution process set forth in paragraph IV.C.5.

iii. ARB shall review the complete report and, if necessary, make a preliminary determination that the Participating Railroad did not satisfy its fleet average emissions obligation under subsection III.A for the previous year or was otherwise not in compliance with its obligations hereunder. ARB shall provide the Participating Railroad with its written preliminary determination as expeditiously as practicable but not later than 120 days after initial receipt of the Participating Railroad's report submitted pursuant to paragraph IV.B.1, 3 and 4, as applicable, or 30 days after receipt of a complete report, whichever is later. The time periods provided for ARB to make a preliminary compliance determination may be extended by written agreement between ARB and the Participating Railroad.

b. A Participating Railroad shall have 45 days to respond to ARB's preliminary determination that the Participating Railroad is or was not in compliance herewith. The Participating Railroad's response may contain such information and analysis as the Participating Railroad believes appropriate to demonstrate its compliance with this Memorandum of Mutual Understandings and Agreements.

c. If, after review and consideration of the Participating Railroad's response to a preliminary determination, ARB confirms its preliminary determination that the Participating Railroad is or was not in compliance herewith, within 30 days of its receipt of the Participating Railroad's response ARB shall provide an opportunity for the Participating Railroad to meet and confer with ARB in an effort to resolve the parties' differences.

d. If, after meeting with a Participating Railroad pursuant to subparagraph

IV.C.3.c, ARB confirms its preliminary determination that the Participating Railroad is or was not in compliance herewith, within 45 days after that meeting ARB shall provide to the Participating Railroad a final written determination of noncompliance.

e. A preliminary or final determination of noncompliance shall specifically identify the portion or portions hereof with which ARB contends the Participating Railroad is or was not in compliance, and the reasons for the determination. Where ARB has determined that the Participating Railroad did not achieve the Fleet Average Target for the year in question, any preliminary or final determination of noncompliance shall state, with the greatest precision possible based on data submitted by the Participating Railroad, ARB's calculation of the difference between the Participating Railroad's Final FA and the Fleet Average Target.

f. The ARB and Participating Railroads shall use their respective best efforts to expedite submission and review of the report under this paragraph IV.C.3.

4. Mitigation and Liquidated Damages

a. The parties agree that any determination of damages resulting from a Participating Railroad's failure to achieve the Fleet Average Target, or from any other breach of this Memorandum would be speculative and uncertain. The parties therefore agree to mitigation of excess emissions as measured in g/bhp-hr and the payment of reasonable liquidated damages for any such noncompliance, as follows:

i. Where a Participating Railroad did not achieve the Fleet Average Target for a calendar year and received ARB's preliminary determination of noncompliance within the time period specified in subparagraph IV.C.3.a, the Participating Railroad shall mitigate excess emissions as measured in g/bhp-hr and pay liquidated damages as specified in Appendix E.

ii. Where a Participating Railroad failed to collect data as provided in paragraph III.E, to keep records as provided in paragraph IV.A.1, or to submit a timely annual compliance report as provided in paragraph IV.B.1, the Participating

Railroad shall pay liquidated damages as specified in Appendix E.

iii. ARB may for good cause waive or reduce the amounts otherwise payable pursuant to this paragraph IV.C.4.

b. If ARB determines that a Participating Railroad is in noncompliance with this Memorandum because of disapproval of an adjustment, correction, or calculation methodology used in an annual compliance report, the railroad shall not be subject to mitigation or liquidated damages as a result of such noncompliance if the Participating Railroad relied in good faith upon such adjustment, correction or calculation methodology. For purposes of this paragraph, good faith includes reliance on an adjustment, correction or calculation methodology when the adjustment, correction or methodology has been approved or accepted by ARB in accordance with Appendix D.

c. As provided in Appendix D, a Participating Railroad may at any time submit to ARB an adjustment, correction or calculation methodology to be used in determining compliance with the annual fleet average obligation, or may present such an adjustment, correction or calculation methodology in an annual compliance report.

5. Limited Dispute Resolution.

a. In the event of any disagreement regarding a determination of noncompliance, the magnitude of noncompliance, the increment by which the Final FA exceeded the Fleet Average Target for any year, or any other issue arising hereunder (except for an ARB determination made pursuant to clause IV.C.4.a.iii), a Participating Railroad may appeal the issue to an administrative appeals panel. The panel shall be comprised of one member selected by ARB, one member selected by the Participating Railroad, and a third member selected by the initial two members. The panel shall evaluate evidence provided by the parties, shall make decisions by majority vote, and shall render its decision as expeditiously as practicable under the circumstances. Decisions of the panel shall be binding on the parties unless judicial review is sought pursuant to subparagraph IV.C.5.b.

b. Any party dissatisfied with the outcome of the administrative appeals process established pursuant to subparagraph IV.C.5.a may seek de novo review of the disagreement in any court of competent jurisdiction located in California.

6. Any liquidated damages payable pursuant to this paragraph IV.C.6 and Appendix E shall be deposited in an escrow account established for this purpose. All fees for the escrow account may be paid out of interest earned. All liquidated damages funds shall be used for air quality-related projects, including clean technology projects, mutually agreeable to ARB and the Participating Railroad that paid the liquidated damages. Any liquidated damages not expended or allocated to a specific project within 36 months of payment shall revert to the state Air Pollution Control Fund. The provisions of this Memorandum are for the benefit only of the parties, and no third party may seek to enforce or benefit from this paragraph or any other provisions of this Memorandum.

7. The measures expressly identified in this subsection IV.C are the exclusive remedy for any noncompliance herewith, except as otherwise agreed to in writing between ARB and a Participating Railroad. The parties expressly agree that the Participating Railroads' obligation to achieve the Fleet Average Target pursuant to this Memorandum cannot be enforced by an order for specific performance or similar injunction intended to compel establishment of a fleet average program consistent with this Memorandum. The parties specifically disavow any desire or intention to create any third party beneficiary under this Memorandum, and specifically declare that no person or entity, except the parties hereto, shall have any remedy or right of enforcement hereof.

8. In the event that a Participating Railroad fails in whole or in part to fulfill its obligations to mitigate pursuant to paragraph IV.C.4, ARB may file suit and seek any and all remedies available under state law for damages for failure to provide the unmitigated quantity of regional emissions reductions (plus 10 percent of such unmitigated quantity).

D. Effective Date and Term

1. Effective Date.

a. This Memorandum shall take effect on January 1, 2002, unless:

i. ARB or EPA has not approved an amendment to Measure M14 to incorporate revised projections of the locomotive NO_x emission reductions expected to occur in the South Coast Nonattainment Area from 2005 through 2009 no greater than those set out in paragraph III.F.2; or

ii. A court has entered a final, unappealable order invalidating or remanding the Tier II NO_x emissions standard or the preemption provisions in the Final EPA National Locomotive Rule; or

iii. Any litigation challenging the Tier II NO_x emissions standard or the preemption provisions of the Final EPA National Locomotive Rule has not yet been resolved and a final, unappealable order entered.

2. The term of this Memorandum commences on the Effective Date and expires on January 1, 2030, unless earlier terminated pursuant to subsection IV.F or by mutual written agreement of the parties, or unless extended by mutual written agreement of the parties.

E. Modifications

1. The terms hereof may be modified at any time, and from time to time, by mutual written agreement between the parties.

2. All parties hereto agree to meet to discuss and negotiate any revisions hereof which, in the judgment of any party, are needed to address significant changes in circumstances

or to assure that this Memorandum continues to accomplish the objectives of the parties.

3. No amendment hereto shall be binding on the parties unless in writing and signed by authorized representatives of all parties, except as otherwise expressly provided herein.

F. Termination

1. ARB may terminate this Memorandum by providing written notice to the Participating Railroads in the event that:

a. ARB determines, after conclusion of the dispute resolution process provided in subsection IV.C, that the Participating Railroads have materially breached their obligation to achieve the Fleet Average Target by 1.0 g/bhp-hr or more in three or more consecutive years; provided, however, that ARB may make such determination regarding the third year of noncompliance upon issuance of a final written determination of noncompliance under subparagraph IV.C.3.d. Notwithstanding ARB's exercise of its termination right under the preceding sentence, the Participating Railroad may elect to exercise its rights to use the limited dispute resolution process under paragraph IV.C.5 for the purpose of resolving any matter identified in subparagraph IV.C.5.a.

b. The Participating Railroads do not comply with the annual obligation set out in paragraph III.A.1 as the result in part or in whole of one or more events of force majeure continuing 36 months or more.

2. The Participating Railroads may terminate this Memorandum by providing written notice to ARB in the event that:

a. The State of California or any political subdivision thereof takes any action to establish (i) locomotive emission standards; (ii) any mandatory locomotive fleet average emissions standard; or (iii) any requirement applicable to locomotives or locomotive engines and within the scope of the preemption established in the Final EPA National Locomotive

Rule; or

b. EPA or any agency of the United States government takes any action to establish or approve any mandatory locomotive fleet average emissions standard or revises the preemption provisions of the Final EPA National Locomotive Rule; or

c. The California Legislature or U.S. Congress take or require any action which if taken administratively by EPA or ARB would allow the Participating Railroads to terminate this Memorandum pursuant to this paragraph IV.F.2; or

d. The effective date for the Tier II NO_x emission standard is later than January 1, 2005; or

e. Their noncompliance is the result in part or in whole of one or more events of force majeure continuing 36 months or more.

3. Prior to giving notice of termination pursuant to this subsection IV.F, a party shall provide the other parties with at least 30 days notice of intent to terminate, and, upon request of the other parties, shall meet to discuss the issues giving rise to the proposed termination.

4. Except as noted below, in the event any party gives notice of termination of this Memorandum, the obligation of the Participating Railroads to achieve the Fleet Average Target shall terminate on December 31 of the year prior to the year in which the notice of termination was given. If the ARB gives notice of termination under subparagraph IV.F.1.a, the obligation of the Participating Railroads to achieve the Fleet Average Target shall terminate on April 1 of the year in which the notice of termination was given and any railroad obligations (including any obligations to mitigate and pay liquidated damages) hereunder shall be prorated as of such date.

5. As an alternative to termination, the parties may agree to suspend the Participating Railroads' continuing obligation under this Memorandum for a time certain,

which may be extended from time-to-time by agreement of the parties.

6. In the event this Memorandum is terminated by any party, any outstanding noncompliance issues, whether asserted or unasserted at the time of termination, shall continue to be resolved pursuant to the procedures specified in subsection IV.C and Appendix E. A Participating Railroad's obligation, if any, to mitigate excess g/bhp-hr and pay liquidated damages arising from any noncompliance for any year ending before termination of the Memorandum, asserted by the ARB prior to termination, shall survive termination, as shall any defenses the Participating Railroad may have. The ARB shall allege any previously unasserted claims of noncompliance within one year from the date of termination.

G. Force Majeure

Parties shall not be responsible for failure to perform the terms hereof where nonperformance is based upon events or circumstances that are beyond the reasonable control of the nonperforming party, and the events or circumstances affect a Participating Railroad's ability to comply with the terms hereof. Events of force majeure are not limited to Acts of God, may occur on any part of the system of a Participating Railroad, and include, but are not limited to, flood, earthquake, storm, fire and other natural catastrophes, epidemic, war (whether declared or undeclared), riot, civic disturbance or disobedience, strikes, labor disputes, sabotage of facilities, any order or injunction made by a court or public agency, accommodations to the government made in connection with a state of emergency, whether or not formally declared, or the inability of a Participating Railroad to obtain or operate sufficient locomotives to make any of the compliance demonstrations specified in paragraph III.A.2 (including but not limited to the availability in each of the years 2005 to 2009 of sufficient quantities of locomotives with CLs at or below the Fleet Average Target to enable the Participating Railroads to meet their obligations under this Memorandum), and include the secondary effects of any such event. This paragraph is to be construed in recognition of the understanding that the Participating Railroads are end users, not manufacturers, of locomotives. Upon becoming aware that an occurrence constitutes an event of force majeure, the Participating Railroad must promptly notify ARB and must use its best efforts to resume performance as quickly as possible, and may suspend performance only for such period of time

and to the extent necessary as a result of the event or circumstances that constitutes a force majeure.

H. Notices

All notices and other communications to be given hereunder shall be in writing and shall be deemed to have been duly given if delivered personally, delivered by U.S. Mail or a recognized overnight commercial carrier, or telecopied with receipt acknowledged, to the party at the address set forth below or such other address as such party shall have designated by 10 days prior written notice to the other parties. Each party's designated contact person shall be a management-level employee, with sufficient authority to act for the party pursuant to the terms hereof.

If to ARB:

California Air Resources Board
2020 L Street
Sacramento, California 95814
Attention: Executive Officer
Telephone: (916) 445-4383

If to The Burlington Northern and Santa Fe Railway Company:

The Burlington Northern and Santa Fe Railway Company
2650 Lou Menk Drive
Ft. Worth, TX 76131
Attention: Matthew K. Rose
Sr. Vice President and Chief Operating Officer
Telephone: (817) 352-6100

If to Union Pacific Railroad Company:

Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
Attention: Chief Mechanical Officer - Locomotive
Telephone: (402) 271-4739

I. Entire Understanding/References.

This Memorandum, the Appendices hereto, and the Statement of Principles constitute all understandings and agreements among the parties with respect to the Locomotive Fleet Average Emissions Program, and supersede all prior oral or written agreements, commitments or understandings with respect thereto. The appendices hereto are made part of this Memorandum. "Herein," "hereto," and like terms refer to this Memorandum and all Appendices attached to it. Headings are for convenience only and shall not be deemed a part hereof.

J. Choice of Law

This Memorandum shall be interpreted according to the laws of the United States and internal laws of the State of California.

K. Counterparts

This Memorandum may be executed in any number of counterparts, each of which shall be considered an original, but all of which together constitute one and the same instrument.

L. Assignment

This Memorandum and the rights, duties and obligations under it may not be assigned by any party without the prior written consent of the other parties, except that a Participating Railroad shall not need the consent of any other Participating Railroad to make any assignment. Any assignment or delegation of rights, duties or obligations hereunder made without the prior written consent contemplated by this subsection shall be void and of no effect. This Memorandum shall be binding upon, and inure to the benefit of, the successors and approved assigns of the parties.

M. Severability

Wherever possible, each provision of this Memorandum shall be interpreted in such manner as to be effective and valid under applicable law. If any provision hereof shall be prohibited by or invalid under applicable law, such provision shall be ineffective to the extent to such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions hereof. Notwithstanding the previous sentence, if any party determines, in its sole discretion, that in the absence of the invalidated provision or provisions this Memorandum no longer properly serves the purposes for which it was prepared, within 75 days of the entry of a final non-appealable order invalidating one or more provisions hereof such party may terminate this Memorandum upon 12 months advance notice.

N. Time

In interpreting this Memorandum, time is of the essence, "days" means calendar days and "months" means calendar months.

* * * * *

IN WITNESS WHEREOF, the parties have executed this Memorandum as of July 2, 1998.

CALIFORNIA AIR RESOURCES BOARD,
an agency of the State of
California

_____
Signature

_____
Name (printed)

_____
Position

_____
Date

UNION PACIFIC RAILROAD
COMPANY,
a Utah Corporation

_____
Signature

_____
Name (printed)

_____
Position

_____
Date

THE BURLINGTON NORTHERN AND SANTA
FE RAILWAY COMPANY,
a Delaware Corporation

_____
Signature

_____
Name (printed)

_____
Position

_____
Date

ATTACHMENT 3

ARB/Railroad Statewide Agreement

Particulate Emissions Reduction Program at California Rail Yards

June 2005

A. Parties

The BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UPRR") (collectively, the "Participating Railroads") and the California Air Resources Board ("ARB") (collectively, "the parties" or, individually, a "party").

B. Background

1. The factual background, regulatory setting, administrative history and current rail yard issues are complex and important. Key background information is included in Attachment C, which is incorporated into this Agreement in its entirety.

2. The parties understand and acknowledge that the joint understandings and future voluntary actions described in this Agreement will contribute to efforts in California to improve the environment and economy of California. The parties acknowledge the important relationship of this Agreement to California's broader statewide efforts on goods movement. This Agreement has been developed based on the key principles of California's goods movement efforts: (a) that the state's economy and quality of life depend upon the efficient and safe delivery of goods to and from our ports, rail yards, and borders, and, at the same time, (b) the environmental impacts associated with California's goods movement must be managed to ensure the protection of public health.

3. ARB and the Participating Railroads are committed to working together to ensure that this Agreement achieves its objectives. In entering this Agreement, the parties recognize that rail yards operated by the Participating Railroads are located throughout the state and that emissions from rail yards are a matter of state concern. Certain measures to reduce these emissions can be best addressed on a statewide rather than local level.

4. The parties also recognize that the Participating Railroads are federally regulated and that aspects of state and local authority to regulate railroads are preempted. The parties believe that a consistent and uniform statewide approach to addressing emissions at rail yards is necessary and will provide the greatest and most immediate health and welfare benefits to the people of California. Nothing in this Agreement is intended to affect the scope of existing preemption or ARB's regulatory authority.

5. The parties agree that this Agreement takes another step in the near and mid-term efforts to improve the environment for the citizens of California, and that ARB and the

Participating Railroads will continue to collaborate in order to address the environmental impacts of railroads in California.

C. Program Elements

These Program Elements apply to the California rail yards identified herein and will take effect as of June 30, 2005 (the "Effective Date"). For purposes of this Agreement, "feasible" and "feasibly" refer to measures and devices that can be implemented by the Participating Railroads, giving appropriate consideration to costs and to impacts on rail yard operations.

1. Locomotive Idling-Reduction Program.

The goal of this Program Element is to effectively eliminate non-essential locomotive idling, both inside and outside of rail yards. It is anticipated that the locomotive idling-reduction program will expedite the installation of locomotive idling reduction devices and implement highly-effective locomotive operational idling reduction procedures in California.

(a) Automatic Idling-Reduction Devices Shall Be Installed on Intrastate Locomotives Expeditiously.[1] The Participating Railroads shall install automatic idling-reduction devices on all intrastate locomotives based in California that are not already so equipped as of the Effective Date in accordance with the following schedule:

Date	Cumulative Percent of Unequipped Intrastate Locomotives To Be Equipped by Date
June 30, 2006	35%
June 30, 2007	70%
June 30, 2008	>99%

[1] All new locomotives purchased by the railroads that are used in interstate service come from the manufacturer already equipped with automatic shutdown devices. "Intrastate locomotives" have the same meaning as in 13 Cal. Code Regs. § 2299(b)(5) and 17 Cal. Code Regs. § 93117(b)(5). Note: These regulations have been adopted by the California Air Resources Board, and submitted to the California Office of Administrative Law ("OAL") for approval. OAL has until July 5, 2005 to make a determination.

(b) Performance Standards for Locomotives Equipped with Automatic Idling-Reduction Devices. The automatic idling-reduction devices shall limit locomotive idling to no more than 15 consecutive minutes. If the engine characteristics of a particular locomotive model will not allow a 15 minute shut-down cycle without risking excessive component failures, the automatic idling-reduction devices required pursuant to subsection (a) shall reduce locomotive idling by the maximum amount that is feasible.

(c) Inventory of Intrastate Locomotive Fleet. Within 60 days after the Effective Date, the Participating Railroads will provide information on their intrastate locomotive fleet based in California, including locomotive manufacturer, model number, certification level, locomotive number, the availability of automatic idling-reduction devices for each locomotive make and model, and the idling reduction limits these devices can feasibly achieve. The Participating Railroads will also provide information regarding intrastate locomotives based in California already equipped with automatic idling-reduction devices. This information shall include locomotive number, manufacturer, and model of the automatic idling-reduction device installed, the idling reduction limits that the device can feasibly achieve, date of installation, and any other information the railroad or ARB may deem necessary. Every April thereafter, the Participating Railroads agree to submit the same information for each intrastate locomotive equipped with an automatic idling-reduction device under subsection (a) during the previous 12 months. As part of its annual report to ARB, the Participating Railroads will also report the number of locomotives and overall percentage of locomotives owned by them nationwide that foreseeably may operate in California and that have been equipped with automatic idling-reduction devices during the previous 12 months.

(d) Performance Standards for Locomotives Not Equipped with Idling-Reduction Devices. Notwithstanding the Participating Railroads' obligation to install automatic idling-reduction devices on at least 99 percent of their intrastate locomotives by June 30, 2008, the Participating Railroads agree to exert their best efforts to limit the non-essential idling of locomotives not equipped with automatic idling-reduction devices. In no event shall a locomotive be engaged in non-essential idling for more than 60 consecutive minutes. The Participating Railroads shall limit non-essential idling of locomotives installed with automatic idling reduction devices to the limits specified in subsection (b).

(e) Exceptions to Idling Limits. Subsections (b) and (d) shall not apply when it is essential that a locomotive be idling. It shall be considered essential for a locomotive to idle to ensure an adequate supply of air for air brakes or for some other safety purpose, to prevent the freezing of engine coolant, to ensure that locomotive cab temperatures in an occupied cab remain within federally required guidelines, and to engage in necessary maintenance activities. The parties agree that necessary maintenance includes, but may not be limited to, fueling, testing, tuning, servicing, and repairing. Within 60 days after the Effective Date, the Participating Railroads may submit to ARB for consideration a more exhaustive listing of necessary maintenance activities that require extended idling, which shall be used in enforcement of this Program Element. An unoccupied locomotive shall include either an individual locomotive with no personnel on-board, or the trailing locomotives in a consist where only the lead locomotive

has personnel on-board. It shall be considered essential for an unoccupied locomotive not equipped with an automatic idling-reduction device to idle when the anticipated idling period will be less than 60 minutes. The Participating Railroads shall make efforts to notify train crews of anticipated wait times for such events such as train meets, track repair, emergency activities, etc. which could result in idling events greater than 60 minutes.

(f) Participating Railroads' Idling Reduction Training Programs. Within 90 days after the Effective Date, the Participating Railroads and ARB agree to establish procedures, training and any other appropriate educational programs necessary to implement and execute the provisions of this section. ARB will provide the necessary training for ARB inspectors and, if a district desires to participate in this Program Element, for inspectors from local districts. The Participating Railroads will provide the necessary training for locomotive operators, local rail yard and regional dispatchers, and any other appropriate rail yard employees. Such training shall include instruction that appropriate rail yard employees shall shut down locomotives not equipped with idling-reduction devices if they become aware that nonessential idling will exceed 60 minutes. The Participating Railroads and ARB shall undertake efforts to assure compliance with the provisions of this section, including maintaining records of training. The Participating Railroads and ARB shall make every reasonable effort to minimize the amount of time to complete this training. Information on the establishment, implementation (including training schedules), and compliance with the training components of this subsection, and any other information the railroad or ARB may deem necessary, shall be provided to the designated ARB representative within 120 days of the Effective Date of this Agreement, and every April thereafter.

(g) Participating Railroads' Rail Yard Idling Reduction Program Coordinators. This subsection applies to the rail yards listed in Attachment A (the "Designated Yards"), plus the rail yards listed in Attachment B (the "Covered Yards"). To implement the standards established by this section, the Participating Railroads will establish a single point of contact (a Program Coordinator) for all Covered Yards who will be responsible for maintaining and providing records required to demonstrate compliance with this section. The name and contact information for the program coordinator for each Covered Yard shall be provided to ARB within 30 days after the Effective Date.

(h) Idling Reduction Program Community Reporting Process. Within 60 days after the effective date and in conjunction with ARB and local residents, the respective Participating Railroad shall establish a process at each Covered Yard in the state for informing members of the community regarding how they can report excessively idling locomotives and notifying them of what actions have been taken by the railroad in addressing any identified problems.

(i) ARB Locomotive Idling-Reduction Enforcement Program. A detailed enforcement protocol to determine the specific procedures for enforcing this Program Element will be developed by ARB no later than December 31, 2005, and updated as necessary, to ensure that each ARB or participating air district staff who is enforcing the provisions of this Program

Element is knowledgeable of the provisions, intent and protocols governing this section. Each notice of violation (NOV) issued for this Program Element shall include a detailed description of the alleged violation, including time, identification and location of the locomotive; all facts relating to subsection (b) (in the case of locomotives equipped with automatic idling-reduction devices); and all facts relating to subsection (d) (in the case of locomotives not equipped with automatic idling-reduction devices). If possible, every NOV shall include the Program Coordinator's acknowledgment of receipt of the railroad's copy of the notice by fax or otherwise. Copies of notices for violation of this Program Element will be provided to the Program Coordinator (or designee) upon completion or as soon as practical if the contact is not available. For an NOV issued by an air district, the district shall, within 48 hours, mail, fax or electronically transmit a copy of the NOV to the designated ARB representative. ARB shall have sole authority to assess or modify a penalty, to waive any penalty or to determine that no violation has occurred under this Program Element. In the event of a dispute between ARB and the Participating Railroad concerning a penalty, either party may activate the appeal procedures set forth in subsection (a)(iii) of Program Element 10.

2. Early Introduction of Lower Sulfur Diesel in Locomotives.

The goal of this Program Element is to achieve emission benefits from the use of cleaner, lower sulfur on-highway diesel fuel in locomotives earlier than is required under existing federal and California regulations.

(a) Supply of Lower Sulfur On-Highway Diesel Fuel to Locomotives within California. The Participating Railroads agree to maximize the use of lower sulfur on-highway diesel fuel in locomotives operating in California, and agree to ensure that, after December 31, 2006, at least 80 percent of the fuel supplied to locomotives fueled in California meets the specifications for either California diesel fuel (CARB diesel) or U.S. EPA on-highway diesel fuel.

(b) Nothing in this Program Element 2 is intended to supersede title 13, California Code of Regulations ("CCR"), section 2299, or title 17, CCR, section 93117.[2]

3. Visible Emission Reduction and Repair Program.

The goal of this Program Element is to ensure that the incidence of locomotives with excessive visible emissions is very low, so that the compliance rate of the Participating Railroads' intrastate and interstate locomotive fleets operating within California is at least 99 percent. This Program Element will also ensure that a locomotive with excessive visible emissions is repaired expeditiously.

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[2] These regulations have been adopted by the California Air Resources Board, and submitted to the California Office of Administrative Law ("OAL") for approval. OAL has until July 5, 2005 to make a determination.

(a) Fleet Average Performance Standard for Visible Emissions. Within 60 days after the Effective Date, the Participating Railroads shall establish and provide ARB with a detailed statewide visual emission reduction and repair program. This program shall be designed to ensure that the visible emissions compliance rate for each of the Participating Railroads is at least 99 percent of the Participating Railroads' intrastate and interstate locomotive fleets that operate within California, and that locomotives with excessive visible emissions are repaired in a timely manner.

(b) Statewide Visual Emission Reduction and Repair Program Components. The statewide visual emission reduction and repair program established by the Participating Railroads pursuant to subsection (a) shall include all of the following components, at a minimum:

(i) An annual inspection of each locomotive that operates in California either through the use of an opacity meter or a certified Visible Emissions Evaluator.

(ii) A process whereby any locomotive observed by any qualified railroad employee as having excessive visible emissions is expeditiously sent either for testing through the use of an opacity meter or a certified Visible Emissions Evaluator or to a repair facility pursuant to subsection (vii).

(iii) The annual number of visible emission locomotive inspections in the yards and in the field that each railroad commits to conduct in order to develop a base case for determining compliance with the applicable standard(s).

(iv) Provisions that the inspectors conducting inspections for the Participating Railroads under this subsection will maintain qualifications as "Visible Emissions Evaluators."

(v) Provisions that identify and screen locomotives exceeding a steady state opacity measurement of 20 percent and to repair locomotives that exceed the currently applicable visible emissions standards. "Steady state" excludes start-up, shut-down and transitional states.

(vi) The currently applicable visible emissions standard.

(vii) Provisions for routing locomotives operating in California with excessive visible emissions to the nearest Participating Railroad's repair facility within 96 hours. If travel along its scheduled route will take a locomotive with excessive visible emissions out of the state, it is the intent of the Participating Railroads to repair the locomotive expeditiously, and commit that in no event shall the locomotive reenter California without appropriate testing and

repairs having been made. Units that have been identified as having excessive visible emissions may be returned to service after demonstrating compliance with appropriate locomotive certification standards. Locomotive emissions occurring during test and repair operations shall not be considered subject to the opacity or emissions standards.

(viii) Provisions for training key employees[3] and reporting locomotives with excessive visible emissions, as prescribed in subsection (f) of this Program Element.

(ix) Provisions to promptly meet and confer on any disagreements between the Participating Railroad and ARB relating to the Program.

(c) Visible Emission Inspection and Repair Program Recordkeeping Requirements. As part of its visual emission reduction and repair program, each Participating Railroad shall record the locomotive manufacturer, model number, certification standard, unit number, test(s) performed, date, time and location of test(s), inspection or excessive visible emissions and the results of such tests. For each locomotive (including those locomotives that were repaired out of state) identified as having excessive visible emissions, the Participating Railroads shall also record which additional test(s), if any, were performed, where the defect(s) was corrected, what defect(s) was repaired, and when the unit was returned to service. These records will be retained for a period of no less than two years.

(d) Report on the Number of Visible Emissions Inspections. Within 90 days after the Effective Date, and every April thereafter, the Participating Railroads shall provide to the designated representative of ARB the total number of visible emissions inspections conducted by the railroad and the results of those inspections, and other information the railroad or ARB may deem reasonably necessary.

(e) Failure to Meet Compliance Standard. If, in any calendar year, a Participating Railroad's visible emissions compliance rate is less than the 99 percent performance standard specified in subsection (a), the affected Participating Railroad and ARB will meet and confer to agree on additional measures necessary to return the locomotive fleet to the performance standard.

(f) Training Requirements for Key Employees for Each Covered Yard. Within 90 days after the Effective Date, the Participating Railroads agree to develop and implement a training program for key employees for each Covered Yard in the State. Additionally, the Participating Railroads agree to have personnel who are certified as "Visible Emissions Evaluators" present at or near the Designated Rail Yards where locomotives are

[3] Examples include managers, supervisors and dispatchers.

maintained. Key elements of the training program include opacity inspection training to identify excessively smoking locomotives and development of company procedures explaining how an employee will report locomotive units exceeding opacity limits. The Participating Railroads shall make every reasonable effort to complete this training expeditiously.

(g) Report on Training Information. Information on the establishment, implementation (including training schedules), and compliance with the training components of this subsection shall be provided within 120 days after the Effective Date of this Agreement, and every April thereafter.

(h) Annual Review of Visible Emission Inspection and Repair Program. At least once each year, representatives of each Participating Railroad shall meet with the designated representative of ARB to review trends and issues in the locomotive visible emission inspection and repair program under this Program Element and to consider possible adjustments to the program.

(i) Participating Railroads' Visible Emission Inspection and Repair Program Coordinators. Within 30 days after the Effective Date, the Participating Railroads will establish a single point of contact (a "Program Coordinator") for each Covered Yard in the State with assigned employees who will be responsible for maintaining and providing records required demonstrating compliance with this section, including tracking units that have been reported as deviating and making certain that reported locomotives are corrected. The Program Coordinator may be an employee or a contractor. The Participating Railroads shall promptly forward the name and contact information of the selected program coordinators to the designated ARB staff.

(j) Community Reporting Process. Within 60 days after the Effective Date and in conjunction with ARB, the local district and local residents, the respective Participating Railroad shall establish a process at each Covered Yard for informing members of the community on how they can report locomotives which they believe have excessive visible emissions and notifying them of what actions have been taken by the railroad in addressing any identified problems.

4. Early Review of Impacts of Air Emissions from Designated Yards.

Feasible measures that can be implemented to reduce the impact of air emissions from rail yards should be pursued expeditiously. The goal of this Program Element is to expedite the implementation of actions that are feasible in the Designated Yards.

(a) Early Review of Existing Impacts of Air Emissions from Rail Yards. Within 120 days after the Effective Date, each Participating Railroad will review the air emissions from each of the Designated Yards identified on Attachment A to determine if feasible changes could lessen the impacts of locomotive and associated rail yard equipment emissions in adjacent residential neighborhoods while maintaining the Participating Railroad's ability to operate the yard efficiently. As part of this review, the Participating Railroads shall meet with

members of the community and local air districts to discuss the concerns of the community and ways to address their concerns.

(b) Early Evaluation of Feasible Mitigation Measures at Rail Yards. Within 180 days after the Effective Date of this Agreement, the Participating Railroads shall provide ARB with a progress report on how the Participating Railroads plan to implement feasible mitigation measures in the Designated Yards. Measures which should be considered include, but are not limited to, providing a greater buffer between emission sources and the community, local modifications to the Participating Railroads' system-wide idling requirements for anticipated low temperatures, and efficiency measures that reduce emissions. ARB and the Participating Railroads shall meet and confer as appropriate to expeditiously finalize the draft Plan.

(c) Meeting on the Health Risk Assessment Data. Within 60 days after finalization of a health risk assessment developed under Program Element 5 below, ARB, the air district, community member representatives and the Participating Railroads will meet to discuss the findings of the health risk assessment and to discuss the concerns of the community. The plan developed under subsection (b) shall be updated to include any additional feasible measures identified in the Designated Yards.

(d) Annual Updates on the Implementation of Mitigation Measures at Rail Yards. At least once each year, the Participating Railroads will meet and confer with the appropriate ARB, air district, and community member representatives with a progress report, which will include any new alternative practices or other feasible actions that have been implemented in the Designated Yards (including measures implemented under other provisions of this Agreement). ARB and the Participating Railroads shall also meet and confer to update the plan developed under subsection (b) to include any additional feasible measures identified in the Designated Yards.

5. Assessment of Toxic Air Contaminants from Designated California Rail Yards.

ARB, the local air districts and the Participating Railroads have worked collaboratively to start developing uniform statewide criteria and guidelines for the evaluation of toxic air contaminants from rail yards in California. Many factors may influence the risks from toxic air contaminants at a particular rail yard, including population density, rail yard activity, rail yard diesel engine population and meteorology, all of which make the extrapolation of findings from one rail yard to another difficult. The goal of this Program Element is to conduct evaluations at all Designated Yards expeditiously in order to identify the risk from toxic air contaminants that these rail yards represent in relation to risks represented by other sources in the affected communities.

(a) ARB Criteria and Guidelines. ARB will continue to develop criteria and guidelines for the identification, monitoring, modeling and evaluation of toxic air contaminants from Designated Rail Yards throughout California. ARB will continue to work collaboratively

with affected local air districts, cities, counties and the Participating Railroads to develop consistent, comprehensive and accurate criteria and guidelines for use in evaluating toxic air contaminants from Designated Yards and other sources in the affected communities statewide.

(b) Collection of Data for Overall Health Risk Assessment. Within 90 days after the Effective Date, the Participating Railroads shall submit a proposed study plan which provides an outline and timeline of components and data that will be provided to ARB in order that a health risk assessment may be completed for each Designated Yard. The timeline set forth in the proposed study plan will provide for a staggered start of the health risk assessments to better manage the associated financial and administrative burdens. Based on the study plan submitted by the Participating Railroads and approved by ARB, the railroads or their contractors will assemble the required information regarding Designated Yards at their reasonable expense for half of the Designated Yards within 18 months of the approval of the study plan, and for all of the Designated Yards within 30 months of the approval of the study plan, as set forth in Attachment A. At a minimum, for each Designated Yard, this information shall include rail yard specific activity data, an emission inventory of any resident or transient major diesel equipment (including locomotives, on- and off-road vehicles, and non-road engines) operating in the rail yard, dispersion modeling results (concentrations) of diesel emissions, collection of appropriate meteorological and demographic data, and any other information deemed reasonable and appropriate by the Participating Railroads and ARB. ARB will be responsible for assembling the required information for other sources significantly affecting the community. The Participating Railroads and ARB agree to meet and confer as to the specific nature of the data reasonably necessary for completion of the health risk assessment for the affected community, including the selection of an appropriate model(s), data formats and prioritization of the Designated Yards to be evaluated.

(c) Health Risk Assessments. After receiving the data provided in subsection (b), or any other appropriate data, ARB shall complete draft health risk assessments for the communities affected by each of the Designated Yards. The draft health risk assessments shall be performed using a methodology deemed appropriate by ARB and, to the extent possible, consistent with previous health risk analyses involving rail yards performed by ARB.

(d) Release of Health Risk Assessment Findings and Further Actions. Upon completion of a draft health risk assessment, ARB, the local air district, representatives from the affected community and the Participating Railroads will meet and confer to discuss the draft results. Within 90 days after the completion of each health risk assessment, ARB and Participating Railroads will meet and confer to finalize the risk assessment and create a process to determine what additional actions are necessary to communicate and mitigate the risks identified in the health risk assessment and put the risks in the appropriate context.

6. Funding of Mitigation Measure Components in the Agreement.

Because many of the mitigation measures specified in the Agreement will come at some expense, the parties agree that they will work cooperatively to seek any available private and public funding sources.

(a) Potential Funding Sources for Mitigation Components in the Agreement. Potential funding sources for the mitigation components contained in this Agreement, whether specifically identified or potentially to be included in the future after a feasibility determination, include, but are not limited to:

(i) The Participating Railroads and other industries.

(ii) The Carl Moyer program.

(iii) U.S. EPA programs, including the West Coast Diesel Collaborative.

(iv) Any other similar, innovative or available private and public funding sources, including funding jointly sought by both the Participating Railroads and ARB.

7. Agreement to Evaluate Remote Sensing to Identify High-Emitting Locomotives.

Several studies have been conducted with motor vehicles to demonstrate technology that can identify high-emitting in-use vehicles along roadways. It has been suggested that this same technology can be similarly employed to identify emissions from in-use locomotives along sections of track. However, to date, only one study has been conducted on locomotives, and it was not designed to demonstrate the ability to identify emissions from locomotives in relation to federal certification levels. The goal of this Program Element is to evaluate the feasibility of using this technology to measure emissions from in-use locomotives.

The parties agree to implement a locomotive remote sensing pilot program based on AB 1222 (Jones), as amended as of May 27, 2005. If AB 1222 passes the Legislature as amended on May 27, 2005, and is signed by the Governor, carrying out the provisions of that Act will serve as the pilot project in lieu of this Program Element. If the bill fails passage, is altered from its May 27th version or is not signed by the Governor, the parties agree to meet by no later than January 1, 2006 and discuss how to implement this Program Element.

8. Agreement to Evaluate Other, Medium-Term and Longer-Term Alternatives.

This Agreement will implement the foregoing currently available and feasible mitigation measures at rail yards. EPA has commenced a further rulemaking regarding "Tier 3"

locomotive emission standards, which, together with existing and potential technologies, could achieve greater than a 90 percent reduction in diesel particulate matter emissions from locomotives at uncontrolled levels. It is also envisioned that additional measures will be deemed to be feasible. The goal of this Program Element is to ensure that the evaluation and implementation of feasible mitigation measures continues expeditiously.

(a) Diesel Particulate Filters and Oxidation Catalysts. The parties previously agreed to cooperatively evaluate the feasibility of developing Diesel Particulate Filters or Oxidation Catalysts for use on Roots Blown switcher engines. This Agreement included provisions for the Participating Railroads to commit up to $5 million dollars towards this evaluation. Within 120 days after the Effective Date, the parties will determine whether to continue this evaluation. Unless the parties agree to terminate the evaluation before it is completed, the evaluation, including recommendations on the feasibility of this technology, shall be completed by December 31, 2005. A detailed description of the evaluation findings to date, as well as an assessment of the current application of this technology to locomotives in Europe, will also be completed by December 31, 2005.

(b) Funding Sources for Additional Other, Medium- and Longer-Term Alternatives. To date, the diesel particulate filter and oxidation catalyst study identified above in subsection (a) has expended approximately $1.5 million. Upon completion or termination of this study, the Participating Railroads will propose to the Executive Officer a spending plan for, at a minimum, putting any remaining funds towards the evaluation or implementation of the projects identified below in subsection (c) or of other elements required by this Agreement. Approval of the plan will be at the discretion of the Executive Officer. The parties will also work cooperatively to assure the full use of other potential funding sources for the evaluation of the projects identified below in subsection (c).

(c) Additional Measures. The parties agree to continue to meet and confer to evaluate additional measures that are feasible at the Designated Rail Yards. The initial list of possible measures includes:

(i) Accelerated replacement of line haul locomotives operating outside of the South Coast Air Basin with lower emitting locomotives.

(ii) Retrofit or rebuild of existing line haul locomotives with lower emitting technology.

(iii) The use of other lower-emitting technologies, such as LNG- or CNG-fueled locomotives, truck engine switch locomotives or battery/electric hybrid switch locomotives in Designated Yards.

(iv) Retrofit of non-locomotive diesel rail yard equipment with diesel particulate filters or other diesel particulate matter emission reduction devices.

(v) The use of cleaner fuels, including alternative diesel fuels.

(d) Meetings to Evaluate Future Potential Measures. Technical evaluation meetings will occur no less frequently than every 6 months and will be held at a time and place of mutual convenience. Community leaders, local air districts and other interested parties will be invited to attend these meetings and offer their perspectives. Within 30 days after the second meeting, the parties will jointly prepare a brief written progress report on these consultations and make the information available to any interested parties.

9. Compliance Reporting.

The goal of this Program Element is to develop effective compliance reporting for all Program Elements in this Agreement.

(a) Development of Compliance Reporting Protocols. Within 180 days after the Effective Date, the parties intend to develop a mutually acceptable compliance reporting and inspection protocol. The parties also shall meet and confer as needed regarding the sufficiency of the data provided under this Agreement.

(b) Commitment to Program Reviews. The parties will conduct periodic joint program effectiveness reviews on all elements of this Agreement upon a party's reasonable request and will consider modifying each of the Program Elements as field results are developed and reviewed.

(c) Development of Program Review Protocol. Additionally, within 180 days after the Effective Date, the Participating Railroads will develop a review protocol to ensure the highest level of program effectiveness. ARB will be asked to review and comment on the draft protocol. The results of the Participating Railroads' summarized submittals under the Program Elements in this Agreement will be provided to ARB no less than once a year.

10. Enforcement and Penalties.

The goal of this Program Element is to assure compliance with certain Program Elements specified in this Agreement.

(a) Individual Violations.

(i) Noncompliance with Idling Provisions. Violations of Program Element 1(b) or (d) (Locomotive Idling Performance Standards) or Program Element 3(b)(vii) (repair of locomotives with excessive visible emissions) of this Agreement occurring on or after September 30, 2005 shall be assessed on an individual locomotive basis (by locomotive identification number) during each calendar year according to the following schedule:

- $400 for the first violation on any day during a calendar year.

- $800 for the second violation on any subsequent day during the same calendar year.
- $1,200 for the third and any subsequent violation on any subsequent day(s) during the same calendar year.

(ii) Noncompliance with other Provisions. For all other individual violations of Program Elements specified in this Agreement, ARB will notify the Participating Railroad of any alleged noncompliance, and will provide the Participating Railroad a reasonable opportunity to remedy the alleged noncompliance. If the Participating Railroad fails to remedy the alleged noncompliance within a reasonable time, ARB may assess a penalty up to the amounts specified in subsection (a) for each day of alleged noncompliance during a calendar year.

(iii) Appeal to Administrative Law Judge or Mediator. A Participating Railroad may review all information relating to an alleged violation, may present additional information and defenses and may appeal alleged violations to an independent mediator. The parties agree to develop an efficient and fair appeal process under this subsection (a) within 90 days after the Effective Date. The adjudicatory official in the process shall be an independent mediator or arbitrator selected in a manner to be determined by the parties. The parties agree to share any costs associated with any such appeal equally. Any penalties received for violations of Program Elements specified in this Agreement will be deposited into the Carl Moyer Program account and will be distributed to the air district where the violation occurred.

(iv) Repeated Individual Violations. If ARB determines that a Participating Railroad has repeatedly committed individual violations of this Agreement in a manner that substantially impairs the goals of this Agreement, it shall meet and confer with the Participating Railroad. If, after conferring with ARB, a Participating Railroad's pattern of noncompliance is confirmed, ARB may seek the penalties provided in subsection (b) of this Program Element.

(b) Penalties for Failure to Meet Program Requirements. Failure by a Participating Railroad to implement the necessary steps to meet the performance standards, training and/or compliance date requirements specified in:

- Section 1(a) [Installation of Automatic Idling Reduction Devices];
- Section 1(f) [Idling Reduction Training Program];
- Section 2(a) [Supply of Lower Sulfur On-Highway Diesel Fuel];
- Section 3(a) [Establishment of Visible Emission Reduction and Repair Program];
- Section 3(f) [Visible Emission Training Requirements for Key Employees at Each Rail Yard];

- Section 4 [Review of Operating Practices in Each Designated Yard]; or
- Section 5 (b) [Collection of Data for Overall Health Risk Assessment],

where such failure substantially impairs the goals of this Agreement, shall result in the following penalties:

(i) After 30 calendar days beyond the compliance date: up to $10,000.

(ii) After 60 calendar days beyond the compliance date up to 180 days after the compliance date: up to $20,000 per month.

(iii) After 180 calendar days beyond the compliance date and beyond: up to $40,000 per month.

(iv) The penalties prescribed above will be waived if meeting a performance standard, training requirement and/or compliance date within this Agreement was not possible due to unforeseen and/or uncontrollable circumstances on behalf of the Participating Railroad(s). In the event that unforeseen or uncontrollable circumstances prevent a Participating Railroad from complying with any of the sections of this Agreement cited above, every reasonable effort will be made by the Participating Railroad to inform ARB as soon as possible, and shall include an explanation of the circumstances for noncompliance and how compliance will be achieved in the most expeditious manner.

(v) In determining the amount of the penalties prescribed above, ARB or any administrative appeals panel convened under section 11(a) below shall take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the compliance history of the Participating Railroad involved under this Agreement, and the corrective action taken by the Participating Railroad.

If ARB reaches a preliminary determination that a Participating Railroad has substantially failed to meet a performance standard, training and/or compliance date requirement under this Agreement, as specified in this subsection (b), ARB shall provide notice to the Participating Railroad. ARB and the Participating Railroad shall meet and confer regarding the determination within 30 days of receipt of ARB's notification. If ARB and the Participating Railroad do not reach agreement after such consultation, within 30 days ARB and the Participating Railroad shall submit their respective positions to an administrative appeals panel, in accordance with the procedures set forth in section 11(a).

(c) Enforcement of Existing Visible Emission Statutes and Regulations. Nothing in this Agreement shall limit the ability of ARB or a local air district to cite a Participating Railroad for visible emission violations as prescribed under any other appropriate, federal, state or local regulation or statute nor shall the Agreement affect the rights and defenses of a Participating Railroad.

11. Administration

(a) Consultation and Arbitration. In the event of a dispute concerning the meaning, implementation or enforcement of this Agreement, the party seeking to clarify or enforce this Agreement shall provide notice to the other party or parties affected. ARB and the Participating Railroad(s) involved shall meet and confer regarding the determination within 30 days after receipt of notification. If ARB and the Participating Railroad(s) do not reach agreement after such consultation, within 30 days ARB and the Participating Railroad(s) involved shall submit their respective positions to an administrative appeals panel. The panel shall be comprised of one member selected by ARB, one member selected by the Participating Railroad(s), and a third member selected by the initial two members. The panel shall evaluate evidence provided by the parties, shall make decisions by majority vote, and shall render its decision as expeditiously as practicable under the circumstances. If the panel finds in favor of ARB, it shall take into consideration the conduct of the Participating Railroad(s) during the pendency of the dispute, and determine whether the Participating Railroad(s) should be assessed a penalty for the period during which the matter was in dispute, considering the factors listed in section 10(b)(v). Any party dissatisfied with the outcome of the administrative appeals process may seek de novo review of the disagreement in any court of competent jurisdiction located in California. If judicial review is not sought, then the decision of the appeals panel will be binding on the parties. Each party to proceedings hereunder shall bear its own costs and fees, except that the costs and fees of the administrative appeal panel shall be split evenly among the participating parties.

(b) Full Understanding of the Parties.

(i) This Agreement constitutes all understandings and agreements among the parties with respect to the Program Elements in this Agreement, and supersedes all prior oral or written agreements, commitments or understandings with respect to the Program Elements in this Agreement. This Agreement shall be interpreted according to the laws of the United States and internal laws of the State of California.

(ii) A Participating Railroad may at any time initiate informal consultations with ARB to identify and resolve concerns or other issues regarding compliance with this Agreement. ARB may at any time initiate informal consultations with either or both of the Participating Railroads to identify and resolve concerns or other issues regarding Participating Railroad compliance with this Agreement. All parties to the Agreement agree to meet to discuss and

negotiate any revisions to the Agreement which, in the judgment of any party, are needed to address significant changes in circumstances or to assure that this Agreement continues to accomplish the objectives of the parties. Nothing in this Agreement shall limit the ability of ARB or Participating Railroads to meet and confer, upon 30 days notice, to replace or modify one or more Program Elements of this Agreement with further agreements that meet the goals and purposes of this Agreement.

(iii) No amendment to the Agreement shall be binding on the parties unless in writing and signed by authorized representatives of all parties. Parties shall not be responsible for failure to perform the terms of the Agreement where nonperformance is based upon events or circumstances that are beyond the reasonable control of the nonperforming party, and the events or circumstances affect a Participating Railroad's ability to comply with the terms of the Agreement.

(c) Release from Obligations of this Agreement. The parties agree that the Participating Railroads shall not be required to comply with more than one agreement, regulation, statute or other requirement to meet the same goal of any Program Element contained in this Agreement. If any agency proposes to adopt any requirement addressing the goal of any Program Element set forth in this Agreement and affecting any area in California, the parties agree to meet and confer regarding any such proposal before the Participating Railroads take any action that would otherwise release them from their obligations under this Agreement. The parties agree that the Participating Railroads shall perform all obligations set forth in the Program Elements of this Agreement, unless (i) an agency or political subdivision of California adopts or attempts to enforce any requirement addressing the goal of any Program Element set forth in this Agreement (other than ARB enforcement of this Agreement) and affecting any area in California, or (ii) U.S. EPA adopts or attempts to enforce more stringent requirements addressing the goal of any Program Element set forth in this Agreement and affecting any area in California. At any time when any of these events occurs, the Participating Railroads may elect in their sole discretion to be released from their obligations under the specific Program Elements of this Agreement that address the same goal as any such requirements, *provided* that the Participating Railroads shall notify ARB at least 30 days in advance of their election. Nothing in this Agreement shall limit the rights of a Participating Railroad to challenge in any forum any requirement addressing the goal of any Program Element set forth in this Agreement.

(d) Rights and Responsibilities under this Agreement. Except as otherwise provided with regard to enforcement of visible emissions under Program Element 3, ARB is designated as the agency responsible for enforcement of the obligations undertaken by the Participating Railroads under this Agreement. The parties agree that the measures expressly identified in Program Element 10 are the exclusive remedy for any breach of this Agreement, and that the Participating Railroads' obligations under this Agreement cannot be enforced by an order for specific performance or similar injunction. Nothing in this Agreement shall modify

any existing rights of the public or any person or entity not a party to this Agreement. This Agreement does not create any new rights to any person or entity not a party to the Agreement.

(e) Notice. By notice given to the person listed on the signature page, the parties may specify the name of the person to whom notice must be given to satisfy any notification requirement of this Agreement.

(f) Unless terminated in writing by mutual agreement of the parties, this Agreement shall remain in effect until December 31, 2015.

IN WITNESS WHEREOF, the parties have executed this Agreement as of June 30, 2005.

CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California

Signature

Catherine Witherspoon
Name (printed)

Executive Officer
Position

June 24, 2005
Date:

Address for notice:
1001 "I" Street
P.O. Box 2815
Sacramento, CA 95812

THE BNSF RAILWAY COMPANY, a Delaware corporation

Signature

Carl Ice
Name (printed)

Executive Vice President, Operations
Position

June 23. 2005
Date: June 23, 2005

Address for notice:
2650 Lou Menk Drive, Second Floor,
Fort Worth, TX 76131-2830

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation

Signature

Dennis J. Duffy
Name (printed)

Executive Vice President of Operations
Position

June 23, 2005
Date:

Address for notice:
1400 Douglas Street
Omaha, NE 68179

ATTACHMENT A

DESIGNATED YARDS

YARDS FOR WHICH A HEALTH RISK ASSESSMENT HAS BEEN COMPLETED UNDER PROGRAM ELEMENT 5		
Yard Name	**Operated By**	**Address**
Roseville	UPRR	

YARDS FOR WHICH RAILROADS WILL ASSEMBLE DATA WITHIN 18 MONTHS AFTER THE EFFECTIVE DATE UNDER PROGRAM ELEMENT 5		
Yard Name	**Operated By**	**Address**
Commerce	UPRR	4341 E. Washington Blvd., Commerce, CA 90023
Hobart	BNSF	3770 East Washington, Los Angeles, CA 90023
Commerce/Eastern	BNSF	Eastern Avenue, Commerce, CA
Watson/Wilmington	BNSF	1302 Lomita Boulevard Wilmington, CA 90744
LATC	UPRR	750 Lamar Street Lamar, CA 90031
Mira Loma	UPRR	4500 Etiwanda Avenue Mira Loma, CA 91752
Richmond	BNSF	303 Garrad Avenue Richmond, CA 94801

Stockton	BNSF	
Stockton	UPRR	833 East 8th Street Stockton, CA 95206

YARDS FOR WHICH RAILROADS WILL ASSEMBLE DATA WITHIN 30 MONTHS AFTER THE EFFECTIVE DATE UNDER PROGRAM ELEMENT 5		
Barstow	BNSF	200 North "H" Street Barstow, CA 92311
City of Industry	UPRR	17525 E. Arenth Avenue, City of Industry, CA 91748
Colton	UPRR	19100 Slover Avenue Colton, CA 92316
Dolores/ICTF	UPRR	2401 E. Sepulveda Blvd., Long Beach, CA 90810
Oakland	UPRR	1408 Middle Harbor Road Oakland, CA 94607
San Bernardino	BNSF	1535 West 4th Street, San Bernardino, CA 92410
San Diego	BNSF	

ATTACHMENT B

COVERED YARDS

1. **All Designated Yards**

2. **UPRR additional yards:**

   Anaheim

   Fresno

   Martinez

   Milpitas

   Montclair

   Portola

   Yermo

3. **BNSF additional yards:**

   Fresno (Calwa)

   Bakersfield

   Pico Rivera

   La Mirada

   Needles

   Pittsburg

   Riverbank

   Watson

4. If ARB subsequently determines that it would be appropriate to include additional yards as covered yards under this Agreement, ARB will notify the respectively affected Participating Railroads, and the parties will meet and confer regarding the inclusion of the identified rail yards on the list of covered yards.

ATTACHMENT C

1. The Participating Railroads operate national locomotive fleets that travel between California and other states daily, currently moving more than 40 percent of the total intercity revenue ton-miles of freight in the United States. Railroad networks are geographically widespread across the country, serving every major city in California and the United States. Efficient train transportation is an important factor in California and national economy. Railroads continue to improve their efficiency and reduce emissions per ton-mile by utilizing more efficient locomotives, improving freight movement operations, and by other means.

2. Railroads need rail yards. Rail yards perform essential functions such as making up cross-country trains, transferring containers to and from trucks and testing and repairing locomotives. Rail yard operation, maintenance, repairs, modification and capacity improvements are also essential. The railroads have decommissioned and removed many rail yards in California since WWII. This has benefited the immediate neighbors and communities where rail yards have been removed. At the same time, the railroads have found ways to increase efficiency and reduce rail congestion within the remaining rail yards. Intermodal transfer facilities are a good example of technical improvements that benefit the economy and environment of California. California will need more new, well-sited, environmentally superior facilities like these in the near future.

3. ARB has conducted an initial risk-assessment study of the Roseville Rail Yard, and concluded that the magnitude of diesel PM emissions and the size of the area impacted by these emissions justified short- and long-term mitigation measures to significantly reduce diesel PM emissions at the rail yard. ARB believes that similar emissions and exposure levels may exist at other rail yards in the state. Therefore, ARB has determined that taking feasible, practicable, cost-effective actions to lower emissions associated with rail yard operations is both necessary and prudent.

4. Following public notice and opportunity for comment, the United States Environmental Protection Agency (EPA) promulgated final emissions standards applicable to new locomotives and new engines used in locomotives on April 16, 1998 (63 Fed. Reg. 18978) under Section 213 of the Federal Clean Air Act (the "Final EPA National Locomotive Rule"). EPA adopted national emission standards consisting of several tiers, applicable to locomotives as specified in the Final EPA National Locomotive Rule. These standards include Tier 0, 1 and 2 opacity standards that govern visible emissions from locomotives covered by the EPA standards. EPA promulgated each of these emission standards based on an evaluation of technology and costs at the time of promulgation of the rule.

5. The California Health and Safety Code designates ARB as the air pollution control agency "for all purposes set forth in federal law" (H&S Code § 39602). ARB has primary authority under California law to carry out the state's mobile source programs. For

more than thirty years, ARB has adopted stringent emission standards applying to on-road and off-road vehicles under approved EPA waivers/authorizations of preemption. The railroads operate many ARB certified heavy-duty vehicles in California now and are anticipated to operate more of them to meet goods movement demand in the future.

6. To help attain state and federal air quality standards in the South Coast Air Basin (the "South Coast"), the railroads and ARB entered into the "MEMORANDUM OF MUTUAL UNDERSTANDINGS AND AGREEMENTS — South Coast Locomotive Fleet Average Emissions Program, dated as of July 2, 1998 ("1998 MOU") to implement the "Statement of Principles — South Coast Locomotives Program," agreed to by EPA, ARB, and the Participating Railroads, and dated as of May 14, 1997 ("1997 SOP"). All conditions to the effectiveness of the 1998 MOU were satisfied or removed and the 1998 MOU took effect on January 1, 2002 in accordance with its terms. The 1998 MOU has not been amended or terminated and remains in effect on the date of this Agreement. The railroads are implementing the 1998 MOU as anticipated.

7. To implement the 1998 MOU, the railroads are purchasing and/or installing clean locomotive technologies and preparing for the rollout of the cleanest available locomotive technologies certified by the EPA during 2005-2010 period in the South Coast. The binding and enforceable program in the 1998 MOU continues to set one of the most successful public-private partnerships to achieve clean air in California. To address more recent statewide concerns about major rail yards in California, the railroads and ARB now wish to enter into a further statewide agreement to build on the emission reduction benefits achieved by the 1998 MOU.

8. It has been widely recognized that railroads need consistent and uniform regulation and treatment to operate effectively. A typical line-haul locomotive is not confined to a single air basin and travels throughout California and into different states. The U.S. Congress has recognized the importance of interstate rail transportation for many years. The Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Termination Act and many other laws establish a uniform federal system of equipment and operational requirements. The parties recognize that the courts have determined that a relatively broad federal preemption exists to ensure consistent and uniform regulation. Federal agencies have adopted major, broad railroad and locomotive regulatory programs under controlling federal legislation. At the state level in California, the California Legislature has specifically limited the authority of local air districts to adopt regulations affecting the design of equipment, type of construction, or particular methods to be used in reducing the release of air contaminants from locomotives. (Health and Safety Code section 40702.) The Legislature has also specifically entrusted ARB to adopt regulations pertaining to locomotives. (Health and Safety Code sections 43013(b) and 43018(d)).

9. The parties agree that reductions in locomotive idling and the reduction in operational emissions from switch locomotives are feasible methods to reduce emissions of toxic air contaminants and to protect the health and welfare of citizens of California who live near rail yard operations in the state. The parties also recognize that operation of locomotives in the

idling and switching modes is necessary for certain railroad operations. For example, it takes time to move railcars into line, and larger locomotives must wait while smaller yard locomotives assemble trains in the yard. By the same token, smaller locomotives must wait while larger road locomotives enter the yard, couple to trains and move trains safely out of the yard. The parties have determined that automatic idling-reduction devices are available for most locomotives and locomotive engines and that most of those devices should be able to limit idling to no more than 15 consecutive minutes.

10. Although the Participating Railroads have taken steps to reduce the amount of idling and switch locomotive emissions through introduction of new technologies, ARB has concluded that it is necessary to take additional steps to reduce idling on a uniform statewide basis. ARB has determined that it has authority to identify toxic air contaminants and adopt Airborne Toxic Control Measures (ATCMs) to reduce emissions from such contaminants, such as ARB's recent control measure that requires intrastate locomotives to exclusively use CARB diesel fuel starting in January 2007.

11. To address the emissions impact from rail yards across the state expeditiously, the parties agree that it is in the state's best interest to establish a statewide program that implements a uniform and consistent approach for controlling emissions of toxic air contaminants from rail yards. Statewide action is appropriate for several reasons:

(a) ARB has the resources, knowledge, and expertise to conduct a statewide program addressing toxic air contaminants from California rail yards.

(b) A uniform statewide approach would ensure that emissions from rail yards throughout the state are reduced and that all neighboring local communities receive the benefits of the reductions. At the same time, it would afford the Participating Railroads a consistent and effective way to address the emissions at its facilities.

(c) ARB has over the years been effective in developing locomotive emission reduction programs in California. ARB was the agency in California that developed, negotiated and is implementing the 1998 Memorandum of Understanding with the Participating Railroads providing for the introduction of the cleanest available locomotives in the South Coast Air Basin by 2010. The 1998 South Coast Locomotive MOU is one of the most innovative and aggressive programs for turning over an entire fleet of mobile sources anywhere.

(d) Based on the railroads' performance since the 1998 MOU, the parties anticipate that the 1998 MOU and this ARB/Railroad Statewide Agreement will ensure that feasible measures to reduce emissions of toxic air contaminants from rail yards are achieved in the most expeditious manner. ARB and the railroads wish to confirm all of their mutual understandings and agreements in the 1998 MOU and the 1997 SOP (as implemented in the 1998 MOU). Moreover, they wish to confirm and ensure that the 1998 MOU will remain fully in effect as executed and approved and that the 1998 MOU will continue to be implemented as anticipated without interference.

12. It is in the best interest of the State and its affected communities and the railroads to rely on the MOU process as the principal means to continue to make progress in reducing emissions in the future. ARB believes that this can best be accomplished through continuing cooperative efforts between the Participating Railroads and ARB that ensure statewide actions and involve communities in expanding on yard-specific assessment and mitigation efforts. All parties agree that they will continue to meet and confer so that this can be accomplished.

ATTACHMENT 4

In the Supreme Court of the State of California

Friends of the Eel River and Californians for Alternatives to Toxics, **Plaintiffs and Appellants,** **v.** **North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority,** **Defendants and Respondents.**	Case No. S222472
Northwestern Pacific Railroad Company **Real Party in Interest and Respondent.**	

First Appellate District, Division One Case Nos. A139222, A139235
Marin County Superior Court, Case Nos. CIV11-3605, CIV11-03591
Honorable Roy Chernus, Judge

APPLICATION OF CALIFORNIA HIGH-SPEED RAIL AUTHORITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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Dayton-Goose Creek Ry. Co. v. United States
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International Longshoremen's Ass'n, AFL-CIO v. North Carolina Ports Authority
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Port City Properties v. Union Pacific R. Co.
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Railroad Commission of California v. Southern Pacific Co.
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Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. Co.
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South Central Timber Development v. Wunnicke
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SSC Corp. v. Town of Smithtown
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Staten Island Rapid Transit Operating Authority v. Interstate Commerce Commission
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Transit Commission v. United States
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Los Angeles Metropolitan Transit Authority v. Public Utils. Comm.
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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the California High-Speed Rail Authority (Authority) respectfully requests permission to file the attached amicus curiae brief. The Authority is filing this brief in support of Respondents to address why federal law preempts the state-law remedies at issue in this case and why that issue is important to public agencies that construct, own, and operate interstate railroads.

HOW THIS BRIEF WILL ASSIST THE COURT

This proposed amicus curiae brief, which presents the views of the Authority, will assist the Court by explaining how the express preemption clause in 49 U.S.C. section 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA) applies to a California public agency railroad, that, absent preemption, would be subject to remedies under the California Environmental Quality Act, as sought here. The Authority acknowledges that it is unusual for a state agency to concede that one of its laws is preempted. However, when a state voluntarily decides to build, acquire, or operate an interstate rail line and establishes a public agency for this express purpose, it does so knowing that this particular activity, even when undertaken by a public agency, has long been subject to pervasive and exclusive federal regulation. Like a private railroad, the public agency railroad is under the regulatory jurisdiction of the federal Surface Transportation Board (STB) and must obtain a license to operate on an existing rail line or to construct a new rail line. Section 10501(b) preempts state-law remedies against a public agency railroad that would

prevent or unreasonably interfere with its actions that are under STB jurisdiction, including the CEQA remedies Petitioners seek in this case.

This amicus curiae brief will elaborate on the federal judicial and STB decisions applying ICCTA's express preemption provision, as well as the statutory framework and history of federal regulation of public agency railroads. The Authority will explain why those authorities mandate a conclusion that the CEQA remedies sought in this case are preempted, and why Tenth Amendment considerations and the "market participant doctrine" do not create an exception to preemption here. Finally, the Authority's brief will explain both the importance of voluntary agreements between railroads and public agencies and why they typically escape preemption under section 10501(b), but also their limits.

In the case of this specific federal statute and how it applies to the high-speed rail project, it is in the State's interest to support federal preemption of state-law remedies. To be successful in an integrated interstate rail system, a public agency railroad must be subject to the same regulatory scheme as other railroads. Preemption in this narrow context furthers the Authority's ability to achieve the transportation, environmental, and economic benefits the high-speed rail system has to offer.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Authority, established in 1996, is building the nation's first high-speed rail system. (Pub. Util. Code, § 185000 et seq.) The system will initially connect San Francisco to Los Angeles via electrically-powered high-speed trains travelling in excess of 200 miles per hour. Upon completion, the system will provide Californians with a safe, reliable mode of intercity transportation that will reduce congestion on freeways and at

airports and will help meet growing transportation demands. High-speed rail is also an important component of the State's strategy for addressing climate change because electrified high-speed rail service will significantly reduce greenhouse gas emissions from the transportation sector.

This case, while seemingly limited to the rail line owned by the North Coast Railroad Authority (NCRA) and operated under its direction, has potentially important ramifications for the high-speed rail project. The issues presented here are similar to those currently facing the Authority. Just as the State established the NCRA as an independent agency to acquire, own, and operate a railroad, the State established the Authority as an independent agency to plan, construct, and operate a high-speed rail line. The high-speed rail system and the rail line at issue in this case are both subject to STB jurisdiction and regulation under the ICCTA. (49 U.S.C. § 10101 et seq.) The public agency railroad in this case obtained an STB license to operate over a rail line pursuant to 49 U.S.C. section 10901, the same statute under which the Authority has obtained two licenses to construct two of nine planned segments of its new railroad line. And like the NCRA, the Authority is facing multiple CEQA lawsuits in state court that seek to prevent and unreasonably interfere with its STB-authorized actions pending further CEQA compliance.

At the same time, this case has important differences from the Authority's situation because the Authority's STB licenses are for mainline track construction, were preceded by multi-thousand page environmental impact statements under the National Environmental Policy Act, and were conditioned on the Authority implementing hundreds of environmental mitigation measures. Applying its exemption authority under 49 U.S.C. section 10502, the STB authorized the construction. Furthermore, once the

STB determined in 2013 that it had jurisdiction over the high-speed rail system, the Authority has consistently stated in its subsequent CEQA documents that it was not waiving its right to raise ICCTA preemption.

In light of the foregoing, the Authority's interests here are two-fold. First, the Authority has an interest in addressing how the ICCTA's exclusive regulation of rail transportation and its express preemption provision apply to a public agency railroad under STB jurisdiction. Second, the Authority has an interest in ensuring that, as the Court considers the express preemption in section 10501(b), it is cognizant of how a decision in this case may have consequences for the high-speed rail system.

STATEMENT REGARDING PREPARATION OF THE BRIEF

No party or counsel for any party in the pending case authored any portion of the proposed amicus curiae brief, and no party or counsel for any party contributed financially to the preparation of the brief in any way. No person or entity other than the proposed amicus curiae made any monetary contribution intended to fund the preparation or submission of this brief.

Dated: July 1, 2015

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INTRODUCTION

This case poses the narrow question of whether the Interstate Commerce Commission Termination Act (ICCTA) (49 U.S.C. § 10101 et seq.) preempts judicial remedies under the California Environmental Quality Act (CEQA) against a public agency that owns and operates a railroad line under STB jurisdiction. The Environmental Agencies in their concurrently filed brief agree this is the issue. This inquiry, while limited, is vitally important to the California High-Speed Rail Authority (Authority), which is charged with building a statewide high-speed rail system. Under the ICCTA, the STB has exclusive jurisdiction over the construction and operation of rail lines, and state-law remedies that would interfere with or prevent these federally authorized actions are expressly preempted. The Authority respectfully submits that the ICCTA preempts CEQA remedies under the circumstances of this case, i.e., where a public agency railroad's project is subject to STB jurisdiction and regulation under the ICCTA. It offers this brief to provide a more comprehensive discussion of how the ICCTA and its predecessor statutes govern public agencies operating railroads in interstate commerce, why the Tenth Amendment and the "market participant doctrine" do not eliminate preemption here, and how a railroad's voluntary agreements are analyzed under the ICCTA.

The Authority faces similar core legal conflicts between federal and state law as the NCRA faces in this case, but on a different scale. Construction of the high-speed rail project is subject to STB approval under the same provision of ICCTA that covers NCRA's railroad operations. In 2013, the Authority sought a jurisdictional determination, contending the STB lacked jurisdiction over its project, but the STB disagreed and has required the Authority to comply with ICCTA requirements. Since then,

the Authority has obtained two STB authorizations to build portions of its project, submitting thousands of pages of environmental analysis required by federal law, leading to hundreds of mitigation measures as conditions of the federal approval.[1] At the same time, however, the Authority is facing multiple CEQA lawsuits seeking remedies that could interfere with the project's construction, federal funding, and the STB's exclusive jurisdiction.

Absent preemption, a public agency charged with building or operating a railroad, and subject to exclusive federal regulation in the ICCTA for these activities, would nevertheless be subject to an additional state-imposed scheme under CEQA. The public agency railroad would therefore be subject to state-law remedies under CEQA that conflict with the federal regulatory scheme by interfering with and even preventing the agency from engaging in the actions the State has charged it with doing, and which the STB has authorized. This result is the opposite of the uniformity Congress intended in section 10501(b).[2]

Preemption in this case does not unconstitutionally impinge on state control over its subdivisions under the Tenth Amendment. For nearly one hundred years, regulation of the type of railroad operations at issue in this case has been exclusively federal and has applied uniformly to publicly and

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[1] *California High-Speed Rail Authority – Construction Exemption – in Merced, Madera and Fresno Counties, Cal.,* Fin. Docket No. 35724 (S.T.B. served June 13, 2013), 2013 WL 3053064; *California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal.,* Fin. Docket No. 35724 (Sub.-No. 1) (S.T.B. served August 12, 2014), 2014 WL 3973120.

[2] A private rail carrier, on the other hand, is not subject to CEQA. CEQA applies only to public agencies as they approve a private project or carry out their own project. (Pub. Resources Code, § 21080, subd.(a).)

privately owned railroads (referred to herein for convenience as "public" and "private" railroads). When the STB has jurisdiction over a railroad project, be it construction or operations, federal law sets out the exclusive regulations and remedies, even for public agency railroads.

Nor does the market participant doctrine eliminate preemption here. The doctrine simply does not apply where, as here, applying it would be contrary to congressional intent for uniform and exclusive federal regulation by treating public railroads differently than private railroads. And when NCRA complied with CEQA it was not participating in a market, it was simply carrying out a traditional state regulatory responsibility.

Finally, while the Authority takes no position on whether, under the facts of this case, NCRA voluntarily agreed to comply with CEQA, the Authority will elaborate on the legal structure for analyzing those contentions. The federal courts and STB have recognized that railroads can enter into voluntary agreements with local jurisdictions and such contracts are presumptively not "regulation" that the ICCTA would preempt. Preemption may, however, limit certain agreements that conflict with exclusive federal regulation of interstate railroad operations.

ARGUMENT

I. SECTION 10501(b) EXPRESSES CONGRESSIONAL INTENT TO HAVE UNIFORM AND EXCLUSIVE FEDERAL REGULATION AND EXCLUSIVE FEDERAL REMEDIES FOR RAILROAD LINE CONSTRUCTION AND OPERATIONS.

A. The Touchstone of Every Preemption Analysis Involves Discerning Congressional Intent.

The parties have recited the basic tenets of preemption analysis, so the Authority reiterates them here only briefly. Congress can preempt state

law in matters that lie within its authority. (U.S. Const., art. VI, cl. 2; *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 955.) "The doctrine of preemption gives force to the Supremacy Clause." (*People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1521.) "Where a state statute conflicts with, or frustrates, federal law, the former must give way." (*CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. 658, 663.)

Essential to this case, and meriting emphasis, is that federal preemption "fundamentally is a question of congressional intent." (*Carillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1162, quotation omitted; *Viva! Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 939.) When a federal statute contains express preemption language, a reviewing court establishes the scope of preemption in the first instance by interpreting the plain wording of the statute as the best evidence of congressional intent. (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778; *CSX Transp., Inc. v. Easterwood, supra*, 507 U.S. at p. 664.)

However, interpretation of an express preemption provision does not take place "in a contextual vacuum." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 484-485.) A reviewing court must consider "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1060, internal quotations and citations omitted.) Furthermore, every preemption analysis, and particularly where Congress legislates in a field states have traditionally occupied, "start[s] with the assumption that the historic police powers of the States were not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Ibid.*, internal citation omitted.) The presumption ensures that neither Congress nor the courts will disturb the federal-state balance unintentionally. (*Ibid.*)

The plain language of section 10501(b) and its larger statutory framework and history demonstrate congressional intent to preempt CEQA remedies against a public agency railroad where such remedies would conflict with railroad actions under STB jurisdiction.[3]

B. Section 10501(b) Gives the STB Exclusive Jurisdiction to Regulate Rail Line Construction and Operations and Preempts State Regulation and Remedies in These Areas.

1. Section 10501(b) preempts state laws that regulate in areas reserved exclusively to the STB or that would prevent or unreasonably interfere with railroad operations.

Section 10501(b) provides:

The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side

[3] This case involves a railroad invoking preemption as a defense to a CEQA lawsuit. Whether section 10501(b) preempts CEQA in general, rather than CEQA judicial remedies, is not at issue because NCRA prepared an EIR. The Authority therefore focuses this brief only on the question of whether section 10501(b) preempts the CEQA remedies being sought in this case.

> tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

(49 U.S.C. § 10501(b), emphasis added.) In cases involving rail line construction and operations, federal courts recognize this language is broad. (*City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1031 [endorsing broad interpretation of express preemption language]; *CSX Transp., Inc. v. George Public Service Comm'n* (N.D. Ga. 1996) 944 F.Supp. 1573, 1581 ["It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."]; see also *Island Park, LLC v. CSX Transp.* (2d Cir. 2009) 559 F.3d 96, 104 [acknowledging language is "unquestionably broad," although not without limits].)

Of course, acknowledging the breadth of the express preemption language does not fully answer the preemption question in this case. The Court must consider whether the scope of the express preemption provision includes the CEQA remedies sought here, where the public rail agency is subject to STB jurisdiction and is operating a railroad in interstate commerce pursuant to a license from the STB. While this Court is addressing section 10501(b) for the first time, federal court precedent has extensively addressed the scope of this statute.

Several federal courts of appeals have adopted or followed the STB's comprehensive test for determining whether section 10501(b) preempts a state action or remedy against a railroad. (*New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332 (*Barrois*) citing *CSX Transp., Inc. – Petition for Declaratory Order*, Fin. Docket No. 34662

(S.T.B. served May 3, 2005), 2005 WL 1024490 at *2-3; accord *Adrian & Blissfield R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 540; *Union Pacific R. Co. v. Chicago Transit Authority* (7th Cir. 2011) 647 F.3d 675, 679; *Emerson v. Kansas City Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, 1130.) That test distinguishes between two types of state regulations or actions: those that section 10501(b) preempts categorically, and those that may be preempted *as applied.* (*Barrois*, *supra*, 533 F.3d at p. 332.)

Categorically preempted state actions or regulations, are those that "would directly conflict with exclusive federal regulation of railroads" including:

> (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 Board has authorized*" and
>
> (2) "state or local regulation of *matters directly regulated by the Board* such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service."

(*Barrois*, *supra*, 533 F.3d at p. 332, emphasis added, citations omitted.) The STB based these two classes of categorically preempted state actions or regulations on holdings in prior cases under both the ICCTA and the Interstate Commerce Act. (*CSX Transp., Inc. – Petition for Declaratory Order*, *supra*, 2005 WL 1024490 at *2 citing e, g., *City of Auburn*, *supra*, 154 F.3d at pp. 1030-1031; *Green Mountain R.R. Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 642; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318.) Because the categorically preempted actions are deemed to "directly conflict with exclusive federal regulation," the preemption analysis is directed at the act of state regulation itself, not to

the reasonableness of the particular action. (*Barrois*, *supra*, 533 F.3d at p. 332.)

State actions or regulations may also be preempted by section 10501(b) *as applied*. (*Barrois*, *supra*, 533 F.3d at p. 332.) "Section 10501(b) of the ICCTA may preempt state regulations, actions, or remedies as applied, based on the degree of interference the particular state action has on railroad operations." (*Ibid.*) If a particular state action or regulation is not facially preempted, the analysis under section 10501(b) "requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation." (*Ibid.* citing *CSX Transp., Inc.*, *supra*, 2005 WL 1024490 at *3.)[4]

While section 10501(b) is broad, its plain language does not "sweep up" all state laws that happen to merely touch upon railroads in interstate commerce. (*Island Park, LLC*, *supra,* 559 F.3d at p. 104.) "[I]nterference with rail transportation must always be demonstrated." (*Ibid.*) In section 10501, Congress "narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or govern[ing]' rail transportation" while allowing continued application of state laws that have "a more remote or incidental effect on rail transportation." (*Florida East Coast Ry. Co. v. City*

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[4] Those instances in which a public or private entity has an STB license to construct, operate, acquire, or abandon a rail line are clearly within the larger definition of "rail transportation" under STB jurisdiction. (49 U.S.C. §§ 10102(9), 10501(b).) However, an action by a railroad may fall within the definition of "rail transportation" and preemption may attach even though it does not require a license. (See, e.g., 49 U.S.C. § 10906; *Port City Properties v. Union Pacific R. Co.* (10th Cir. 2008) 518 F.3d 1186, 1188-1189.) This case involves licensed operations, so this brief focuses on this situation.

of West Palm Beach (11th Cir. 2001) 266 F.3d 1324, 1331, internal citation omitted.) For activities with only a remote effect on railroad transportation, Congress intended to retain for the states "the police powers reserved by the Constitution." (*City of Auburn, supra,* 154 F.3d at p. 1029 [quoting H.R.Rep. No. 104-311, 104th Cong., 1st Sess., at pp. 95-96 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793, 807-808].)

Lower federal court authorities are not binding, even as to questions of federal law. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58 discussing *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321.) Nevertheless, the cited decisions are persuasive and entitled to great weight as to the scope of preemption in section 10501(b). (*Ibid.*; see also *People v. Burlington Northern Santa Fe R.R.*, *supra*, 209 Cal.App.4th at p. 1531 [reasoning of federal decisions on section 10501(b) preemption was "highly persuasive"].) The Court should "hesitate to reject" their test for identifying whether section 10501(b) preempts a particular state action or remedy. (*Barrett*, *supra*, 40 Cal.4th at p. 58.)

Finally, the issues in this case are important, but narrowly focused. The analytical framework in this case is focused on the limited situation in which a public agency engages in actions the STB directly regulates. As shown below, CEQA remedies in this situation directly interfere with congressional intent because they conflict with exclusive federal regulation of railroads and interfere with federally authorized railroad operations.

2. Section 10501(b) preempts CEQA remedies in this case under either a categorical or as-applied preemption analysis.

a. CEQA remedies here could prevent STB-authorized railroad operations.[5]

At the outset, CEQA remedies in this case fall under the first type of categorically preempted state laws because they can prevent a public railroad from proceeding with an STB-authorized project pending compliance with CEQA. It is beyond dispute that the Legislature established the NCRA as a public agency to own, manage, and operate a railroad in interstate commerce. (Gov. Code, §§ 93001, 93003, subd. (a).) The STB regulates the NCRA like any other railroad, authorizing it to acquire and operate over the railroad line in dispute and has recognized NCRA's status as a rail carrier, independent of the current private operator, Northwestern Pacific Railroad Co.[6]

In the context of this case, because a public agency must comply with CEQA before it can make a final decision to proceed with its own project, the law and its remedies as applied to NCRA's rail project is a "preclearance requirement" that "could be used to deny a railroad the

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[5] The Authority refers in this brief only to railroad "operations" the STB regulates pursuant to 49 U.S.C. section 10901. The STB also regulates new railroad line construction and a similar preemption analysis would apply because the STB has exclusive jurisdiction over both actions.

[6] See, e.g., *North Coast Railroad Authority – Acquisition and Operation Exemption – Eureka Southern Railroad*, Fin. Docket No. 32052 (S.T.B. served April 20, 1992), 1992 WL 80295; *North Coast Railroad Authority – Purchase Exemption – Southern Pacific Transportation Company*, Fin. Docket No. 32788 (S.T.B. served March 20, 1996), 1996 WL 120522; *North Coast Railroad Authority - Lease and Operating Exemption – California Northern Railroad Company, etc.*, Fin. Docket No. 33115 (S.T.B. served Sept. 27, 1996), 1996 WL 548249.

ability to conduct some part of its operations or to proceed with activities that the Board has authorized." (*Adrian & Blissfield Railroad Co.*, *supra*, 550 F.3d at p. 540, citing *CSX Transp., Inc.*, *supra*, 2005 WL 1024490 at *3.)[7] Under CEQA, public agencies must follow specific steps to review and consider environmental information before approving their own projects. (Pub. Resources Code, §§ 21000, subd. (g), 21001, 21065, subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393.) When a public agency is proposing a project itself, the agency must undertake the same environmental review as it would to approve or permit a private project, and make a decision informed by CEQA's information gathering and public input processes. (Pub. Resources Code, § 21001.1.)

However, contrary to Petitioners' suggestions, CEQA's directives are not limited to public disclosure and procedural requirements before a public agency decides whether to approve its own project. (Petitioners' Reply Brief, pp. 22-34.) The statute includes mandatory requirements to change a proposed project by adopting feasible mitigations measures or feasible alternatives. (Pub. Resources Code, § 21002.) CEQA also includes remedial provisions authorizing a court to compel a public agency to rescind its decision to approve the project, enjoin project implementation pending compliance with CEQA, and undertake further environmental review steps before deciding to re-approve (or alter or abandon) its own project. (*Id.*, § 21168.9; see, e.g., *County of Orange v. Superior Court*

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[7] Where an agency is not directly undertaking a public rail project but rather has a permitting role over a private rail project, the relevant "preclearance" requirement that may subject to preemption is the act of permitting. Where permitting is preempted, CEQA is not triggered.

(2003) 113 Cal.App.4th 1, 12-13 [discussing CEQA remedial provisions]; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 453; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 415-416.)

Indeed, this is precisely what Petitioners seek with their CEQA lawsuit: to require NCRA to rescind its decision to proceed with its project and enjoin NCRA from engaging in railroad operations the STB has authorized pending further CEQA procedures and a court determination that the NCRA has fully complied with CEQA. This application of CEQA remedies to a public agency railroad flies in the face of the uniform and exclusive federal scheme for licensing railroad operations under 49 U.S.C. section 10901 because it can be used to deny the public railroad the right to engage in activities the STB has authorized. (*City of Auburn*, *supra*, 154 F.3d at p. 1033; *Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at pp. 324-327.)

b. CEQA remedies here have the effect of regulating railroad operations, an area within the STB's exclusive licensing authority.

CEQA and its remedies also fall under the second type of categorically preempted state laws in this case because the statute as applied to an interstate rail project undertaken by a public railroad has the effect of regulating "matters directly regulated by the Board – such as the construction, operation, and abandonment of rail lines . . . ." (*Adrian & Blissfield R. Co.*, *supra*, 550 F.3d at p. 540.) The STB regulates construction and operation of rail lines pursuant to 49 U.S.C. section 10901. (49 U.S.C. §§ 10501(b)(2), 10901.) A railroad obtains the

authority to operate over a line through an application for a certificate of public convenience and necessity or through an exemption. (49 U.S.C. §§ 10901, 10502.) The STB's jurisdiction in this area is plenary and exclusive. "[T]he ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations." (*CSX Transp., Inc. v. George Public Service Comm'n.*, *supra*, 944 F.Supp. at p. 1584; *Pace v. CSX Transp., Inc.* (11th Cir. 2010) 613 F.3d 1066, 1069 ["section 10501(b) plainly conveys Congress's intent to preempt all state law claims pertaining to the operation or construction of a side track"].)

The STB must also comply with NEPA (42 U.S.C. § 4321 et seq.) in making its licensing decisions. In some cases, such as STB authorization for construction of new railroad lines, federal approval comes with exhaustive federal environmental review and results in approval conditioned on extensive mitigation measures. (See, e.g., *California High-Speed Rail Authority – Construction Exemption – in Merced, Madera and Fresno Counties, Cal., supra*, 2013 WL 3053064, *19, *36-37 [mandatory compliance with mitigation measures]; *California High-Speed Rail Authority – Construction Exemption – in Fresno, Kings, Tulare, and Kern Counties, Cal., supra*, 2014 WL 3973120, *16, *44-45 [same].) In the case at hand, the STB considered the NCRA's proposed operations under its NEPA regulations and determined the proposed operations were categorically excluded from environmental review. (See 49 C.F.R. §§ 1105.6(b)(4), (c), 1105.7(e)(5)(i)(C).) The type of action, be it construction or operations, will determine the level of federal environmental review.

The result of the STB's regulatory process is a decision to permit or deny proposed rail construction or operations. (49 U.S.C. §§ 10901,

10502.) If the STB permits the proposed action, federal law provides avenues to challenge the decision and federal remedies. (*Id.*, § 10502(d) [request to revoke exemption]; 28 U.S.C. §§ 2321(a), 2342(5), 2344 [judicial review in federal court of appeals for action to enjoin or suspend STB order].)[8] Applying CEQA to a public railroad undertaking an interstate rail project would trigger a largely parallel state process that could lead to lawsuits and judicial intervention that could have the effect of second-guessing fully considered decisions already made by the STB. This constitutes substantial interference in an area that the STB directly and exclusively regulates, and is therefore preempted. (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 321 [in analogous rail abandonment context, ICC's plenary and exclusive authority suggests congressional intent "to limit judicial interference with the agency's work" and state law regulating abandonment therefore preempted]; *People v. Burlington Northern Santa Fe R.R.*, *supra*, 209 Cal.App.4th at p. 1529 [ICCTA preempted state anti-blocking regulation].)

c. CEQA remedies here would prevent or unreasonably interfere with rail transportation.

CEQA remedies here also satisfy an *as applied* test for preemption under section 10501(b) because they "would have the effect of preventing or unreasonably interfering with railroad transportation." (*Barrois*, *supra*,

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[8] Petitioner Friends of Eel River unsuccessfully challenged the August 2007 change in operator exemption. (*Northwestern Pacific Railroad Company – Change in Operators Exemption – North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, Fin. Docket No. 35073 (S.T.B. served Feb. 1, 2008), 2008 WL 275698.)

533 F.3d at p. 332 citing *CSX Transp., Inc. – Petition for Declaratory Order*, *supra*, 2005 WL 1024490 at *3.) For example, the ICCTA preempted a state condemnation law under the *as applied* test because the facts showed that the proposed condemnation of actively used railroad property in that case was unreasonable interference with rail transportation. (*Union Pacific R. Co.*, *supra*, 647 F.3d at pp. 679-680; see also *Association of American Railroads v. South Coast Air Quality Man. Dist.* (9th Cir. 2010) 622 F.3d 1094, 1098.) The CEQA remedies Petitioners seek in this case include a writ of mandate and injunctive relief that could prevent or unreasonably interfere with the NCRA's and its private operator's railroad operations that they have a federal license to perform. (Pub. Resources Code, § 21168.9 [describing CEQA remedies].) This is not a situation involving a remote or incidental effect on rail transportation, but rather direct, unreasonable interference with federally authorized railroad operations. (*Florida East Coast Ry. Co.*, *supra*, 266 F.3d at p. 1331; *Barrois*, *supra*, 533 F.3d at p. 332.)

3. The STB has determined that section 10501(b) preempts CEQA remedies in the context of a public agency railroad engaging in STB-authorized actions.

Finally, the STB has addressed a similar preemption question in *California High-Speed Rail Authority – Petition for Declaratory Order*, Fin. Docket No. 35861, 2014 WL 7149612 (S.T.B. served December 12, 1014).[9] In the context of a public railroad under its jurisdiction,

[9] Parties to this STB proceeding have petitioned for review to the Ninth Circuit Court of Appeals. (*Kings County, et al. v. Surface Transportation Board*, No. 15-71780, filed June 11, 2015.)

undertaking its own rail project, the STB held, "CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity's right to construct a line that the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation." (*Id.* at *7.) CEQA lawsuits and remedies in this context attempt to regulate a project the STB directly regulates. (*Id.* at *7.) The STB's decision merits careful consideration because the agency administers the ICCTA and is "uniquely qualified" to determine whether state law would stand as an obstacle to congressional intent in the ICCTA. (*Green Mountain R.R. Corp.*, *supra*, 404 F.3d at p. 642-643; accord *Emerson*, *supra*, 503 F.3d at p. 1130; *Adrian & Blissfield R. Co.*, *supra*, 550 F.3d at p. 539; see also *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 332, fn. 4.)

C. The Statutory Framework and History Reinforces Congressional Intent to Preempt State Laws That Have the Effect of Interfering with Uniform Federal Regulation of Railroad Operations.

Not only does the plain language in section 10501(b) indicate congressional intent to preempt the CEQA remedies here, so does the ICCTA's statutory framework and history. Neither Petitioners nor Respondents provide a comprehensive discussion of the statutory framework or history surrounding federal regulation of railroad operations. That history establishes Congress's long-standing emphasis on national uniformity for regulating railroads operating in interstate commerce by establishing an exclusive federal licensing scheme and preempting state laws that regulate in the same areas.

1. The Transportation Act of 1920 amended the Interstate Commerce Act to establish uniform and exclusive federal regulation over construction, operations, and abandonments of track in interstate commerce.

"Railroads have been subject to comprehensive federal regulation for [well over] a century." (*United Transp. Union v. Long Island R. Co.* (1982) 455 U.S. 678, 687, overruled in part by *Garcia v. San Antonio Metropolitan Transit Auth.* (1985) 469 U.S. 528.) In 1887, Congress enacted the Interstate Commerce Act, which created the Interstate Commerce Commission, the nation's first independent regulatory agency. (Sen.Rep. No. 104-176, 1st Sess., p. 2 (1995), 1995 WL 701522 at *2.) "The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes . . . ." (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 318.)

The Interstate Commerce Act originally focused on regulating railroad rates, not specifically on matters affecting railroad construction or operations. (Sen.Rep. No. 104-176, *supra*, 1995 WL 701522 at *2; see also James W. Ely, Jr., *The Railroad System Has Burst Through State Limits: Railroads and Interstate Commerce, 1830-1920* (2003) 55 Ark. L. Rev. 933, 966 (Ely).) "Prior to the Transportation Act of 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened, and destroyed interstate commerce." (*Transit Commission v. United States* (1933) 289 U.S. 121, 127.) "Dominant federal action was imperatively called for." (*Ibid.*) In response, Congress passed the Transportation Act of 1920, amending the Interstate Commerce Act and establishing uniform and exclusive federal regulation over rail line

construction, operations, and abandonment. (*Id.* at pp. 126-127; see generally *Railroad Comm. of Wisconsin v. Chicago, B. & Q. R. Co.* (1922) 257 U.S. 563, 582-586 [1920 Act placed construction of new lines and abandonment of old lines under ICC jurisdiction].)

The Transportation Act of 1920 serves as a critical foundation for understanding the statutory framework in the ICCTA and how it affects the preemption analysis in this case. Section 1 (18) of the Act imposed a specific framework mandating federal approval prior to any railroad line construction (new lines or extensions of existing lines), operations over the lines, or abandonment of the lines if the lines were operated as part of interstate commerce. (Transportation Act of 1920, § 402, 41 Stat. 477-478, previously codified at 49 U.S.C. § (1)(18).) The Act reserved two areas for state regulation: wholly intrastate rail transportation, including intrastate spur and side tracks (¶ 2); and states' ability to exercise their police powers "to require just and reasonable [rail] service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of the Act." (*Id.*, § 402, 41 Stat. 474, 476, previously codified at 49 U.S.C. §(1)(2), § (1)(17).)

Importantly, the 1920 amendments to the ICA defined the Commission's federal jurisdiction over railroad construction, operations, and abandonment, "to the exclusion of state regulation . . . ." (*Transit Commission*, *supra*, 289 U.S. at p. 128; see also *Alabama Public Service Commission v. S. Ry. Co.* (1951) 341 U.S. 341, 346 fn. 7 [describing Commission authority under section (1)(18-20) as exclusive].) Out of concern for uniformity of regulation over railroads, the 1920 Act "puts the railroad systems of the country more completely than ever under the

fostering guardianship and control of the Commission . . . ." (*Dayton-Goose Creek Ry. Co. v. United States* (1924) 263 U.S. 456, 478; see also *Texas & P. Ry. Co. v. Gulf, C. & S.F. Ry. Co.* (1926) 270 U.S. 266, 277 ["Congress undertook to develop and maintain, for the people of the United States, an adequate railway system."]; Ely, *supra*, 55 Ark. L. Rev. at pp. 960-961.)[10]

Thus, as far back as 1920, Congress had expressed its clear intent to have exclusive federal regulatory jurisdiction over rail lines in interstate commerce. The 1920 amendments drew a clear distinction between the types of railroad facilities over which a state could exercise authority (e.g., intrastate spurs, side tracks) and the types of facilities over which it had no authority (e.g., railroad main lines). (*Railroad Commission of California v. Southern Pacific Co.* (1924) 264 U.S. 331, 344-346.) Further, state laws that interfered with interstate rail operations were subordinate to the federal interest. (*Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dist. of Wyandotte Cnty., Kan.* (1914) 233 U.S. 75, 79 ["direct interference with commerce among the states could not be justified"].)

2. The Staggers Act continued and the ICCTA strongly reinforced exclusive federal jurisdiction over rail construction, operations, and abandonments.

Uniformity through exclusive federal jurisdiction over rail line construction, operations and abandonment remained in place in the

[10] Decisions following the 1920 amendments made clear that vesting exclusive jurisdiction in the Commission specifically excluded the states from regulating the same areas. (See, e.g., *Colorado v. United States* (1926) 271 U.S. 153, 163-166; *Atchison, T. & S.F. Ry. Co. v. R.R. Commission* (1922) 190 Cal. 214, 221-222, *aff'd sub nom. Railroad Commission of California v. Southern Pac. Co.* (1924) 264 U.S. 331.)

intervening decades. (See, e.g., *Palmer v. Com. of Mass.* (1939) 308 U.S. 79, 84-85; *City of Yonkers v. United States* (1944) 320 U.S. 685, 690-691.)[11] The Supreme Court continued to describe this jurisdiction as "exclusive and plenary." (*Chicago and N.W. Transp. Co.*, *supra*, 450 U.S. at p. 321 [discussing section 1(20) of Transportation Act related to rail line abandonment].)

This exclusive jurisdiction over rail line construction, operations, and abandonments continued essentially unchanged in the Staggers Rail Act of 1980, as did state jurisdiction over spur, industrial, team, switching, and side tracks located wholly in one state. (Staggers Rail Act of 1980, Pub.L. No. 96-448 (Oct. 14, 1980) § 221, 94 Stat. 1895; see generally *Illinois Commerce Com'n v. I.C.C.* (D.C. Cir. 1989) 879 F.2d 917, 921-925 [discussing treatment of intrastate tracks under 1920 Act and Staggers Act].) Under the Staggers Act, states could apply to the Interstate Commerce Commission for certification to regulate intrastate rates, classifications, rules, and practices pursuant to federal standards. (See generally *Southern Pacific Transp. Co. v. Public Utilities Com'n* (9th Cir. 1993) 716 F.2d 1285, 1287.)

In 1995, Congress enacted the ICCTA, amending the Interstate Commerce Act again. The ICCTA abolished the Interstate Commerce Commission and replaced it with the STB, substantially deregulated the railroad industry, and broadly preempted state regulation of railroads. (*Florida East Coast Ry. Co.*, *supra*, 110 F.Supp.2d at p. 1373.) The

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[11] Congress codified provisions of the Interstate Commerce Act in 1978 as subtitle IV of title 49 of the U.S. Code. (Act of Oct. 1978, Pub.L. No. 95-473, 92 Stat. 1337.) Section (1)(18) was codified at section 10901 (construction and operations of main line track). Section 1(20) on abandonments was codified at section 10903.

ICCTA maintained the exclusive federal jurisdiction over railroad construction, operation, and abandonment dating back to the Transportation Act of 1920, but then extended that exclusive jurisdiction to include the more general term "rail transportation" and, specifically, wholly intrastate tracks. (49 U.S.C., §§ 10901, 10903, 10501(b)(1), 10501(b)(2).) In addition, the ICCTA included section 10501(b), with the express preemption language at issue here.

The collective impact of these amendments was to establish in the ICCTA, "an incredibly wide grant of exclusive jurisdiction to the STB to regulate railroad operations . . . ." (*CSX Transp., Inc. v. Georgia Public Service Comm'n*, *supra*, 944 F.Supp. at p. 1582.) Congress's intent is manifest in the Act's legislative history:

> Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation 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.

(H.R.Rep. 104–311, *supra*, at p. 808.) The ICCTA thus strengthened the comprehensive scheme of uniform federal regulation of railroad construction, operations, and abandonments put in place nearly a century ago. (See, e.g., *Florida East Coast Ry. Co.*, *supra*, 266 F.3d at p. 1373 ["In 1995, Congress eliminated what little remained of state and local regulatory authority over railroad operations . . ."]; *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, *supra*, 944 F.Supp. at p. 1582 [". . . Congress intended the preemptive net of the ICC Termination Act to be broad by extending exclusive jurisdiction to the STB over anything included within

the general and all inclusive terms "transportation by rail carriers."]; see also *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 805 citing H.R. Rep. No. 104-311 [section 10501(b) establishes "'the direct and complete pre-emption of State economic regulation of railroads.'"].)

The statutory framework around section 10501(b), with its emphasis on nationally uniform regulation of railroad line construction and operations, reinforces Congress's intent to preempt the type of dual federal/state regulation inherent in the CEQA remedies sought in this case. This goal of national uniformity, made express in the statute, would be impossible if a different set of rules applied in every state.

D. The Presumption Against Preemption Does Not Overcome the Congressional Intent in the Plain Language of the Statute and the Statutory Framework.

Every preemption analysis must consider the presumption against preemption. (*Brown*, *supra*, 51 Cal.4th at p. 1060.) The purpose of the presumption against preemption is to ensure that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. (*Ibid.*) Applying it in this case, however, does not change the result in light of the express preemption language in section 10501(b) and the statutory framework. (*People ex rel. Harris v. Pac Anchor Transp., Inc.*, *supra*, 59 Cal.4th at p. 778 [interpretation of express preemption provision requires consideration of plain language and statutory framework].) Section 10501(b)'s plain language and the larger statutory framework for exclusive STB regulation of railroad operations demonstrate Congress's intent to preempt the state-law remedies in this case. The presumption against preemption does not overcome this evidence of congressional intent. (*City of Auburn*, *supra*, 154 F.3d at pp. 1029-1031.)

II. INTERPRETING SECTION 10501(b) TO PREEMPT CEQA REMEDIES AGAINST A PUBLIC AGENCY RAILROAD'S FEDERALLY-AUTHORIZED RAIL TRANSPORTATION PROJECT DOES NOT UNCONSTITUTIONALLY INFRINGE ON STATE SOVEREIGNTY.

Despite the express preemption language and statutory framework, Petitioners claim preemption of CEQA remedies here would impermissibly infringe on state sovereignty. (See, e.g., Petitioners' Reply Brief, pp. 16-22.) The U.S. Supreme Court, however, has rejected nearly identical claims based in the Tenth Amendment, holding that when a state exercises its sovereign prerogative to build and operate a railroad, uniform application of federal law to the public railroad does not improperly infringe on state sovereignty. Petitioners' reliance on *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, which involved fundamentally different circumstances, is misplaced.

A. Uniform Application of Section 10501(b) Preemption To A Public Agency Railroad Is Consistent With The Tenth Amendment.

In the context of railroads in interstate commerce, the Supreme Court has repeatedly rejected Tenth Amendment challenges to interpreting various federal laws that apply uniformly to public and private railroads. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." (U.S. Const., 10th Amend.) When a state voluntarily directs one of its agencies to enter into the business of interstate railroading, the Tenth Amendment does not prevent Congress from requiring uniform application of federal law to that railroad, even if it impedes to some degree the state's governance of its agency.

The Supreme Court first addressed Tenth Amendment considerations in the context of a public agency railroad in *United States v. California* (1936) 297 U.S. 175, overruled in part in *Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528. The underlying issue was whether the State-Belt Railroad was a "common carrier engaged in interstate commerce by railroad" within the meaning of the federal Safety Appliance Act and subject to its requirements, even though the statute did not specifically state that it applied to state-owned railroads. (*Id.* at pp. 180-181.) The Supreme Court held the state-owned railroad was a common carrier and that the federal law applied. (*Id.* at pp. 185-186.) The Court rejected the argument that the statute was insufficiently clear to bind the sovereign based on the presumption that a sovereign is not bound by a statute unless named. (*Id.* at pp. 185-186.) The Court explained:

> We can perceive no reason for extending [the presumption] so as to exempt a business carried on by a state from otherwise applicable provisions of an act of Congress, all-embracing in scope and national in purpose, which is as capable of being obstructed by state as by individual action.

(*Id.* at p. 186.) The presumption was intended only to resolve doubts, not contradict the plain meaning of the statute. (*Id.* at p. 187.)

Two decades later, in *California v. Taylor* (1957) 353 U.S. 553, the Supreme Court rejected a Tenth Amendment challenge to the federal Railway Labor Act analogous to the one Petitioners make in this case to the ICCTA:

> If California, by engaging in interstate commerce by rail, subjects itself to the commerce power so that Congress can make it conform to federal safety requirements, it also has subjected itself to that power so that Congress can regulate its employment relationships.

(*Id.* at p. 568.) That is, the Tenth Amendment did not bar a federal statute from supplanting state civil service laws governing employees of a state-owned railroad. (*Id.* at pp. 560, 568.) The fact that the state laws had to "give way" was consistent with the Tenth Amendment.

Even at the height of the Supreme Court's expansive interpretation of the Tenth Amendment in *National League of Cities v. Usery* (1976) 426 U.S. 833, overruled in *Garcia*, *supra*, 469 U.S. 528, the Supreme Court preserved the holdings in *United States v. California* and *California v. Taylor* that operating a railroad in interstate commerce was not an integral part of a State's sovereign activity and thus was not immune from federal regulation. (426 U.S. at p. 854, fn. 18; accord, *United Transp. Union v. Long Island R.R. Co.* (1982) 455 U.S. 678, 685, overruled in part by *Garcia*, *supra*, 469 U.S. 528 ["operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*"]; see also *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Comm.* (E.D.Penn. 1993) 826 F.Supp. 1506, 1521-1522 [discussing how *National League of Cities* did not disturb *United States v. California* and *California v. Taylor*].)

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court considered whether a local transit agency was immune under the Tenth Amendment from application of employee overtime and minimum wage requirements under the Fair Labor Standards Act. (*Garcia*, *supra*, 469 U.S. at p. 530.) The Supreme Court rejected the holding in *National League of Cities* that the federal government could not enforce legislation against the States in "areas of traditional government functions." (*Id.* at pp. 545-547.) The Court adopted an expansive view of Congress's

power under the Commerce Clause and concluded that there was no destruction of state sovereignty in Congress applying the federal act's wage and hour provisions to the local transit agency. (*Id.* at pp. 554, 557.) *Garcia* reinforces the earlier holdings that that when a state voluntarily enters the field of interstate commerce by rail, federal laws can, consistent with the federal Constitution, expressly mandate the state to conform to the uniform regulatory scheme.

B. Petitioners' Reliance on *Nixon v. Missouri Municipal League* is Misplaced.

The basis for the holdings in the foregoing cases was that in the various railroad laws at issue, Congress intended to treat public and private railroads uniformly, in order to create and maintain a uniform nationwide rail system. For example, the Supreme Court held the federal Railway Labor Act applied to the publicly-owned State Belt Railroad in the same fashion it applied to a private railroad, and preempted state civil service laws even though the Act did not specify that state-owned railroads were covered. (*California v. Taylor*, *supra*, 353 U.S. at pp. 567-568.) In so holding, the Court emphasized that, "the consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included." (*Id.* at p. 564.) The Court explained without qualification, "Congress intended it to apply to any common carrier by railroad engaged in interstate transportation, whether or not owned or operated by a State." (*Id.* at p. 567.)

California v. Taylor was founded on extensive authorities holding federal railroad laws apply uniformly to railroads in interstate commerce, regardless of the public or private nature of their ownership. (See generally

California v. Taylor, *supra*, 353 U.S. at pp. 561-564.) The Interstate Commerce Commission treated the State Belt Railroad and "other state-owned rail carriers" as common carriers and subject to its jurisdiction under the Interstate Commerce Act. (*Id.* at pp. 561-562 citing *California Canneries Co. v. Southern Pacific Co.*, 51 I.C.C. 500, 502-503 (1918), *United States v. Belt Line Railroad Co.*, 56 I.C.C. 121 (1919), and *Texas State Railroad*, 34 I.C.C. Val.R. 276 (1930).) Other federal statutes regulating railroads, "have consistently been held to apply to publicly owned or operated railroads." (*California v. Taylor*, *supra*, 353 U.S. at pp. 562-563 citing cases involving the Safety Appliance Act, Federal Employers' Liability Act, and Carrier's Taxing Act.)[12] In light of the federal scheme, there was no basis to treat a state-owned railroad differently than a private railroad. (*Id.* at pp. 563-564.)

The holding and reasoning of *California v. Taylor* with respect to the Railway Labor Act applies with equal force in the context of the ICCTA and public railroads. Courts and the Interstate Commerce Commission consistently treated public railroads the same as private railroads under the Interstate Commerce Act, the ICCTA's predecessor statute. (*City of New Orleans v. Texas & Pa. Ry. Co.* (5th Cir. 1952) 195 F.2d 887, 889 [New Orleans Public Belt Railroad was common carrier subject to Interstate Commerce Act]; *City of New Orleans by and Through Public Belt R.R. Comm. v. Southern Scrap Material Co., Ltd.* (E.D.La. 1980) 491 F.Supp. 46, 48 [same]; *International Longshoremen's Ass'n, AFL-CIO v. North*

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[12] The California Attorney General also recognized the Railway Labor Act applied to the State Belt Railroad and superseded conflicting provisions of state civil service laws. (*California v. Taylor*, *supra*, 353 U.S. at p. 561, fn. 9 citing 4 Ops.Cal.Atty.Gen. 300-306 (1944).)

Carolina Ports Authority (4th Cir. 1972) 463 F.2d 1, 3-4 [North Carolina Ports Authority was common carrier subject to Interstate Commerce Act, and Railway Labor Act for operation of terminal railroad]; *Staten Island Rapid Transit Operating Authority v. I.C.C.* (2d Cir. 1983) 718 F.2d 533, 539-540 [local public agency qualified as carrier under Interstate Commerce Act].)

As the Fifth Circuit Court of Appeals explained in discussing the New Orleans Public Belt Railroad, "[s]o long as it engages in interstate and foreign commerce it is subject to the federal law and the Interstate Commerce Commission, *like any other railroad*." (*City of New Orleans v. Texas & Pa. Ry. Co.*, *supra*, 195 F.2d. at p. 889, emphasis added; cf. *Los Angeles Met. Transit Authority v. Public Utils. Comm.* (1963) 59 Cal.2d 863, 868-870 [term "common carrier" in state statute inclusive of both public and private transportation utilities].)

Moreover, the STB continues to regulate public agency railroads under the ICCTA on par with private railroads. (See, e.g., *Alaska Railroad Corporation – Construction and Operation Exemption – Rail Line Between North Pole and Delta Junction, AK*, Fin. Docket No. 34658 (S.T.B. served Jan. 6, 2010), 2010 WL 24954 at * 1 [STB authorized state-owned Alaska railroad to construct and operate new rail line]; *California High-Speed Rail Authority – Construction Exemption – In Merced, Madera, and Fresno Counties, Cal.*, *supra*, 2013 WL 3053064 [STB authorized state rail authority to construct new rail line]; *South Carolina Division of Public Railways, D/B/A Palmetto Railways – Intra-Corporate Family Transaction Exemption etc.*, Fin. Docket No. 35762 (S.T. B. Served Sept. 13, 2013), 2013 WL 4879234 [applying exemption procedures to state-owned rail carrier]; *State of North Carolina – Intracorporate Family Exemption –*

Merger of Beaufort and Morehead Railroad Company into North Carolina Railroad Company, Fin. Docket No. 33573 (S.T.B. served April 23, 1998), 1998 WL 191270 [same].)

Nixon therefore does not govern this case because the federal statute there was ambiguous about treating public and private entities uniformly and involved a state opting out of an industry, not a state affirmatively opting in. In *Nixon*, the federal statute preempted state or local laws expressly or effectively "prohibiting the ability of any entity" to provide telecommunications services and the state statute prohibited its political subdivisions from doing so. (*Nixon*, *supra*, 541 U.S. at p. 128 citing 47 U.S.C. § 253.) The Court interpreted the term "any entity" to be ambiguous, and not intended to include political subdivisions of the state, emphasizing the rule from *Gregory v. Ashcroft* (1991) 501 U.S. 452, that congressional intent to impinge on a State's arrangement for conducting its own government must be through a "plain statement." (*Nixon*, *supra*, 541 U.S. at pp. 132-134, 140-141.) "[N]either statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." (*Id.* at p. 141.) In other words, there was no suggestion in *Nixon* that the particular provision challenged was designed to ensure nationwide uniformity in the area of telecommunications, or that there was a danger that a state, by passing a law removing its subdivision from the pool of entities that could provide telecommunications services, would undermine the federal scheme.

In contrast to the statute in *Nixon*, the ICCTA, its statutory framework and history, and similarly comprehensive federal railroad laws are replete with indications of congressional intent to treat public agency

and private railroads "on par" in order to create and maintain a uniform national interstate rail system. (*California v. Taylor*, *supra*, 353 U.S. at pp. 566-568; *United Transp. Union*, *supra*, 455 U.S. at p. 687; see also *Southeastern Pennsylvania Transportation Authority*, *supra*, 826 F.Supp. at pp. 1521-1522.) Moreover, this case does not involve a state decision to keep a political subdivision from undertaking rail transportation, but an express decision to enter this area. When a state voluntarily chooses to enter the business of interstate commerce by rail, it does so in light of the extensive, comprehensive regulation in the field and with the knowledge that it must conform to that regulation in order to ensure uniformity. If the "clear statement" rule of *Nixon* applies to this case, it is met here in the context of section 10501(b).

III. THE MARKET PARTICIPANT DOCTRINE DOES NOT APPLY IN THE CIRCUMSTANCES OF THIS CASE.

Just as the Tenth Amendment does not eliminate preemption in this case, neither does the market participant doctrine. The market participant doctrine allows a public agency to engage in markets in the same manner as a similarly-situated private party, without fear that federal law will preempt its true market interactions. In the typical case, a public agency invokes the doctrine to shield its market interactions from preemption. Petitioners, however, seek to use the market participant doctrine in an unprecedented way to subject a public agency to judicial proceedings and further compliance with a generally applicable state law that is specifically preempted under the posture and facts of this case. In this specific context of a public agency created by the State for the purpose of constructing or acquiring and operating a railroad that is subject to exclusive federal

regulation under the ICCTA, which treats public and private railroads uniformly, the doctrine does not apply to eliminate preemption.

As with the issue of preemption more generally, the Authority recognizes that the position it is taking in this brief is different from the typical public agency assertion of the market participant doctrine. But that is because the doctrine, as raised in *Atherton* and the appellate Opinion here, is addressed to a situation in which a public railroad must grapple with an exclusive federal regulatory scheme and a state law that, under the circumstances, conflict. The arguments here are limited to the issues in these cases, addressing the unique area of a public agency charged with operating a railroad under a pervasive and comprehensive federal regulatory scheme. In this context, applying the market participant doctrine would interfere with the State's own purpose in creating the agency to accomplish that task.

A. The Market Participant Doctrine Protects a Public Agency's Market Interactions From Preemption.

"[S]tate action in the nature of 'market participation' is not subject to the restrictions placed on state regulatory power by the Commerce Clause." (*Wisconsin Dept. of Industry, etc. v. Gould Inc.* (1986) 475 U.S. 282, 289 (*Gould*).) The market participant doctrine recognizes that when a state acts in a proprietary capacity, it has the same freedom to pursue its proprietary interests as would a similarly-situated private entity. (*Bldg. & Const. Trades Council of Metro Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (1993) 507 U.S. 218, 231-232 (*Boston Harbor*).) "To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and

its business goals – just as if it were a private party." (*SSC Corp. v. Town of Smithtown* (2d Cir. 1995) 66 F.3d 502, 510.)

In a statutory preemption case, a reviewing court addressing the market participant doctrine must first consider whether, in a particular case, the market participant doctrine is even available, or whether there is clear congressional intent to preclude this exception to preemption. The doctrine is not free-standing, but a presumption about congressional intent in a particular federal statute. (*Engine Mfrs. Ass'n. v. South Coast Air Quality Management. Dist.* (9th Cir. 2007) 498 F.3d 1031, 1042.) The doctrine therefore does not apply if the federal statute "contains 'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under the Act." (*Ibid.*, citing *Boston Harbor*, *supra*, 507 U.S. at p. 231.) If a court concludes the doctrine is not available in light of the federal law and facts at issue in a particular case, the doctrine will not serve as an exception to preemption and that is the end of the inquiry. (*City of Charleston, South Carolina v. A Fisherman's Best, Inc.* (2002) 310 F.3d 155, 178-179 [no indication in Magnuson Act of proprietary exception to preemption].)

Only if a reviewing court concludes the federal statute is amenable to the market participant doctrine under the facts presented will the court engage in a second inquiry to consider whether the doctrine applies to the specific public agency action in dispute. The court must carefully define what the challenged action is, who is taking the challenged action, and what the market is, if any. (See *South Central Timber Development v. Wunnicke* (1984) 467 U.S. 82, 96-98 [defining action and market in dormant commerce clause challenge].)

Market participant doctrine questions may arise in a number of different ways. However, it is helpful here to describe two distinct procedural contexts reflected in cases involving federal statutes. The first is a lawsuit by a plaintiff claiming a public agency defendant's action is preempted under a particular federal statute. The public agency defendant invokes the market participant doctrine to shield its actions (i.e., allow the actions to continue) from claims of preemption. (See, e.g., *Boston Harbor*, *supra*, 507 U.S. at pp. 220-222, 232-233.) A second procedural context is a lawsuit by a plaintiff seeking to require compliance with a state law, the defendant raises preemption as a defense to the state-law enforcement suit, and the plaintiff invokes the market participant doctrine to defeat the federal preemption defense. (See, e.g., *State of New York ex rel. Grupp v. DHL Express* (N.Y. 2012) 19 N.Y. 3d 278, 286.)

To determine whether the market participant doctrine applies in either of these two contexts (and only after determining that the doctrine is available in a particular case), a reviewing court considers two questions:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

(*Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Tex.* (5th Cir. 1999) 180 F.3d 686, 693.) A state action need satisfy only one of the two questions to qualify the action as market participation rather

than preempted regulation. (*Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1024.)

In this case involving section 10501(b) and actions subject to the STB's exclusive jurisdiction and regulation, the market participant doctrine is not available to overcome preemption because applying the doctrine here would conflict with congressional intent. Even if, however, the Court considers the doctrine available and proceeds to further analysis, the doctrine still does not apply because the challenged action in this case is not market participation.

B. The Market Participant Doctrine Does Not Apply Here Because it Would Undermine Congressional Intent to Have Uniform and Exclusive Federal Regulation of Railroads in Interstate Commerce.

The Court's first inquiry must consider whether the market participant doctrine is even available in this case as an exception to the preemption in section 10501(b). The doctrine is not available here to eliminate preemption for two reasons. First, the market participant doctrine would contradict the basis for applying section 10501(b) preemption in the first place. And second, the doctrine here would be contrary to congressional intent. Moreover, in this particular situation, applying the doctrine would be contrary to the State's intent in creating an agency to operate a railroad subject to a federal regulatory scheme.

In analyzing the availability of the market participant doctrine in a particular case, it is necessary to consider whether the doctrine is consistent with general preemption principles under the federal law at issue. (*Boston Harbor*, *supra*, 507 U.S. at p. 230 [explaining that market participant doctrine was consistent with preemption principles under National Labor

Relations Act].) As discussed above, preemption in section 10501(b) is intended to give the STB exclusive jurisdiction over the regulation of rail transportation, including the STB-licensed railroad operations at issue in this case. Allowing a state law of general applicability to govern the same area is contrary to preemption principles under the ICCTA. (*Chicago and N.W. Transp. Co., Inc.*, *supra*, 450 U.S. at pp. 324-326 [preempting state law that sought to regulate abandonments, an area under exclusive federal jurisdiction under Interstate Commerce Act]; *City of Auburn*, *supra*, 154 F.3d at p. 1031 [preempting state law that sought to regulate rail line construction and operations].)

The market participant doctrine here would also be contrary to congressional intent. Congressional intent is manifest in section 10501(b) that STB's jurisdiction over the railroad operations in this case is "exclusive" and that "the remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." (49 U.S.C. §§ 10501(b), 10901; *City of Auburn*, *supra*, 154 F.3d at pp. 1029-1030.) Congress intended to not only promote uniformity of regulation by giving the STB exclusive and plenary jurisdiction over railroad operations, but also to preempt state law remedies related to a railroad's federally licensed operations that would impose differing standards by states. (See *Chicago and Northwest Transp. Co.*, *supra*, 450 U.S. at pp. 320-321; *CSX Transp.*, *supra*, 944 F.Supp. at p. 1581.)

Moreover, Congress enacted section 10501(b) in the context of a regulatory framework that has applied uniformly to public and private railroads for decades. (See section I.C, *supra*.) In light of this long-standing history, the ICCTA indicates no congressional intent to allow for a

separate, non-uniform regulation or remedial scheme for public agency railroads as to their federally licensed activities. (Cf. *California v. Taylor*, *supra*, 353 U.S. at p. 567 [recognizing uniform application of federal railroad labor law, and preempting state civil service laws from applying to public railroad]; see also *Southeastern Pennsylvania Transportation Authority*, *supra*, 826 F.Supp. at p. 1521 [rejecting Tenth Amendment argument that federal statute could not preempt state tax law from applying to public railroad]; *City of New Orleans*, *supra*, 195 F.2d at p. 889.) Congress intended to have uniform and exclusive federal regulation, not separate, additional state-specific requirements and remedies in states with public agencies building or operating railroad in interstate commerce. (*City of Auburn*, *supra*, 154 F.3d at p. 1030; cf. *City of Charleston, South Carolina v. A Fisherman's Best, Inc.*, *supra*, 310 F.3d at p. 179 [no indication in Magnuson Act that Congress intended to allow market participant exception].) Under the circumstances of this case, to allow the Petitioners here to use the market participant doctrine to nullify preemption would be contrary to both congressional and state intent.

As indicated in the first question on review here, the only two published decisions to address the market participant doctrine in the context of section 10501(b) are the appellate Opinion in this case and *Atherton*. (Opinion, pp. 28-34; *Atherton*, *supra*, 228 Cal.App.4th at pp. 334-341.) Both cases involved California public agencies engaged in interstate commerce by railroad and under the STB's exclusive jurisdiction, and facing CEQA lawsuits. The two decisions reached the opposite result on the market participant doctrine and section 10501(b), albeit on different facts. The Authority submits that under the facts of this case, and in light of the analysis above, the market participant doctrine does not apply.

Atherton's market participant doctrine analysis fell short because the court there assumed that the market participant doctrine was available under section 10501(b) and then proceeded to consider whether the action at issue was proprietary. (*Atherton*, *supra*, 228 Cal.App.4th at pp. 334-336.) The court never analyzed whether the application of section 10501(b) in that case was even amenable to the market participant doctrine. (*Id.* at pp. 334-341.) The court therefore never reconciled the market participant doctrine with congressional intent in the ICCTA. (*Ibid.*) A proper focus on congressional intent in section 10501(b) and the long history of uniform treatment of public and private railroads demonstrates that the doctrine is not available in this case. The *Atherton* court omitted an essential step in market participant doctrine analysis.

Moreover, the *Atherton* court did not have before it a case where the CEQA challenge was directly targeting actions over which the STB not only had jurisdiction, but had specifically authorized. (*Atherton*, *supra*, 228 Cal.App.4th at p. 322 [challenge in case was to program EIR]; *id.*, p. 332, fn. 4 [acknowledging that agency could make request to STB for declaratory order on issue of preemption].) *Atherton* recognized that the challenged program EIR would be followed by further project-level environmental review and thus the possibility of interfering with rail transportation was more remote than was the case in *City of Auburn*. (*Id.* at p. 333 [contrasting *Atherton* facts with *City of Auburn* because less clear CEQA could deny railroad ability to conduct its operations or activities].) Yet, this case presents the exact situation where *Atherton* recognized preemption would apply to prevent a state law from interfering with STB authorized rail operations. *Atherton* thus not only applied an incorrect analytical framework for the market participant doctrine, it is

distinguishable from this case, where the CEQA suit challenges rail operations the STB has authorized.

The STB has recently assessed the market participant doctrine, section 10501(b), and CEQA remedies, considering the appellate decisions in both this case and in *Atherton*. (*California High-Speed Rail Authority, Petition for Declaratory Order*, *supra*, 2014 WL 7149612, at *9-10.) For a public railroad project under its jurisdiction and for which it had issued a federal license, the STB held CEQA was preempted and the market participant doctrine did not apply. (*Id.* at *10.) While Petitioners claim the STB has no special expertise about the market participant doctrine and that its decision can be disregarded, the Authority respectfully suggests that the STB's decision merits weight regarding the application of CEQA in the context of a particular railroad under its jurisdiction. (Petitioners' Reply Brief, p. 31; *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1488; *Atherton*, *supra*, 228 Cal.App.4th at p. 332, fn. 4.)

The Authority submits that by applying the initial market participant doctrine inquiry and considering the doctrine in conjunction with congressional intent in the ICCTA, and recognizing that the CEQA remedies in this case are directed at STB authorized actions by a public agency, the Court should affirm the holding of the appellate court below and find the doctrine does not operate in this case to eliminate preemption.

C. In the Circumstances of This Case, NCRA's Compliance with CEQA and Being Subject to CEQA Lawsuits is not Market Participation.

The Court need go no further with its market participant doctrine analysis than conclude, as explained above, the doctrine simply does not apply in this case as an exception to preemption. However, if the Court

undertakes the second inquiry and considers whether the disputed action at issue is proprietary, the doctrine still does not apply. The challenged "action," when properly defined and in light of the procedural posture of the case, is not market participation by NCRA that leads to an exception to preemption.

1. A public agency railroad's compliance with CEQA, standing alone, is not market participation.

Market participant doctrine cases focus on the "action" for purposes of analysis as the action being disputed as preempted in a particular case. (See, e.g., *Boston Harbor*, *supra*, 507 U.S. at pp. 222-223 [action for market participant doctrine analysis was public agency's approval of a project labor agreement that litigants claimed was preempted by federal law]; *Gould*, *supra*, 475 U.S. at p. 285 [action for market participant doctrine analysis was state debarment scheme that litigants claimed was preempted by federal law]; *State of New York ex rel. Grupp*, *supra*, 19 N.Y.3d at pp. 286-287 [action for market participant doctrine was state law that litigant was trying to enforce]; *DHL Express (USA) Inc. v. State, ex rel. Grupp* (Fl.Dist.Ct.App. 2011) 60 So.3d 426, 429 [same]; *Whitten v. Vehicle Removal Corp.* (Tx.Ct.App. 2001) 56 S.W.3d 293, 309-310 [same].) The focus of each of these types of cases is whether the particular challenged action or state law is itself market participation, rather than whether the public agency is engaging in some form of market participation more generally.

This case is fundamentally different from these types of market participant cases. The specific "action" at issue that is said to be the market participation is the NCRA's compliance with CEQA, and the resulting

CEQA enforcement lawsuits. (Pub. Resources Code, §§ 21002, 21081; 21167.) This is the case because Petitioners' lawsuit is grounded in NCRA's alleged failure to fully comply with CEQA, and it seeks remedies under Public Resources Code section 21168.9. But a public agency's actions to comply with CEQA, standing alone, are not market participation. When a public agency complies with a state law that is itself not proprietary, it "is not participating in an open market but simply carrying out a traditional state regulatory responsibility." (*Children's Hospital and Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 768.)

Inherent in market participation is an underlying *voluntary* action by a public agency making choices in a specific free market. (*Boston Harbor*, *supra*, 507 U.S. at pp. 230, 231 [describing doctrine as "permitting the States to participate freely in the marketplace"]; *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority* (2d Cir. 2006) 438 F.3d 150, 158 [Commerce Clause does not restrict a public agency's "choices" about how to dispose of trash].) Following generally applicable legal requirements here is not "participation" in any "market" because a public agency preparing an EIR under CEQA, and then being sued by a third party, involves neither a voluntary action nor any market interaction. (*State of New York ex rel. Grupp*, *supra*, 19 N.Y.3d at pp. 286-287; *Children's Hospital and Medical Center*, *supra*, 97 Cal.App.4th at p. 768 [discharging regulatory responsibilities under state and federal law not responsive to market forces and not engaging in any market].) Fundamental aspects of market participation are simply lacking in this case. (See, e.g., *Gould*, *supra*, 475 U.S. at p. 291 [rejecting market participant doctrine where challenged statute not related to "state procurement constraints or to local economic needs . . . ."].)

The cases cited by Petitioners, which address a state or a local government agency's specific proprietary and procurement-related actions, are distinguishable. (E.g., *Engine Mfrs.*, *supra*, 498 F.3d at pp. 1035-1036 [rules for procuring clean vehicles when adding to a fleet]; *Boston Harbor*, *supra*, 507 U.S. at pp. 220-223 [contract bid specifications applicable to specific construction project]; *Johnson*, *supra*, 623 F.3d at p. 1016 [project labor agreement to govern labor relations for multiple agency construction projects]; *White v. Massachusetts Council of Const. Employers, Inc.* (1983) 460 U.S. 204, 205-206 [city executive order requiring percentage of workforce on construction projects paid for with city funds to be performed by workforce comprised of at least half city residents].) Characterizing compliance with CEQA as market participation here, simply because the overall mission of the NCRA is to own and operate a railroad, would be an unwarranted extension of the doctrine.

Atherton, admittedly, did conclude that the Authority engaged in market participation when it prepared its programmatic environmental report. (*Atherton*, *supra*, 228 Cal.App.4th at p. 337.) The court reached this result principally because the Legislature did not affirmatively exempt the high-speed rail project from complying with CEQA, a state law that pre-dated the Authority's enabling and funding legislation. (*Id.* at p. 337.) By this logic, however, a railroad's compliance with generally applicable state laws would always be market participation and would mean there would never be preemption. For example, under this reasoning the federal labor law at issue in *California v. Taylor* would not preempt state civil service laws, the opposite of the result the Supreme Court reached. This

analytical approach is flawed because it results in the market participant doctrine swallowing the rule of preemption.[13]

Finally, the *Cardinal Towing* test further demonstrates that the present circumstances of complying with CEQA and being subject to CEQA lawsuits is not market participation in the context of a public agency engaging in interstate rail operations and viewed in light of the ICCTA's purposes. Only public agencies must comply with CEQA's procedural and substantive mandates prior to approving and implementing a project. (Pub. Resources Code, § 21002.) A similarly-situated private railroad has no similar legal obligation to prepare an EIR or adopt feasible mitigation if it wishes to construct, repair, or operate a railroad line, nor will it typically be required to obtain permits or pre-approvals that would trigger CEQA review by a public agency. (*City of Auburn*, *supra*, 154 F.3d at p. 1031; see also *DesertXpress Enterprises, LLC – Petition for Declaratory Order*, Fin. Docket No. 34914 (S.T.B. served June 27, 2007), 2007 WL 1833521, at *3-4.) Accordingly, the NCRA's legal duties under CEQA are unlike "*the typical behavior of private parties in similar circumstances*." (*Cardinal Towing*, *supra*, 180 F.3d at p. 693, emphasis added.) This is particularly the case here because even though a private railroad may be able to freely choose to consider environmental information and to share information with the public as it pursues its business goals (Petitioners' Reply Brief, pp.

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[13] Petitioners cite *Electrical Contractors v. Department of Education* (Conn. 2012) 303 Conn. 402 as rejecting the argument that only state actors may assert the market participant doctrine. That court did not decide this issue, but instead relied on *Boston Harbor* to find that the plaintiffs' state law challenge to the labor agreement at issue were not preempted in the first instance. (*Id.* at pp. 446-455.)

26-27), the private railroad is not subject to being sued in state court for alleged inadequacies in its internal procedures or substantive decisions.

And CEQA does not merely guide internal decisionmaking as Petitioners suggest, but it includes a series of mandatory procedures that precede agency decision making. (Petitioners' Reply Brief, pp. 23-24.) CEQA's substantive mandate requires that public agencies not approve projects as proposed if there are feasible mitigation measures or alternatives that would substantially lessen the significant environmental effects of the project. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.) Standing alone, CEQA is a law of general application, not a law addressing a specific proprietary problem. (*Cardinal Towing, supra,* 180 F.3d at p. 693.) And the ICCTA does not contemplate that public railroads must be subject to an additional set of regulations and remedies. In this context, complying with CEQA constitutes implementing generally applicable state regulations, not engaging in narrow market interaction. (*Cardinal Towing, supra,* 180 F.3d at p. 693.)

2. That a public rail agency's operation of a rail line might be described as proprietary does not transform CEQA compliance into market participation.

Petitioners argue, nevertheless, that CEQA compliance in this case is "proprietary" and escapes preemption because it is a required part of NCRA's underlying decision to lease, restore, and reopen its railroad line. (Petitioners' Reply, p. 23.) "Here, by requiring CEQA compliance before reopening of the rail line, the State was acting within its capacity as a proprietor of the line." (*Id.* at p. 25.) According to Petitioners, it is not simply NCRA, but "the State" that is engaging in proprietary conduct by

making proprietary decisions. (*Id.* at pp. 27-30.) These arguments are unpersuasive for two reasons.

First, Petitioners incorrectly attempt to merge NCRA's CEQA compliance with its railroad operations in order to characterize the entirety of these two discrete activities as collectively constituting market participation. (Petitioners' Reply Brief, pp. 23-27.) This contention ignores that a state may act as a market participant with respect to one portion of a program while operating as a market regulator in implementing another." (*United Haulers Ass'n, supra*, 438 F.3d at p. 158.) Thus, "[c]ourts must evaluate separately each challenged activity of the state to determine whether it constitutes participation or regulation." (*USA Recycling, Inc. v. Town of Babylon* (2nd Cir. 1995) 66 F.3d 1272, 1283.) The fact that the NCRA's decision about railroad operations may have been participation in the railroad services market does not convert NCRA's CEQA compliance, let alone it being subject to CEQA enforcement lawsuits, into market participation. (See *State of New York ex rel. Grupp, supra*, 19 N.Y.3d at pp. 286-287 [state False Claims Act suit not part of market participant action of contracting for shipping services]; *DHL Exp. (USA) v. State ex rel. Grupp, supra*, 60 So.3d at p. 429 [same].)

Second, Petitioners' arguments improperly merge "the State" and NCRA in terms of who was allegedly acting in a proprietary capacity in requiring or complying with CEQA. NCRA is the public agency respondent in this lawsuit, and as discussed above, when it prepared its EIR, it was simply complying with state law, not engaging in market interactions with other parties. There is no challenge here to any state legislative enactment or state agency funding decision, and this case involves no state defendants. This case is therefore unlike cases Petitioners

cite involving state statutes imposing funding conditions on public construction projects that private parties alleged were preempted on their face. (Petitioners' Reply Brief, p. 25.) To the extent Petitioners argue "the State" as a whole is engaging in the proprietary activity by either entering the railroad business or requiring CEQA compliance, there can be no doubt that the Legislature enacted CEQA to establish general state environmental policy. As applied to public rail agencies constructing or operating rail lines under STB jurisdiction, CEQA is effectively regulatory. (Pub. Resources Code, §§ 21000, 21001, 21001.1, 21002; cf. *Chamber of Commerce v. Brown* (2008) 554 U.S. 60, 71 [California statute establishing labor policy, and not addressing procurement of goods and services, was not market participation].)

3. CEQA remedies as applied to a public agency railroad undertaking an STB-regulated project reinforce that complying with the statute is not market participation by the NCRA.

Finally, being subject to a CEQA enforcement lawsuit is not market participation by NCRA, it is preempted state regulation of NCRA's railroad actions in the specific context of this case. Petitioners' case is based solely on CEQA. When a public agency prepares an environmental impact report to consider in conjunction with its own proposed project, CEQA provides for citizen enforcement of CEQA's procedural and substantive requirements by a private right of action against the public agency. (Pub. Resources Code, §§ 21167, 21177.) A CEQA lawsuit may result in remedies in the form of writs of mandate and injunctive relief. (*Id.* at § 21168.9; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 422-424 [discussing CEQA remedies].)

CEQA's remedy provisions both encourage initial compliance with CEQA's procedural and substantive mandates, and force corrective action where appropriate. (Pub. Resources Code, § 21168.9.)

Petitioners' lawsuit seeks to block NCRA from engaging in federally-authorized railroad operations. This form of third party CEQA lawsuit *against* NCRA is not NCRA's market participation. (*California High-Speed Rail Authority – Petition for Declaratory Order*, *supra*, at *12-13; *Whitten*, *supra*, 56 S.W.3d at p. 310 ["The State may not escape the preemptive effect of federal statutes by using private litigation as a means of enforcement . . . ."]; see generally *Ball v. GTE Mobilnet of California* (2000) 81 Cal.App.4th 529, 537 [state court enforcement is form of state regulation]; cf. *Chamber of Commerce v. Brown*, *supra*, 554 U.S. at p. 72 [rejecting market participant argument where state statute included citizen suit provision and provided for injunctive relief, damages, and penalties].)

Petitioners cite *Engine Manufacturers* for the premise that an enforcement mechanism does not convert an otherwise proprietary action into a regulatory action. (*Engine Mfrs.*, *supra*, 498 F.3d at p. 1048.) This holding was grounded, however, in the fact that the enforcement action was embedded as part of an inherently proprietary action – clean vehicle procurement rules. (*Ibid.*) CEQA's enforcement mechanisms, in contrast, are in the Public Resources Code and are entirely separate from NCRA's market participation. *Engine Manufacturers* is therefore not applicable in this case, where an entirely separate state statute prescribes procedural and substantive requirements a public agency must follow and includes a separate enforcement mechanism as part of that statute. (*State of New York ex rel. Grupp*, *supra,* 19 N.Y.3d at p. 286; *Whitten*, *supra*, 56 S.W.3d at pp. 309-310.)

The holding in *Engine Manufacturers* was also based in part on the fact that the federal statute at issue expressly recognized state authority and roles in regulating air pollution to meet federal standards and indicated no congressional intent to bar states from choosing to use their own funds to acquire or use vehicles cleaner than the federal standards. (*Engine Mfrs.*, *supra*, 498 F.3d at p. 1043.) Enforcement of the procurement rules through penalty provisions presented no conflict with federal law. The ICCTA, by contrast, establishes uniform and exclusive federal regulation of the railroad operations at issue in this case. (Compare *id.* at p. 1042 ["The "Clean Air Act largely preserves the traditional role of the states in preventing air pollution."] and *City of Auburn*, *supra*, 154 F.3d at p. 1030 [plain language in the ICCTA grants the STB "exclusive authority" over railway projects like Stampede Pass"].) The market participant doctrine has no place here, where applying it would undermine rather than carry out congressional intent. (*Engine Mfrs.*, *supra*, 498 F.3d. at p. 1042.)

IV. SECTION 10501(B) WILL NOT PREEMPT A RAILROAD'S VOLUNTARY AGREEMENTS THAT DO NOT UNREASONABLY INTERFERE WITH RAILROAD OPERATIONS.

The second question before the Court is whether section 10501(b) preempts the CEQA claims in this case if the NCRA voluntarily agreed to prepare an EIR in return for receiving state funds. The Authority will not weigh in on the specific facts of this case and whether a voluntary agreement exists. The Court of Appeal thoroughly addressed the facts in its Opinion and the parties have briefed whether an agreement to prepare an EIR exists, whether the agreement covered an EIR on federally-licensed railroad operations, and whether the Petitioners have standing to enforce the agreement if it exists. Rather, the Authority addresses this question

solely to ensure full consideration of the relationship between voluntary agreements and preemption under 10501(b), including two important STB decisions on this issue the parties do not address.

Section 10501(b) preempts only state or local *regulation* of rail transportation. (49 U.S.C. § 10501(b)(2).) Thus, section 10501(b) generally will not preempt a railroad's voluntary choice to undertake an "activity or restriction" that reflects the railroad's own determination that the condition is reasonable. (*Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, Fin. Docket No. 33971 (S.T.B. served May 1, 2001), 2001 WL 458685 at *67 and fn. 38 (*Boston and Maine*).) This is the case because, in general, voluntary agreements between private parties are not presumptively regulatory acts. (*PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 218-219.)

The STB first articulated the distinction between preempted regulation under section 10501(b) and non-regulatory voluntary agreements in *Township of Woodbridge, N.J. et al., v. Consolidated Rail Corp., Inc.*, No. 42053 (S.T.B. served Dec. 1, 2000), 2000 WL 1771044 (*Township of Woodbridge*). There, a freight railroad entered into a settlement agreement to resolve a town's litigation against it over noise from locomotive engine idling by agreeing to curtail idling between 10:00 pm and 6:00 am. (*Id.* at *1.) The railroad later argued before the STB that the settlement agreement, both in its original form and as subsequently clarified in a consent decree, was preempted and not enforceable. (*Id.* at *2.) The STB rejected that argument, concluding that when a railroad enters into a contractual settlement agreement to resolve litigation, the railroad cannot shield itself from the contractual bargain it struck by resorting to

preemption. (*Id.* at *3-*4.) The voluntary agreement reflected the railroad's own determination and admission that the agreement would not unreasonably interfere with interstate commerce. (*Id.* at *3.) There were no facts suggesting that complying with the disputed settlement agreement would unreasonably interfere with railroad operations. (*Ibid.*)

Enforceable voluntary agreements can be an important tool for railroads to address environmental issues. (See, e.g., *Boston and Maine, supra*, 2001 WL 458685 at *6, fn. 38 [encouraging railroads and communities "to work together to reach mutually acceptable solutions to localized environmental concerns."].) Voluntary agreements provide a mechanism to resolve community concerns short of litigation, or resolve litigation it if it occurs. (See, e.g., *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.* (2000) 163 N.J. 446, 462 [describing voluntary efforts to address community issues in manner consistent with congressional intent in the ICCTA]; *Township of Woodbridge, supra*, 2000 WL 1771044 at *3-4.) Railroads gain an important degree of flexibility through voluntary agreements to address local concerns while preserving their ability to engage in federally licensed railroad operations.

However, while a voluntary agreement is presumptively non-regulatory, that presumption can be rebutted based on the specific facts of the case. (*Township of Woodbridge v. Consolidated Rail Corp., Inc.*, No. 42053 (S.T.B. served March 23, 2001), 2001 WL 283507, at *2-3 [railroad could raise facts to show unreasonable interference with main line operations as part of contract enforcement case].) Section 10501(b) may preempt, for example, a contract enforcement remedy "so onerous as to unreasonably interfere with railroad operations." (*Township of Woodbridge, supra*, 2000 WL 1771044 at *4; see also *Wichita Terminal*

Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order, Fin. Docket No. 35765 (S.T.B. served June 23, 2015), 2015 WL 3875937.)

In *California High-Speed Rail Authority – Petition for Declaratory Order*, the STB held that third party enforcement of judicial remedies would not escape preemption, even if a public agency's actions in preparing an EIR qualified as an implied voluntary agreement to comply with CEQA. (*California High-Speed Rail Authority - Petition for Declaratory Order*, *supra*, 2014 WL 7149612 at *7.) The STB explained:

> In particular, we conclude that any implied agreement to comply with CEQA that potentially could have the effect, through the mechanism of a third-party enforcement suit, of prohibiting the construction of a rail line authorized by the Board unreasonably interferes with interstate commerce by conflicting with our exclusive jurisdiction and by preventing the Authority from exercising the authority we have granted it.

(*Id.* at *7.) Therefore, if judicial enforcement of a voluntary agreement between a railroad and a governmental entity would unreasonably interfere with STB-regulated railroad operations, then section 10501(b) may preempt that component of an agreement.

CONCLUSION

The Authority has provided the foregoing discussion to ensure a comprehensive consideration of how the express preemption in section 10501(b) applies to public agency railroads. The Authority respectfully suggests that while the Court of Appeal's opinion may not have considered all of the points raised here, that its ultimate holding was correct.

Dated: July 1, 2015

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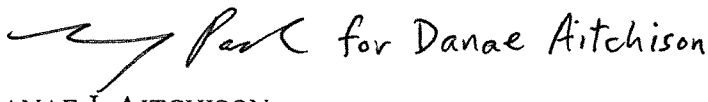

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief uses a 13 point Times New Roman font and contains 13927 words, exclusive of the application, table of contents, table of authorities, and signature block, based on the word count feature in Microsoft Word.

Dated: July 1, 2015

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***

Case No.: **S222472**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On **July 1, 2015**, I served the attached:

APPLICATION OF THE CALIFORNIA HIGH SPEED RAIL AUTHORITY FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 1, 2015**, at San Francisco, California.

Erika Y. Gomez
Declarant

Erika Gomez
Signature

SA2015300475

SERVICE LIST

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***

Case No.: **S222472**

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ATTACHMENT 5

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August 9, 2013

The Honorable Vance W. Raye, Presiding Justice
Honorable Associate Justices
Third District Court of Appeal
Stanley Mosk Library and Courts Building
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FILED

AUG 09 2013

Court of Appeal, Third Appellate District
Diana C. Fawcett, Clerk
BY _____ Deputy

Re: Town of Atherton, et al. v. California High-Speed Rail Authority
Court of Appeal of the State of California, Third Appellate District, No. C070877

Dear Presiding Justice Raye:

Respondent California High-Speed Rail Authority (Authority) respectfully submits this supplemental letter brief to address the effect on this appeal of the federal Surface Transportation Board taking jurisdiction over the California High-Speed Train system. Pursuant to the Court's July 8th order, this brief discusses the following:

1. Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)

   Answer: The Interstate Commerce Commission Termination Act preempts a California Environmental Quality Act remedy in this appeal.

2. Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature? (See *International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

Answer: Preemption of the California Environmental Quality Act in this case is jurisdictional in nature.

This brief also explains that the STB decision is new legal authority relative to the STB's jurisdiction, not improper extra-record evidence being offered on the merits of the CEQA case, and that the STB's jurisdictional decision overlaps geographically with the decisions being challenged in this appeal.

Sincerely,

DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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California High-Speed Rail Authority

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Introduction

The Surface Transportation Board (STB) is the successor to the Interstate Commerce Commission. Pursuant to the Interstate Commerce Commission Termination Act of 1995, or the "ICCTA," Congress vested the STB with exclusive regulatory jurisdiction over railroads involved in interstate commerce. The remedies provided in the ICCTA over rail transportation are exclusive and preempt the remedies provided under federal or state law.

Courts and the STB uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate. By contrast, federal environmental laws like the National Environmental Policy Act, Clean Water Act, and Clean Air Act apply to rail transportation under STB jurisdiction because these laws can be harmonized with the ICCTA. The STB recently determined it has jurisdiction over California's high-speed train system. The ICCTA now preempts any CEQA remedy in this appeal, and the case must be dismissed.

The preemptive effect of the ICCTA on the CEQA remedies at issue in this appeal is jurisdictional in nature. In section 10501(b), Congress removed the right of state courts to adjudicate and provide state-law remedies in those areas that the federal law preempts. Because this

preemption implicates a state court's jurisdiction, the defense can be raised for the first time on appeal. Furthermore, the issue can be addressed for the first time on appeal because the STB's decision is new legal authority and is not improper extra-record evidence directed at the merits of the CEQA case.

The STB's jurisdiction over the high-speed train system, and application of the ICCTA, marks a shift in the applicable regulatory framework for the project. Still, the environmental mitigation discussed in the revised program environmental impact report, and that the Authority adopted in 2010 (and readopted in 2012), will continue to apply to this project. The Authority will work with its federal partners to ensure all environmental mitigation from the program EIR is included in the project moving forward.

Procedural Setting

On March 27, 2013, the Authority filed with the STB a petition for exemption from the prior approval requirements in 49 U.S.C. § 10901 for planned high-speed train construction in the Central Valley and concurrently filed a motion to dismiss on the grounds that the STB lacked jurisdiction over the high-speed train project as a whole. (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 1701795, at *1 (S.T.B. April 18, 2013).) On April 18, 2013, the STB denied the Authority's motion to dismiss, stating it has jurisdiction over the entire high-speed train system, including the proposed Central Valley construction. (*Id.* at *2.)

The STB did not explain the basis for its jurisdiction, however, and instead reserved that explanation for a subsequent decision. (*Id.* at *2.)

On June 13, 2013, the STB issued its decision explaining that it "has jurisdiction over transportation by rail carrier . . . between a place in a state and a place in the same state, as long as that interstate transportation is carried out 'as part of the interstate rail network.'" (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 3053064, at *6, (S.T.B. June 13, 2013).) The decision goes on to explain that the STB has jurisdiction over the high-speed train system because its interconnectivity with Amtrak makes it part of the interstate rail network. (*Id.*, at *6.)[1] The STB found that the high-speed train system "would have extensive interconnectivity with Amtrak, which has long provided interstate passenger rail service, and is therefore part of the interstate rail network." (*Id.* at *6.) The STB thus determined it has jurisdiction over the entire high-speed train system.[2]

---

[1] The June 13, 2013, STB decision discusses the programmatic EIR/EISs prepared by the Authority and the Federal Railroad Administration that the agencies used to establish the high-speed train system, which is depicted in a map in Appendix B of the paper copy of the decision submitted to the Court and served on June 26, 2013. (*Id.* at *4-5 and fn. 49; *id.*, Appendix B; see also Appendix C Environmental Memorandum, * 26-28 [discussing first-tier EIR/EISs, including 2010 Revised Final Program EIR].) The high-speed train system map is not reproduced in the Westlaw version of the June 13th decision.

[2] Following the jurisdictional portion of the decision, the STB analyzed the Merced to Fresno project that the Authority has proposed for construction, exempted the construction from further regulation, and authorized the construction to proceed with various conditions. (*Id.* at * 9-13.)

The STB decision became effective on June 28, 2013. (*Id.* at *16.) No petitions to reopen the proceeding were filed by the July 3, 2013, deadline. (*Id.* at *16.) The limitations period for an appeal is August 27, 2013. (28 U.S.C. §§ 2321(a), 2342, 2343, 2344.)

ARGUMENT

I. The California High-Speed Train System Is Now Subject to STB Jurisdiction Under the ICCTA, Which Preempts A CEQA Remedy in this Case.

The first question in the Court's July 8, 2013, order asks:

> Does federal law preempt state environmental law with respect to California's high-speed rail system? (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025; *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094.)

The only state environmental law at issue in this case is CEQA. (Pub. Resources Code, § 21000 et seq.) And the only high-speed train system decisions at issue in this case are the Authority's certification of the Bay Area to Central Valley Revised Final Program Environmental Impact Report (EIR) and its selection of the general route into the Bay Area from the Central Valley. On the limited issues before the Court in this appeal, the ICCTA preempts any CEQA remedy.

In enacting the ICCTA in 1995, Congress abolished the former Interstate Commerce Commission, assigned regulatory responsibilities under the act to the STB, and broadly deregulated the railroad industry. (49 U.S.C. § 10101; see also *CSX Transportation, Inc. v. Georgia Public Service Comm.* (N.D. Ga. 1996) 944 F.Supp. 1573, 1583-84 [discussing the

ICCTA and its underlying policy].) Of the many rail transportation policies Congress articulated in the ICCTA, one of them is "to reduce regulatory barriers to entry into and exit from the industry." (49 U.S.C. § 10101.) The ICCTA "expanded the agency's [STB's] jurisdiction to include certain wholly intrastate rail transportation based upon its relationship to the interstate rail network, endorsing a shift in jurisdiction away from the states." (*California High-Speed Rail Authority-Construction Exemption-in Merced, Madera and Fresno Counties*, Cal., No. FD 35724, 2013 WL 3053064, at *7-8, (S.T.B. June 13, 2013).)

Under the Supremacy Clause of the United States Constitution, laws of the United States are the supreme law of the land. (U.S. Const., art. VI, cl. 2.) "The doctrine of preemption gives force to the Supremacy Clause." (*People. v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1521.) "[W]hen 'a state statute conflicts with, or frustrates, federal law, the former must give way.'" (*Ibid.*, citing *CSX Transp. v. Easterwood* (1993) 507 U.S. 658, 663.)

There are three types of federal preemption of state law: express preemption, field preemption, and conflict preemption. (*Id.* at pp. 1521-22; see also *CSX Transportation, Inc.*, *supra*, 944 F.Supp. at p. 1580-81.) Where a federal statute contains express preemption language, a court's review focuses on the plain wording of the statute to discern Congressional intent. (*CSX Transp. v. Easterwood*, *supra*, 507 U.S. at p. 664.) Section 10501(b) of the ICCTA includes an express preemption provision:

> The jurisdiction of the Board over—
>
> **(1)** transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> **(2)** the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.*

(49 U.S.C. § 10501(b), emphasis added.)

This language reflects the traditional federal regulation of railroads engaged in interstate commerce. (See *City of Auburn v. United States Government* (9th Cir. 1998) 154 F.3d 1025, 1029 [discussing cases recognizing need to regulate railroads at federal level].) As one federal court observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." (*CSX Transportation, Inc.*, *supra*, 944 F.Supp. at p. 1581.)

Although the ICCTA retains for the states the police powers reserved by the Constitution, this case involves the express preemption of state regulation, not reserved police powers. (*City of Auburn*, *supra*, at p. 1029 [discussing legislative history of the ICCTA]; *Jones v. Union Pacific*

Railroad Company (2000) 79 Cal.App.4th 1053, 1058-59 [same].)[3] The question here is whether the ICCTA's express preemption language preempts CEQA and CEQA remedies. The federal courts and the STB have answered this question in the affirmative, and California appellate courts recognize that affirmative answer.

A. Federal Courts Have Consistently Held That The ICCTA Preempts State Environmental Preclearance Laws.

Federal courts have consistently held that the ICCTA preempts state environmental preclearance laws. The federal cases establish a preemption analysis for state regulation of railroads in interstate commerce that distinguishes between facially preempted state regulation and state regulation that may be preempted "as applied." (*Adrian & Blissfield Railroad Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 539-540.) There are two types of facially preempted state regulation:

> (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 Board has authorized" and
>
> (2) "state or local regulation of matters directly regulated by the Board such as the construction, operation, and abandonment of rail lines; railroad mergers, line acquisitions,

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[3] In the ICCTA, Congress has legislated in an area with significant federal presence, i.e., railroads, and therefore the typical presumptions about narrowly construing the scope of federal preemption of state law are less strong. (*Elam v. Kansas City Southern Railway Co.* (5th Cir. 2011) 635 F.3d 796, 804; *Miller v. Bank of America, N.A.* (2009) 170 Cal.App.4th 980, 985.)

> and other forms of consolidation; and railroad rates and service."

(*Id.* at p. 540 citing *CSX Transp., Inc. – Petition for Declaratory Order*, No. FD 34662, 2005 WL 1024490 at * 3 (S.T.B. May 3, 2005); *New Orleans & Gulf Coast Railway Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332; *Green Mountain Railroad Corporation v. State of Vermont* (2d Cir. 2005) 404 F.3d 638, 642.)

The federal courts consider these two types of state regulations or actions to be "*per se* unreasonable interference with interstate commerce," and that is the end of the inquiry. (*Id.* at p. 540.) There is no need to analyze the reasonableness of the burden imposed by the particular state action or regulation because the analysis is directed at the act of regulation itself. (*Ibid.*) State regulations or actions that do not fall into either of the two types of actions that are preempted on their face may nonetheless be preempted "as applied" based on an assessment of whether the action would prevent or unreasonably interfere with rail transportation. (*Ibid.* citing *Barrois, supra*, 533 F.3d at p. 332.)

In *City of Auburn*, the Court of Appeals for the Ninth Circuit upheld an STB declaratory order finding the ICCTA preempted state and local environmental review laws pertaining to the reopening of a railroad line in Washington. (*Id.* at pp. 1031, 1033.) The railroad sought STB approval to reacquire a portion of the 229-mile Stampede Pass rail line and reestablish rail service, with plans to repair and replace track and make other rail improvements. (*Id.* at p. 1027-28.) The railroad initially applied for permits from local authorities but later contended that the ICCTA preempted local environmental review requirements. (*Id.* at p. 1028.)

The City of Auburn challenged the STB's approval of the railroad's proposal and its assertion that the ICCTA preempted state and local environmental review and permitting laws, arguing Congress intended to preempt only economic regulation. (*Id.* at pp. 1028-29.) The Ninth Circuit disagreed, reasoning that the broad language of section 10501(b)(2) blurred the lines between economic and environmental regulation because the power to impose environmental requirements, "will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." (*Id.* at p. 1031.) The court further explained that:

> We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. [Citation and footnote omitted.] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB's finding of federal preemption.

(*Id.* at p. 1031.) *City of Auburn* thus interprets the ICCTA to explicitly preempt state and local environmental review laws for railroads under STB jurisdiction.

The federal Court of Appeals for the Second Circuit reached a similar result in *Green Mountain Railroad Corporation v. State of Vermont*, *supra*, 404 F.3d 638, holding that the ICCTA preempted Vermont's environmental land use law because it was an environmental pre-clearance requirement. (*Id.* at p. 639.) Citing *City of Auburn*, the court held the Vermont statute unduly interfered with interstate commerce by giving a

local body the ability to deny the railroad the right to construct its facilities. (*Id.* at pp. 642-643.)

Other federal circuit courts of appeal are in accord. (*Adrian & Blissfield Railroad Co.*, *supra*, 550 F.3d at pp. 539-40 [recognizing two types of facially preempted state regulation]; *New Orleans & Gulf Coast Ry. Co. v. Barrois*, *supra*, 533 F.3d at p. 332 [recognizing two types of facially preempted state regulation same]; *New York Susquehanna and Western Railway Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, [concurring in STB decisions and Second Circuit Court of Appeals in *Green* case]; *Association of American Railroads v. South Coast Air Quality Management District*, *supra*, 622 F.3d at pp. 1097-98 [affirming preemption discussed in *City of Auburn* and applying second type of facial preemption to find air district regulation of railroad activity preempted].) Railroads under the jurisdiction of the STB are therefore not subject to remedies imposing state or local environmental pre-clearance requirements because such regulation represents, "per se unreasonable interference with interstate commerce." (*New Orleans & Gulf Coast Ry. Co.*, *supra*, 533 F.3d at p. 332 citing *CSX Transp. Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, pp. 2-3; see also *Elam*, *supra*, 635 F.3d at p. 805 [quoting ICCTA legislative history for the point that the federal scheme of railroad regulation is intended to be "completely exclusive"].)

B. The STB Holds That The ICCTA Preempts CEQA.

While no federal appellate decision has addressed whether the ICCTA preempts CEQA specifically, the STB has held that the ICCTA

preempts CEQA and CEQA remedies.[4] In response to a declaratory order petition, the STB held that the proponent of a 200-mile high-speed train project between Victorville, California and Las Vegas, Nevada would be an interstate rail carrier and explained that the DesertXpress project qualified as transportation by a rail carrier and "[a]ccordingly, the Board has exclusive jurisdiction over the planned new track, facilities, and operations and the Federal preemption under section 10501(b) attaches." (*DesertXpress Enterprises, LLC – Petition for Declaratory Order*, No. FD 34914, 2007 WL 1833521, at *3 (S.T.B. June 25, 2007).) Federal environmental statutes such as NEPA, the Clean Air Act, and Clean Water Act would apply to the project, and the STB explained that state and local agencies and the public would have an opportunity to participate in the NEPA process. (*Id.*) Citing *City of Auburn*, the STB held "state permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Act, will be preempted." (*Id.*)

An earlier STB decision involving the City of Encinitas reached a similar holding. (*North San Diego County Transit Development Board – Petition for Declaratory Order*, No. FD 34111, 2002 WL 1924265, *2-5 & fn.7 (S.T.B. August 19, 2002) [CEQA and state Coastal Act permit requirements preempted for railroad under STB jurisdiction]; accord *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal.

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[4] The federal appellate decisions discussed in section IA, *supra*, cite to and rely on the decisional authority of the STB. (See *Association of American Railroads*, *supra*, 622 F.3d at p. 1097; *Green*, *supra*, 404 F.3d at p. 642; *New Orleans & Gulfcoast Railway*, *supra*, 533 F.3d at p. 332; *New York Susquehanna and Western Railway Corp.*, *supra*, 500 F.3d at pp. 253-54.)

Jan. 14, 2002) 2002 WL 34681621 at * 4; see also *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, No. FD 33971, 2001 WL 458685 (S.T.B. April 30, 2001) [Massachusetts Conservation Commission review process preempted].) These STB decisions thus specifically support that the ICCTA preempts any CEQA remedy in this appeal.

C. California Courts Also Recognize That The ICCTA Preempts State Environmental Pre-Clearance Laws.

Two published California appellate cases have considered the scope of federal preemption of state law under the ICCTA. Although neither case involves CEQA, both cases recognize the ICCTA's facial preemption of state environmental review laws as discussed in federal cases.

In *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, the Court of Appeal for the First District considered whether the ICCTA preempted a Public Utilities Commission (PUC) general order regulating railroad blocking of at-grade crossings. A railroad was convicted of a misdemeanor violation of the PUC general order. (*Id.* at p. 1516.) The Court of Appeal reversed, holding that the ICCTA preempted the PUC general order. (*Id.* at p. 1531.) In reaching its holding, the Court recognized the two types of facially preempted state regulations discussed in federal case law: (1) state environmental pre-clearance or permitting requirements; and (2) state regulation of matters directly regulated by the STB including rail operations. (*Id.* at p. 1528 citing *Adrian & Blissfield R. Co., supra,* 550 F.3d at p. 540.) The ICCTA preempted the PUC general order because it was regulating railroads

operations, an area regulated by the STB, and thus was the second of the two types of facially preempted state laws. (*Id.* at pp. 1528-29, 1531.)

In *Jones v. Union Pacific Railroad, supra*, 79 Cal.App.4th 1053, the Court of Appeal for the Fourth District considered whether the ICCTA preempted two homeowners' state-law claims against a railroad for nuisance, other torts, and monetary damages. The claims alleged the railroad created excessive train noise, including harassing horn blowing, and excessive fumes from idling trains that served no legitimate purpose. (*Id.* at pp. 1057-58.) The trial court granted the railroad's motion for summary judgment, finding the ICCTA preempted the state-law claims. (*Id.* at p. 1058.) The Court of Appeal reversed, holding that whether the ICCTA preempted the state-law claims presented a triable issue of fact as to whether the claims were within the State's police power. (*Id.* at pp. 1059-61.) The Court of Appeal distinguished *City of Auburn* as a case involving state environmental regulations preempted under the ICCTA, whereas the complaint at issue in *Jones* alleged harassing behavior with no legitimate purpose. (*Id.* at p. 1060.) Like *People v. Burlington Northern Santa Fe Railroad*, *Jones v. Union Pacific Railroad* recognizes the ICCTA's preemption of state environmental review requirements.

D. Because No CEQA Remedy Is Available In This Case, It Must be Dismissed.

The federal and state case law authorities discussed above uniformly hold or recognize that the ICCTA preempts state environmental pre-clearance laws. And on two occasions (DesertXpress and North San Diego County Transit Development Board), the STB held that CEQA is one such

environmental pre-clearance law the ICCTA preempts. Now that the STB has determined that the high-speed train system is under its jurisdiction and subject to the regulatory framework in the ICCTA, the ICCTA preempts CEQA in this case. (*City of Auburn, supra*, 154 F.3d at p. 1031; 49 U.S.C. § 10501(b).) No CEQA remedy is available, and the Authority therefore respectfully requests that the Court dismiss this case. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541.)

II. The Preemptive Effect of the ICCTA on Appellants' CEQA Claims Is Jurisdictional in Nature.

The second question in the Court's July 8, 2013, order asks:

> Assuming that federal law does, in fact, preempt state law in this area, is the preemption in the nature of an affirmative defense that is waived if not raised in the trial court or is the preemption jurisdictional in nature? (See *International Longshoremen's Ass'n, AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-391 [90 L.Ed.2d 389]; *Elam v. Kansas City Southern Ry. Co.* (5th Cir. 2011) 635 F.3d 796, 810; *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280.)

Under section 10501(b), the ICCTA's preemption of CEQA is jurisdictional in nature.

A. The Preemptive Effect of the ICCTA Affects The Court's Subject Matter Jurisdiction.

The preemptive effect of the ICCTA on Appellants' CEQA claims is jurisdictional in nature because in California "preemption implicates subject matter jurisdiction and cannot be waived." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 956 citing *Detomaso v. Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 520,

fn.1.) California courts therefore regularly consider federal preemption defenses to state law claims that are raised for the first time on appeal. (*Consolidated Theaters, Inc. v. Theatrical Stage Emp. Union, Local 16* (1968) 69 Cal.2d 713, 721 & fn.8 [jurisdictional defects due to federal preemption may be raised for first time on appeal]; *Readylink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166, 1175 ["a party may raise a constitutional issue, like preemption, for the first time on appeal"]; *Steele v. Collagen Corp.* (1997) 54 Cal.App.4th 1474, 1489 ["preemption is a matter of subject matter jurisdiction that cannot be waived"]; *Barnick v. Longs Drug Stores, Inc.* (1988) 203 Cal.App.3d 377, 379-80 [party can raise jurisdictional defense such as federal preemption for first time on appeal]; *Molina v. Retail Clerks Union & Food Employers Benefit Fund* (1980) 111 Cal.App.3d 872, 879 [allowing federal preemption defense to be raised for first time on appeal where application of state law was preempted by federal law and facts on preemption were undisputed].)[5]

Appellants cite *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, for the argument that federal law preemption is a waivable affirmative defense that must be raised in the trial court. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013.) *Karlsson* is distinguishable. The federal law preemption defense being raised for the first time on appeal in that case involved a federal law (the National Traffic and Motor Vehicle Safety Act) that specifically provided for state court jurisdiction over non-conflicting state-law products liability claims. (*Id.* at

[5] The Authority identified lack of subject matter jurisdiction as an affirmative defense in both answers. (1 JA 47 (*Atherton 1*); 3 JA 800 (*Atherton 2*).)

pp. 1206-08, 1236.) "Where jurisdiction resides in both the federal and state courts, whether federal law applies is a choice of law question. Choice of law preemption issues may be waived." (*Id.* at p. 1236; accord *Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 849-850.) In contrast, under the ICCTA the remedies are exclusive and eliminate state court jurisdiction to provide the CEQA remedy being sought in this appeal. (49 U.S.C. § 10501(b); *City of Auburn, supra,* 154 F.3d at p. 1031; *Adrian & Blissfield Railroad Co., supra,* 550 F.3d at p. 540; see also 49 U.S.C. § 11704 (d)(1) [allowing state court jurisdiction over civil actions to enforce STB order requiring payment of damages by rail carrier providing transportation subject to STB jurisdiction]; 49 U.S.C. § 11706 (d)(1) [allowing state court jurisdiction over civil actions on receipts and bills of lading].)

Other courts addressing the ICCTA and state court subject matter jurisdiction have similarly concluded that a state court lacks jurisdiction to adjudicate the merits of the state-law claim that it finds preempted by the ICCTA. (*In the Matter of Metropolitan Transportation Authority* (2006) 32 A.D.3d 943, 946 [823 N.Y.S.2d 88] [ICCTA placed exclusive jurisdiction over proposed condemnation of rail tracks in STB and New York courts lacked subject matter jurisdiction]; *In re Application of Burlington Northern Railroad Co. v Page Grain Co.* (Neb. 1996) 545 N.W.2d 749, 751 [ICCTA placed regulation of rail service agencies under exclusive jurisdiction of STB and Nebraska courts lacked subject matter jurisdiction]; see also *B&S Holdings, LLC v. BNSF Railway Co.* (E.D. Wash. 2012) 889 F.Supp.2d 1252, 1256-58 [district court denied motion to remand state-law

adverse possession claim to state court and dismissed, finding the ICCTA completely preempted state claim]; *City of Encinitas v. North San Diego County Transit Development Bd.* (S.D. Cal. Jan. 14, 2002) 2002 WL 34681621 at * 4 [district court denied motion to remand CEQA claim to state court and dismissed, finding the ICCTA vests jurisdiction over such claims in STB].)

B. The Preemptive Effect of the ICCTA Affects The Court's Jurisdiction Because The Court Has No Jurisdiction To Order A Remedy That Congress Has Prohibited.

The preemptive effect of the ICCTA on the Appellants' CEQA claims is also jurisdictional in nature because, if the Court finds preemption, it lacks jurisdiction to provide the requested state-law remedy.

The concept of jurisdiction in California involves a court's power over the subject matter, the parties, and its inherent authority to hear and determine a case. (See *Varian Medical Systems, Inc., v. Delfino* (2005) 35 Cal.4th 180, 196 [discussing subject matter jurisdiction].) In converse, "[l]ack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) A court lacks fundamental jurisdiction "to grant relief that it has no authority to grant," even if it otherwise has jurisdiction over the parties and general subject matter. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 538; *Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691.) Any judgment or order by a court lacking jurisdiction over the subject matter, the persons, or because the court granted relief it had no power to

grant, is void on its face. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.)

This Court has inherent authority to determine the scope of its own jurisdiction. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 267 citing *Abelleira, supra,* 17 Cal.2d at pp. 302-303.) The Court not only can, but must, determine whether the ICCTA preempts the state-law remedies being sought in this appeal. (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 740; see also *Girard v. Youngstown Belt Ry. Co.* (Ohio 2012) 979 N.E.2d 1273, 1280 [Ohio court had jurisdiction to consider merits of ICCTA preemption defense of state-law claim against railroad].) This is the case because assuming Congress has preempted the very state-law remedies Appellants seek in this case – a writ of mandate and injunctive relief – this Court lacks jurisdiction to provide such remedies. (49 U.S.C. § 10501(b); *City of Auburn, supra,* 154 F.3d at p. 1031; *Adrian & Blissfield Railroad Co., supra,* 550 F.3d at p. 540; 3 JA 690-91; 3 JA 657-664; Appellants' Opening Brief, p. 40; Appellants' Reply Brief, p. 24.) A CEQA remedy in this case would be void for lack of jurisdiction if the ICCTA preempts CEQA here. (*In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 636 citing *Kalb v. Feuerstein* (1940) 308 U.S. 433, 439.) And since an action that was originally based on a justiciable controversy cannot be maintained on appeal if subsequent occurrences eliminate an effective remedy, this case must be dismissed. (*Consolidated Vultee Air Corp. v. United Automobile* (1946) 27 Cal.2d 859, 862-863.)

These authorities are consistent with *International Longshoremen's Assn. AFL-CIO v. Davis* (1986) 476 U.S. 380, 390-91. In *Davis*, the United

States Supreme Court analyzed whether the preemptive effect of the National Labor Relations Act (NLRA) on Alabama state-law claims was a waivable affirmative defense or was jurisdictional. (*Id.* at p. 381-82.) The Court concluded that because the federal preemption defense under the NLRA "is a claim that the state court has no power to adjudicate the subject matter of the case . . . it must be considered and resolved by the state court." In other words, there could be no waiver of the federal preemption defense because, "where state law is pre-empted by the NLRA under *Garmon* and our subsequent cases, the state courts lack the very power to adjudicate the claims that trigger preemption." (*Id.* at p. 398; see also *Hughes*, *supra*, 215 Cal.App.3d at pp. 849-850 [discussing *Davis* and "choice of law" preemption versus jurisdictional preemption when Congress provides exclusive federal jurisdiction over a claim].)

Elam v. Kansas City Southern Railway Co., *supra*, 635 F.3d 796, is also consistent. *Elam* involved simple negligence and negligence per se claims two individuals filed in state court against a railroad. (*Id.* at p. 801-802.) The Court of Appeals concluded that the ICCTA preempted the state law negligence per se claim and that the nature of preemption was sufficiently comprehensive that it conferred federal court jurisdiction over the matter. (*Id.* at p. 805-806 discussing ICCTA legislative history.) The simple negligence claim was not preempted. (*Id.* at p. 814.) The Court of Appeals thus dismissed the negligence per se claim and remanded to the state court only the simple negligence claim. (*Id.* at p. 814.) *Elam* thus reinforces that if a state-law claim is preempted by the ICCTA, the state court lacks jurisdiction to consider it on the merits.

C. The STB's Jurisdictional Decision is New Legal Authority That Can Be Raised For the First Time On Appeal.

An alternative basis for this Court to reach the preemptive effect of the ICCTA for the first time on appeal is that the STB decision is new authority, not inappropriate extra-record evidence as Appellants have suggested. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013.) The STB is an expert regulatory agency Congress created to enforce the ICCTA, with a three-member "independent adjudicatory panel" for decision making. (H.R.Rep. No. 104-311, 1st Sess., p. 111 (1995); 49 U.S.C. § 701.) Congress empowered the STB to issue final decisions and orders on matters that come before it. (49 U.S.C. § 721; 5 U.S.C. § 554(e).) These final decisions and orders are reviewable under the Hobbs Act exclusively by the federal courts of appeals to ensure uniform interpretation of the law that the STB is responsible for enforcing. (28 U.S.C. § 2342; *King County v. Rasumussen* (9th Cir. 2002) 299 F.3d 1077, 1089; *CE Design, Ltd. v. Prism Business Media, Inc.* (7th Cir. 2010) 606 F.3d 443, 450 [discussing purpose of Hobbs Act].) As such, the STB decision constitutes new legal authority that eliminates the jurisdiction of this Court to provide a CEQA remedy. It is not extra-record factual evidence directed at whether the Authority proceeded in a manner required by law or made factual decisions supported by substantial evidence. (*Western States Petroluem Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572-73.)

Moreover, courts can reach arguments raised for the first time on appeal if they are based on new authority that could not have been anticipated during the trial court proceedings. (*People v. Turner* (1990) 50 Cal.3d 668, 703; *In re Guardianship of Steven G.* (1995) 40 Cal.App.4th

1418, 1422-23.) That is the situation here, because the STB issued its decision in June 2013, several years after the trial court proceedings in this case concluded. This provides an independent basis to distinguish *Karlsson*, cited by Appellants, because in that case the main federal case authorities supporting preemption were decided "well before the case went to trial" and therefore the defendant car maker should have raised the preemption issue in the trial court. (*Karlsson*, *supra*, 140 Cal.App.4th 1202, 1236.) And as discussed at length above, the STB decision deprives this Court of subject matter jurisdiction. If the Authority could not bring this development to the attention of the Court, this Court would run the risk of granting relief that the ICCTA preempts.

III. The STB Decision Is Relevant To This Appeal Because its Scope Overlaps With The Scope Of The Revised Final Program EIR.

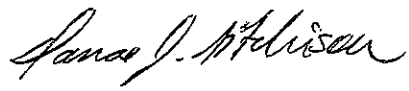
Finally, Appellants are incorrect in asserting that the STB decision has no relevance to this appeal. (Letter from Stuart Flashman to Hon. Vance Raye, June 28, 2013, pp. 1-2.) The programmatic project at issue in this appeal is the Authority's decision on a general high-speed train route into the Bay Area from the Central Valley, the Pacheco Pass network alternative. (Supplemental Administrative Record (SAR) 000003-7.) The Authority's decision in favor of the Pacheco Pass network alternative overlaps with the STB's decision taking jurisdiction over the entire high-speed train system. (Compare SAR000291 [map of selected Pacheco Pass Network Alternative] and STB, App. B.) The high-speed train system as a whole, including the route from the Central Valley into the Bay Area, is

now under the jurisdiction of the STB. The decision establishing STB jurisdiction is therefore plainly relevant to this appeal.

CONCLUSION

The STB's decision concluding it has jurisdiction over the entire high-speed train system fundamentally affects the regulatory environment for the project moving forward. The Authority, and the high-speed train system, are now subject to the ICCTA. Under 49 U.S.C. section 10501(b), the ICCTA preempts CEQA in this case and there is no available CEQA remedy. The Authority therefore respectfully requests that the Court of Appeal dismiss this case.

Sincerely,



DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DJA:
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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Supplemental Letter Brief uses a 13 point Times New Roman font (except the cover letter in 12 point Times New Roman font) and contains 6105 words.

DANAE J. AITCHISON
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL and ELECTRONIC MAIL

Case Name: *Town of Atherton et al. v. California High-Speed Rail Authority*

Case No.: **Court of Appeal, Third Appellate District Case No. C070877**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **August 9, 2013**, I served the attached **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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California Supreme Court
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San Francisco, CA 94102
(4 Copies)

Honorable Michael Kenny
c/o Clerk of Court, Dept. 31
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on
August 9, 2013, at Sacramento, California.

Ruthann Reshke
Declarant

Ruthann Reshke
Signature

SA2012105991
31720693

ATTACHMENT 6

Oil by Rail Safety in California

Preliminary Findings and Recommendations

A crude oil train travels across the Clear Creek Trestle in Plumas County, California and through the Feather River Canyon on June 5, 2014.

State of California
INTERAGENCY RAIL SAFETY WORKING GROUP

June 10, 2014

I. Introduction

California is on the cusp of dramatic changes in how oil is transported to the state. In 2012, about 70% of oil imported by California refineries came through marine terminals;[1] only one million barrels or 0.3% came by rail.[2] In 2013, crude oil imports by rail jumped 506% to 6.3 million barrels, or approximately 1% of total imports.[3] Many experts, including the California Energy Commission, project that this number could increase by up to 150 million barrels, or 25% of total imports, by 2016. There currently are at least a half dozen planned infrastructure projects statewide that would facilitate greatly expanded oil by rail shipments, either refinery expansions and retrofits allowing for processing of more imported oil, such as from the Bakken shale formation in North Dakota, or expansion of rail terminal facilities.[4] To date, most crude oil by rail has come from Canada and North Dakota.

These trends parallel what has been a sharp increase in oil by rail shipments nationally, especially in response to increases in production of oil from the Bakken shale formation. Oil from the Bakken is high-quality, light, sweet crude, making it more valuable and economically competitive than some of the other domestic crude oils. While moving oil by rail is more expensive than by pipeline ($12/barrel of oil (bbl) versus $6/bbl), it is faster and offers greater flexibility, enabling companies to take advantage of $30/bbl price differentials across the United States. Industry is currently investing heavily in rail infrastructure and rail tank cars; Burlington Northern Santa Fe plans to invest $400 million to expand rail capacity in North Dakota alone.[5] Over the last several years, oil by rail in the United States has increased from 9,500 carloads in 2008 to 434,000 carloads in 2013.[6] (A carload holds about 600 to 700 barrels, or between 25,000 to 30,000 gallons.)[7]

The federal government has primary authority over railroad safety. California, however, enforces federal requirements, as well as state specific rules, and state and local agencies have the lead in the areas of emergency planning, preparedness and response. States additionally can help ensure that federal and voluntary industry actions are adequate given the risks posed by oil by rail. In January 2014, the Governor's Office convened a Rail Safety Working Group to examine safety

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[1] Office of Spill Prevention and Response, "OSPR Statewide Oil Program: Briefing to the Governor's Office," December 19, 2013.

[2] California Energy Commission, "Crude Imports by Rail (2012, 2013, 2014)," Energy Almanac, last modified May 2014, http://energyalmanac.ca.gov/petroleum/statistics/2013_crude_by_rail.html.

[3] Ibid.

[4] These include:

- Bakersfield – Plains All American (under construction): 90 cars per day
- Pittsburg – WesPac Energy Project (planned): 70 cars per day, construction could begin in early 2014 and would reach completion in about 18 months
- Benicia – Valero (planned): 100 cars per day, could be operational by the first quarter of 2015
- Bakersfield – Alon (planned): 200 cars per day
- Wilmington – Valero (planned): 85 cars per day
- Santa Maria – Phillips 66 (planned)

[5] Burlington Northern Santa Fe, "BNSF 2014 Capital Spending Now in Full Swing: $1 Billion Going to Northern Corridor States," May 1, 2014, http://www.bnsf.com/media/news-releases/2014/may/2014-05-01a.html.

[6] Association of American Railroads, "Moving Crude Oil by Rail," December 2013, https://www.aar.org/keyissues/Documents/Background-Papers/Crude-oil-by-rail.pdf.

[7] Association of American Railroads, "Just the Facts – Railroads Safely Move Hazardous Materials, Including Crude Oil," https://www.aar.org/safety/Documents/Just%20the%20Facts%20on%20Hazmat%20and%20Crude%20Oil%20Safety.pdf.

concerns and recommend actions the state and others should take in response to this emerging risk.[8] This report contains a summary of initial recommendations from the Working Group.

II. Scope of the Problem

A. Recent Accidents and Risks of Oil by Rail Transport

As oil by rail shipments have increased in recent years, there has been a dramatic increase in the number of incidents involving crude oil by rail. Nationally, rail incidents rose from several per year prior to 2010 to 155 in 2013, and 90 thus far in 2014.[9] More crude oil by volume was spilled in rail incidents in 2013 than was spilled in the nearly four decades prior.[10] California is experiencing similar trends, albeit on a smaller scale to date. Incidents involving oil by rail in California increased from 3 in 2011 to 25 in 2013; as of May, there have been 24 thus far in 2014.[11] Total petroleum spills by rail in California (crude oil and other) increased from 98 in 2010 to 182 in 2013.[12] Most reported incidents document a relatively small volume of oil released, but as detailed below, the potential for high-consequence incidents will increase as more oil is transported by rail.

Incidents involving crude oil from the Bakken shale formation have been particularly devastating – most notably, the tragic accident in July 2013 in Lac-Mégantic, Quebec, where 63 tank cars of crude oil exploded, killing 47 people.[13]

Lac-Mégantic, Quebec[14]

[8] The Working Group includes representatives from the California Public Utilities Commission, California Office of Emergency Services, California Environmental Protection Agency, Department of Toxic Substances Control, California Energy Commission, California Natural Resources Agency, California Office of the State Fire Marshal, Department of Oil, Gas and Geothermal Resources, and Office of Spill Prevention and Response.
[9] Pipeline and Hazardous Material Administration, "Incident Reports Database Search," Office of Hazardous Materials Safety, June 2014, https://hazmatonline.phmsa.dot.gov/IncidentReportsSearch/search.aspx.
[10] McClatchyDC, "More oil spilled from trains in 2013 than previous 4 decades, federal data show," January 20, 2014, http://www.mcclatchydc.com/2014/01/20/215143/more-oil-spilled-from-trains-in.html.
[11] California Office of Emergency Services, "Historical HazMat Spill Notifications," May 6, 2014, http://www.calema.ca.gov/HazardousMaterials/Pages/Historical-HazMat-Spill-Notifications.aspx.
[12] Ibid.
[13] Congressional Research Service, "U.S. Rail Transportation of Crude Oil: Background and Issues for Congress," May 5, 2014, http://www.fas.org/sgp/crs/misc/R43390.pdf.
[14] The Atlantic, "Freight Train Derails and Explodes in Lac Mégantic, Quebec," July 8, 2013, http://www.theatlantic.com/infocus/2013/07/freight-train-derails-and-explodes-in-lac-megantic-quebec/100548/.

In addition to Lac-Mégantic, there have been eight major accidents in 2013 and 2014 combined:[15]

- **October 19, 2013 – Gainford, Alberta**: No injuries, 100 people evacuated, 13 cars derailed (9 carrying liquefied petroleum gas and 4 carrying Canadian crude oil)
- **November 8, 2013 – Aliceville, Alabama**: No injuries, 30 cars carrying North Dakota crude oil derailed
- **December 30, 2013 – Casselton, North Dakota**: No injuries, 1,400 people evacuated, 34 cars derailed (20 carrying North Dakota crude oil)
- **January 7, 2014 – Plaster Rock, New Brunswick**: No injuries, 17 cars derailed (5 carrying Canadian crude oil)
- **January 20, 2014 – Philadelphia, Pennsylvania**: No injuries, 7 cars derailed (6 carrying Canadian crude oil)
- **February 13, 2014 – Vandergrift, Pennsylvania**: No injuries, 21 cars derailed (19 carrying Canadian crude oil)
- **April 30, 2014 – Lynchburg, Virginia**: No injuries, 15 cars carrying crude oil derailed
- **May 9, 2014 – LaSalle, Colorado**: No injuries, 6 cars carrying crude oil derailed[16]

The causes of these accidents vary and some are still being investigated, but they include track failures, inadequate rail car equipment, and human error (such as leaving cars unattended without proper braking systems). Federal safety experts believe many recent rail car failures are due to the rupture of tank cars containing a pressurized liquid above its boiling point, and are closely examining the potential unique risks posed by transporting oil from the Bakken shale formation. The concern is that the light, gasoline-like nature of the crude oil from Bakken (and other similar shale plays) is inherently more flammable than other crude oil and makes such rail car ruptures more likely, especially given existing tank car standards. Others posit that oil producers are not extracting enough propane (or other natural gas liquids) from Bakken, and similar crude oil, before transport, thereby exacerbating the risk of rupture.

The National Transportation Safety Board (NTSB) has also found numerous deficiencies in the regulation of rail safety. These include that crude oil transported by rail sometimes has been incorrectly characterized and labeled, and not transported with the level of protection mandated for the degree of hazard posed, inadequacies in route planning to avoid population centers and environmentally sensitive areas, and a need for auditing rail carriers to ensure adequate response plans are in place.[17] In addition, a comprehensive recent report by New York found similar weaknesses in the existing regulatory scheme, including: outdated tank cars with insufficient placards, a lack of critical information about the characteristics of crude oil being transported, a

[15] Congressional Research Service, "U.S. Rail Transportation of Crude Oil: Background and Issues for Congress," May 5, 2014, http://www.fas.org/sgp/crs/misc/R43390.pdf.
[16] Huffington Post, "6 Cars Of Crude Oil Train Derail Near LaSalle, Colorado," May 10, 2014, http://www.huffingtonpost.com/2014/05/10/crude-oil-train-colorado_n_5298679.html.
[17] National Transportation Safety Board, "Safety Recommendation R-14-1," January 23, 2014, http://www.ntsb.gov/doclib/recletters/2014/R-14-001-003.pdf.

lack of data about trends in the movement and volume of crude oil, and a need to expand and update federal environmental and contingency response plans.[18]

B. Oil by Rail Routes and Risks in California

In California, trains transporting crude oil are expected to travel via the Feather River or Donner Pass to the Bay Area, the Tehachapi Pass to Bakersfield, or into Los Angeles. As a result, they will travel through some of the state's most densely populated areas, as well as some of the most sensitive ecological areas, since rail lines frequently operate near or over rivers and other sensitive waterways in the state.

Agencies in the Working Group collaborated to identify and map areas along rail routes with potential high vulnerability, and to identify the locations of emergency response teams relative to the vulnerabilities.[19] As seen in the attached map, there are serious risks throughout the state from oil by rail and significant gaps in local emergency response capabilities.

Specifically, the mapping exercise found the following:

- High hazard areas[20] for derailments are primarily located in the mountains, with at least one such site along every rail route into California. Some high hazard areas are also located in more urban areas, such as in the San Bernardino-Riverside and San Luis Obispo regions. Overall, high hazard areas represent an estimated 2% of track and 18% of the derailments that have occurred.[21] This means that 82% of derailments have occurred in a wide range of other locations. The high hazard areas do not reflect the locations of other types of rail accidents (e.g., collisions). Therefore, while the highlighted areas are important, they are not the only sites where accidents may occur.

- Areas of vulnerable natural resources are located throughout the state, including in urban areas. A rail accident almost anywhere in California would place waterways and sensitive ecosystems at risk. The high hazard areas for derailments are generally located in areas with high natural resources vulnerability and nearby waterways (e.g., Dunsmuir, the Feather River Canyon).

- Emergency hazardous material response teams ("hazmat") in California have generally good coverage of urban areas, but none are located near the high hazard areas in rural Northern California. Some areas such as Yuba City and Monterey only contain "Type III Hazmat" teams, units that are equipped to perform only in a support rather than lead role during a major chemical or oil incident.

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[18] State of New York, "Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity," April 30, 2014, http://www.governor.ny.gov/assets/documents/CrudeOilReport.pdf.
[19] The map was prepared by OSPR, OES, CPUC, CalEPA, and the California Department of Technology.
[20] "High hazard areas" are areas that were identified in Decision 97-09-045 of the California Public Utilities Commission, and were identified either by a statistically significant high frequency of derailments, or by the existence of restrictive railroad operating rules to address unusually risky operating characteristics such as steep grade and sharp curves. There is considerable overlap between the two identification criteria.
[21] For 2003 to 2013 in areas identified via the statistical method described in the preceding footnote.

Other populated areas near rail routes, such as Stockton, San Luis Obispo, Santa Maria, and Barstow, contain only "Non-Certified Hazmat" teams, which are local teams that have not applied to be certified by the state as meeting certain levels of training and equipment.[22]

- Population centers, schools, and hospitals are frequently located near rail lines in urban areas and in the Central Valley. A highly populated area is located near a major high hazard area for derailments in the San Bernardino-Riverside area.

- Earthquake faults in California are located along rail lines in many areas, especially in urban areas in and around Los Angeles and the Bay Area. A major earthquake could damage tracks and bridges beyond the immediate area of the marked faults.

III. Government Actions to Date

A. Federal

Federal law governs most major aspects of rail transport, and preempts most state regulation. The principal agency responsible for promulgating and enforcing the safety of rail shipments of crude oil is Department of Transportation (DOT), and specifically within DOT: the Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

DOT has responded to the spate of accidents and increased volume of oil by rail with a series of increasingly stringent emergency orders and advisories.[23] Among the most important of the federal actions are the following:

- Requirements for proper testing, characterization, classification and designation of oil shipped by rail
- Investigation of how shippers and carriers are classifying crude oil
- Review of crew staffing levels and operating procedures
- Requirement for updated safety and security plans

[22] Although Non-Certified Hazmat teams are not a part of the formal mutual aid system, they may be fully capable of responding to and mitigating an event.

[23] The actions include:

August 2013 - Operation Classification
August 2, 2013 - Joint FRA-PHMSA Safety Advisory 2013-06
August 7, 2013 - FRA Emergency Order 28
September 6, 2013 - PHMSA Advanced Notice Of Proposed Rulemaking (ANPRM): Rail Petitions and Recommendations to Improve the Safety of Railroad Tank Car Transportation
November 20, 3013 - Joint PHMSA-FRA Safety Advisory 2013-07
January 2, 2014 - PHMSA Safety Alert, Preliminary Guidance from Operation Classification
January 21, 2014 - NTSB Safety Recommendations to FRA and PHMSA
February 21, 2014 - 8-Part Agreement between DOT and the Association of American Railroads
February 25, 2014 - DOT Emergency Restriction/Prohibition Order
March 6, 2014 - DOT Amended and Restated Emergency Restriction/Prohibition Order
May 7, 2014 - DOT Emergency Restriction/Prohibition Order, FRA Safety Advisory 2014-01

- Restrictions on leaving trains unattended
- Requirement for advance notification to State Emergency Response Commissions of weekly shipments of significant volumes of Bakken crude oil by county

PHMSA also has initiated a rulemaking to consider revisions to the regulations governing the transportation of hazardous materials by rail. The changes under consideration include more stringent requirements for the tank cars most typically used to transport Bakken or other crude oil, DOT Specification 111 (DOT-111) tank cars. In addition, earlier this year DOT reached an agreement with the Association of American Railroads (AAR) under which industry agreed to eight voluntary safety measures, including: reduced speed for crude oil trains with older tank cars going through urban areas, analyses to determine the safest routes for crude oil trains, increased track inspections, enhanced braking systems, installation of wayside defective bearing detectors along tracks, better emergency response plans, improved emergency response training, and working with communities through which oil trains move to address community concerns. The voluntary measures go into effect between March and July 2014.

B. California

At the state level, the California Public Utilities Commission (CPUC) shares authority with the federal government to enforce federal rail safety requirements, and also has authority to enforce state safety rules. The CPUC has also been an active participant in federal rulemaking efforts, including through the FRA's Railroad Safety Advisory Committee.

Various state agencies engage in prevention, planning, emergency response, and cleanup activities applicable to oil by rail, including the Office of Emergency Services (OES), the Office of State Fire Marshal (OSFM), California Environmental Protection Agency (CalEPA), and the Office of Spill Prevention and Response (OSPR). These state agencies are all beginning to prepare for the heightened risks posed by oil by rail. Local agencies, including the local Certified Unified Program Agencies (CUPAs), also play critical roles in emergency preparedness and response, and have expressed growing concern about increased oil by rail transport.

Several aspects of the state's emergency response framework are currently being updated: The CalEPA Emergency Response Management Committee is revising the Hazardous Material and Oil Spill annex of the State Emergency Plan, OES is leading an effort to review and update the six Regional Plans for Hazardous Materials Emergency Response, and OES has also re-started meetings of the State Emergency Response Commission (SERC), the federally-mandated state coordinating body for hazardous materials release response planning.

IV. Recommendations

The Working Group's preliminary findings and recommendations are set forth below. In sum, while the federal actions taken to date are significant, they do not go far enough to address the risks of increased oil by rail transport. The state should press both the federal government and the railroad industry to take additional safety measures. Additionally, the state should strengthen its inspection and enforcement resources, remedy significant gaps in its emergency preparedness and response programs, and provide the public with an interactive map showing potential high risk areas from oil by rail traffic.

1. Increase the Number of California Public Utilities Commission Rail Inspectors

The CPUC is responsible for enforcing federal and state railroad safety requirements, including those governing railroad tracks, facilities, bridges, rail crossings, motive power and equipment, operating practices, and hazardous material shipping requirements.

The CPUC has only 52 total authorized positions in the Railroad Operations and Safety Branch to handle inspections, investigations, and risk assessment and analysis for railroad operations (freight and passenger), including inspections of rail cars and thousands of miles of rail track, bridges and railroad crossings in the state. This staffing level is seriously inadequate given current and projected numbers of oil shipments. With existing resources, the CPUC is often not able to meet its statutory mandate to inspect every mile of railroad annually. Increased transportation of oil by rail will mean more tank cars subject to inspection, increased tonnage and wear and tear on track and structures, and greater potential for hazardous spills with explosive potential, creating a corresponding greater need for resources.

The Legislature should approve the proposal in the Governor's Budget to add seven rail inspectors to the CPUC so that it can carry out additional inspections and enforcement actions related to tank cars, railroad lines, bridges, and hazardous material shipping requirements necessary to respond to increases in the transport of oil by rail.

2. Improve Emergency Preparedness and Response Programs

The state needs to strengthen all aspects of its emergency preparedness and response programs to deal with the threats posed by oil by rail – from preparedness and training in advance of any incidents to effective response and cleanup after an incident occurs. State and local agencies have important, complementary responsibilities in this area. OES is responsible for coordinating emergency response statewide, while local agencies typically are the first on the scene responding following an incident. These agencies handle initial emergency response and immediate actions to abate the hazard. In the event of an oil spill, OSPR manages the incident, including cleanup, natural resource protection, hazardous waste management, and cost recovery from responsible parties. As agencies update their programs, they should do so in a coordinated fashion that does not result in duplicative efforts or obligations on industry.

Specific recommendations in this area include the following:

a. Expand the Oil Spill Prevention & Response Program to Cover Inland Oil Spills

The State Office of Spill Prevention and Response (OSPR) has a program to prevent, prepare for, and clean up oil spills in waters off the California coast, funded by a per barrel oil fee of 6.5 cents on oil transported over marine water. OSPR, however, has no comparable fee structure or authority for preparedness activities for oil that is transported to or within California by rail or pipeline, even though it is designated in statute as the state Incident Commander for spills to inland waters of the state. Therefore OSPR has no program in place to prepare for

and respond to oil spills to inland rivers, streams, or other water bodies, despite the fact that rail lines frequently operate near sensitive waterways in the state.

The Legislature should fund the proposal in the Governor's Budget to extend the per barrel fee to cover all sources of crude oil sent to refineries in the state, and to provide OSPR with the regulatory authority and resources to establish an inland spill preparedness and response program. This will enable OSPR to expand its proven maritime oil spill program to inland areas. The program will: support existing prevention measures as appropriate, enhance preparedness for spills (including training and drills, cleanup contractor testing requirements, industry drills and exercises, geographic response and contingency planning, oiled wildlife rescue and multi-agency coordination), and allow OSPR to oversee responses to oil spills in order to maximize containment, protect and restore natural resources, and ensure effective cleanup. These activities should be closely coordinated with the work of state and local emergency response agencies, as described below.

b. Provide Additional Funding for Local Emergency Responders

According to a recent analysis conducted by OES, numerous local emergency response offices lack adequate resources to respond to oil by rail accidents. Many of these first responders are in rural areas, such as Plumas, Siskiyou, and Modoc counties, where some of the highest risk rail lines are and some of our state's most pristine natural resources are located. Additionally, many of these areas have little or no funding for firefighters and rely on volunteer firefighters. Specifically, 40% of the fire fighters in California are volunteer firefighters, with many fire departments entirely staffed by volunteer firefighters. These departments lack the necessary capacity to support a hazmat team to purchase or maintain necessary specialized vehicles and equipment, or to obtain training in the specialized areas of oil rail safety and flammable liquid, and their response time to a significant oil by rail accident could be hours. Moreover, these small departments cannot rely on the assistance of larger, certified departments because those departments could be engaged in an incident locally and would be unavailable.

The Legislature should authorize additional funding to establish regional hazardous materials response teams and otherwise remedy the gaps in local emergency response training, equipment, and planning capabilities needed to adequately prepare for oil by rail incidents.

c. Review & Update of Local, State and Federal Emergency Response Plans

The State of California has several local, state and federal emergency response plans for government agencies to respond to and minimize the impacts of potential hazardous material incidents. These are implemented through various local and regional agencies, including Local Emergency Planning Committees (LEPCs) and six Mutual Aid Regions.

OES is currently leading an effort to review and update the six Regional Plans for Hazardous Materials Emergency Response, with the goal of developing a more

standardized approach to local emergency planning. As part of this assessment and update, OES should incorporate elements for responding to crude oil by rail incidents. OES should also review local Area Plans – plans prepared by local agencies that serve as a blueprint for responding to hazardous materials releases – to determine if updates due to potential increases in oil by rail incidents are appropriate.

In addition, OES, CalEPA and OSPR should partner with US EPA Region 9 and the FRA to undertake a review of local, state and federal emergency response plans to ensure they address the risks associated with increased transportation of oil by rail in California.

d. Improve Emergency Response Capabilities

Emergency responders currently lack basic, critical information needed to help plan for and respond to oil by rail incidents, including what resources railroads can provide in the event of an accident, and how they would respond to potential worst case scenarios.

The recent voluntary agreement between AAR and DOT calls on the railroads to develop an inventory of emergency response resources available in case of a release of large amounts of crude oil along routes over which trains with 20 or more cars of crude oil operate. This inventory will include locations for the staging of emergency response equipment and, where appropriate, contacts for the notification of communities. When the inventory is completed, railroads will provide DOT with information on the deployment of the resources and make the information available upon request to appropriate emergency responders.

In light of this agreement, OES should request that railroads provide a complete inventory of their firefighting and spill recovery resources to the state. Effective response capability planning requires that the state has information in advance on the type of equipment available, strategic location of the resources, as well as the amount accessible. This inventory assessment should also indicate how resources are deployed, the trigger points for deployment, and the contact names and numbers for these resources to be made available to the local emergency responders.

In addition to these resource inventories, OES, in coordination with OSPR, should request that the railroads provide “Worst Case Scenario” plans for responding to a multi-car incident in any part of California.

For oil by rail, a Worst Case Scenario plan would likely involve a major train derailment in a highly populated part of the state with 10 or more tank cars breaching, burning, exploding, and spilling oil downhill, resulting in high loss of life and extensive damage to buildings and communities. An example like this should be used to test the emergency response plans of the county or region that could be affected, and reveal any gaps in the response plans.

With both an inventory of resources and Worst Case Scenario plans from the railroads, state and local emergency responders can effectively test response capabilities and update Regional Plans and local Area Plans.

e. Request Improved Guidance from United States Fire Administration on Resources Needed to Respond to Oil by Rail Incidents

While the International Association of Fire Chiefs has recently provided helpful direction on planning for the safe transport of crude oil by rail, there is a need for additional guidance. Currently, nationwide, response teams and firefighters are unsure of the best response techniques and quantities of resources necessary to respond to oil by rail accidents, especially in light of recent explosions. Lessons can be learned from previous accidents in both the United States and Canada.

OSFM should request that the United States Fire Administration promptly issue guidance on the resources required, including, but not limited to:

i. Training based upon lessons learned during recent accidents across the United States to prepare firefighters for derailment, spill/leak, and fire risks. Training should highlight best practices from lessons learned from previous incidents and required resources for the hazard classification of this type of crude oil product.
ii. Provide accessible training in multiple formats (web based, video, or instructor facilitated) that allows for each state's fire service training organization to deliver the training to meet specific needs.

f. Increase Emergency Response Training

California firefighters and first responders lack training in the specialized areas of oil rail safety and flammable liquid, as well as financial resources to attend out of state trainings. To maximize state training capabilities, the state has begun planning for a multi-agency West Coast Regional Training Center in Sacramento. OES and OSFM should seek partnerships with railroads and oil companies to help fund establishment of this center.

3. Request Improved Identifiers on Tank Placards for First Responders

Information about the flash point and vapor pressure of the specific type of crude oil in each tank car is of critical importance in the event of a derailment so that emergency responders can quickly determine what resources and equipment are needed to contain the incident. Currently, this information is on-board the train, but not captured visually on tank car placards. If first responders can quickly identify an incident involving Bakken, or similar crude, from a safe distance by using the visual information on the placard, decisions can be made on whether to attack the fire or spill, or take a more defensive posture and wait for additional resources.

As New York recently concluded in its report, the United Nations, which assigns unique hazardous materials identifiers on tank placards, should recommend new classifications based on crude oil characteristics to enable appropriate packaging and inform response personnel as

to the qualities of the crude oil and the State of California supports this recommendation. This would provide the immediate visual identification required.

Alternatively, if the United Nations does not assign a new classification for this category of crude oil, OES, in coordination with CPUC should recommend that DOT, at a minimum, require some kind of external visual identification on tank cars of Bakken and similar crude, to aid first responders nationwide.

4. Request Railroads to Provide Real-Time Shipment Information to Emergency Responders

As noted, DOT recently issued an order requiring railroads transporting more than 1 million gallons of crude oil from the Bakken shale formation to provide the State Emergency Response Commission (the Chair of the Commission is the Director of OES) with information on expected weekly shipments of crude oil, including number of trains, contents of crude oil, and routes over which material will be transported. Upon receipt, OES will share this data with local, regional, and state emergency response offices throughout the state. OES also will share this information with the public to the maximum extent permitted by DOT rules and other applicable law.

While advance weekly information about crude by rail shipments by county is vital, local and state emergency responders and regulators will also benefit by knowing in actual real-time what is sent into the state, in what quantities, and along which routes.

CPUC and OES should request that Class I railroads operating in California establish a system where emergency responders can securely log-in and access the daily location and status of rail cars and train consists (including hazmat carload detail for Bakken crude oil and other hazardous substances).

5. Request Railroads Provide More Information to Affected Communities

The increase in oil by rail activity has generated considerable interest and concern from communities in which rail facilities are located or rail lines pass through. Communities in particular want more information about what steps the railroads are taking to ensure safety. The CPUC and OES should request that the railroads should provide better outreach programs and more information to communities, including interactive websites and open community forums, and updates on additional voluntary safety advancements.

6. Develop and Post Interactive Oil by Rail Map

The state should develop and post on a public website an interactive map depicting areas along rail lines with potential high vulnerability. The maps include layers that represent the major rail lines in California, locations of earthquake faults near rail lines, natural resource vulnerabilities (water crossings and sensitive ecosystems), population vulnerabilities (populated areas, schools, daycare centers, and hospitals), and rail segments that have an historically high frequency of derailments. The location of certified emergency response hazmat teams should be included. State agencies should update the webpage as relevant, additional information becomes publicly available

7. Request DOT to Expedite Phase Out of Older, Riskier Tank Cars

Currently, as much as 82% of crude oil in the United States is shipped in older model DOT-111 tank cars.[24] There is growing evidence that such cars are inadequate to protect against vapor explosions of highly flammable crude such as that from the Bakken shale formation. The remaining 18% of tank cars are new or retrofitted as a result of recent voluntary industry action to increase safety. As noted above, PHMSA is currently considering regulatory changes that will address tank cars, On May 7, 2014, it issued Safety Advisory 2014-01 strongly urging the phase-out of the older DOT-111 tank cars—but it did not require this by any certain date. On April 23, 2014 Canada ordered that older tank cars be phased out by May 2017 and that the least crash-resistant DOT-111 tank cars be removed from dangerous goods service within 30 days.[25]

The CPUC should request that DOT move expeditiously to finalize new and retrofitted tank car regulations that will result in a more rapid phase out of DOT 111 tank cars.

8. Accelerate Implementation of New Accident Prevention Technology

a. Positive Train Control

Positive Train Control (PTC) is an advanced technology that incorporates GPS tracking to automatically stop or slow trains prior to an accident. In particular, Positive Train Control is designed to prevent train-to-train collisions, derailments caused by excessive speed and unauthorized movement of trains onto sections of track where repairs are being made or as a result of a misaligned track switch. The Rail Safety Improvement Act of 2008 requires Class I railroads to install PTC on tracks that carry passengers or poison- or toxic-by-inhalation materials by the end of 2015.[26]

The CPUC should request that the FRA identify routes that crude oil trains are expected to run on without PTC in California under current requirements and consider requiring the implementation of Positive Train Control on these routes.

b. Electronically-Controlled Pneumatic Brakes

Electronically controlled pneumatic (ECP) brakes instantly signal a brake application to all cars, whereas current pneumatic brakes rely on lowering the air pressure in the train air brake line that can be well over a mile long.
This new braking technology provides faster application of brakes and reduces the chances of brake failure. Although each car in a train and the locomotive must be equipped with this technology, unit trains, which typically are used for oil by rail

[24] State of New York, "Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity," April 30, 2014, http://www.governor.ny.gov/assets/documents/CrudeOilReport.pdf.
[25] Government of Canada, "Transport Canada takes action in response to TSB's initial Lac-Mégantic recommendations," News Release, April 23, 2014, http://news.gc.ca/web/article-en.do?nid=841129.
[26] Association of American Railroads, "Positive Train Control," 2013, https://www.aar.org/safety/Pages/Positive-Train-Control.aspx#.U5DxwHJdVHU.

transport, are especially suited for this type of technology because all cars travel together and can operate efficiently under an overarching braking system.[27]

Crude oil trains represent the ideal application of this new technology.[28] Unit train cars stay together for long periods of service, new cars are being built, cars are likely undergoing retrofit, and the benefit is magnified by the magnitude of the risk reduction that would be accomplished for these high risk trains.

The CPUC should request that the FRA require electronically-controlled brake technology on crude oil trains.

9. Update California Public Utilities Commission Incident Reporting Requirements

Current CPUC reporting requirements for incidents involving hazardous materials releases have been interpreted by the railroads in varying ways, resulting in some railroads failing to report incidents, or to be late in reporting such incidents.

To ensure adequate and timely reporting, the CPUC should clarify incident reporting requirements for the release of hazardous substances by rail.

10. Request Railroads Provide the State of California with Broader Accident and Injury Data

Under federal law, states are entitled to receive information about railroad accidents and injuries provided to the federal government. However, while individual accident reports are available through the FRA's website, the state does not have access to basic, broader data (that the FRA receives) needed to determine accident and injury rates and trends for railroads operating in California—so called "normalizing data." This includes information such as the rate of accidents or injuries based on locomotive miles, passenger and freight train miles, number of passengers transported, and employee hours.

The CPUC should request that FRA provide state-specific normalizing data to enable state accident analysis, including trend analysis and risk assessment, to evaluate the risks presented by the transportation of oil by rail. (Notably, the railroads previously provided the state with this type of state-specific normalizing data for many years, but not more recently.)

11. Ensure Compliance with Industry Voluntary Agreement

As noted, earlier this year the railroad industry agreed with DOT to implement eight voluntary safety measures. While significant, these measures are only voluntary. To ensure that they are fully enforceable by federal and state authorities, DOT should codify the agreement into regulation. In the meantime, it is important for the state to monitor the agreement and ensure that the railroads comply with its provisions, as noted below. In addition, the agreement should be strengthened in several areas.

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[27] Unit trains are freight trains carrying a single commodity that is bound for a single destination. Currently, unit trains carrying crude oil are generally between 70 to 100 cars long.

[28] Federal Railroad Administration (2006), Final Report, Booz Allen Hamilton.

- ***Increased Track Inspections*** – The voluntary agreement calls for additional internal rail and comprehensive track geometry inspections by the railroads.

  The CPUC should monitor and publicly report the extent of railroad compliance with these inspection requirements on crude oil routes. In addition, to the extent consistent with its existing inspection mandates, the PUC should conduct at least one additional inspection of the crude oil routes each year.

- ***Braking Systems*** – The agreement requires better braking systems that will allow train crews to apply emergency brakes from both ends of the train in order to stop trains faster. This end-of-train braking technology has been required for many years on certain trains and railroad grades, but the voluntary agreement goes beyond this by requiring it on crude oil trains regardless of the existing criteria.

  The CPUC should request that railroads document where the voluntary agreement adds this requirement, that is, where crude oil trains travel and the existing regulation does not apply. The CPUC should also request information on, and monitor, the extent to which the railroads have complied with this request and consider ways to enforce these voluntary braking applications.

- ***Use of Rail Traffic Routing Technology*** – The agreement calls for railroads to use a more sophisticated risk management tool that accounts for multiple risk factors in determining the safest and most secure rail routes for trains with 20 or more cars of crude oil.

  The CPUC should ask the FRA to provide the analysis and results of the route analyses outlined above. This will enable the CPUC to better plan its inspection and risk prevention activities.

- ***Lower Speeds*** – The agreement provides for lower speed limits (no more than 40 miles per hour) for crude oil trains of more than 20 cars containing older tank cars in federally designated "high-threat-urban areas."

  This designation may omit areas of California where lower speed limits could reasonably enhance safety. The CPUC should complete a survey of speed limits on California railroads and determine whether there are additional areas where lower speed limits might be appropriate. If, after the survey, speed reductions in particular areas appear warranted, the CPUC should petition the FRA to consider additional speed restrictions.

  In addition, the CPUC should develop a proposal for monitoring and enforcing the new speed limits outlined in the voluntary agreement.

- ***Increased Trackside Safety Technology*** – The agreement calls for railroads to employ wayside wheel bearing detectors every 40 miles along tracks with trains carrying 20 or more crude oil cars.

To ensure that optimal intervals are established for the defect, the CPUC should inventory wayside train inspection technology on crude oil shipment routes, and recommend additional actions, if necessary.

12. Ensure State Agencies Have Adequate Data

Multiple state agencies need timely and complete data to successfully evaluate and regulate the risks from oil by rail transport. This is highlighted throughout the recommendations in this report such as the need for real-time shipment information, and state-specific normalizing accident and injury data. Other data is critical for agencies such as the California Energy Commission and the Department of Oil and Gas and Geothermal Resources to analyze trends in petroleum demand and sources of oil and gas production,

State agencies currently are working to identify what data they have and where there may be potential data gaps, and should work with federal agencies and the rail industry to obtain the information needed to fill those data gaps.

State agencies should put in place or strengthen existing measures, to the extent that such measures are inadequate, to protect confidential business information and data that may impact national security.

V. Conclusion

Transportation of oil by rail has dramatically increased in recent years and will likely continue to increase in the future, both nationally and in California, because of the increased oil production from the Bakken shale and other oil fields. Current regulations and industry practices are not adequate given this recent boom. Minimizing the potentially serious risks of transporting oil by rail will require strengthened federal requirements, expedited tank car upgrades, and other proactive measures by industry. It will also require additional resources, planning and preparation, and coordination among local and state agencies.

This report represents interim recommendations of the interagency Rail Safety Working Group. The group will continue to meet and refine recommendations and actions in light of new information.

Appendix

Agency Glossary

CalEPA	California Environmental Protection Agency
CalTech	California Department of Technology
CEC	California Energy Commission
CNRA	California Natural Resources Agency
CPUC	California Public Utilities Commission
DOGGR	Department of Oil, Gas and Geothermal Resources
DTSC	Department of Toxic Substances Control
OES	California Office of Emergency Services
OSFM	Office of the State Fire Marshal
OSPR	Office of Spill Prevention and Response

Recommendations by Agency

Lead Agency (or Agencies)	Recommendation
OES, CPUC, OSPR, EPA, CTA	Develop and post on a public website an interactive map depicting areas along rail lines with potential high vulnerability
OES, CPUC, OSPR, EPA, CEC, DOGGR	Identify any data gaps state agencies have and work with federal agencies and railroad industry to address
State Legislature	Approve the proposal in the Governor's Budget to add seven rail inspectors to the CPUC
State Legislature	Approve the proposal in the Governor's Budget to extend the per barrel oil fee to establish an inland oil spill preparedness and response program
State Legislature	Approve funding to establish regional hazardous materials response teams and otherwise remedy the gaps in local emergency response programs needed to adequately prepare for oil by rail incidents

OSPR	Establish inland oil spill preparedness and response program, upon funding by Legislature
OES	Incorporate elements for responding to crude oil by rail incidents in the assessment and update of the six Regional Plans for Hazardous Materials Emergency Response
OES	Review local Area Plans to determine if updates due to l increases in oil by rail incidents are appropriate
OES	Partner in coordination with CalEPA and OSPR with US EPA Region 9 and the FRA to undertake a review of local, state and federal emergency response plans
OES	Request that railroads provide a complete inventory of their firefighting and spill recovery resources (as outlined in the voluntary agreement)to the state
OES	Request (in coordination with OSPR) that the railroads provide "Worst Case Scenario" plans for responding to a multi-car incident in any part of California
OES	Recommend (in coordination with CPUC) that DOT require external visual identification on tank cars of Bakken and similar crude to aid first responders
OES	Request (in coordination with CPUC) that Class I railroads operating in California establish a system where emergency responders can securely log-in and access the daily location and status of rail cars and train consists
OES	Request (in coordination with CPUC) that the railroads provide better outreach programs and more information to communities
OSFM	Request that the United States Fire Administration promptly issue guidance on the resources required to respond to oil by rail accidents
OSFM	Seek partnerships (in coordination with OES) with railroads and oil companies to help fund establishment of a West Coast Regional Training Center
CPUC	Request that DOT move expeditiously to finalize new and retrofitted tank car regulations
CPUC	Request that the FRA identify routes that crude oil trains are expected to run on without PTC in California under current requirements and consider requiring the implementation of PTC on these routes
CPUC	Request that the FRA require electronically-controlled pneumatic brake technology on crude oil trains
CPUC	Clarify incident reporting requirements for the release of hazardous substances by rail

CPUC	Request that FRA provide California with normalized data to enable accident and injury analysis
CPUC	Monitor and publicly report the extent of railroad compliance with inspection requirements on crude oil
CPUC	Conduct at least one additional inspection of the crude oil routes each year, consistent with existing inspection requirements
CPUC	Request information on, and monitor, the extent to which the railroads have complied with the braking systems request (as outlined in the voluntary agreement)
CPUC	Ask the FRA to provide the results of the route analyses outlined in the voluntary agreement
CPUC	Complete a survey of speed limits on California railroads and determine whether there are additional areas where lower speed limits might be appropriate and if warranted, petition the FRA to consider additional restrictions
CPUC	Develop a proposal for monitoring and enforcing the new speed limits outlined in the voluntary agreement
CPUC	Inventory wayside train inspection technology on crude oil shipment routes

California Department of Fish and Wildlife
Office of Spill Prevention and Response

Data Source: CDFW, CDOC, CPUC, CalOES
Requestor: Rail Task Force
Author: J. Muskat
Date Created: 6/10/2014

NAD_1983_California_Teale_Albers

Crude By Rail
Areas of Concern

0 25 50 75 100
Miles

ATTACHMENT 7

Chapter 7
Response to Comments

SCH# 2013091062

Volume 3

Alon Bakersfield Refinery
Crude Flexibility Project
Paramount Petroleum Corporation
(PP13268)

Modification of Precise Development Plan No. 62, Map 102
Modification of Precise Development Plan No. 1, Map 102-23

Kern County
Planning and Community Development Department
Bakersfield, California

August 2014

- Notice of Preparation at PDF page 10
- Notice of Completion & Environmental Document Transmittal form at PDF page 16
- Initial Study/Notice of Preparation at PDF pages 21, 35, and 36
- Appendix B Air Quality and Greenhouse Gases Technical Report at PDF page 119
- Appendix D Cultural Resources Technical Report at PDF pages 642 and 643
- Appendix F Hazards and Hazardous Materials Technical Report at PDF page 874
- Appendix G Noise Technical Report at PDF page 908
- Appendix H Transportation and Traffic Technical Report at PDF pages 975 and 976

Also, the refinery's Precise Development Plan Condition of Approval No. 3 provides:

"This plan is for a refinery with the operational parameter of 70,000 barrels per day of input (crude). Increases to the input of crude above 70,000 barrels per day, calculated as an annual average will require a precise development plan modification and a review by the Kern County Planning Department Director as outlined in Condition (2)."

(Reference: Kern County Board of Supervisors Resolution No. 2008-531, In the matter of: Adoption of Precise Development Plan No. 1, Map No. 102-23 and Precise Development Plan No. 62, Map No. 102 (Big West of California, passed and adopted October 21, 2008.)

N. The comment states that the DEIR must analyze potential environmental impacts of main line (offsite) rail operations, and that this analysis is not preempted by federal law.

The DEIR addresses the preemption of local regulation of mainline rail activities, including potential impacts regarding air quality and public safety requested by the comment. The DEIR notes that while the Lead Agency is preempted from imposing regulations or mitigation measures for off-site rail activities, other federal agencies are responsible for ensuring compliance with air quality and safety regulations, and are doing so. The DEIR also explains that the federal agencies responsible for regulating rail transport have continued to implement new and increased safety and air quality measures through regulations and negotiated agreements with railroads. The Lead Agency has considered the authority cited by the commenter. However, the cases cited, as well as the Lead Agency's own authorities, confirm the conclusions of the DEIR. Because the field of transport by rail is preempted by federal regulation, the Lead Agnecy cannot apply CEQA and its significance thresholds to impacts resulting from mainline rail activities.

The comment repeatedly states that CEQA review of mainline rail activities is not preempted by Interstate Commerce Commission Termination Act (ICCTA). The Lead Agency has considered both the case law cited in support of these statements, as well as other authorities. However, the Lead Agency does not find the authorities cited in the comment to be applicable to the CEQA review process for this project for the reasons outlined in the DEIR and further explained below.

Federal preemption of the regulation of transport by rail carriers, and operation of rail tracks or facilities, is broad and exclusive. Rail carriers are subject to federal environmental laws, but certain local rules and regulations imposed under state environmental laws are preempted.

Federal preemption of regulation of the railroads was strengthened in 1995 with passage of the ICCTA. As described in the DEIR, under the ICCTA, the Surface Transportation Board (STB) is given exclusive authority to regulate the construction, operation and abandonment of

new and existing rail lines. The state and local regulation of trains moving outside of the project vicinity is preempted by federal law under the ICCTA. (DEIR, page 4.12-18).

49 U.S.C. Section 15051(b) provides that "the jurisdiction of the [Surface Transportation] Board over … transportation by rail carriers … and … operation" of tracks or facilities "is exclusive," and that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

Congress has made a number of changes to federal law to eliminate a state regulatory role over railroad operations. The ICCTA removed prior statements of regulatory cooperation between federal and state governments, and removed sections providing for joint federal and state regulatory bodies. The ICCTA also removed state jurisdiction over wholly intrastate railroad tracks, because even intrastate operations ultimately affect the flow of interstate commerce. Accordingly, states may not regulate railroad operations even in the absence of federal regulation.

The commenter cites *Fla. E. Coast Railway Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331 for its statement that ICCTA allows "the continued application of laws having a more remote or incidental effect on rail transportation." That case holds that a city's application of local zoning and occupational license requirements for a business which leased rail yard property was not preempted. The City of Palm Beach sought to regulate a private company who leased the rail yard but was not, itself, a railway. The City was not seeking to impose its regulations on offsite rail activity conducted by the railways or to regulate them indirectly through regulation of the lessee's activities. This is consistent with the Lead Agency's approach to the project here. The Lead Agency is applying its zoning and other ordinances to the Alon Bakersfield Refinery, including the onsite rail activities of the Crude Flexibility Project. It is the application of County regulation to the offsite rail activity that is preempted by the ICCTA.

The Lead Agency also notes that a subsequent decision stated that "the Eleventh Circuit's interpretation [in *E. Fla. Railway*] is not consistent with the interpretation of the Second Circuit in *Green Mountain* [*Railroad Corp. v. State of Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005)] . In *Green Mountain*, the Second Circuit noted that under ICCTA, "'transportation' is expansively defined. . . Certainly, the plain language [of the statute] grants the [Surface] Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain." (*Coastal Distrib., LLC v. Town of Babylon*, 2005 U.S. Dist. LEXIS 40795, 54 (E.D.N.Y. July 15, 2005).)

CEQA, specifically, has been found to be preempted by the ICCTA. For example, in *DesertXpress Enterprises, LLC*, STB Finance Docket No. 34914, the Surface Transportation Board considered the company's request for a declaratory order that its proposed project to construct a 200-mile high speed passenger rail line between Southern California and Las Vegas was not subject to state and local permitting laws in Nevada or California, including CEQA. The Board confirmed that the project qualified for Board jurisdiction in that it involved transportation by a rail carrier. As such, "State permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Action, will be preempted." (Decision on Petition for Declaratory Order, June 25, 2007, at 5.) Similarly, the 9th Circuit held that the South Coast Air Quality Management District rule requiring railroads to report emissions from idling trains was preempted by the ICCTA. (*Ass'n of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1096 (9th Cir. 2010).). The recent opinion addressing a challenge to the

environmental review of the California High Speed Train route selection does not contradict these authorities. (*Town of Atherton v. California High-Speed Rail Authority* (Cal. App. 3d Dist. July 24, 2014, C070877) ___ Cal.App.4th ___ [2014 WL 3665045].)

The Lead Agency acknowledges that, in enacting ICCTA, Congress intended states to retain traditional police powers reserved by the Constitution. However, case law has confirmed that the exception for state exercise of police powers does not extend to state permitting programs – and related environmental review – that are inherently discretionary. The Lead Agency may apply regulations designed to protect public health and safety where such regulations "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." (*Green Mountain Railroad Corp. v. State of Vermont,* (2nd Cir. 2005) 404 F.3d 638, 643.) Environmental pre-clearances do not meet this test where "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." (*Id.*) By definition, CEQA does not meet this test because CEQA attaches only where an agency faces a discretionary decision to approve or disapprove a project. (14 Cal. Code Regs. §§ 15002(i)(2), 15357, 15378.) Therefore, application of CEQA to railroads and rail operations is preempted by the ICCTA, and it would be inappropriate for the County to impose regulations or conditions, or apply CEQA significance thresholds, based on railroad activities that occur offsite.

The commenter cites to *Humboldt Baykeeper v. Union Pac. R.R. Co., et al,* 2010 U.S. Dist. LEXIS 52182, 2010 WL 2179900 (N.D. Cal.,May 27, 2010) ("*Baykeeper"*) to support its statement that ICCTA's preemptive scope is limited. The Lead Agency has considered this authority, and finds the authority consistent with the Lead Agency's understanding that ICCTA's preemptive scope is not limited by the requirements of CEQA, a *state* law. *Baykeeper* only addresses the question of whether ICCTA preempts a federal environmental law. The court, in determining that ICCTA does not generally preempt Clean Water Act requirements, noted that the STB has made clear that ICCTA is not intended to interfere with the role of state and local agencies in implementing "[f]ederal environmental statutes, such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce." (*Baykeeper* at 8.) This holding is consistent with the Lead Agency's understanding of the preemptive scope of ICCTA.

The DEIR describes federal environmental statutes that apply to the project, including the Clean Water Act (DEIR, page 4.7-14.), the Safe Drinking Water Act (DEIR, page 4.7-17) and the Clean Air Act (DEIR, page 4.1-4; pages 4.1-24 to 4.1-27). Some provisions of these acts and implementing regulations apply to offsite rail transport and operations activities. But ICCTA preempts the Lead Agency's ability to impose its ordinances or mitigation measures based on rail activity that occurs offsite or outside of County boundaries. Nonetheless, the DEIR considers the authority of these other regulating agencies and the rules those agencies have established to ensure the safe and responsible operation of offsite rail activities.

For example, the DEIR, at pages 4.1-26 to 4.1-27, discusses the emissions standards adopted by the EPA that are applicable to new locomotives and new engines used in locomotives. Under the Final EPA National Locomotive Rule, locomotive engines are required to meet progressively more stringent emissions requirements over time. (Title 40 CFR part 92, with an update in 2008 at Title 40 CFR Part 1033).)

The commenter also cites *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 958 (Cal. App. 3d Dist. 1999) in support of its statement that CEQA review of offsite rail is not preempted, but that case concerns the Federal Power Act (FPA). Unlike ICCTA, FPA contains a savings clause expressly exempting certain state water laws from FPA jurisdiction. The FPA does not govern this project, and the comment is not relevant to ICCTA preemption. As stated above, the DEIR acknowledges that offsite rail activities are subject to regulation under federal environmental statutes.

The comment further states that the DEIR must assess any public safety hazards posed by increased rail traffic on the mainline. The DEIR does discuss hazards associated with crude oil transport (see pages 3-27 through 3-29), and provides information recent rail accidents (see pages 3.2-27 through 3.2-29 and 4.6-5 through 4.6-7). Although the Lead Agency is preempted from regulating rail activities on the mainline, the DEIR provides a discussion of regulations that directly relate to public safety concerns related to mainline rail activities. The Lead Agency also acknowledges that new safety measures are being proposed by the federal agencies that regulate transport of crude by rail, and summarizes some of the most recent proposed measures in this Response.

The DEIR discusses the requirements for rail cars equipped to carry crude oil. These tank cars, classified as DOT-111 cars, are regulated by the U.S. Department of Transportation (DOT) and its Pipeline and Hazardous Materials Safety Administration (PHMSA). The DEIR provides background on the safety requirements that manufacturers of DOT-111 rail cars have been required to implement since 2011.

The DEIR also outlines the measures that the members of the American Association of Railroads (AAR) have voluntarily taken since then to improve safety. (DEIR, pages 4.6-14 to 4.6-16.) Additionally, under new Mitigation Measure MM 4.6-6(c), the project proponent is required to comply with all US Department of Transportation (DOT) railcar safety regulations and associated requirements as they become effective. Prior to the effective date of any more restrictive requirements all crude oils classified by the DOT as Class 3: Packing Group 1 or 2 flammable liquids, can only be received at the facility in railcars that were constructed on or after October 1, 2011 or in cars that have been retrofitted to meet or exceed the October 1, 2011 standards.

MM 4.6-6 The project proponent shall continuously comply with the following during operation of the facility:

a. The project proponent shall maintain adequate records of all crude oil received at the rail terminal via rail and train deliveries. These records shall be in the form of formal manifests that accompany each shipment and which properly label the crude materials, based on levels of volatility and as required by the applicable federal and State regulatory requirements. These records shall be continuously maintained on the refinery site for no less than three years and shall be made readily available for inspection by appropriate County, State and federal agencies.

b. The project proponent/operator shall work with rail carriers delivering crude oil to the proposed rail terminal to ensure compliance with any Emergency Order (EO) issued by the U.S. Department of Transportation (DOT) related to requirements for rail carriers to notify State Emergency Response Commissions (SERCs), and others as specified by the EO, regarding the

expected routing of the Project's unit trains of Bakken crude oil. The notice shall include, but not be limited to the following information:

1. ~~r~~Reasonable estimate of the number of trains carrying 1,000,000 gallons or more of Bakken crude oil, per week and by county;

2. ~~w~~With the crude oil identified and described in accordance with 49 CFR part 172, subpart C;

3. ~~w~~With the emergency response information required by 49 CFR part 172, subpart G; and

4. ~~t~~The routes over which the crude oil will be transported.

c. The project proponent shall comply with all US Department of Transportation (DOT) railcar safety regulations and associated requirements as they become effective. Prior to the effective date of any more restrictive requirements, all crude oils classified by the DOT as Class 3: Packing Group I or II flammable liquids, can only be received at the facility in railcars that were constructed on or after October 1, 2011 or in cars that have been retrofitted to meet or exceed the October 1, 2011 standards.

DOT and PHMSA are proceeding with the formal effort to enact rules that will strengthen safety standards for rail transport of crude, ethanol, and other flammable liquids, as announced in early 2014 and described in the DEIR. The two proposed rules are anticipated to be in effect by 2015. The Alon Bakersfield Refinery Crude Flex project anticipates completing construction in 2015 and therefore rail traffic to and from the refinery will be subject to these new rules.

On August 1, 2014, PHMSA published a notice of proposed rulemaking for new tank car standards which would apply to all crude rail cars constructed after October 1, 2015, and would require any existing cars to be retrofitted to meet substantially similar performance standards on a 5-year phase-out timeline, depending on the class of the materials transported. (79 Federal Register 45016.) Specifically, the rule proposes to revise the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180) that establish requirements for ''high-hazard flammable trains'' (HHFT). The new rule would define HHFTs as "a train comprised of 20 or more carloads of a Class 3 flammable liquid." The Alon Bakersfield Refinery Crude Flex project anticipates unloading approximately two unit trains per peak day with approximately 104 tank cars each. These trains would be considered HHFT under the new rule and would be subject to the proposed regulations, which include the following measures:

- Rail routing risk assessments which consider 27 safety and security factors which will dictate the ultimate route taken by HHFT;

- Speed restrictions of 50 mph in all areas, with 40 mph speed restrictions on those trains carrying cars which do not yet meet the enhanced HHFT car standards of the rule;

- Implementation of enhanced braking mechanisms;

- Notification to State Emergency Response Commissions for those trains carrying one million gallons or more of Bakken crude;

- More stringent standards and design criteria for cars used to transport flammable liquids, which will be designated as “DOT Specification 117.” These standards would apply to all new rail cars manufactured after October 1, 2015, and existing rail cars carrying flammable liquids as part of a HHFT would be required to be retrofitted to satisfy most or all of these standards. These upgraded rail cars would replace the DOT-111 cars currently in use.

The comment period on the proposed rule closes September 30, 2014.

Also on August 1, 2014, PHMSA published an advanced notice of proposed rulemaking (ANPRM) seeking comment on whether it should expand the regulatory requirement for Oil Spill Response Plans (OSRPs) by lowering the threshold of transported crude oil that triggers the need for a more robust "comprehensive OSRP." (79 Fed. Reg. 45079.) A comprehensive OSRP requires more training, documentation, coordination, and contracted personnel and resources available to provide emergency response in the event of accidents than is required under a basic OSRP.

Under existing rules, a comprehensive OSRP must be prepared if an individual rail car contains more than 42,000 gallons of crude. Because a typical rail car holds approximately 30,000 gallons, a comprehensive OSRP is usually not required. The new proposed rule would redefine the minimum threshold by aggregating amounts of crude oil transported on a single train. PHMSA is seeking comments on an appropriate new threshold of gallons of oil on a per-train basis, and the related cost impacts, and is considering the following options: 1,000,000 gallons of total crude oil (approximately 35 rail cars); 42,000 gallons (approximately 2 rail cars); or some other threshold. PHMSA requests comments on the ANPRM by September 30, 2014.

The ANPRM is in addition to the recommendations made on January 23, 2014 by the NTSB to PHMSA, which advise preparing oil spill response plans based on the maximum amount of oil that could be released, rather than the maximum contents of the single largest container. (DEIR, page 4.6-16.)

DOT has also issued Emergency Orders (EOs), with which the project proponent is required to comply under Mitigation Measure 4.6-6. These EOs include an emergency order issued February 25, 2014, revised and amended on March 6, 2014, requiring that all rail shipments of crude oil that is properly classed as a flammable liquid in Packing Group (PG) III material be treated as a PG I or II material which is subject to more stringent handling standards. (Docket No. DOT–OST–2014–0025.) Another EO issued May 7, 2014, requires that all railroads that operate trains containing one million gallons of Bakken crude oil to notify SERCs about the operation of these trains through their States. (Docket No. DOT-OST-2014-0067.)

Finally, as discussed in the DEIR on page 4.6-16, the Secretary of Transportation Anthony Foxx and the Association of American Railroads (Association) announced on February 20, 2014 that those railroads subscribing to the agreement would implement numerous safety measures outlined in the DEIR. These include adhering to a speed limit of 50 miles per hour for Key Crude Oil Trains (40 miles per hour within high threat urban areas if the train includes one or more cars meeting DOT 111 standards rather than the enhanced standards adopted by the Association), developing and providing a hazardous material transportation training curriculum for emergency responders, and working with local communities to

identify location specific concerns. The agreement provides that these measures were to be implemented no later than July 1, 2014.

The DEIR and these Responses set forth the requirements and entities regulating mainline rail activities. CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. (*Barthelemy v. Chino Basin Mun. Water Dist*. (1995) 38 Cal. App. 4th 1609, 1617.) Therefore, the DEIR has not "improperly exclude[d] the study of mainline rail train operations" as the comment states. The DEIR provides information available concerning mainline rail operations, and the environmental and safety regulations which govern them. The Lead Agency notes that the federal agencies charged with regulating offsite rail, including public safety and air quality considerations, are continuing to implement increased safety standards in these areas.

O. The commenter states that the DEIR improperly uses the refinery's 2007 operations as the baseline, resulting in a flawed analysis that contravenes CEQA, misleads the public, and masks the significant impacts that the project will have.

Section 3.3.2 of the DEIR provides, in great detail, the approach used to establish the baseline for the Crude Flexibility Project and explains why this approach presents the most accurate picture of the project's impacts as required under CEQA. (DEIR, pages 3-16 to 3-25.) As explained in Response to Comment 20-P below, the Lead Agency believes that this approach is proper given the unique circumstances presented here, including the 80 year operating history of the refinery, the temporary suspension of refinery caused by the bankruptcy of the prior owner, and the new owner's repeated statements of intent to continue refining crude oil at the refinery.

P. The commenter states that CEQA requires that the baseline be based on existing conditions and that a baseline reflecting 2007 operating conditions is improper since conditions at the refinery have changed since 2007. The commenter also states that because refinery operations have been suspended, the DEIR should have analyzed the project's impacts utilizing a baseline that assumes "no refining operations" – in other words, a zero baseline.

CEQA Guidelines Section 15125 sets forth the general rule agencies are required to follow in determining the proper baseline:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.
>
> Section 15125, subdivision (a) (italics added).

In using the word "normally," section 15125(a) necessarily contemplates that physical conditions at other points in time may constitute the appropriate baseline or environmental setting. *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal. App.4th 316, 336; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277-1278. The date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods. *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 327-328. Neither CEQA nor the CEQA Guidelines mandate a

ATTACHMENT 8

APPENDIX G

Preemption of CEQA by the ICCTA

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Appendix G

Preemption of CEQA by the ICCTA

Many, if not most, of the comments received on the DEIR addressed potential off-site impacts from the operation of trains travelling to and from the Refinery. Potential off-site impacts from rail operations include the risk of crude oil releases from tank cars, the impact of locomotive emissions on air quality, the impact of noise on biological resources living along the rail corridor, and the impact of rail crossings on traffic.

Valero has taken the position that the Interstate Commerce Commission Termination Act ("ICCTA") preempts the City's ability to require CEQA review of impacts from the Project, including both impacts from on-site activities, such as construction and operation of the unloading rack, and impacts from off-site rail operations. Valero's position is set forth in Appendix H.

The City disagrees with Valero in part and agrees in part. The City has concluded as follows:

1. The ICCTA does *not* preempt the application of CEQA to Valero's on-site activities, including construction and operation of the proposed unloading rack and related equipment.

2. The ICCTA *does* preempt the City's ability to mitigate impacts from rail operations.

3. The ICCTA *may well* preempt the City's ability to require disclosure of impacts from rail operations under CEQA. There is no case law authority directly on point, however, and the issue is uncertain. The City has decided to continue with disclosure of impacts from rail operations unless and until a court, in a binding precedent, clearly rules that the ICCTA preempts the disclosure requirements of CEQA as applied to impacts from rail operations.

I. The ICCTA Does Not Preempt the Application of CEQA to Valero's On-Site Activities.

Under prevailing case law, CEQA clearly applies to Valero's proposed on-site unloading rack and related facilities because (1) Valero owns and operates the unloading facilities; (2) in constructing and operating the facilities, Valero is not acting as an agent of Union Pacific; and (3) Union Pacific will not control the operation of the unloading facilities. On similar facts, courts and the STB have consistently held that the ICCTA does not preempt the application of state and local land use and environmental laws.[1] The decisions make it clear that ICCTA preemption applies to unloading facilities if, and only if, the railroad owns and operates the facilities or the operator is an agent of the railroad.

In *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011), for example, a freight railroad entered into an agreement with Coastal Distribution whereby Coastal would construct and operate a transloading facility on a rail yard leased by the railroad. The

[1] *See, e.g., New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

transloading facility would be used to handle building materials and debris from construction and demolition activities. The city's zoning ordinance prohibited waste transfer facilities. When the project was almost constructed, the city served a stop work order on Coastal on the ground that the transloading facility was a prohibited use under the zoning ordinance.

The railroad and Coastal Distribution filed suit against the city, seeking to enjoin the city from enforcing the zoning ordinance against the waste transfer facility. At the same time, the city petitioned STB for a declaratory order that the zoning ordinance was not preempted.

The STB concluded in *New York and Atlantic Railway* that the STB does not have exclusive jurisdiction over the waste transfer facility because the railroad's responsibility and liability for the cars "end when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to [the railroad's] locomotive."[2] The STB explained that it has exclusive jurisdiction over transloading facilities if, and only if, "the activities are performed by a rail carrier or the rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party's operation."[3]

The court in *New York and Atlantic Railway* agreed with the STB. The court held that Coastal Distribution's proposed waste transfer facility did not constitute "transportation by rail carrier" because the railroad did not own or operate the facility and Coastal was not acting as an agent of the railroad. Therefore, the ICCTA did not preempt the application of the city's local zoning regulations.[4]

Similarly, in *Florida East Coast Railway*, a railroad leased a rail yard property in the City of West Palm Beach to Rinker Materials Corporation, a third party corporation. Rinker used the rail yard as a transloading facility for the distribution of aggregate, a material used to make cement. The city issued cease and desist orders to the railroad and Rinker because Rinker's transloading operation did not comply with the city's zoning, and Rinker failed to obtain a business license. The railroad sued the city, seeking a declaration that the ICCTA preempted the application of the city's zoning and business license ordinances to Rinker's transloading operations.

The court in *Florida East Coast Railway* concluded that the application of the city's ordinances to Rinker's transloading facility did not constitute regulation of "transportation by rail carrier" within the meaning of the ICCTA preemption provision.[5] The court explained as follows:

> existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws 'with respect to regulation of rail transportation.'[6]

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2 *Ibid*.
3 *New York & Atlantic Ry. Co. v. Surface Tranp. Bd., supra*, 635 F.3d at 69.
4 *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66, 73 (2nd Cir. 2011).
5 *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001).
6 *Ibid.*

Thus, the court concluded, "in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad."[7]

In support of Valero's position that the ICCTA preempts the application of CEQA to the on-site unloading facilities, Valero cites the decision in *Norfolk Southern Ry Co v City of Alexandria* 608 F.3d 150 (2010). The *Norfolk Southern Railway* case, however, does not support this conclusion. In *Norfolk Southern Railway*, a railroad constructed and began operating an ethanol transloading facility in the City of Alexandria, Virginia. The railroad used the facility to transfer ethanol from rail cars to trucks operated by third parties. The city adopted an ordinance regulating the hauling of bulk materials, including ethanol, within the city limits. The City unilaterally issued a permit to the transloading facility under its haul ordinance. The permit limited the materials that could be hauled; specified hauling routes; and restricted the days and times of hauling. The railroad refused to comply with the permit conditions, on the assumption that the application of the haul ordinance to the facility was preempted by the ICCTA.

The city petitioned STB for a declaration that the city had the authority to regulate the transloading facility, and the railroad filed an action for declaratory relief in federal court. The STB found that the transloading facility constitutes "transportation by a rail carrier," such that the city's haul ordinance was preempted. The federal district court reached the same conclusion.[8]

The *Norfolk Southern Railway* case does not control here, however, because, in *Norfolk Southern Railway*, the railroad actually owned and operated the transloading facility. In contrast, the Valero unloading facilities, like the transloading facilities in *New York And Atlantic Railway* and *Florida East Coast Railway*, would be owned and operated by a third party (Valero), which in no way would be acting as an agent of the railroad (Union Pacific).

In sum, it is clear that CEQA applies to the unloading rack and related on-site facilities proposed as part of the crude-by-rail project.

II. The ICCTA Preempts the City's Authority to Mitigate Impacts from Union Pacific's Rail Operations.

Under the ICCTA, the federal Surface Transportation Board ("STB") has exclusive jurisdiction to regulate transportation by rail carrier.[9] The ICCTA preemption provision is quite broad, covering virtually all aspects of railroad operations.[10] As a number of courts have stated, "it is

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7 *Id*. at 1332.

8 *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010).

9 49 U.S.C. § 10501(b).

10 *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 839 (E.D. Ky. 2004) (49 U.S.C. § 10501(b) grants the STB exclusive jurisdiction "over nearly all matters of rail regulation").

difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."[11]

In light of the STB's exclusive jurisdiction, state and local governments may not directly regulate rail operations. Thus, for example, state and local governments may not place limits on emissions from locomotives,[12] limit the amount of time that trains can block grade crossings,[13] or require railroads to obtain permits before constructing new or modified tracks and related facilities.[14]

The ICCTA also preempts any attempt by state and local governments to regulate railroad operations indirectly.[15] Simply put, the ICCTA preempts any regulations that "may reasonably be said to *have the effect* of managing or governing rail transportation."[16] One court held, for example, that a city may not limit the number of trucks entering and leaving a railroad offloading facility, even though the railroad did not own or operate the trucks, because the limit on truck trips would effectively limit the number of rail cars that could be unloaded.[17] To take another example, a number of courts have held that the ICCTA preempts state common law claims against railroads, including claims for negligence,[18] tortious interference,[19] and nuisance.[20] In reaching this conclusion, the courts have emphasized that common law claims effectively regulate railroad operations just as any "preventative relief" that a state government might obtain through direct regulation.[21]

The DEIR and/or the RDEIR identify significant offsite impacts from rail operations in certain areas, including air quality, hazards, biological resources, and greenhouse gas emissions. There are various mitigation measures that might reduce and/or avoid these impacts, such as limiting the number of rail deliveries that Valero may accept per day, requiring Valero to purchase

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[11] *See, e.g., City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1030; *CSX Transp Inc v Georgia Public Service Com'n*, 944 F.Supp. 1573, 1581 (N.D. Georgia 1996).

[12] *Association of American Railroads v South Coast Air Quality Management District*, 622 F.3d 1094 (9th Cir. 2010).

[13] *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001); *People v Burlington Northern Santa Fe RR*, 209 Cal.App.4th 1513 (2012); *CSX Trans., Inc. v. Plymouth*, 92 F.Supp.2d 643 (E.D.Mich.2000).

[14] *See, e.g., Green Mountain RR Corp v Vermont*, 404 F.3d 638 (2nd Cir. 2005) (the ICCTA preempts a city's pre-construction permit requirement as applied to rail project); *City of Auburn v. United States Government*, 154 F.3d 1025 (9th Cir. 1998) (the ICCTA preempts a county from requiring a railroad to obtain permits before making improvements to an existing rail line);

[15] *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, (1992)); *Guckenberg v. Wisconsin Central Ltd*, 178 F.Supp.2d 954, 958 (E.D. Wisconsin 2001) (same).

[16] *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528 (2012) (emphasis added).

[17] *Norfolk Southern Ry Co v City Of Alexandria*, 608 F.3d 150 (2010).

[18] *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir.2001).

[19] *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 297 F.Supp.2d 326, 334 (D.Maine, 2003).

[20] *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493, 500 (S.D.Miss.2001).

[21] *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004); *Guckenberg v Wisconsin Central Ltd*, 178 F.Supp.2d 954, 958 (E.D. Wisconsin 2001).

emissions credits to offset locomotive emissions, or requiring Valero to use upgraded tank cars that are not required by federal law. Any attempt by the city to condition project approval on such requirements, however, would be preempted, because the requirements would clearly "have the effect of managing or governing rail operations." Limiting the number of rail deliveries that Valero could accept, for example, would effectively reduce the number of train trips that Union Pacific may operate on its lines. Requiring Valero to purchase emissions credits to offset locomotive emissions would essentially be an indirect way of regulating locomotive emissions. Finally, any attempt to require Valero to use upgraded tank cars that are not required by federal law would infringe on the STB's exclusive jurisdiction to prescribe tank car design standards. All of these mitigation requirements would be preempted.

III. While the ICCTA May Preempt Disclosure of Rail Impacts Under CEQA, There is No Clear Authority on Point.

CEQA requires lead agencies to identify and disclose a project's potential environmental impacts before approving the project. CEQA is a law of general application, and governs approval of any non-exempt project that may result in a physical change in the environment.

Valero takes the position that the ICCTA preempts even the disclosure aspect of CEQA as applied to rail operations. In other words, Valero maintains that the City is legally prohibited from requiring disclosure of offsite impacts from rail operations, such as locomotive emissions or rail safety impacts, as a condition of project approval – even though CEQA generally requires disclosure of all impacts that would be caused by a project, wherever those impacts may occur.

There is no case or STB decision directly on point involving CEQA or any other state or local environmental or land use law. That is, there is no case considering whether a city that clearly has jurisdiction over the construction and operation of *onsite* unloading facilities must -- or indeed may -- require disclosure of *offsite* impacts created by trains traveling to and from the onsite operation.

On the one hand, a court might well conclude that requiring disclosure of rail impacts as part of a pre-construction permitting process has a direct and impermissible effect on rail operations because the disclosure requirement could delay the project indefinitely. Under this theory, the application of CEQA's disclosure requirement to rail impacts would be controlled by the "preclearance" cases and STB decisions that Valero cites in its letter.[22]

On the other hand, there is an argument to be made that merely requiring disclosure of rail impacts has only a "remote or incidental" impact on rail operations, such that ICCTA preemption does not apply. Requiring disclosure of information about potential rail impacts, in itself, arguably does not have the same impact on operations as, for example, mitigation measures that

[22] These authorities include, among others, *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1031 (9th Cir. 1998), as amended (Oct. 20, 1998); *City of Encinitas v North San Diego County Transit Development Bd* 2002 WL 34681621; *Desertxpress Enterprises LLC--Petition for Declaratory Order Fed. Carr. Cas*. P 37238 (S.T.B.), 2007 WL 1833521.

effectively limit the number of trains that Union Pacific can operate, or regulate locomotive emissions.

There are some, but not many, cases where a court or the STB found that the effect of a state or local law on rail operations was merely "remote or incidental." As explained above, the courts and the STB have concluded that regulation of a transloading facility owned and operated by a private party has only a remote and incidental effect on rail operations.[23] The courts and the STB have also concluded that agencies can enforce water quality laws against railroads discharging earth and waste from construction projects into water bodies.[24] Finally, in one of its opinions, the STB provided the following list as examples of permissible "pre-construction" conditions:

> Examples of solutions that appear to us to be reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.[25]

None of the existing authorities, however, directly addresses the issue at hand – whether the ICCTA preempts CEQA's disclosure requirement to the extent that it would require disclosure of impacts from rail operations as a condition of approving Valero's project. Thus, the City intends to continue requiring disclosure unless and until a court, in a binding precedent, clearly rules that the ICCTA preempts disclosure under CEQA under similar facts.

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[23] *See, e.g., Florida E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1339 (11th Cir. 2001); *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997).

[24] *See, e.g., United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013).

[25] *Joint Petition for Declaratory Order - Boston & Maine Corp. & Town of Ayer, Ma*, Fed. Carr. Cas. (CCH) ¶ 38352 (Apr. 30, 2001)

ATTACHMENT 9

AGENDA ITEM
PLANNING COMMISSION MEETING: FEBRUARY 8, 2016
REGULAR AGENDA ITEMS

DATE : January 28, 2016

TO : Planning Commission

FROM : Amy Million, Principal Planner

SUBJECT : **VALERO CRUDE BY RAIL PROJECT**

PROJECT : 12PLN-00063 Use Permit
3400 East Second Street
APN: 0080-110-480

RECOMMENDATION:
Staff recommends that the Planning Commission hold a public hearing, consider all appropriate documents and testimony, and then act to:

1. Adopt the draft Resolution certifying the Final Environmental Impact Report, adopting California Environmental Quality Act ("CEQA") findings for the Project and adopting the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program.

2. Adopt the draft Resolution approving the Use Permit for the Valero Crude by Rail Project, with the findings and conditions listed in the resolution.

EXECUTIVE SUMMARY:
The proposed Valero Crude by Rail Project (CBR) would allow the Valero Benicia Refinery (Refinery) access to additional North American-sourced crude oil for delivery to the Refinery by railroad. Valero Refining Company is requesting approval of a Use Permit which would allow the installation and modification of Refinery non-process equipment that would allow the Refinery to receive a portion of its crude oil deliveries by rail car, replacing equal quantities of crude currently being delivered to the Refinery by marine vessel. Valero intends to replace up to 70,000 barrels per day of the crude oil currently supplied to the Refinery by marine vessel with an equivalent amount of crude oil transported by railcars. The crude oil to be transported by railcars is expected to be of similar quality compared to existing crude oil imported by marine vessels. Crude delivered by rail would not displace crude delivered to the Refinery by pipeline.

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BUDGET INFORMATION:
Valero is a large source of revenue for the City and the single largest private employer, employing more than 500 employees. The combined property, sales and utility user tax represent more than 20% of the City's general fund revenue. The proposed Project will allow the Refinery to remain competitive in the marketplace. In addition, the proposed Project will generate an estimated $240,000 in building permit fees as part of the construction plan review and inspection process.

ENVIRONMENTAL REVIEW PROCESS:
The Project is a significant Project for the City, the Refinery, and communities near and far, and as such, it has generated a great deal of public interest. Moreover, the Project is intertwined with a complex legal issue of preemption and the Environmental Impact Report (EIR) is necessarily complex as well. In recognition of those facts, the City has conducted a public information and review process that went beyond the legal requirements of CEQA to try to ensure that all interested persons had an opportunity to review and comment on the EIR and the Use Permit.

A special page for the Project was established on the City's website at the time that the Initial Study was prepared. All application materials were posted on the website along with, all official notices regarding the Project, the Initial Study, scoping comments received, the Draft EIR, Revised Draft EIR and Final EIR and related documents, public comments received during the course of the Project (Initial Study/Mitigated Negative Declaration, Draft EIR, Revised Draft EIR) and the minutes of all the Planning Commission hearings. All of these documents comprise the Record of Proceedings for the EIR. Note that twenty additional hard copies of the environmental documents were made available to the public free of charge.

<u>Mitigated Negative Declaration</u>
In accordance with the California Environmental Quality Act (CEQA), the State CEQA Guidelines and the City of Benicia's adopted CEQA Guidelines, an Initial Study was completed for the proposed Project. A Mitigated Negative Declaration was prepared and circulated for a 30-day public review period between May 31, 2013 and July 1, 2013. On July 11, 2013, the Planning Commission held a public meeting where formal presentations on the Project were provided. Based on public comment, the City determined that an EIR was necessary for the Project.

<u>Draft EIR</u>
A Notice of Preparation/ Notice of Scoping Session was prepared and circulated to the Planning Commission, the City Council, responsible and interested agencies and organizations including all agencies and school districts

along the Union Pacific Railroad (UPRR) line from Benicia to Roseville. A Notice of Preparation and Scoping Session was also sent to property owners within 300 feet of the refinery properties, posted at City Hall and the Benicia Public Library.

A legal notice and display ad was placed in the Benicia Herald and Vallejo Times Herald and a press release was sent to media groups along the UPRR line from Benicia to Roseville to inform the general public. The City held a public scoping session before the Planning Commission on September 13, 2013. Twenty-one written comments were received regarding the scope of the EIR. In addition to the written comments, oral comments at the scoping session, and all of the comments on the Initial Study Mitigated Negative Declaration were considered as part of the process of EIR preparation.

The Draft EIR was completed and released for a 45-day public review period on June 17, 2014. At their July 10, 2014 meeting, the Planning Commission extended the public review period an additional 45-days to September 15, 2014. As required by CEQA, a Notice of Availability of the Draft EIR was mailed to all property owners and occupants within 300' of the Project site and a notice was posted at City Hall and the Library. A Notice of Availability of the Draft EIR was also mailed to all agencies and school districts along the UPRR line from Benicia to Roseville. The Draft EIR was circulated to interested and responsible agencies and copies were provided to the State Clearinghouse as required for transmittal to state agencies. Copies of the EIR were also made available at the Community Development Department and the Library.

During the public review period for the Draft EIR, the City held three public meetings to hear oral comment on the Draft EIR on July 10, 2014, August 14, 2014 and September 11, 2014. The first session, held on July 10, 2014, included formal presentations to the Planning Commission. All meetings were well-publicized in advance and large numbers of the public attended.

<u>Revised Draft EIR</u>
In response to comments received on the Draft EIR, a Revised Draft EIR was prepared and released for a 45-day review period on August 31, 2015. A Notice of Availability of the Revised Draft EIR was mailed to all property owners and occupants within 500' of the Project site, and a notice was posted at City Hall and the Library. The mailing of the Notice of Availability of the Revised Draft EIR was expanded to include all agencies and school districts along the Union Pacific Railroad (UPRR) line from Benicia to the California Stateline. A copy of the notice was also provided to all who commented on the Draft EIR. The Draft EIR was circulated to interested and responsible agencies and copies were provided to the State Clearinghouse as required for transmittal to state agencies. Copies of the EIR were also made available at the Community Development Department and the Library.

During the public review period for the Revised Draft EIR, the City held a public meeting to hear comments on the Revised Draft EIR on September 29, 2015. Although additional meetings had been tentatively scheduled in anticipation of a large number of speakers, the meetings were canceled because all the speakers spoke at the September 29 meeting.

Final EIR

The Final EIR was published on January 5, 2016. The Final EIR, consistent with CEQA requirements, is comprised of the Draft EIR, Revised Draft EIR and the Response to Comments document which includes all written and oral comments received during the comment period, responses to all of the comments, and necessary corrections to the Draft EIR. Copies were provided to the commenting agencies, Planning Commission and the City Council and were made available to the public at the Library, at the Community Development Department, and on the City's website. All agencies and individuals who provided comments within the public review periods for the Draft EIR and Revised Draft EIR were provided with a response to their comments in the Final EIR, at least 30 days in advance of the public hearing to consider approving the Final EIR and taking action on the Use Permit. A notice of the Planning Commission hearing was provided to all commenters and was mailed to property owners within 500 feet of the refinery properties. A legal notice and a display ad were placed in the Benicia Herald and Vallejo Times Herald and a notice was posted at City Hall and the Library.

The EIR concludes that there are impacts from the Project that are:

1. Potentially Significant Mitigated to a Less-than-Significant Level

The EIR identified 8 potentially significant impacts relating to air quality, biological resources, energy conservation, geology and soils, and hydrology and water quality. All of these impacts can be mitigated to a less-than-significant level by mitigation measures described in the EIR.

2. Potentially Significant and Unavoidable

The EIR identified 11 significant and unavoidable impacts related to air quality, biological resources, greenhouse gas emissions, and hazards and hazardous materials. All of these impacts identified are due to rail operations and the City is preempted from mitigating those impacts.

A more detailed discussion of the environmental review is provided below in section “Environmental Review”.

GENERAL PLAN:
Relevant General Plan Goals and Policies:

- GOAL 2.5: Facilitate and encourage new uses and development which provide substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life.
- GOAL 2.6: Attract and retain a balance of different kinds of industrial uses to Benicia.
  - Policy 2.6.4: Link any expansion of Industrial land use to the provision of infrastructure and public services that are to be developed and in place prior to the expansion.
  - Policy 2.6.5: Establish and maintain a land buffer between industrial/commercial uses and existing and future residential uses for reasons of health, safety, and quality of life.
- GOAL 2.7: Attract and retain industrial facilities that provide fiscal and economic benefits to—and meet the present and future needs of—Benicia.
- GOAL 2.20: Provide a balanced street system to serve automobiles, pedestrians, bicycles, and transit, balancing vehicle-flow improvements with multi-modal considerations.
  - Policy 2.20.1: Maintain at least Level of Service D ("LOS D") on all city roads, street segments, and intersections. *Exceptions may be allowed where measures required to achieve LOS D are infeasible because of right-of-way needs, impact on neighboring properties, aesthetics, or community character.
- GOAL 3.9 Protect and enhance scenic roads and highways.
  - Policy 3.9.1 Preserve vistas along I-780 and I-680
- GOAL 4.1: Make community health and safety a high priority for Benicia.
  - Policy 4.1.1: Strive to protect and enhance the safety and health of Benicians when making planning and policy decisions.
- GOAL 4.7: Ensure that existing and future neighborhoods are safe from risks to public health that could result from exposure to hazardous materials.
- GOAL 4.8: Protect sensitive receptors from hazards.
  - Policy 4.8.1: Evaluate potential hazards and environmental risks to sensitive receptors before approving development.
- GOAL 4.9: Ensure clean air for Benicia residents.
- GOAL 4.22: Update and maintain the City's Emergency Response Plan.
- GOAL 4.23: Reduce or eliminate the effects of excessive noise.

A detailed analysis of the Project's consistency with the General Plan is included later in this report.

STRATEGIC PLAN:
Relevant Strategic Issues and Strategies and Actions:

- Strategic Issue 2: Protecting and Enhancing the Environment
  - Strategy 2.1 Reduce greenhouse gas emissions and energy consumption
- Strategic Issue 3: Strengthening Economic and Fiscal Conditions
  - Strategy 3.2 Strengthen Benicia Industrial Park competitiveness
  - Strategy 3.3: Retain and attract business

PROJECT BACKGROUND:
Applicant/Owner: Valero Refining Company
General Plan: General Industrial, Water-front Industrial (marine terminal)
Zoning: IG (General Industrial), IW (Waterfront Industrial)
Existing use: existing refinery and associated shipping operations

Adjacent zoning and uses:
North: IG, IP and IW; industrial uses; undeveloped industrial property
East: IG; industrial uses
South: IG; industrial uses; Carquinez Strait
West: IG; undeveloped refinery property

The Refinery was constructed by Humble Oil in 1969, and it has undergone a number of changes over the years. Many of the changes were in response to new regulations limiting emissions from Refinery process units and requiring reformulation of gasoline to produce cleaner-burning fuels. In 2000, Exxon sold the Refinery to Valero, an independent refining company. In 2003, Valero received Use Permit approval for the Valero Improvement Project to modify existing Refinery equipment and install new equipment to allow the Refinery to process lower grades of raw materials (crude oil and gas oil) and to increase overall production by about 10%. The proposed Crude by Rail Project would change the shipment method of up to 70,000 barrels per day of crude oil to be delivered by railcar rather than by marine vessel. The Refinery is limited by its permits from the Bay Area Air Quality Management District to 180,000 barrels per day on a maximum daily basis and 165,000 barrels per day on an annual average. This limit would not change.

PROJECT DESCRIPTION/SUMMARY:
Description
The Project would consist of the installation and modification of Refinery non-process equipment that would allow the Refinery to receive a portion of its crude oil deliveries by railcar replacing equal quantities of crude currently being delivered to the Refinery by marine vessel. These changes would include the installation of new facilities as well as the modification of certain existing

facilities. The components of the Project include the following:

1. Change the shipment method of up to 70,000 barrels per day of crude oil to be delivered by rail cars rather than by marine vessel
2. Installation of a new 1,500-foot-long unloading rack capable of offloading two rows of 25 crude oil rail cars
3. Construction of two parallel rail spurs on Valero property to access the unloading rack
4. Installation of approximately 4,000 linear feet of 16-inch diameter crude oil pipeline (above ground)
5. Removal of approximately 1,800 feet of earthen containment berm and replacement with a new 8-foot-tall concrete berm approximately 12 feet west of the existing berm
6. Relocation of an existing firewater pipeline, compressor station and associated underground infrastructure
7. Relocation of existing groundwater monitoring wells along Avenue "A"
8. Construction of a new 20-foot-wide service road along the western side of the new unloading rail spurs
9. Installation of three new pumps located on the western side of the new service road.

Approval Process

A two-step process is required to approve the Project: 1. Certify the Environmental Impact Report and 2. Approve the Use Permit. In order to approve the Project the Planning Commission must first take action on the Environmental Impact Report. If the Commission certifies the EIR, the Commission may then act to approve the Project. If the Commission fails to certify the EIR, the Commission may not approve the Project. Note that if the Commission declines to certify the EIR, the Commission should provide specific comments on the deficiencies of the EIR and/or direction on what needs to be improved in the EIR.

Note that the City has no ability to reject the EIR or the Use Permit due to rail related impacts. As noted in the EIR, the City and its legal team have evaluated the preemption issue and determined that the City is preempted from imposing mitigation measures which have the effect of regulating the rail aspects of the proposed Project. Similarly, the City is preempted from conditioning the Use Permit in such a way that impacts the rail aspects of the Project. The preemption issue is discussed r below.

LEGAL ISSUES AND PREEMPTION:

The Interstate Commerce Commission Termination Act (ICCTA), preempts any attempt by state and local governments to regulate railroad operations directly or indirectly. The EIR identifies significant offsite impacts from rail operations in

certain areas, including air quality, hazards, biological resources, and greenhouse gas emissions. There are various mitigation measures that might reduce and/or avoid these impacts, such as limiting the number of rail deliveries that Valero may accept per day, requiring Valero to purchase emissions credits to offset locomotive emissions, or requiring Valero to use upgraded tank cars that are not required by federal law. However, any attempt by the city to adopt such a mitigation measure or condition Project approval on such requirements, is preempted because the requirements would clearly "have the effect of managing or governing rail operations." *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528 (2012).

ICCTA preempts local permitting or "preclearance" requirements that "could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [Surface Transportation Board] has authorized." *Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 330 (2014)

In addition, the City may not deny Valero's application based on impacts or health and safety risks posed by rail operations because that denial would preclude UPRR operations that have been authorized by the Surface Transportation Board. This means, among other things, that the City cannot deny the application based on the fact that the benefits of the Project do not outweigh the Project's unavoidable significant impacts from rail operations. If the Commission were to deny the Project, the denial must be based on an inability to make the required Use Permit findings and that inability must be based on non-rail impacts.

As discussed later in this report, staff recommends that the City consider sending a letter to the City's congressional representatives urging they adopt appropriate laws to protect the public from significant rail impacts.

PROJECT ANALYSIS:

The IG district requires a Use Permit for oil and gas refining. The Valero Refinery was constructed prior to the adoption of that requirement and, therefore, the existing Refinery is a legal nonconforming use. The nonconforming use regulations require a Use Permit for "alteration" or "expansion," of a legal nonconforming use. The Project constitutes an "alteration" of the existing use, in accordance with Benicia Municipal Code (BMC) Section 17.98.070, because its cost, estimated at $50 million, exceeds the $20 million threshold.

The proposed Project will be constructed within the existing developed area of the Refinery, and the Project will meet the setback, lot coverage and landscaping requirements set forth in the Zoning Ordinance. The height of the new loading racks and walkways measure a maximum of 23 feet above grade,

which is well below the 75 foot height limit for the IG zoning district. The proposed Project does not trigger additional parking requirements of the Zoning Ordinance and the Refinery has ample parking to accommodate both permanent employees and contractors. The addition of approximately 20 permanent workers or contractors as part of the Project will not change those determinations.

Lighting

The proposed Project would add new safety lighting on and around the proposed rail car unloading racks. Lighting standards provided in BMC Section 17.70.250 D2, require that *site lighting shall be designed and installed to confine direct light rays to the site. Minimum illumination at ground level shall be 0.5 footcandles. Security lighting in any district may be indirect or diffused, or shall be shielded or directed away from adjoining properties and public rights-of-way.*

The unloading rack platform walkway would be approximately 13 feet above grade and is located near the northeastern property line adjacent to Sulphur Springs Creek. The 1,500-foot-long unloading rack would consist of twenty-five 60-foot-long segments. Each segment would include an aluminum pole with four LED lights mounted 12 feet above the unloading rack platform walkway and two LED pendant fixtures mounted underneath the platform, eight feet above grade. In addition, two pole-mounted LED lights would be located 18 inches above grade. Walkways extending over the rail spurs would include six stanchion-mounted LED fixtures along the walkway and stairs and four at stairway landings at each end of the unloading rack. Eleven stanchion-mounted LED fixtures would be mounted eight feet above eleven monitoring stations that would be evenly spaced along the length of the unloading rack. Eight stanchion mounted fixtures at eight feet above grade would be installed in the pumping station.

As shown on the attached lighting plans, all proposed lighting is shielded downward toward the platform, walkways, loading rack and adjacent service road. Prior to issuance of a building permit, the applicant is required to provide a detail of the specific lighting fixture per condition of approval no. 7.

Noise

Noise levels associated with the proposed Project would be related to the movement of rail cars and operation of the unloading rack pumps. Chapter 8.20 BMC provides the noise regulations. BMC 8.20.140 addresses noise from the operation of machinery, equipment, fans, and air conditioning units. This section limits noise *increases* from such mechanical devices to a maximum of 5 dBA over ambient base noise levels at the property line of any property generating the noise. A noise assessment was prepared by Wilson Ihrig &Associates to

evaluate noise level increases at the Refinery due to the implementation of the proposed Project.

A copy of this report is included as an attachment to the Draft EIR. The noise assessment found that under worst-case conditions, noise from the unloading rack pumps and the rail car movements would be up to 21 dBA and 58 dBA, respectively, at the nearest residence at Lansing Circle, approximately 2,700 feet northwest of the northern end of the Project site (Wilson, Ihrig &Associates, 2013). Existing average hourly L_{eq} noise levels for day, evening, and nighttime hours at the nearest residences to the proposed Project site were measured to range between 52 dBA and 55 dBA. Therefore, the noise generated by the Project once operational would be similar to existing noise generated by the Refinery.

BMC 8.20.150 prohibits construction activities within any residential zoning district, or within a radius of 500 feet from a residential zone prior to 7:00 a.m. or after 7:00 p.m. on Monday through Friday, or prior to 8:00 a.m. or after 7:00 p.m. on Saturdays and Sundays. The Project area is more than 2,000 feet from the nearest residential zoning district and therefore the standard related to construction noise does not apply to this Project.

Noise levels associated with movement of railcars along the rail line beyond the Refinery were evaluated in the EIR. See *Environmental Review* section for further details.

Emergency Access and Response

Valero maintains an onsite Fire Department that regularly coordinates with the City of Benicia Fire Department. The Draft EIR disclosed that operation of the proposed Project could interfere with an emergency evacuation plan, resulting in a potential significant adverse impact due to the amount of time during which Project-related rail traffic would block Park Road outside the Refinery's southern border (Impact 4.7-8) and recommended as Mitigation Measure 4.11-4 that an Operational Aid Agreement be concluded between the City of Benicia Fire Department/Valero Benicia Refinery Fire Department to be implemented in the event an emergency occurs during a Project train crossing. Due to preemption, the City has no ability to require such a mitigation measure since the impact to be mitigated relates to the rail operations.

The City, however, does have the ability to enforce existing agreements with Valero. The Fire Department and Exxon were parties to the 1996 County-wide mutual aid agreement. Valero's commitment to mutual aid was confirmed in the September 2000 Good Neighbor Agreement. A separate operational aid agreement specific for Benicia was executed last year. This Operational Aid Agreement meets all of the recommendations of draft Mitigation Measure 4.11-

4 and was fully executed by the responsible parties on December 18, 2015. It includes enforceable actions that would reduce Impact 4.7-7 to a less-than-significant level already are in place. Mitigation Measures 4.7-7 and 4.11-4 (Appendix H MMRP of FEIR) are no longer required and an updated Mitigation Monitoring and Reporting Program is attached this staff report for your review and approval. The signed Operational Agreement was included as Appendix B of the Final EIR.

The Benicia Fire Department has a response time goal of 7 minutes for all emergency calls. In 2012, the average response time was 5.2 minutes (2,099 total incidents) and the average response time to the Park Road/Bayshore Road area was about 6.6 minutes (27 total incidents). An average of about two emergency incidents a month occurred along the industrial areas of Park Road and Bayshore Road.

Although the probability of an emergency at the same time as a train crossing is low, the existing at-grade train crossing at Park Road can potentially delay response times by the City of Benicia's emergency response vehicles in the area. If an emergency incident were to happen during those times, the City emergency respondents would be required to use East 2nd Street to Industrial Way in order to access areas that normally would be accessed via Park Road. The additional rail crossings proposed by the CBR Project increases the number of potential times where an alternative response route to the industrial area will need to be used. This alternative route of travel increases the response time to areas of the industrial park by slightly over two (2) minutes. This is based on an average travel speed of 30 mph.

However, pursuant to the City's Operational Aid Agreement with the Refinery to address emergency response, the Refinery's onsite emergency response team will assist Benicia Fire Department by responding to off-site emergencies within the Park Road and Bayshore Road industrial areas if an emergency occurs during the event of a train crossing on Park Road. This helps keep response times at acceptable levels.

Additionally, Benicia Fire Department uses Opticom transmitters which are placed on stoplights and on emergency response vehicles as a form of communication so that the stop light is changed to green for their direction of travel and a red light for cross traffic. There may be locations throughout the City where this is not available. Since the alternative route to the Park Road/Bayshore Road area is longer and designated for emergency response, it is important to have the equipment in place along this route. Consistent with the City's Operational Aid Agreement with the Refinery, draft condition of approval no. 11 requires that Valero insures that Opticom (3m) receivers along the entire alternate route of travel from Fire Station 11 (150 Military West) along Military

West, East 2nd Street and Industrial Way to Park Road are installed and functional. In addition, Opticom transmitters shall be provided on all fire suppression units, including incident command vehicles.

The Park Road at-grade train crossing is also used by UPRR for deliveries to other parts of the industrial park. Some of these deliveries can cause extensive delays at the intersection due to the dividing of the train cars by UPRR. This activity is not associated within the Project. It is understood that Valero does not oversee the operation of UPRR; however it is important that the City's emergency responders are kept apprised of any blockage. Staff is recommending as a condition of approval that Valero provide communications to emergency responder agencies with the City of Benicia as to the blockage of normal travel routes due to the presence of a Refinery train at the intersection of Bayshore and Park Road. Any information provided to Valero by UPRR regarding known potential delays at railway crossings must be communicated to Benicia Police and Fire dispatch promptly. Draft condition of approval no. 12 requires that Valero actively coordinate with the City's emergency responders to provide advanced notification of any known blockage as well as install cameras at the intersection which provide live feed back to the City's Police and Fire dispatch center. This condition is consistent with the Operational Aid Agreement.

General Plan Consistency

The City's use permit regulations require that a Project be consistent with the General Plan. The Refinery itself is located in the General Industrial land use category. As stated on p. 28 of the General Plan, "*the General Industrial land use category is the least restrictive of the three [industrial] categories and is intended to allow a great deal of flexibility for industrial development. Over half of the Benicia Industrial Park is designated General Industrial. This includes nearly all of the Industrial Park north of I-780 and east of East Second Street. This category includes manufacturing, assembly, and packaging of goods and products from extracted, raw, and previously prepared materials and related industrial and commercial services.*"

An analysis of how the Project is consistent with the applicable General Plan goals and policies are as follows:

- ***GOAL 2.5:*** *Facilitate and encourage new uses and development which provide substantial and sustainable fiscal and economic benefits to the City and the community while maintaining health, safety, and quality of life.*

  The General Plan states that the Benicia Industrial Park, which includes the Valero Refinery, "*provide[s] a strong economic base for the City. In addition, businesses that support the refinery industry need to be located nearby, and many choose Benicia given its location and large concentration of like*

businesses. The tax revenues that the BIP and other heavy industrial uses generate allow the City to provide a relatively high level of public services, including its own library system. As a result, the Economic Development Goals, Policies, and Programs emphasize the importance of protecting existing heavy industrial uses." (p. 38).

The General Plan also notes that the Refinery was the City's largest private-employer in 1999, which is still the case today, with the Valero Refinery employing more than 500 employees. Project construction would create temporary jobs and economic benefits for the local community. This would include 121 construction workers per day over the 25-week construction period. Implementation of the Project, which includes operation of the proposed crude oil unloading rack, would require approximately 20 new full-time jobs.

The proposed Project would allow the Refinery access to additional North-American sourced crudes thus allowing the Refinery to remain competitive in the marketplace into the future.

The proposed change of shipment methods of up to 70,000 barrels per day from marine vessel to railcar would result in a net reduction of GHG (greenhouse gas) emissions in the Bay Area, therefore benefiting the community while maintaining health, safety, and quality of life.

- ***GOAL 2.6:*** *Attract and retain a balance of different kinds of industrial uses to Benicia.*
  - ***Policy 2.6.4:*** *Link any expansion of Industrial land use to the provision of infrastructure and public services that are to be developed and in place prior to the expansion.*
  - ***Policy 2.6.5:*** *Establish and maintain a land buffer between industrial/commercial uses and existing and future residential uses for reasons of health, safety, and quality of life.*

The Project would consist of changes and improvements to an existing industrial use in an existing industrial district. The Refinery is unique in that it is the only use of its kind in the City of Benicia and one of five refineries in the San Francisco Bay Area. Currently the Refinery receives crude oil for processing from pipeline and marine vessel. The Project would provide a change of shipment methods of up to 70,000 barrels per day from marine vessel to railcar. The Project's proposed improvements are located within a development area of the Refinery in the northeast area of the parcel. The proposed Project does not expand the Refinery itself nor require additional public infrastructure or services. Therefore, the proposed Project does not

warrant a provision for the inclusion of new infrastructure to provide public services.

The closest residential areas are more than 2,000 feet from the proposed unloading rack and new rail infrastructure. Valero owns about 400 acres of land west and south of their facility which has served as a buffer between the Benicia Industrial Park, the Refinery and the City's residential neighborhoods. The Project does not alter or impact this existing land buffer between the Refinery and the residential uses.

- ***GOAL 2.7:*** *Attract and retain industrial facilities that provide fiscal and economic benefits to—and meet the present and future needs of—Benicia.*

  Valero is a large source of revenue for the City and the single largest private employer, employing more than 500 employees. The combined property, sales and utility user tax represent more than 20% of the City's general fund revenue. The proposed Project would allow the Refinery access to additional North-American sourced crudes, thus allowing the Refinery to remain competitive in the marketplace into the future.

  Furthermore, upon completion of the Project Valero will hire twenty (20) additional full time employees or contractors.

- ***GOAL 2.20:*** *Provide a balanced street system to serve automobiles, pedestrians, bicycles, and transit, balancing vehicle-flow improvements with multi-modal considerations.*
  - ***Policy 2.20.1:*** *Maintain at least Level of Service D ("LOS D") on all city roads, street segments, and intersections. *Exceptions may be allowed where measures required to achieve LOS D are infeasible because of right-of-way needs, impact on neighboring properties, aesthetics, or community character.*

  As stated on p. 59 of the General Plan, "*traffic operations at intersections are described in terms of Level of Service (LOS). LOS D is generally accepted as the standard for intersection operation and has been adopted as the standard for Benicia.*" The Project's train crossings would not degrade any intersection currently operating at LOS D or better to a level worse than LOS D. As part of the Transportation Impact Analysis Report prepared by Fehr & Peers Transportation Consultants (included in the Draft EIR), vehicular and train crossing studies were conducted in the area of proposed increased railcar activity (Park Road rail crossing at Valero) as follows:

  1) An automatic traffic count was conducted on Park Road;

2) A train crossings count was collected at the Park Road at-grade crossing; and
3) A train crossing count at the Iron Workers Union Driveway 700 feet southeast of Park Road, each study conducted for seven days.

These studies show that the proposed Project would increase the frequency of the number of crossings (four crossings per day), but the increased crossing frequency is within the current range of crossing variability (length of time). The proposed crossing duration of 8-minutes is lower than train crossing durations that already exist today without the proposed Project. The Project would not further decrease the LOS beyond what current exists and therefore would be consistent with the City's LOS standards.

- ***GOAL 3.9*** *Protect and enhance scenic roads and highways.*
  - ***Policy 3.9.1*** *Preserve vistas along I-780 and I-680*

The most visible physical changes at the site would be the replacement portions of the farm dikes with the 8-foot tall retaining wall and the rail car unloading rack. Views of these changes would be blocked from most offsite viewpoints due to their location within the Refinery and surrounding topography. The proposed facilities would be much shorter than the existing tanks in the immediate area. The proposed Project would blend in with the existing facilities in the Refinery and would not obstruct predominant visual elements of the area including the nearby hills, Suisun Bay and adjacent open space; all of which are visible from I-680.

Furthermore, according to the Scenic Highway Guidelines (California Department of Transportation), freeways are evaluated on the merits of how much natural landscape a traveler sees and the extent of visual intrusions. Visual intrusion may be natural or constructed and the less affected the scenic corridor is by the intrusion, the more likely it is to be nominated [for designation]. Based on the requirements and the existing extent of visual intrusions, designation of I-680 as a scenic highway is unlikely.

- ***GOAL 4.1:*** *Make community health and safety a high priority for Benicia.*
  - ***Policy 4.1.1:*** *Strive to protect and enhance the safety and health of Benicians when making planning and policy decisions.*
- ***GOAL 4.7:*** *Ensure that existing and future neighborhoods are safe from risks to public health that could result from exposure to hazardous materials.*

The closest residential areas are more than 2,000 feet from the proposed unloading rack and new rail infrastructure. Valero owns about 400 acres of land west and south of their facility which has always served as a buffer between the Benicia Industrial Park, the Refinery and the City's residential

neighborhoods. The Project does not alter or impact this existing land buffer between the Refinery and the residential uses.

In addition, due to the nature of its operations, the Refinery maintains an onsite Fire Department that regularly coordinates with the City of Benicia Fire Department. Although the probability of an emergency at the same time as a train crossing is low, the existing at-grade train crossing at Park Road can potentially delay response times by the City of Benicia's emergency response vehicles in the area. If an emergency incident were to happen during those times, the City emergency responders would be required to use East 2nd Street to Industrial Way in order to access areas that normally would be accessed via Park Road. This alternative route of travel increases the response time to areas of the industrial park by slightly over two (2) minutes. However, the city has an operational aid agreement with the Refinery to address emergency response. Pursuant to the existing Operational Aid Agreement, the Refinery's onsite emergency response team will assist Benicia Fire Department by responding to off-site emergencies within the Park Road and Bayshore Road industrial areas if an emergency occurs during the event of a train crossing on Park Road.

Additionally, Benicia Fire Department uses Opticom transmitters which are placed on stoplights and on emergency response vehicles as a form of communication so that the stop light is changed to green for their direction of travel and a red light for cross traffic. There may be locations throughout the City where this is not available. Since the alternative route to the Park Road/Bayshore Road area is longer and designated for emergency response, it is important to have the equipment in place along this route. Draft condition of approval no. 11 requires that Valero insures that Opticom (3m) receivers along the entire alternate route of travel from Fire Station 11 (150 Military West) along Military West, East 2nd Street and Industrial Way to Park Road are installed and functional. In addition, Opticom transmitters shall be provided on all fire suppression units, including incident command vehicles.

Draft condition of approval no. 12 requires that Valero actively coordinate with the City's emergency responders to provide advanced notification of any blockage as well as install cameras at the intersection which provide live feed back to the City's Police and Fire dispatch center.

In regard to hazards associated with the proposed crude oil unloading rack, the Revised Draft EIR provides the following:

> "*[An] accident may occur at the rail unloading facility when a rail car is coupled to the manifold during unloading operations. This process could*

result in spills due to mechanical failure, structural failure, corrosion, or human error. The most likely spill related event would be a release during the unloading process due to a loading line failure.

To minimize the likelihood and the volume in the event of an oil spill at the unloading rack, hardware design on the rack includes a sight/flow glass for each tank car to verify that the contents have been emptied prior to decoupling the hose, a check valve between the offloading header and each tank car to prevent backflow from the offloading header, and manually operated block valves on both ends of the offloading hose. Since the volume released would be relatively small, contained on site, and under controlled conditions, the impact would be less than significant. Even so, the sump under the unloading facility has the capacity to receive and contain a volume almost nine times greater than the capacity of one tank car. This containment volume is significantly larger than the EPA 40 CFR 112.9 SPCC, which requires 100% of a single storage container and sufficient freeboard to contain precipitation. Given this, even if the contents of one entire tank car were released during an unloading operation, the impact would remain contained and less than significant.

The loading area also would be equipped with a fire protection system that complies with code requirements at the time of construction..." (pp. 2-106 to 2-107)

- ***GOAL 4.8:*** *Protect sensitive receptors from hazards.*
  - ***Policy 4.8.1:*** *Evaluate potential hazards and environmental risks to sensitive receptors before approving development.*

The environmental review associated with the proposed Project evaluated and addressed several different factors relating to community health and safety including, air quality, hazardous materials, water quality, transportation, etc. The EIR determined that the potential impacts within the City's purview can be mitigated to a less-than-significant level. All associated significant and unavoidable Project impacts are associated with rail operations and therefore beyond the authority of the City to mitigate or regulate.

The proposed change of transport of up to 70,000 barrels of crude oil per day by marine vessel transport by rail car results in a net decrease of air pollutants and greenhouse gas emissions in the Bay Area.

The Project area is located on the northeast portion of the Refinery. The closest sensitive receptors to the proposed Project would be residencies over

2,000 feet northwest of the Project site. The potential impacts to these receptors were evaluated in the EIR and it was determined that the impact would be less than significant.

- ***GOAL 4.9:*** *Ensure clean air for Benicia residents.*

  The General Plan requires that projects with identified significant air quality impacts include all feasible mitigation measures needed to reduce impacts to less than significant levels. This Project does not change the air impacts from the processing of crude oil but does change air quality impacts due to temporary construction and the change in delivery method. The EIR prepared for the proposed Project identified mitigation measures during Project construction. Those mitigation measures implement the Bay Area Air Quality Management District (BAAQMD) control measure for Project construction.

  The change of shipment of up to 70,000 barrels of crude oil per day by marine vessel to shipment by rail car results in a net decrease of air pollutants and greenhouse gas emissions. The emissions by marine vessel are higher than the emissions by rail car; therefore, the operation of the proposed Project results in proportionately less emission reduction in the San Francisco Bay Area air basin which includes the City of Benicia. By reducing the air pollutants, the proposed Project is consistent with the goal of having clean air for Benicia residents.

- ***GOAL 4.22:*** *Update and maintain the City's Emergency Response Plan.*
  - ***Policy 4.22.1*** *Provide an early community alert and notification system and safe evacuation plan for emergency incidents.*
  - ***Policy 4.22.3*** *Provide the public with information on specified emergency evacuation routes.*

  The proposed Project does not necessitate an update to the City's Emergency Response Plan. However, the potential impacts associated with the transport of crude by rail serve as a reminder that the City can always benefit from maintaining such a plan.

  As part of the City's Emergency Response Plan, the City uses the Community Alerting & Notification (CAN) System. The CAN System consists of seven sirens throughout the community, and is intended to alert the community to potential hazards associated with the Refinery. In addition, the CAN System also includes the ability to display messages on the local cable station and provide broadcast information on the local AM radio station. The intent is that community members upon hearing the siren could tune into the radio or television for further information or instructions related to the incident. This

system is currently being upgraded to include more modern technology and enhanced notification to the public.

Emergency evacuation route information is communicated to the public through local cable channel, local radio, City's website, social media (Facebook & Twitter), and CityWatch. (Reverse 911). Proposed upgrades to the CAN System will provide enhanced notification capabilities.

- ***GOAL 4.23:*** *Reduce or eliminate the effects of excessive noise.*

  As described in the EIR, the proposed Project does not create excessive noise; therefore no effects need to be reduced or eliminated. Noise levels associated with the proposed Project would be related to the movement of rail cars and operation of the unloading rack pumps. A noise assessment was prepared by Wilson Ihrig &Associates to evaluate noise level increases due to the implementation of the proposed Project. The noise assessment found that under worst-case conditions, noise generated by the Project once operational would be similar to existing noise generated by the Refinery.

Climate Action Plan Analysis/Consistency

The purpose of the City of Benicia Climate Action Plan (CAP) is to provide objectives and strategies that guide the development and implementation of actions that cut Benicia's greenhouse gas emissions (GHG) to meets its established goals of reducing GHG. Principle 3 GHG Reductions in Industrial and Commercial Sector on p. 16 of the CAP states that "Reducing GHG emissions in the Industrial and Commercial sector is critically important given the significant emissions associated with the sector…."

While the CAP states that the Valero Refinery is one of two large emitters in the City which are primarily regulated by federal and State agencies, the Project would result in a reduction of GHG emissions in the Bay Area.

Objective IC-4 is to *Encourage the Valero Refinery to Continue to Reduce Emissions*. Strategy IC-4.1. *Continue Implementing Capital Improvement Programs* focuses on regular replacement of inefficient equipment to maintain efficient industrial processes. Strategy IC- 4.2. *Investigate Onsite Energy Production* supports generating on-site energy to reduce fluctuation in energy costs and increase the efficiency of the power generated due to reduced transmission loss. The strategy suggests that Valero should consider becoming operationally independent for energy supply.

The Project results in a decrease in GHG emissions in the Bay Area, thus the Project would not directly conflict with the City's established strategies to support Objective IC-4; including Strategy IC-4.1 and Strategy IC4.2. Therefore,

the Project would not conflict with the Climate Action Plan.

Onsite Project construction of the unloading rack, containment berm, piping, etc., would generate GHG construction-related emissions due to the use of heavy-duty off-road equipment that would include excavators, graders, front loaders, dump trucks, cranes, paving equipment, etc. The CAP does not focus on construction related emissions due to their temporary nature. However, the Project would comply with all BAAQMD requirements for emissions during construction, thus mitigating potential impacts during construction.

ENVIRONMENTAL REVIEW:
The first decision that must be made when considering the Use Permit for the Project is whether to certify the EIR. The key issues in certifying the EIR are whether the EIR adequately identifies and addresses the potential significant environmental impacts and whether those impacts within the City's purview would be reduced below established thresholds by the implementation of the proposed mitigation measures. Because CEQA was designed to apprise the public and decision makers, like the Planning Commission, about the potential significant environmental effects of proposed projects, the City ultimately chose to evaluate the Project beyond the boundaries of the Project site. This has resulted in the EIR identifying some potential environmental damage beyond what the City may legally mitigate or avoid because of preemption. The impacts that may be mitigated and the impacts that cannot be mitigated are discussed below. Note that impacts such as Air Quality Impact 4.1-1 may be both mitigatable and not mitigatable depending on the details of the impact (i.e. are the impacts due to rail operations).

Potential Impacts with Mitigation Measures
The EIR identified 8 potentially significant impacts relating to Air Quality, Biological Resources, Energy Conservation, Geology and Soils, and Hydrology and Water Quality. All of these impacts can be mitigated to a less-than-significant level by mitigation measures described in the EIR. An overview of those impacts is provided as follows:

<u>Air Quality</u>
The air quality analysis takes into consideration both the construction phase and the operation of the Project: the EIR concludes that the construction-related air quality impact would be less than significant with mitigation incorporated (Impact 4.1-1) and that the operations-related air quality impact would be less than significant. Air pollutant emissions were estimated by ERM, a consultant to the Applicant, and independently reviewed by the City's consultant, ESA.

BAAQMD basic control measures, which are recommended for every construction project and contained in Mitigation Measure 4.1-1, would be

implemented to ensure that impacts associated with construction exhaust emission and fugitive dust emissions would be reduced to a less-than-significant level.

Mitigation Measure 4.1-1: Implement BAAQMD Basic Mitigation Measures. Valero and/or its construction contractors shall comply with the following applicable BAAQMD basic control measures during Project construction:

- All exposed dirt non-work surfaces (e.g., parking areas, staging areas, soil piles, and graded areas, and unpaved access roads) shall be watered two times a day.
- All haul trucks transporting soil, sand, or other loose material off-site shall be covered.
- All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
- All vehicle speeds on unpaved roads shall be limited to 15 mph.
- Idling times shall be minimized either by shutting equipment off when not in use or reducing the maximum idling time to five minutes (as required by the California Airborne Toxics Control Measure Tile 13, Section 2485 of California of Regulations). Clear signage shall be provided for construction workers at all access points.
- All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified mechanic and determined to be running in proper condition prior to operation.
- A publicly visible sign with the telephone number and person to contact at the City of Benicia regarding dust complaints shall be posted throughout construction. Valero and/or contractor shall respond and take corrective action within 48 hours of notification by the City. The BAAQMD's phone number shall also be visible to ensure compliance with applicable regulations.

No mitigation measure is required to address operations-related air quality emissions, which would be less than significant. As explained in the EIR, operation of the proposed Project would result in reduced air emissions relative to the baseline within the San Francisco Bay Area Air Basin, meaning that the annual net operations exhaust emissions from the shipment by rail would be less than that for marine vessel (the baseline condition) within the Bay Area Air Basin.

<u>Biological Resources</u>

While other special-status species occur in the vicinity, they are unlikely to be impacted by the Project due to lack of habitat at the Project site. California red-legged frog (*Rana draytonii*) and Western pond turtle (*Actinemys marmorata*) are unlikely to occur in the proposed Project area, which is defined for this

analysis as the construction footprint where direct impacts to species could occur. Although the chain link fence marking the Refinery boundary is permeable to these species, there is no habitat in the proposed Project area and no protective cover.

Nesting birds also are unlikely to occur in the proposed Project area; however, they could occur in the adjacent Sulphur Springs Creek corridor and so could experience significant adverse indirect effects resulting from construction activities (Impact 4.2-1). The noise, vibrations, visual disturbance, and increased human activity associated with Project construction could result in nest failure (disturbance, avoidance, or abandonment that leads to unsuccessful reproduction), or cause flight behavior that exposes an adult or its young to predators such as Cooper's hawks (*Accipiter cooperii*). Nest failure is a possible but unlikely outcome of construction activities, since the baseline noise and activity levels at the Refinery would not be significantly increased by construction activities. However, if it were to occur, nest failure would be a significant effect under CEQA and a violation of California Fish and Game Code Sections 3503- 3513 and the federal Migratory Bird Treaty Act. Implementation of Mitigation Measure 4.2-1 would reduce potentially significant Project effects on nesting birds to a less-than-significant level.

The implementation of Mitigation Measure 4.8-1 (below in Hydrology and Water Quality) would reduce to a less than significant level potential significant adverse impacts to the Sulphur Springs Creek riparian corridor and downstream coastal brackish marshes during construction activities including grading and other soil-disturbing activities, which could result in excessive sediment loads being carried into surface waters (Impact 4.2-2) and to Sulphur Springs Creek, which is a federally protected waters, and downstream coastal brackish marshes, which are federally protected wetlands (Impact 4.2-3).

Mitigation Measure 4.2-1: Project construction activities should avoid the nesting season of February 15 through August 31, if feasible. If seasonal avoidance is not possible then no sooner than 30 days prior to the start of any Project activity a biologist experienced in conducting nesting bird surveys shall survey the Project area and all accessible areas within 500 feet. If nesting birds are identified, the biologist shall implement a suitable protective buffer around the nest and no activities shall occur within this buffered area. Typical buffers are 250 feet for songbirds and 500 feet for raptors, but may be increased or decreased according to site-specific, Project-specific, activity-specific considerations such as visual barriers between the nest and the activity, decibel levels associated with the activity, and the species of nesting bird and its tolerance of the activity. Construction activities that are conducted within a reduced buffer shall be conducted in the presence of a qualified full-time biological monitor.

Energy Conservation

Construction of the proposed Project would result in the consumption of energy and could cause a potential significant adverse effect on local and regional energy supplies or requirements (Impact 4.4-1). Although construction-related energy consumption would be short-term in duration, it would represent irreversible consumption of fossil fuel energy resources. The implementation of Mitigation Measure 4.1-1, which is set forth above in the Air Quality discussion, would ensure that fuel energy consumed in the construction phase would not be wasted through unnecessary idling or through the operation of poorly maintained equipment. With implementation of Mitigation Measure 4.1-1 and the short construction period (estimated to require approximately 25 weeks), construction of the Project would result in a less than significant impact relating to energy conservation.

Geology and Soils

Consistent with the California Supreme Court's December 17, 2015 decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, CEQA's requirement for an EIR to analyze the environmental effects of a project does not require agencies to analyze the environment's effects on a project where the project would not exacerbate existing environmental hazards. Here, the proposed Project would not exacerbate seismic conditions in the Project area. Nonetheless, the EIR analyzes each of the potential geology and soils related issues identified in CEQA Guidelines Appendix G and identifies mitigation measures to reduce potential significant effects below established thresholds.

With foundation and structural design in accordance with the current California Building Code (CBC) standards, seismic shaking should not result in significant structural damage to proposed Project components. Seismic design consistent with current professional engineering and Refinery industry standards would be employed in the proposed construction for resistance to strong ground shaking, especially for lateral forces. At a minimum, the CBC requirements would be followed during design and construction of all elements of the proposed Project. Additionally, consistent with the City's Building Code, the Applicant would be required to submit geotechnical engineering reports to the City that address site stability and foundation integrity for projects involving substantial grading in order to obtain grading or construction permits. Consistent with and in addition to Building Code requirements, the following mitigation measure would ensure that the level of risk from ground shaking (Impact 4.5-1) would be less than significant.

Mitigation Measure 4.5-1: Consistent with the geotechnical investigations and deformation analysis conducted to evaluate the potential for liquefaction hazards, the Valero Benicia Refinery shall incorporate into the final Project

design all recommendations to overcome lateral displacement, horizontal ground separation, and vertical settlement as provided by the licensed geotechnical engineer. Specifically, the Valero Benicia Refinery, in its design of the railroad Project element located in areas identified as underlain by liquefiable or problematic soils, shall design for total seismic lateral displacements of 8 inches to 39 inches. Railroad ties and slabs shall be analyzed to evaluate the effect of up to a 6 inch wide horizontal ground separation and all recommendations to overcome such horizontal ground separation provided by the licensed geotechnical engineer incorporate into the final Project design. A differential settlement of 2 inches across the gage width shall be analyzed to evaluate rail car tipping potential and all recommendations provided by the licensed geotechnical engineer incorporated into the final Project design. All geotechnical design shall comply with seismic design requirements of CBC [the California Building Code].

Mitigation Measure 4.5-2: Valero Benicia Refinery shall include into its current track inspection program, regular and, in the event of a seismic incident with potential for track damage, post-earthquake inspections of the proposed track sections to ensure compliance with Federal Railroad Administration (FRA) track safety standards. Additionally, in the event of an incident with potential for track damage, such as an earthquake and associated secondary ground failure (such as liquefaction or lateral spreading) track inspection shall occur after the occurrence and before the operation of any train over that track.

Hydrology and Water Quality

Construction activities associated with the proposed Project would require land disturbing activities such as grading, earthmoving, backfilling, and compaction. Additionally, proposed Project construction would involve use of chemicals and solvents such as fuel and lubricating grease for motorized heavy equipment. Such construction activities could cause dislodging of soil and erosion or inadvertent spills of construction related chemicals into waterways resulting in potential significant adverse water quality impacts (Impact 4.8-1). Sulphur Springs Creek is directly adjacent to the proposed Project and these impacts could be significant in the immediate vicinity of construction activities as well as further downstream. Construction or grading activities occurring on land parcels of one acre or more in size are subject to a General Construction Permit under the National Pollutant Discharge Elimination System permit program under section 402(p) of the federal Clean Water Act. However, the San Francisco Bay Regional Water Quality Control Board confirmed that stormwater runoff generated during Project construction activities would not require coverage under the General Permit for Construction Activities based on measures described in Valero's SWPPP. Implementation of a storm water management plan (SWMP) as described in Mitigation Measure 4.8-1 would ensure that the Project would not substantially degrade water quality. Implementation of

standard construction procedures and precautions would also ensure that the water quality impacts related to the handling of chemicals from Project construction would be less than significant.

Mitigation Measure 4.8-1: The Applicant and/or its contractor shall prepare and implement a storm water management plan (SWMP) for construction of the Project. The Project is covered under the Applicant's National Pollutant Discharge Elimination System (NPDES) permit and storm water pollution prevention plan (SWPPP). A notice of intent (NOI) application and notice of termination (NOT) application are not required. Implementation of the SWMP shall start with the commencement of construction and continue through the completion of the Project. The SWMP shall identify pollutant sources (such as sediment) that may affect the quality of storm water discharge and implement best management practices (BMPs) consistent with the California Stormwater Quality Association's BMP Handbook for Construction to reduce pollutants in storm water. The Applicant or the construction contractor shall install erosion and storm water control measures on the construction site such as installation of a silt fence and other BMPs, particularly at locations close to storm drains and water bodies. The BMPs shall also include practices for proper handling of chemicals such as avoiding fueling at the construction site and overtopping during fueling and installing spill containment pans.

Significant and Unavoidable Impacts (Impacts without Mitigation Measures)
The EIR also identified 11 significant and unavoidable impacts related to Air Quality, Biological Resources, Greenhouse Gas (GHG) Emissions, and Hazards and Hazardous Materials. The EIR concludes that these 11 potential significant environmental impacts are beyond the City's authority to regulate or mitigate. These impacts would result exclusively from the transport of materials for the Project by rail and the City is preempted from mitigating those impacts.

The DEIR and Revised DEIR evaluated all feasible mitigation measures to reduce potential significant impacts to a less-than-significant level. "If the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly explain the reasons underlying the lead agency's determination." (14 Cal. Code Regs. §15126.4(a)(5)). Mitigation measures that are beyond a lead agency's powers to impose or enforce are legally infeasible. *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276. As explained in the EIR,[1] the City cannot regulate UPRR's rail operations either directly (e.g., by dictating routing, timing, or choice of locomotives) or indirectly

[1] See, DEIR Section 3.7, *Federal Preemption of Railroad Regulation*, DEIR Appendix L, *Union Pacific Railroad Statement re: Preemption*, and Revised DEIR Appendix G, *Preemption of CEQA by the ICCTA*.

(e.g., by requiring Valero to pay a mitigation fee or purchase emissions offsets). Any such attempt would be preempted by federal law, which proscribes any mitigation measure that would have the effect of managing or governing rail operations. For these reasons, mitigation measures to reduce the potential effects of train transport wherever they may occur between the point of origin and the Refinery are preempted by federal law and legally infeasible under CEQA and the California Planning and Zoning Law.

As discussed in greater detail below, the legal concept of "federal preemption" precludes the City's ability to condition or regulate operation of the railroad. Potential impacts resulting from operation of the railroad are identified in the EIR, but do not bear on the City's decision making with respect to certification of the EIR or consideration of the Use Permit. Nonetheless, each potential significant unavoidable impact identified in the EIR is summarized for informational purposes below:

Air Quality

- Locomotive emissions associated with the Project's transportation of crude oil by rail could conflict with implementation of applicable air quality plans [Impact 4.1-1].
- Locomotive emissions required to transport Project-related crude by rail would contribute to an existing or projected air quality violation(s), including NOx [Impact 4.1-1b].
- Locomotive emissions required to transport Project-related crude by rail could result in a cumulatively considerable net increase in criteria pollutant and ozone precursor emissions [Impact 4.1-2].
- Locomotive emissions associated with operation of the Project could contribute to an existing or projected air quality violation uprail from the Roseville Yard [Impact 4.1-5].
- Locomotive emissions associated with operation of the Project could result in cumulatively considerable net increases in ozone precursor emissions in uprail air districts [Impact 4.1-7].

Biological Resources

- The Project could have a substantial adverse effect on candidate, sensitive or special-status wildlife species or migratory birds, including injury or mortality, resulting from collisions with trains along the North American freight rail lines as a result of increased frequency (high traffic volumes) of railcars [Impact 4.2-10].

Greenhouse Gas Emissions

- Locomotive emissions associated with the Project would generate direct and indirect GHG emissions [Impact 4.6-1].

- GHG emissions resulting from the increase in locomotive emissions required to transport Project-related crude oil by rail would conflict with Executive Order S-3-05 [Impact 4.6-2].

Hazards and Hazardous Materials

- The Project could pose significant hazard to the public or the environment at points along the North American freight rail lines through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment [Impact 4.7-2]. Although the risk of such an occurrence is extremely low, the potential consequences of such an event could be extremely high.
- Train derailments and rail car unloading accidents that lead to hazardous materials spills, fires, and explosions could result in substantial adverse secondary effects, including to Biological Resources, Cultural Resources, Geology and Soils, and Hydrology and Water Quality [Impact 4.7-6]. As analyzed in the EIR, these extremely low-risk events could have extremely high consequences.
- Operation of the Project could expose people or structures to significant risk, injury, or loss from wildland fire if a train derails in a fire hazard severity zone and a resulting fire or explosion causes a wildland fire [Impact 4.7-9].

CEQA Findings & Statement of Overriding Considerations

In order to certify the EIR, the Planning Commission must make three key decisions. The first relates to the adequacy of the EIR. The second relates to required findings. The third relates to the Statement of Overriding Considerations because of the Project's impacts. All of these decisions which are included in the draft resolution adopting the EIR are discussed in detail below.

First, prior to approving a project, the Planning Commission shall certify that:

1. The Final EIR was completed in compliance with CEQA (is legally sufficient);
2. The Commission reviewed and considered the Final EIR; and
3. The Final EIR reflects the City's independent judgment and analysis. (CEQA Section 15090).

As noted earlier, if the Commission cannot make these findings, the Commission should be very specific in detailing where the document is deficient so that the deficiencies may be corrected.

Second, the City shall not approve a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the City makes written findings for each of those significant effects. CEQA Guidelines Section 15091(a) states:

"…The possible findings are:

(1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR.

(2) Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency.

(3) Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR."

These findings pertaining to each of the significant environmental effects identified in the EIR are provided below and organized as follows:

A. Findings Regarding Impacts That Will be Mitigated to Below a Level of Significance
B. Findings Regarding Infeasible Mitigation Measures
C. Findings Regarding Mitigation Measures That are the Responsibility of Another Agency
D. Findings Regarding Alternatives.

A. Findings Regarding Impacts That Will be Mitigated to Below a Level of Significance (CEQA §21081(a)(1) and CEQA Guidelines §15091(a)(1)

The FEIR identifies the following potential impacts, which would be mitigated to below a level of significance by the mitigation measures set forth above:

- Air Quality Impact 4.1-1 (construction-related air emissions)
- Biological Resources Impact 4.2-1 (construction-related impacts to nesting birds)
- Geology and Soils Impact 4.5-1 (seismicity-related liquefaction hazards)
- Geology and Soils Impact 4.5-2 (operations-related earthquake-related track displacement)
- Hydrology and Water Quality Impact 4.8-1 (construction-related storm water management)
- Transportation and Traffic Impact 4.11-4 (emergency access to the Park Road and Bayshore Road industrial areas)

The City, having reviewed and considered the information contained in the FEIR and the Record of Proceedings pursuant to Public Resource Code §21081(a)(1)

and State CEQA Guidelines §15091(a)(1), adopts the following finding regarding these potential significant effects:

Finding. Changes or alterations have been required in or incorporated into the project, which avoid or substantially lessen the significant environmental effect as identified in the Final EIR.

Discussion. With the implementation of recommended mitigation measures, the potential impacts would be reduced to a less-than-significant level.

B. Findings Regarding Infeasible Mitigation Measures (Public Resources Code §21081(a)(3) and CEQA Guidelines §15091(a)(3))

The FEIR identifies the following impacts as significant and unavoidable on the basis that federal preemption precludes the City from imposing any requirement that would regulate rail operations either directly (e.g., by dictating routing, timing, or choice of locomotives) or indirectly (e.g., by requiring Valero to pay a mitigation fee or purchase emissions offsets):

- Air Quality: Impact 4.1-1 (locomotive emission-related conflict with implementation of applicable air quality plans); Impact 4.1-1b (locomotive-related contribution to existing or projected air quality violation(s)), Impact 4.1-2 (cumulatively considerable locomotive-related net increase in criteria pollutant and ozone precursor emissions), Impact 4.1-5 (locomotive emission-related contribution to an existing or projected air quality violation uprail from the Roseville Yard), and Impact 4.1-7 (cumulatively considerable locomotive emission-related net increases in ozone precursor emissions in uprail air districts).
- Biological Resources: Impact 4.2-10 (train collision-related impacts to candidate, sensitive or special-status wildlife species or migratory birds, including injury or mortality).
- GHG Emissions: Impact 4.6-1 (locomotive-generated direct and indirect GHG emissions) and Impact 4.6-2 (locomotive emissions-related conflict with Executive Order S-3-05).
- Hazards and Hazardous Materials: Impact 4.7-2 (reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment posing a significant hazard to the public or the environment at points along the North American freight rail lines), Impact 4.7-6 (train derailments and rail car unloading accidents that lead to hazardous materials spills, fires, and explosions thereby resulting in substantial adverse secondary effects, including to Biological Resources, Cultural Resources, Geology and Soils, and Hydrology and Water Quality), and Impact 4.7-9 (exposure of people or structures to significant risk,

injury, or loss from wildland fire if a train derails in a fire hazard severity zone and a resulting fire or explosion causes a wildland fire).

The City, having reviewed and considered the information contained in the FEIR and the Record of Proceedings and pursuant to Public Resource Code §21081(a)(3) and State CEQA Guidelines §15091(a)(3), makes the following finding regarding these impacts:

Finding. Specific economic, legal, social, technological or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR. Each of the significant unavoidable impacts identified above has been determined to be unavoidable on the basis of legal infeasibility due to federal preemption of CEQA by the Interstate Commerce Commission Termination Act of 1995 (ITTCA).

Discussion. "Feasible" is defined in CEQA Guidelines Section 15364 to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." The CEQA statute (Section 21081) and Guidelines (Section 15019(a)(3)) also provide that "other" considerations may form the basis for a finding of infeasibility. Case law makes clear that a mitigation measure or alternative can be deemed infeasible on the basis of its failure to meet project objectives or on related public policy grounds.

C. Findings Regarding Mitigation Measures That are the Responsibility of Another Agency (Public Resources Code §21081(a)(2)) and CEQA Guidelines §15091(a)(2))

As noted above, each of the significant unavoidable impacts identified above has been determined to be unavoidable on the basis of legal infeasibility due to federal preemption. The City, having reviewed and considered the information contained in the FEIR and the Record of Proceedings, finds pursuant to CEQA §21081(a)(2) and CEQA Guidelines §15091(a)(2) that there are changes or alterations which could reduce significant impacts that are within the responsibility and jurisdiction of another public agency.

Finding. Such changes or alterations are within the responsibility and jurisdiction of other public agencies and not the agency making the finding. Such changes have been adopted by such other agencies or can and should be adopted by such other agencies.

Discussion. Federal law precludes the City from imposing any mitigation measure, condition of Use Permit approval, or other requirement that would

regulate rail operations either directly (e.g., by dictating routing, timing, or choice of locomotives) or indirectly (e.g., by requiring Valero to pay a mitigation fee or purchase emissions offsets). The Federal Railroad Administration (FRA) is a department within the U.S. Department of Transportation (USDOT). The FRA adopts and enforces railroad safety regulations, including regulations relating to track safety, grade crossings, rail equipment, operating practices, and the transport of hazardous materials by rail. FRA promulgates railroad safety regulations (49 CFR subtitle B, chapter II (parts 200-299)) and orders, enforces those regulations and orders as well as the Hazardous Materials Regulations at 49 CFR Parts 171-180, and the Federal railroad safety laws, and conducts a comprehensive railroad safety program. Federal agencies, specifically including the FRA and USDOT more generally, have jurisdiction over locomotive emissions, including emission of GHGs, and over track and rail car safety. Federal agencies' ongoing efforts to improve rail safety are summarized in Revised DEIR Section 2.12.2.4 (p. 2-68 et seq.).

The Pipeline and Hazardous Materials Safety Administration (PHMSA) is another department within the USDOT. Pursuant to the Hazardous Materials Transportation Act, PHMSA adopts regulations governing the transport of hazardous materials by rail, highway, air, and water. The PHMSA regulations are set forth in Chapter I of Subtitle B of Title 49 of the Code of Federal Regulations (CFR). The FRA enforces the requirements set forth in PHMSA regulations.

The United States Environmental Protection Agency (EPA) is a federal agency that implements and enforces federal environmental laws, including the federal Clean Air Act. EPA has the authority to regulate air emissions from locomotive engines, and has adopted regulations to that end. See 40 C.F.R. Part 1033.

Federal agencies can and should continue regulatory efforts to further minimize potential risks associated with the transportation of hazardous materials, including crude oil, by rail. The Planning Commission could recommend to the City Council that the Council request congressional representatives adopt appropriate laws to address these issues.

D. Findings Regarding Alternatives (Public Resources Code §21081(a)(3) and CEQA Guidelines §15091(a)(3))

Because the Project would cause one or more significant unavoidable environmental effects, the City must make findings with respect to the alternatives to the proposed Project considered in the FEIR, evaluating whether these alternatives could feasibly avoid or substantially lessen the proposed Project's unavoidable significant environmental effects while achieving most of its objectives. Project objectives are listed in DEIR Section 3.2.1 and set forth below for ease in reference:

1. Allow for the delivery of up to 70,000 barrels per day of North American-sourced crude oil by rail.
2. Replace marine vessel delivery with rail delivery of up to 70,000 barrels per day of crude oil.
3. Mitigate Project-related impacts.
4. Implement the proposed Project without changing existing Refinery process equipment or Refinery process operations, other than operation of the Project components.
5. Continue to meet requirements of existing rules and regulations pertaining to oil refining including the State of California Global Warming Solutions Act of 2006 (AB 32).

The EIR evaluated four alternatives, including three Project alternatives and one No Project Alternative: Alternative 1, which would limit the proposed Project to one 50-car train delivery per day as described in DEIR Section 6.4.2.1 (p. 6-7 et seq.); Alternative 2, which would restrict train delivery at the Refinery to nighttime hours as described in DEIR Section 6.4.2.2 (p. 6-8); Alternative 3, which would involve an offsite unloading terminal as described in DEIR Section 6.4.3 (p. 6-8 et seq.); and the No Project Alternative.

The City, having reviewed and considered the information contained in the FEIR and the Record of Proceedings, and pursuant to Public Resource Code §21081(a)(3) and State CEQA Guidelines §15091(a)(3), makes the following findings with respect to the alternatives discussed in the FEIR:

Finding. Specific economic, legal, social, technological, or other considerations, including considerations of the provision of employment opportunities for highly trained workers, make infeasible Alternative 1 and Alternative 2 identified in the FEIR. More specifically, Federal preemption precludes the City from regulating rail operations including the number of rail cars and the timing of rail car deliveries.

Discussion. Definitions, issues of feasibility, and federal preemption are discussed above.

Finding. The No Project Alternative would not allow the Refinery to meet most of the Project objectives.

Discussion. If the City selected the No Project Alternative, then existing authorizations for the Refinery would not allow for the delivery of up to 70,000 barrels per day of North American-sourced crude oil by rail, would not replace marine vessel delivery with rail delivery of up to 70,000 barrels per day of crude oil, and would not mitigate Project-related [air quality] impacts [within the Bay Area Air Basin]. The No Project Alternative would meet the objectives of not

resulting in a change in existing Refinery process equipment or Refinery process operations and of continuing to meet requirements of existing rules and regulations pertaining to oil refining including the State of California Global Warming Solutions Act of 2006 (AB 32).

Finding. Alternative 3 would not avoid or substantially lower potential significant impacts of the Project, but would allow the Refinery to meet most of the basic Project objectives. Alternative 3 may be infeasible.

Discussion. As shown in Revised DEIR Table ES-1 (p. 2-10 et seq.), which summarizes the environmental impact conclusions for the proposed Project and each of the alternatives, Alternative 3 would result in greater impacts to Biological Resources, Hydrology and Water Quality, and Noise relative to the proposed Project. Feasibility is questionable based on whether it would be capable of being accomplished in a successful manner within a reasonable period of time, considering that no specific site or sites have been identified or permitted and that environmental impacts would be shifted and possibly intensified by siting an offloading rack and related infrastructure in a different location.

Notwithstanding these concerns, Alternative 3 would meet most of the basic Project objectives: it would allow for the delivery of up to 70,000 barrels per day of North American-sourced crude oil by rail, would replace marine vessel delivery with rail delivery of up to 70,000 barrels per day of crude oil, would not result in a change in existing Refinery process equipment or Refinery process operations, and would allow the Refinery to continue to meet requirements of existing rules and regulations pertaining to oil refining including the State of California Global Warming Solutions Act of 2006 (AB 32).

Third, a Statement of Overriding Considerations is required if the Project is to be approved because of the environmental impacts that cannot be mitigated as noted in the findings discussed above. The Statement of Overriding Considerations is in addition to those findings discussed above. Under Public Resources Code Section 21081, a lead agency cannot approve a project that will result in significant unavoidable impacts on the environmental unless the agency finds that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." The Interstate Commerce Commission Termination Act (ICCTA), however, preempts this provision as applied to significant impacts caused by rail operations. The ICCTA broadly preempts local permitting or "preclearance" requirements that "could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [Surface Transportation Board] has authorized." (*Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 330 (2014).) If the City were to deny

Valero's application based on impacts from rail operations, the effect would be to preclude Union Pacific operations that have been authorized by the Surface Transportation Board.

Staff has prepared a Statement of Overriding Considerations for the Planning Commission's consideration. The Statement of Overriding Considerations will be an attachment to the resolution for the EIR. The Planning Commission must weigh the Project benefits and impacts in the Statement of Overriding Considerations. Staff believes that the benefits of the Project do not outweigh the significant and unavoidable impacts on uprail communities. The draft Statement of Overriding Considerations attached to this report as Exhibit A-1 finds that the Project benefits do not outweigh the Project's impacts, but that it is legally infeasible due to preemption to mitigate the impacts of the Project.

Because it is within the Commission's discretion to determine that the Project benefits do outweigh the significant and unavoidable impacts on uprail communities, the Commission could adopt a "standard" Statement of Overriding Considerations. This alternative has been provided as Exhibit A-2.

In order to prepare the Statement of Overriding Considerations, staff has identified the following benefits of the Project:

1. The Project will generate additional tax revenue for the City. A report commissioned by Valero, prepared by Andrew Chang & Company, LLC and dated May 2014[2] concluded as follows:

- The Project will generate almost $200,000 in additional sales tax.
- The Project will increase the value of the Refinery property by approximately $55 million, which will increase property tax revenue by $175,000 per year.
- Project construction will create over 1,000 jobs and could generate up to $2 million in one-time sales tax revenue for the City based on sales of construction materials.

2. The Project will create 20 permanent jobs at the Refinery, and indirectly create an additional 30-40 jobs in the region.

3. The Project will reduce greenhouse gas (GHG) emissions by a total of 225,000 tons per year based on replacing ship trips with locomotive trips for delivery of 70,000 barrels per day of crude oil to the Refinery.

[2] Note that this report was submitted as part of the draft EIR comments from Diane Sinclair.

4. The Project will generate as much as $1,600,000 in annual funding for the California's Office of Spill Prevention and Response for inland spill preparedness.

5. The Project will reduce the likelihood of an oil spill as compared to the risk of maritime spills under current conditions.

6. The Project will ensure the continuing economic viability of the Valero Refinery, thus protecting more than 500 jobs and tax revenues comprising approximately 20% of the City's general fund operating budget.

The January 22, 2016 Report of the City's consultant Dr. Steve McGovern supports benefit no. 6. In his report, Dr. McGovern explains that, without access to North American crudes, the Benicia Refinery could be at a severe economic disadvantage as compared with other West Coast refiners, which could lead to closure of the Refinery.

The failure of the Planning Commission to take any of these three steps means that the Project cannot be approved. Once the three steps are approved, consideration of the Use Permit is appropriate.

USE PERMIT FINDINGS

Once the Commission has certified the FEIR, adopted the mitigation measures and the Statement of Overriding Considerations, it must determine whether to approve or deny the Use Permit based on the required findings. As discussed in the previous section on the CEQA Findings and Statement of Overriding Considerations, preemption again limits consideration of the rail related aspects of the Project. This is discussed further in the paragraph below. The City may only consider aspects of the Project which are within its purview.

Per BMC 17.104.060, the City cannot approve a project that will be "detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of such use, nor detrimental to properties or improvements in the vicinity or to the general welfare of the city." However, the Interstate Commerce Commission Termination Act (ICCTA), among other laws, preempts this requirement to the extent that it would require the City to deny Valero's application based on the health and safety risks of rail operations. The ICCTA broadly preempts local permitting or "preclearance" requirements that "could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [Surface Transportation Board] has authorized." (*Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 330 (2014).) If the City were to deny Valero's application for the proposed Project based on health and safety risks posed by rail operations, the

effect would be to preclude Union Pacific operations that have been authorized by the Surface Transportation Board.

Therefore, the Planning Commission is limited and may only make Use Permit findings as they relate to the aspects of the Project that do not involve the railroad. Findings not related to rail operations would have to be made to deny the proposed Project. Findings related to rail impacts cannot be used as a reason to deny the project.

The three findings which are required to be made in order to approve a Use Permit as outlined in BMC 17.104.060 are as follows:

1. That the proposed location of the use is in accord with the objectives of the City of Benicia Zoning Ordinance set forth as Title 17 of the Municipal Code, and the purposes of the district in which the site is located.

The proposed Project meets the objectives of the Zoning Ordinance and the purposes of the General Industrial (IG) zoning district as outlined in Sections 17.04.030 and 17.32.010 of the Zoning Ordinance as follows:

The specific purpose of the IG zoning district is "*to provide sites for the full range of manufacturing, industrial processing, general service, and distribution uses deemed suitable for location in Benicia; and to protect Benicia's general industrial areas, to the extent feasible, from disruption and competition for space from unrelated retail and commercial uses that could more appropriately be located elsewhere in the city. Performance standards will minimize potential environmental impacts.*" The Refinery, as a use that manufactures products (fuels) by processing raw materials (crude oil and gas oil), is consistent with the purpose of the IG district in that the Project would enhance the Refinery's ability to fulfill that purpose. The Project would consist of changes and improvements to an existing industrial use in an existing industrial district. The Project's improvements would be constructed within the existing Refinery footprint, and as mitigated and conditioned would meet performance standards set forth in Section 17.70.240 of the Zoning Ordinance to ensure that development projects conform with all applicable air and water quality regulations and do not create hazards or problems related to noise, glare, hazardous materials, heat and humidity or electromagnetic interference.

The Project would not have service demands that exceed the capacities of existing streets, utilities or public services. The Project would not have an effect on views of the shoreline and undeveloped hillsides and ridgelines as the new rail car unloading rack would be much shorter than the adjacent development blocking their visibility from most of the off-site viewpoints. The

Project would have no effect on the City's architectural and cultural resources. The Project would not affect existing open space nor would it interfere with future open space plans of the City.

The Project would support the Refinery in its ability to remain competitive in the marketplace and into the future. It would also provide an estimated 121 temporary construction jobs and up to 20 permanent full-time jobs, thereby strengthening the City's economic base. The addition of no more than 20 new employees or contractors would not cause or make a significant contribution to excessive population densities.

2. That the proposed location of the conditional use and the proposed conditions under which it would be operated or maintained would be consistent with the General Plan and will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of the use, nor detrimental to the properties or improvements in the vicinity or to the general welfare of the city.

The EIR, together with the conditions of approval set forth herein and discussed in the staff report, show that the Project, as mitigated and conditioned, would be consistent with all applicable goals and policies of the General Plan. For areas of impact within City purview, the Project would not be detrimental to public health, safety, and welfare because the impacts of the Project would be mitigated by measures that are incorporated into the Project or that are required by the conditions of approval. In addition the proposed change of shipment from marine vessel to rail car for up to 70,000 barrels per day will result in a net decrease in the amount of greenhouse gas emissions in the Bay Area. The mitigation monitoring and reporting program will ensure that the Project is consistent with implementing Program 2.36.A of the General Plan and enhancing the public health, safety, and welfare.

3. That the proposed conditional use will comply with the provisions of the Zoning Ordinance, including any specific condition required for the proposed conditional use in the district in which it would be located.

As shown by the Use Permit Findings 2 and 3 and the discussion in the staff report, the Project as mitigated and conditioned would comply with the provisions of the Zoning Ordinance. There are no specific conditions required for oil and gas refining in the IG district except that a use permit is required.

As set forth above, the findings can be made for the Project, as mitigated and with the proposed conditions of approval.

PUBLIC COMMENT
The Project has received a great deal of interest over the last few years. As noted in the "Environmental Analysis" section of this staff report, the City has held five public meetings and solicited public input on the environmental review for the Project on five different occasions. The majority of written comments received were submitted during one of the four official comment periods:

1. Initial Study Mitigated Negative Declaration
2. EIR Scoping
3. Draft EIR
4. Revised Draft EIR

Those comments which were submitted after the end of the official comment period for the Draft EIR (September 16, 2014- August 28, 2015) and after the end of the official comment period for the Revised Draft EIR (October 31, 2015 – January 25, 2015) were not included in the Response to Comments of the Final EIR. Those are attached to this staff report.

In addition to late comments on the EIR, comments have been submitted throughout the process on the Project in general. All of these comments are also included as an attachment to this staff report.

CONCLUSION:
The Final EIR has been completed in accord with CEQA requirements and accurately describes the potential impacts of the Project and the necessary mitigations. Due to the fact that all significant and unavoidable impacts which would necessitate a Statement of Overriding Considerations are related to the Project's association with rail operations, Section 21081 of the Public Resources Code is preempted. As noted earlier, the Statement of Overriding Considerations has been prepared recognizing that the fact that Commission may not be able to find that the benefits of the Project outweigh the impacts but that preemption negates the application of Public Resources Code Section.

Those aspects of the proposed Project which are within the City's jurisdiction, with the mitigations proposed in the EIR, and with the proposed conditions of approval, are consistent with the purposes of the IG district and will not have significant adverse impacts on surrounding land uses, the public, or the environment. The Project will protect tax revenues to the City and will allow the Refinery to remain competitive in the marketplace into the future.

If the City were to deny the Project based on impacts from rail operations, and the absence of overriding benefits, the effect would be to preclude UPRR operations that have been authorized by the Surface Transportation

Board. Thus, the City is preempted from denying the Project based on rail impacts. The preemption issue raises important questions about what state and local governments can do to protect public health and the environment. The Planning Commission could recommend to the City Council that the Council request congressional representatives adopt appropriate laws to address these issues. The draft resolution for the EIR includes language requesting the City Council send a letter supporting continuing regulatory efforts to protect public health related to transporting crude by rail.

RECOMMENDED ACTIONS:
Staff recommends that the Planning Commission hold a public hearing, consider all appropriate documents and testimony, and then act to:

1. Adopt the attached draft Resolution certifying the Final Environmental Impact Report, adopting California Environmental Quality Act ("CEQA") findings for the Project, the Statement of Overriding Considerations and the Mitigation Monitoring and Reporting Program.

2. Adopt the attached draft Resolution approving the Use Permit for the Project (12PLN-00063), with the findings and conditions listed in the draft resolution.

FURTHER ACTION:
The action of the Planning Commission is final unless appealed or called for review to the City Council within ten business days.

ATTACHMENTS:
- **Attachment 1:** Draft Resolution (Final Environmental Impact Report and Mitigation Monitoring and Reporting Program)
- **Attachment 2:** Exhibit A 1: Statement of Overriding Considerations (Preemption)
- **Attachment 3:** Exhibit A 2: Statement of Overriding Considerations (Benefits Outweigh)
- **Attachment 4:** Exhibit B: Mitigation Monitoring and Reporting Program
- **Attachment 5:** Draft Resolution (Use Permit)
- **Attachment 6:** Use Permit Application
- **Attachment 7:** Applicant's Letter dated January 25, 2016
- **Attachment 8:** Aerial Photograph of Project Area
- **Attachment 9:** Project Plans
- **Attachment 10:** SJ McGovern Report for City of Benicia Valero Crude by Rail Project Economic Impacts
- **Attachment 11:** Valero's Economic and Revenue Impacts Report, May 2014 by Andrew Chang & Company, LLC
- **Attachment 12:** Public Comments *
    - Public Comments Part 1

- Public Comments Part 2
- Public Comments Part 3
- Public Comments Part 4
- Public Comments Part 5

**If viewing online, Attachment 12: Public Comments has been broken into five parts in order to reduce the file size*

Previously provided under separate cover to the Planning Commission members and available for review at the Community Development Department, the Benicia Public Library and the City's website (www.ci.benicia.ca.us):

- Draft EIR
- Revised Draft EIR
- Response to Comments (Final EIR)

ATTACHMENT 10

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Refer To File #: 290396-0017

VIA E-MAIL AND U.S. MAIL

September 15, 2014

Amy Million, Principal Planner
Community Development Department
City of Benicia
250 East L Street
Benicia, CA 94510
amillion@ci.benicia.ca.us

Re: Comments on Draft Environmental Impact Report for the Valero Benicia Crude by Rail Project (SCH #2013052074)

Dear Ms. Million:

1. INTRODUCTION.

On behalf of Valero Refining Co. - California ("Valero"), we submit the following comments on the draft environmental impact report ("DEIR") circulated for public comment by the City of Benicia ("City") regarding the Valero Benicia Crude-by-Rail Project (SCH #2013052074) ("Project"). The Project involves the installation of rail spur tracks, a tank car unloading rack, pumps, connecting pipelines, and related infrastructure. The Project would enable the Benicia refinery to receive up to 70,000 barrels per day of crude oil by tank car. A fuller description of the Project is set forth in the DEIR itself.

We would like to note at the outset that, despite the scope of federal preemption as discussed below, we have cooperated fully in the City's use permit process, and related CEQA review, because of the City's interest, an interest shared by Valero, in providing a vehicle for public disclosure and discussion of our Project and the effects of our Project. Nevertheless, we do so with the reservation of our rights to invoke the full scope of federal preemption. Precisely because of the scope of preemption, we can state with confidence that the City's draft EIR goes far above and beyond what the law requires for review of the Project.

Before we comment further, a few additional introductory thoughts on preemption are in order. First, federal preemption of rail operations has been unfortunately depicted by some as a merely negative reality, when in fact federal preemption has an entirely positive purpose, one that benefits all of us, regardless of where we live and do business. As we have stated in other contexts, we decided as a nation a long time ago that the movement of people and goods from place to place in the United States was so important that it could not be subject to a patchwork of laws that change from state to state, county to county, or city to city. In that obvious respect, railroads have been binding us together for many decades, and only because of federal preemption have we been able to achieve the goals for which the laws were intended.

Neither is it the case, contrary to what some others have also implied, that federal preemption means that a kind of regulatory vacuum has been created, as if railroads can operate without accountability. Of course, nothing could be further from the truth: The federal government has led the way in the regulation of rail safety, and continues to do so even now, as the DEIR itself reveals.

Having established the affirmative and beneficial purposes of federal preemption, we would like in this letter to also discuss in brief the scope of federal preemption, combined with a request that its scope be unqualifiedly acknowledged for all impacts of rail operations pertaining to the development and operation of the Project, for both direct and indirect effects.

As noted in an excellent letter recently submitted by Union Pacific Railroad ("UPRR"), specifically by Melissa B. Hagan, to the Sacramento Area Council of Governments ("SACOG"), Union Pacific is dedicated to rail safety, a dedication proven not only by its encouraging words, but by actions, programs, and significant investment. (A copy of UPRR's letter to SACOG is enclosed herewith.) The letter also does an excellent job of describing recent federal regulatory action concerning the rail transport of hazardous materials, including crude oil.

2. FEDERAL PREEMPTION OF STATE AND LOCAL RAILROAD REGULATIONS.

A. Interstate Commerce Commission Termination Act of 1995.

Under the United States Constitution, Congress has the power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. Pursuant to this power, Congress passed the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 701 et seq. ("ICCTA"). The ICCTA created the Surface Transportation Board ("STB"), which oversees the operation of railroads in the United States. The STB has broad authority to regulate railroad operations, including exclusive jurisdiction over "(1) transportation by rail carriers...and (2) the construction, acquisition, operation, abandonment, or discontinuation of...tracks, or facilities, even if the tracks are located or intended to be located, entirely in one State." 49 U.S.C. § 10501(b). The ICCTA contains an express preemption clause,[1] indicating Congress' intent to preempt all state and local regulation of railroad operations.

Referring to the scope of the federal preemption, one court has stated: "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). The ICCTA also reflects congressional intent to continue the historical 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.").

Congress has stated that federal preemption of railroad regulation "is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity standards and risk the balkanization and

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[1] 49 U.S.C. § 10501(b) states that "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No 104-311, 104th Cong., 1st Sess., at 96 (1995).

As discussed further below, Congress has accordingly established federal preemption of rail operations by means of "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.")

B. Federal Railroad Safety Act.

As already briefed by UPRR to SACOG, 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.* at § 20106(a)(2). State or local hazardous material railroad transportation requirements may be preempted under the FRSA regardless of whether such state and local requirements might be consistent under the Federal hazmat law. *CSX Transportation, Inc. v. City of Tullahoma*, 705 F. Supp. 385 (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).

Section 20106(a)(2) compels the conclusion that DOT regulations and orders preempt state and local regulations relating to the same subject matter. Section 20106 states clearly that its terms govern the preemptive scope of all DOT regulations and orders relating to rail safety. DOT has acknowledged 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).

C. Pipeline Safety Improvement Act.

The Pipeline Safety Improvement Act, which created the Pipeline and Hazardous Materials Safety Administration ("PHMSA), expressly preempts any state or local agency purporting to regulate "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. Accordingly, any project mitigation measure or condition of approval attempting to restrict or specify the type of equipment to be used in transporting crude-by-rail is expressly preempted.

E. Federal Preemption of Rail Operations Applies to State and Local Environmental, Land Use and Tort Laws.

The breadth of federal preemption under the ICCTA encompasses environmental laws such as CEQA. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *People v. Burlington N. Santa Fe R.R.*, 209 Cal.App.4th 1513, 1528 (Cal. Ct. App. 2012). In *City of Auburn*, the Burlington Northern and Santa Fe Railway (BNSF) sought to reacquire a segment of a rail line, make repairs and improvements, and reinstitute service. The Ninth Circuit held that BNSF's proposed project could not be subjected to environmental review pursuant to a Washington state statute that is similar to CEQA because the ICCTA precludes such review. *City of Auburn v. United States*, 154 F.3d at 1030.

Many other courts, and the STB itself, have added to the articulation of federal rail preemption. *See Norfolk S. R.R. Co. v. City of Austell*, 1997 WL 1113647, *6 (N.D. Ga. 1997) ("ICCTA expresses Congress' unambiguous and clear intent to preempt [the local jurisdiction'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 Defendant has relied to prevent [the railroad] from demolishing five buildings...that are related to the movement of property by rail is expressly preempted by [the ICCTA]"); *Village of Ridgefield Park v. N.Y., Susquehanna & W. R.R. Corp.*, 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted); *Village of Big Lake v. BNSF*, 382 SW 3rd 125 (2012) (claim that BNSF's build-up of its railway bed violated floodplain management ordinance preempted by ICCTA); *City of Cace v. Norfolk Southern Ry. Co.*, 391 SC 395 (2011) (claim that Norfolk Southern Railway was allowing a public nuisance because of rust and graffiti on bridge preempted by ICCTA); *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th Cir. 2010) (holding that ICCTA preempted South Coast Air Quality Management District rule requiring railroads to report emissions from idling trains); *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, No. 12-4179-RAL, 2014 WL 4287086 (D.S.D. Aug. 28, 2014) (state-based tort claim preempted).

The STB itself has found that, for the proposed construction of a high-speed rail line, "state permitting and land use requirements that would apply to non-rail projects, such as [CEQA], will be preempted." *DesertXpress Enterprises, LLC – Petition for Declaratory Order* (STB, June 27, 2007, No. FD 34914) 20007 STB Lexis 343, p.11.

A recent CEQA decision by a California appellate court confirms the breadth of the ICCTA's preemption. *See Town of Atherton v. California High-Speed Rail Authority*, No. C070877, 2014 Cal. App. Lexis 670 (July 24, 2014). In *Town of Atherton*, the Court recognized two broad categories of state and local regulations that are categorically preempted by the ICCTA, regardless of the context in which the state seeks to apply the regulation: ***(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 matter 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." *Id.* at 20 (emphasis added). Thus, it is clear that CEQA preclearance and environment permitting requirements are preempted by federal law and do not apply to railroad operations.

The ICCTA does allow states to regulate railroads pursuant to their traditional police powers, but this constitutes a very narrow and restricted exception to the ICCTA's preemptive effect. This is because states may regulate railroads only when the state regulations "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain R.R. Corp. v. State of Vermont*, 404 F3d 643, 643 (2nd Cir. 2005). Environmental permitting and pre-clearances do not meet this test when "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." *Id.* Because CEQA by definition only applies when an agency is making a discretionary decision over whether to approve or disapprove a project, it does not meet this test, and it is federally preempted by the ICCTA. Cal.Code.Regs. tit. 14, §§ 15002(i)(2), 15357, 15378.

F. California Recognizes That Federal Law Preempts the Regulation of Railroads.

The State of California has long accepted that federal law preempts the application of state environmental regulations to rail carriers and rail operations. For example, instead of attempting to enforce California law, the California Air Resources Board has negotiated with the railroads for voluntary reductions in locomotive emissions and in emissions from rail yard activities. *See* Memorandum of Mutual Understandings and Agreements, South Coast Locomotive Fleet Average Emissions Program, July 2, 1998; ARB/Railroad Statewide Agreement, Particulate Emissions Reduction Program at California Rail Yards, June 2005, *available at* http://www.arb.ca.gov/railyard/ryagreement/ryagreement.htm. The 2005 agreement summarizes federal preemption as follows:

> It has been widely recognized that railroads need consistent and uniform regulation and treatment to operate effectively. A typical line-haul locomotive is not confined to a single air basin and travels throughout California and into different states. The U.S. Congress has recognized the importance of interstate rail transportation for many years. The Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Act and many other laws establish a uniform federal system of equipment and operational requirements. The parties recognize that the courts have determined that a relatively broad federal preemption exists to ensure consistent and uniform regulation. Federal agencies have adopted major, broad railroad and locomotive regulatory programs under controlling federal legislation.

2005 ARB/Railroad Statewide Agreement, p. 25.

In the *Town of Atherton v. California High Speed Rail Authority* case referred to above, the California Attorney General asserted that the ICCTA preempts CEQA as applied to the California High-Speed Rail train system. The Attorney General stated:

> Courts and the STB uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate.

Supplemental Letter Brief filed August 9, 2013, in the matter of *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, No. C070877, at p. 3.

G. Federal Law Preempts Local Permitting Authority for Rail Car Unloading Facilities.

As stated above, Valero shares fully in the City's interest in providing a procedural vehicle for disclosure and discussion related to Valero's crude-by-rail Project, and Valero has participated fully in the City's effort to provide such a vehicle, including cooperating in the City's permitting and CEQA review process. The benefits of the process cannot be denied. Nevertheless, the scope of federal preemption precludes not only City authority over mainline rail operations, but also over the unloading facilities to be located on the refinery property. Our participation in this process, it must be understood, is subject to a full reservation of rights under federal law.

Section 10102(9) of the ICCTA defines "transportation" broadly, so as to include not only a "locomotive, car, [or] vehicle," but a "property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail."

Accordingly, preemption also applies to local approval authority over facilities such as Valero's crude-by-rail Project, which receive goods moved by rail. In *Norfolk Southern Railroad Company v. City of Alexandria*, 608 F.3d 150 (2010), the City of Alexandria, in an attempt to regulate an ethanol transloading facility, the purpose of which was to transfer bulk shipments of ethanol from rail cars onto surface tanker trucks for local distribution and delivery, adopted an ordinance purporting to regulate the transportation of bulk materials, including ethanol, within the city. The city also unilaterally issued a permit to Norfolk Southern that purported to limit the materials that could be hauled, the routes, times of day, etc. The city argued that preemption should not apply because the ordinance and permit related to distribution of the cargo by trucks, rather than to the trains or the transloading operation.

The court rejected the city's argument, holding that the ordinance and permit were preempted because they "directly impact Norfolk Southern's ability to move goods shipped by rail." Because a limit on the number of trucks exiting the facility directly affected the number of rail cars that could be unloaded, which in turn could affect the movement of trains in Norfolk's yard, and throughout its rail system, the Fourth Circuit concluded that the conditions restricting ethanol distribution by truck "necessarily regulate the transloading operations." 608 F.3d at 159. The court further found that the ordinance and permit imposed an unreasonable burden on rail transportation because "the city has the power to halt or significantly diminish the transloading operations by declining to issue haul permits or by increasing the restrictions specified therein." *Id.* at 160.

H. CEQA Does Not Apply to Rail Operations Because of the Federal Preemption.

CEQA applies only to discretionary approvals. *San Diego Navy Broadway Complex Coalition v. City of San Diego*, 185 Cal.App.4th 924, 933-934 (2010); *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 266-267 (1987); *Mountain Lion Foundation v. Fish and Game Commission*, 16 Cal.4th 105, 117 (1997). Because of federal preemption, the City's discretion does not reach either mainline rail operations, or the unloading operations at the refinery site itself.

3. COMMENTS RE DEIR ALTERNATIVES ANALYSIS.

Concerning Section 6.4.2.2, Alternative 2: First, the alternative relates to impacts of train crossings at Park Road, a potential effect that is subject to federal preemption. Second, a condition restricting deliveries and departures to nighttime hours, because of the nature of the offloading procedure, the time consumed for both unloading and return of the rail cars, and the compressed time frame for two trains to arrive, offload and return, could have more significant effects on train crossings at Park Road than delivery of the rail cars without such nighttime restriction.

4. CONCLUSION.

The DEIR, as we have stated elsewhere, is one of which the City can be proud, going far above and beyond what the law requires, and even permits. We commend the City's efforts to promote disclosure and discussion related to the Project, and we have participated vigorously and openly in that process. Nevertheless, as stated above, we do so while reserving all rights under federal law.

Thank you very much for your consideration of our comments.

Very truly yours,

John J. Flynn III
of Nossaman LLP

JJF:rg

Enclosure

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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.

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.")

<u>Preemption under ICCTA</u>

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 B. Hagan

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

ATTACHMENT 11

ATTACHMENT 11 TO ALSTON & BIRD LETTER OF FEBRUARY 1, 2016
PREEMPTED MITIGATION MEASURES

FEIR #	FEIR Text	Complete or Partial Preemption
AQ-2a	Prior to issuance of Notice to Proceed, the Applicant shall provide a mitigation, monitoring and reporting plan updated annually. The plan shall investigate methods for reducing the onsite and offsite emissions, both from fugitive components and from locomotives or from other SMR activities (such as the diesel pumps, trucks, and compressors to reduce DPM). In addition, locomotive emissions shall be mitigated to the extent feasible through contracting arrangements that require the use of Tier 4 locomotives or equivalent emission levels. The plan shall indicate that, on an annual basis, if emissions of ROG+NOx and DPM with the above mitigations still exceed the thresholds, as measured and confirmed by the SLOCAPCD, the Applicant shall secure SLOCAPCD approved onsite and/or offsite emission reductions in ROG + NOx emissions or contribute to new or existing programs to ensure that project-related ROG + NOx emissions within SLO County do not exceed the SLOCAPCD thresholds. Coordination with the SLOCAPCD should begin at least six (6) months prior to issuance of the Notice to Proceed for the Project to allow time for refining calculations and for the SLOCAPCD to review and approve any required ROG+NOx emission reductions.	Highlighted portions are improper because they (1) mandate investigation of methods of reducing mainline locomotive emissions; (2) require mitigation of mainline locomotive emissions; (3) specify terms of contract between P66 and UPRR for carriage of goods on railroads in interstate commerce; (4) specify the type of equipment (i.e., locomotive engines) allowed to haul goods on railroads in interstate commerce; and (5) require air emissions offsets for mainline locomotive emissions in SLO County. See Comment AB-03 for extensive discussion of why these provisions are preempted by federal law. See Comment UPRR-04 for an explanation of why local agencies cannot escape the limits of federal preemption by imposing mitigation measures on rail customers rather than on the railroad directly.
AQ-3	Prior to issuance of the Notice to Proceed, the Applicant shall provide a mitigation, monitoring and reporting plan. The plan shall investigate methods for reducing the locomotive emissions through contracting arrangements that require the use of Tier 4 locomotives or equivalent emission levels. The plan shall indicate that, on an annual basis, if the mainline rail emissions of ROG+NOx with the above mitigations still exceed the applicable Air District thresholds, the Applicant shall secure emission reductions in ROG + NOx emissions or contribute to new or existing programs within each applicable Air District, similar to the emission reduction program utilized by the SLOCAPCD, to ensure that the main line rail ROG + NOx emissions do not exceed the Air District thresholds for the life of the project. The Applicant shall provide documentation from each	Highlighted portion is improper because it (1) mandates investigation of methods of reducing mainline locomotive emissions; (2) requires mitigation of mainline locomotive emissions; (3) attempts to drive the use of a particular type of equipment (i.e., Tier 4 locomotive engines) to transport goods on railroads in interstate commerce by imposing significant costs (securing emissions reductions) for emissions from locomotive engines; and (4) requires air emissions offsets for mainline locomotive emissions. The geographic scope of the mitigation

FEIR #	FEIR Text	Complete or Partial Preemption
	Air District to the San Luis Obispo County Planning and Building Department that emissions reductions have been secured for the life of the project prior to issuance of the Notice to Proceed.	measure is vague, but clearly extends beyond SLO County Other (non-preemption) issues: Per FEIR Table 4.3-18, to calculate emissions in each air district, the analysis assumes that all 250 trains per year pass through every listed air district, even though this is impossible. Also, since ERCs usually cover peak daily emissions every day of the year, the MM would require offsets as though a train traverses every listed air district every day. Mitigation would far exceed project emissions.
AQ-4a	Implement measures AQ-2a and AQ-2b.	Portions of AQ-2a are preempted for the reasons described above.
AQ-5	Implement measure AQ-3.	Completely preempted for the reasons described under AQ-3.
AQ-6	Prior to issuance of the Notice to Proceed, the Applicant shall provide a GHG mitigation, monitoring and reporting plan. The plan shall indicate that, on an annual basis, if GHG emissions exceed the thresholds, the Applicant shall provide GHG emission reduction credits for all of the project GHG emissions. Coordination with the San Luis Obispo Planning and Building Department should begin at least six (6) months prior to issuance of operational permits for the Project to allow time for refining calculations and for the San Luis Obispo Planning and Building to review and approve the emission reduction credits.	The highlighted language is preempted to the extent it requires GHG emission reduction credits for emissions from mainline rail operations. Other (non-preemption) issues: It is not clear what thresholds are referenced in this condition. In addition, the geographic scope is vague.
AQ-8	Prior to issuance of the Notice to Proceed, the Applicant shall provide a GHG mitigation, monitoring and reporting plan. The plan shall investigate methods to bring the Rail Spur Project GHG emissions at the refinery to zero for the entire project each year. The plan shall indicate that, on an annual basis, if after all onsite mitigations are implemented, the GHG emissions from the Rail Spur Project still exceed zero, then SLOCAPCD approved off-site mitigation will be	This mitigation measure is not clear. The first highlighted portion suggests that it is limited to Project emissions at the refinery itself. The second highlighted portion refers to the GHG emissions from the entire Project, although read in context it could be limited by the prior sentence to Project GHG emissions at the refinery. If it is

FEIR #	FEIR Text	Complete or Partial Preemption
	required. Methods could include the contracting arrangement that increases the use of more efficient locomotives, or through other, onsite measures. Coordination with the SLOCAPCD should begin at least six (6) months prior to issuance of operational permits for the Project to allow time for refining calculations and for the SLOCAPCD to review and approve the mitigation approach.	intended to require mitigation of GHG emissions from mainline rail operations, then it is preempted.
BIO-11	The Applicant's contract with UPRR, shall include a provision to provide that UPRR has an Oil Spill Contingency Plan in place for all mainline rail routes in California that could be used for transporting crude oil to the SMR. The Oil Spill Contingency Plan shall at a minimum include the following: 1. A set of notification procedures that includes a list of immediate contacts to call in the event of a threatened or actual spill. This shall include a rated oil spill response organization, the California Office of Emergency Services, California Department of Fish and Wildlife, Oil Spill Prevention and Response, and appropriate local emergency responders. 2. Identification of the resources that could be at risk from an oil spill equal to 20% of the train volume. The resources that shall be identified in the plan, and shown on route maps, include but are not limited to the following: a. Habitat types, shoreline types, and associated wildlife resources in those locations; b. The presence of state or federally-listed rare, threatened or endangered species; c. The presence of aquatic resources including state fish, invertebrates, and plants including important spawning, migratory, nursery and foraging areas; d. The presence of terrestrial animal and plant resources; e. The presence of migratory and resident state bird and mammal migration routes, and breeding, nursery, stopover, haul-out, and population concentration areas by season; f. The presence of commercial and recreational fisheries including aquaculture sites, kelp leases and other harvest areas. g. Public beaches, parks, marinas, boat ramps and diving areas; h. Industrial and drinking water intakes, power plants, salt pond intakes, and important underwater structures; i. Areas of known historical and archaeological sites (but not their specific description or location); j. Areas of	Completely preempted. This mitigation measure attempts to specify the terms of a contract between applicant and UPRR for carriage of goods on the railroad in interstate commerce, as well as the content of plans within the control of UPRR. The measure attempts to regulate UPRR indirectly by mandating Phillips 66 to have a contract with UPRR that imposes these obligations on UPRR. Other (non-preemption) issues: • Many aspects are duplicative of existing state or federal law, and the EIR does not identify any environmental benefit of this measure beyond what already exists by virtue of state or federal law. • Subsection 2.l. is incomplete.

FEIR #	FEIR Text	Complete or Partial Preemption
	cultural or economic significance to Native Americans (but not their specific description or location). k. A description of the response strategies to protect the identified site and resources at risk. l. A list of available oil spill response equipment and staging locations along the mainline tracks and shall include. m. A program for oil spill training of response staff and a requirement for annual oil spill drillings.	
BIO-11 (cont.)	3. The oil spill contingency plan must be able to demonstrate that response resources are adequate for containment and recovery of 20% of the train's volume within 24 hours. In addition, within six hours of the spill the response resources shall be adequate for containment and recovery of 50% of the spill, and 75% of the spill within 12 hours. The Applicant's contract with UPRR, shall include provision that UPRR's Oil Spill Contingency Plan shall be reviewed and approved by California Department of Fish and Wildlife, Office of Spill Prevention and Response prior to delivery of crude oil by rail to the Santa Maria Refinery. In addition, the Applicant's contract with UPRR, shall include provisions to provide a copy of UPRR's Oil Spill Contingency Plan to all first response agencies along the mainline rail routes in California that could be used by trains carrying crude oil to the Santa Maria Refinery for the life of the project. Only first response agencies that are able to receive security sensitive information as identified pursuant to Section 15.5 of Part 15 of Title 49 of the Code of Federal Regulations, shall be provided this information.	Other issues (cont.) • Subsection 3 is unclear. The percent recovery and time periods are not consistent. The amount of recovery required in 6 hours (50%) and 12 hours (75%) is more than the amount of recovery required in 24 hours (20%). • Language following subsection 3 prohibits P66 receiving crude oil by rail until CDFW reviews and approves the Oil Spill Contingency Plan, but there is no legal requirement for the CDFW to make such a review, and so no way to compel the agency to do so.
CR-6	As part of the Applicant's contract with UPRR, it shall require that a qualified archaeologist, architectural historian, and paleontologist who meet the Secretary of the Interior's Professional Qualification Standards prepare an Emergency Contingency and Treatment Plan for Cultural and Historic Resources along the rail routes in California that could be used to transport crude oil to the SMR. The treatment plan shall include, but not be limited to, the following components: a. Protocols for determining the cultural resources regulatory setting of the incident site; b. Provide	Completely preempted. This mitigation measure requires a contract between the applicant and the railroad for carriage of goods on the railroad in interstate commerce, and attempts to specify the terms of that contract, as well as the qualifications of consultants and the content of plans within the control of UPRR.

FEIR #	FEIR Text	Complete or Partial Preemption
	various methodologies for identifying cultural resources, as needed, within the incident site (e.g., California Historical Resources Information System records search, agency contact, field survey); and c. If cultural resources are present, identify measures for their avoidance, protection, and treatment. The Treatment Plan shall be in place prior to delivery of crude by rail to the Santa Maria Refinery.	
HM-2a	Only rail cars designed to FRA, July 23, 2014 Proposed Rulemaking Option 1: PHMSA and FRA Designed Tank Car as listed in Table 4.7.6, shall be allowed to unload crude oil at the Santa Maria Refinery	Completely preempted. As a means of dictating which train cars may travel on the mainline track, the mitigation measure would prohibit the unloading of any cars other than Option 1 cars. Local governments may not specify the type of rail cars used to transport goods on the railroad in interstate commerce. Specifying which cars may be unloaded is no different than specifying which ones are allowed for mainline transport, because the cars being unloaded must first travel to the site.
HM-2b	For crude oil shipments via rail to the SMR a rail transportation route analysis shall be conducted annually. The rail transportation route analysis shall be prepared following the requirements in 49 CFR 172.820. The route with the lowest level of safety and security risk shall be used to transport the crude oil to the Santa Maria Refinery	Completely preempted. Federal law and regulation specify the analysis and the route selection process. The EIR does not identify any environmental benefit of this measure beyond what already exists by virtue of state or federal law. Other (non-preemption) issues: • Measure is unworkable. It appears to freeze the route for a year based on an annual analysis. But the route with the lowest safety and security risk will vary with the point of origin and innumerable track factors at any given time.
HM-2c	The Applicant's contract with UPRR, shall include a provision to require that Positive Train Control	Completely preempted. Federal law sets requirements and

FEIR #	FEIR Text	Complete or Partial Preemption
	(PTC) be in place for all mainline rail routes in California that could be used for transporting crude oil to the SMR.	deadlines for implementation of PTC. This mitigation measures attempts to control the equipment on the mainline railroad by specifying terms that must be included in a contract between the applicant and UPRR for carriage of goods on the railroad in interstate commerce.
HM-2d	The refinery shall not accept or unload at the rail unloading facility any crude oil or petroleum product with an API Gravity of 30° or greater	Ordinarily, this MM would be preempted because it attempts to limit the materials that may be transported via the railroad by limiting the materials that may be unloaded. Here, however, this mitigation measure merely reiterates the applicant's own project description.
---	The unnumbered text following HM-2d states: Implement mitigation measures PS-4a through PS-4e.	This mitigation measure is preempted for the reasons stated in PS-4a through PS-4e, below.
N-2a	Prior to issuance of the Notice to Proceed, the Applicant shall develop for review and approved by the County Department of Building and Planning a Rail Unloading and Management Plan that addresses procedures to minimize noise levels at the rail spur, including but not limited to the following: 1) All locomotives operating to the east of the unloading rack area between the hours of 10 P.M. and 7 A.M. shall be limited to a combined total of 100 locomotive-minutes (e.g. 2 locomotives for 50 minutes each or 1 locomotive for 100 minutes, etc. including switching and idling); 2) Arriving trains that enter the refinery between the hours of 10 P.M. and 7 A.M. and are not being immediately unloaded shall shutdown all locomotives once the train is on the refinery property; 3) No horns, annunciators or other signaling devices are allowed unless it is an emergency. If horns and annunciators are needed for worker safety, then warning devices shall be developed, to CPUC standards, to alert the safety of plant personnel when trains are in motion without an	Items 2 through 6 are preempted. Items 2 through 4 place restrictions on the arrival of trains and their movement and use of horns, etc., without regard to requirements of federal and CPUC law and regulations governing railroads operations. With respect to Item 5, Phillips 66 will not own or control the locomotives, and there may be times when UPRR needs to service or repair one of its locomotives upon arrival in order to ensure that it meets federal equipment and maintenance standards when it exits the refinery and returns to the mainline track. Item 6 attempts to control the operations of UPRR by requiring a contract between Phillips 66 and UPRR, and specifying contract terms that constrain the railroad's use and operation of its equipment in ways that may conflict with

FEIR #	FEIR Text	Complete or Partial Preemption
	audible warning device; 4) No horns are to be used on the mainline siding track adjacent to the refinery unless it is an emergency; 5) Any trains repairs shall be conducted only between the hours of 7 A.M. and 7 P.M.; and (6) The Plan shall include a copy of the agreement between the Applicant and UPRR demonstrating the two parties have entered into a legally binding contractual arrangement ensuring implementation of the above requirements.	federal requirements or interfere with its mainline operations.
PS-4a	The Applicant shall provide advanced notice of all crude oil shipments to the Santa Maria Refinery, and quarterly hazardous commodity flow information documents to all first response agencies along the mainline rail routes within California that could be used by trains carrying crude oil to the Santa Maria Refinery for the life of the project. Only first response agencies that are able to receive security sensitive information as identified pursuant to Section 15.5 of Part 15 of Title 49 of the Code of Federal Regulations, shall be provided this information. The plan for providing notice to first response agencies shall be in place and verified by the County Department of Planning and Building prior to delivery of crude by rail to the Santa Maria Refinery.	Completely preempted. This measure attempts to provide first response agencies with certain information regarding timing and routes for rail transportation of crude oil. Federal law specifies information that the railroads must collect and give to first responders, and the applicant does not have this information because it is not qualified under the federal program to receive it. The information requirements of this measure duplicate federal law, and the EIR does not identify any environmental benefit from the measure beyond what already exists by virtue of federal law.
PS-4b	Only rail cars designed to FRA, July 23, 2014 Proposed Rulemaking Option 1: PHMSA and FRA Designed Tank Car shall be allowed to unload crude oil at the Santa Maria Refinery.	Completely preempted. See explanation under HM-2a, above.
PS-4c	The Applicant shall provide annual funding for first response agencies along the mainline rail routes within California that could be used by the trains carrying crude oil to the Santa Maria Refinery to attend certified offsite training for emergency responders to railcar emergencies, such as the 40 hour course offered by Security and Emergency Response Training Center Railroad Incident Coordination and Safety (RICS) meeting	Completely preempted. In order to be allowed to receive goods transported by rail in interstate commerce, this measure would require the applicant to bear the cost of training response agencies all along the mainline track for the life of the project. The RDEIR version required the applicant to enter into a contract with UPRR for UPRR to cover these costs. The

FEIR #	FEIR Text	Complete or Partial Preemption
	Department of Homeland security, NIIMS, OSHA 29 CFR 1910.120 compliance. The Applicant shall fund a minimum of 20 annual slots per year for the life of the project. The plan for funding the emergency response training shall be in place and verified by the Cal Fire/County Fire prior to delivery of crude by rail to the Santa Maria Refinery.	FEIR version would impose these costs directly on the customer, Phillips 66. See Comment UPRR-04 in the FEIR for an explanation regarding why imposing such costs on a rail customer is preempted.
PS-4d	As part of the Applicant's contract with UPRR, it shall require annual emergency responses scenario/field based training including Emergency Operations Center Training activations with local emergency response agencies along the mainline rail routes within California that could be used by the crude oil trains traveling to the Santa Maria Refinery for the life of the project. A total of four training sessions shall be conducted per year at various locations along the rail routes. This contract provision shall be in place and verified by the Cal Fire/County Fire prior to delivery of crude by rail to the Santa Maria Refinery.	Completely preempted. In order to be allowed to receive goods transported by rail in interstate commerce, this measure would require the applicant enter into a contract with UPRR requiring the railroad to conduct certain training for agencies all along the mainline rail routes. Federal law preempts local agencies from demanding such prerequisites for use of the interstate rail network. Also, federal and state law establish training requirements and impose fees on the railroads and the owner of the oil to fund the training. The FEIR does not describe these existing training programs and fees as inadequate, and does not describe any environmental benefits of the mitigation measure beyond those already required.
PS-4e	As part of the Applicant's contract with UPRR, it shall require that all first response agencies along the mainline rail routes within California that could be used by trains carrying crude oil traveling to the Santa Maria Refinery be provided with a contact number that can provide real-time information in the event of an oil train derailment or accident. The information that would need to be provided would include, but not be limited to crude oil shipping papers that detail the type of crude oil, and information that can assist in the safe containment and removal of any crude oil	Completely preempted. This mitigation measure attempts to specify the terms of a contract between applicant and UPRR for carriage of goods on the railroad in interstate commerce. It attempts to regulate UPRR indirectly by mandating Phillips 66 to have a contract with UPRR that imposes these obligations on UPRR. Also, federal law specifies the information that railroads must collect and provide to local

FEIR #	FEIR Text	Complete or Partial Preemption
	spill. This contract provision shall be in place and verified by the Cal Fire/County Fire prior to delivery of crude by rail to the Santa Maria Refinery.	agencies. The EIR does not identify any environmental benefit from this measure beyond that already provided by federal law.
TR-4	The Applicant shall work with UPRR to schedule unit trains serving the Santa Maria Refinery so that they do not interfere with passenger trains traveling the Coast Rail Route.	Completely preempted. Federal law establishes the priority between passenger trains and freight trains (49 USC § 24308(c)) which is implemented using specified metrics and standards (Passenger Rail Investment and Improvement Act, § 207). See *Department of Transportation v. Association of American Railroads,* 135 S.Ct. 1225 (2015), 575 U.S. ___ (2015). Local agencies do not have authority to regulate schedules for the transport of goods or passengers on the railroad network, or establish priority for passenger trains.
WR-3	Implement mitigation measures BIO-11 and PS-4a through PS-4e.	The referenced mitigation measures are preempted for the reasons described above.

ATTACHMENT 12

CEQA
Air Quality Handbook

A GUIDE FOR ASSESSING THE AIR QUALITY IMPACTS FOR PROJECTS SUBJECT TO CEQA REVIEW

April 2012

SLO COUNTY apcd
Air Pollution Control District
San Luis Obispo County

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3 ASSESSING AND MITIGATING OPERATIONAL IMPACTS

Air pollutant emissions from urban development can result from a variety of sources, including motor vehicles, wood burning appliances, natural gas and electric energy use, combustion-powered utility equipment, paints and solvents, equipment or operations used by various commercial and industrial facilities, heavy-duty equipment and vehicles and various other sources. The air quality impacts that result from operational activities of a development project should be fully evaluated and quantified as part of the CEQA review process. The methods for evaluating and mitigating operational impacts from residential, commercial and industrial sources are discussed below.

3.1 OPERATIONAL SIGNIFICANCE CRITERIA

The APCD has established five separate categories of evaluation for determining the significance of project impacts. Full disclosure of the potential air pollutant and/or toxic air emissions from a project is needed for these evaluations, as required by CEQA:

a. Consistency with the most recent Clean Air Plan for San Luis Obispo County;

b. Consistency with a plan for the reduction of greenhouse gas emissions that has been adopted by the jurisdiction in which the project is located and that, at a minimum, complies with State CEQA Guidelines Section 15183.5.

c. Comparison of predicted ambient criteria pollutant concentrations resulting from the project to state and federal health standards, when applicable;

d. Comparison of calculated project emissions to SLO County APCD emission thresholds; and,

e. The evaluation of special conditions which apply to certain projects.

3.2 CONSISTENCY WITH THE SLO COUNTY APCD'S CLEAN AIR PLAN AND SMART GROWTH PRINCIPLES

A consistency analysis with the Clean Air Plan is required for a Program Level environmental review, and may be necessary for a Project Level environmental review, depending on the project being considered. Program-Level environmental reviews include but are not limited to General Plan Updates and Amendments, Specific Plans, Regional Transportation Plans and Area Plans. Project-Level environmental reviews which may require consistency analysis with the Clean Air Plan and Smart/Strategic Growth Principles adopted by lead agencies include: subdivisions, large residential developments and large commercial/industrial developments. The project proponent should evaluate if the proposed project is consistent with the land use and transportation control measures and strategies outlined in the Clean Air Plan. If the project is consistent with these measures, the project is considered consistent with the Clean Air Plan.

3.3 CONSISTENCY WITH A PLAN FOR THE REDUCTION OF GREENHOUSE GAS EMISSIONS

The APCD encourages local governments to adopt a qualified GHG reduction plan that is consistent with AB 32 goals. If a project is consistent with an adopted qualified GHG reduction plan it can be presumed that the project will not have significant GHG emission impacts. This approach is consistent with the State CEQA Guidelines, Section 15183.5 (see text in box below).

§15183.5. Tiering and Streamlining the Analysis of Greenhouse Gas Emissions.

(a) Lead agencies may analyze and mitigate the significant effects of greenhouse gas emissions at a programmatic level, such as in a general plan, a long range development plan, or a separate plan to reduce greenhouse gas emissions. Later project-specific environmental documents may tier from and/or incorporate by reference that existing programmatic review. Project-specific environmental documents may rely on an EIR containing a programmatic analysis of greenhouse gas emissions as provided in section 15152 (tiering), 15167 (staged EIRs) 15168 (program EIRs), 15175-15179.5 (Master EIRs), 15182 (EIRs Prepared for Specific Plans), and 15183 (EIRs Prepared for General Plans, Community Plans, or Zoning).

(b) Plans for the Reduction of Greenhouse Gas Emissions. Public agencies may choose to analyze and mitigate significant greenhouse gas emissions in a plan for the reduction of greenhouse gas emissions or similar document. A plan to reduce greenhouse gas emissions may be used in a cumulative impacts analysis as set forth below. Pursuant to sections 15064(h)(3) and 15130(d), a lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements in a previously adopted plan or mitigation program under specified circumstances.

(1) Plan Elements. A plan for the reduction of greenhouse gas emissions should:

(A) Quantify greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area;

(B) Establish a level, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable;

(C) Identify and analyze the greenhouse gas emissions resulting from specific actions or categories of actions anticipated within the geographic area;

(D) Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;

(E) Establish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels;

(F) Be adopted in a public process following environmental review

(2) Use with Later Activities. A plan for the reduction of greenhouse gas emissions, once adopted following certification of an EIR or adoption of an environmental document, may be used in the cumulative impacts analysis of later projects. An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project. If there is substantial evidence that the effects of a particular project may be cumulatively considerable notwithstanding the project's compliance with the specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.

Detailed information on preparing qualified GHG reduction plans is provided in the Technical Appendices 4.6 GHG Plan Level Guidance.

3.4 COMPARISON TO STANDARDS

State and federal ambient air quality standards are established to protect public health and welfare from the adverse impacts of air pollution; these standards are listed in Table 3-1. Industrial and large commercial projects are sometimes required to perform air quality dispersion modeling if the SLO County APCD determines that project emissions may have the potential to cause an exceedance of these standards. In such cases, models are used to calculate the potential ground-level pollutant concentrations resulting from the project. The predicted pollutant levels are then compared to the applicable state and federal standards. A project is considered to have a significant impact if its emissions are predicted to cause or contribute to a violation of any ambient air quality standard. In situations where the predicted standard violation resulted from the application of a "screening-level" model or calculation, it may be appropriate to perform a more refined modeling analysis to accurately estimate project impacts. If a refined analysis is not available or appropriate, then the impact must be mitigated to a level of insignificance or a finding of overriding considerations must be made by the permitting agency.

Table 3-1: Ambient Air Quality Standards (State and Federal)

Pollutant		Averaging Time	California Standard (1)	Federal Standard (2)
Ozone		1 Hour	0.09 ppm	
		8 Hour	0.070 ppm	0.075 ppm
Carbon Monoxide		8 Hour	9.0 ppm	9 ppm
		1 Hour	20 ppm	35 ppm
Nitrogen Dioxide		Annual Arithmetic Mean	0.030 ppm	0.053 ppm
		1 Hour	0.18 ppm	
Sulfur Dioxide		Annual Arithmetic Mean		0.030 ppm
		24 Hour	0.04 ppm	0.14 ppm
		3 Hour		0.5 ppm (secondary)
		1 Hour	0.25 ppm	
Respirable Particulate Matter	PM_{10}	Annual Arithmetic Mean	20 $\mu g/m^3$	
		24 Hour	50 $\mu g/m^3$	150 $\mu g/m^3$
Fine Particulate Matter	$PM_{2.5}$	Annual Arithmetic Mean	12 $\mu g/m^3$	15.0 $\mu g/m^3$
		24 Hour		35 $\mu g/m^3$
Hydrogen Sulfide		1 Hour	0.03 ppm	
Vinyl Chloride		24 Hour	0.01 ppm	
Sulfates		24 Hour	25 $\mu g/m^3$	
Lead			30 day average: 25 $\mu g/m^3$	Rolling 3-month average:0.15 $\mu g/m^3$ Calendar quarter: 1.5 $\mu g/m^3$
Visibility Reducing Particles		8 Hour	Extinction coefficient of 0.23 per kilometer – visibility of ten miles or more due to particles when relative humidity is less than 70 percent. Method: Beta Attenuation and Transmittance through Filter Tape.	

1. California standards for ozone, carbon monoxide (except Lake Tahoe), nitrogen dioxide, sulfur dioxide (1-hour and 24-hour), $PM_{2.5}$, PM_{10} and visibility reducing particles are values that are not to be exceeded. All other state standards are not to be equaled or exceeded.

2. Federal standards are not to be exceeded more than once in any calendar year. The ozone standard is attained when the fourth highest eight hour concentration in a year, averaged over three years, is equal to or less than the standard. For PM_{10}, the 24 hour standard is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$ is equal to or less than one. For $PM_{2.5}$, the 24 hour standard is attained when the 98 percent of the daily concentration, average over three years, are equal to or less than the standard.

3.5 COMPARISON TO SLO COUNTY APCD OPERATIONAL EMISSION THRESHOLDS

Emissions which exceed the designated threshold levels are considered potentially significant and should be mitigated.

A Program Level environmental review, such as for a General Plan, Specific Plan or Area Plan however, does not require a quantitative air emissions analysis at the project scale. A qualitative analysis of the air quality impacts should be conducted instead, and should be generated for each of the proposed alternatives to be considered. The qualitative analysis of each alternative should be based upon criteria such as prevention of urban sprawl and reduced dependence on automobiles. A finding of significant impacts can be determined qualitatively by comparing consistency of the project with the Transportation and Land Use Planning Strategies outlined in the APCD's Clean Air Plan. Refer to Section 3.2 for more information.

Section 3.7 of this document provides guidance on the type of mitigation recommended for varying levels of impact and presents a sample list of appropriate mitigation measures for different types of projects.

3.5.1 Significance Thresholds for Project-Level Operational Emissions

The threshold criteria established by the SLO County APCD to determine the significance and appropriate mitigation level for **long-term operational** emissions from a project are presented in Table 3-2.

Table 3-2: Thresholds of Significance for Operational Emissions Impacts

Pollutant	Threshold[1]	
	Daily	Annual
Ozone Precursors (ROG + NO_x)[2]	25 lbs/day	25 tons/year
Diesel Particulate Matter (DPM)[2]	1.25 lbs/day	
Fugitive Particulate Matter (PM_{10}), Dust	25 lbs/day	25 tons/year
CO	550 lbs/day	
Greenhouse Gases (CO_2, CH_4, N20, HFC, CFC, F6S)	Consistency with a Qualified Greenhouse Gas Reduction Plan OR 1,150 MT CO_2e/year OR 4.9 CO_2e/SP/year (residents + employees)	

1. Daily and annual emission thresholds are based on the California Health & Safety Code Division 26, Part 3, Chapter 10, Section 40918 and the CARB Carl Moyer Guidelines for DPM.
2. CalEEmod – use winter operational emission data to compare to operational thresholds.

Most of the **long-term operational mitigation strategies** suggested in Section 3.7 focus on methods to reduce vehicle trips and travel distance, including site design standards which encourage pedestrian and bicycle-friendly, transit-oriented development. In addition, the recommendations include design strategies for residential and commercial buildings that address energy conservation and other concepts to reduce total project emissions. These recommendations are not all inclusive and are provided as examples among many possibilities.

3.5.2 Ozone Precursor (ROG + NO_x) Emissions

- If the project's ozone precursor emissions are below the APCD's **25 lbs/day** (combined ROG + NO_x emissions) no ozone mitigation measures are necessary. The Lead Agency will prepare the appropriate, required environmental document(s).

- Projects which emit **25 lb/day** or more of ozone precursors (ROG + NO_x combined) have the potential to cause significant air quality impacts, and should be submitted to the SLO County APCD for review. On-site mitigation measures, following the guidelines in Section 3.7 (*Operational Emission Mitigation*), are recommended to reduce air quality impacts to a level of insignificance.

  If all feasible mitigation measures are incorporated into the project and emissions can be reduced to less than 25 lbs/day, then the Lead Agency will prepare the appropriate, required environmental document(s).

  If all feasible mitigation measures are incorporated into the project and emissions are still greater than 25 lbs/day, then an ENVIRONMENTAL IMPACT REPORT should be prepared. Additional mitigation measures, including off-site mitigation, may be required depending on the level and scope of air quality impacts identified in the EIR.

- Projects which emit **25 tons/year** or more of ozone precursor (ROG + NO_x combined), require the preparation of an ENVIRONMENTAL IMPACT REPORT. Depending upon the level and scope of air quality impacts identified in the EIR, mitigation measures, including off-site mitigation, may be required to reduce the overall air quality impacts of the project to a level of insignificance.

3.5.3 Diesel Particulate Matter (DPM) Emissions

Diesel particulate matter (DPM) is seldom emitted from individual projects in quantities which lead to local or regional air quality attainment violations. DPM is, however, a toxic air contaminant and carcinogen, and exposure DPM may lead to increased cancer risk and respiratory problems. Certain industrial and commercial projects may emit substantial quantities of DPM through the use of stationary and mobile on-site diesel-powered equipment as well diesel trucks and other vehicles that serve the project.

Projects that emit more than **1.25 lbs/day** of DPM need to implement on-site Best Available Control Technology measures. If sensitive receptors are within 1,000 feet of the project site, a Health Risk Assessment (HRA) may also be required. Sections 3.5.1 and 3.6.4 of this Handbook provide more background on HRAs in conjunction with CEQA review. Guidance on the preparation of a HRA may be found in the CAPCOA report *HEALTH RISK ASSESSMENT FOR PROPOSED LAND USE PROJECTS* which can be downloaded from the CAPCOA website at www.capcoa.org.

3.5.4 Fugitive Particulate Matter (Dust) Emissions

Projects which emit more than **25 lbs/day** or **25 tons/year** of fugitive particulate matter need to implement permanent dust control measures to mitigate the emissions below these thresholds or provide suitable off-site mitigation approved by the APCD. Operational fugitive dust emissions from a proposed project are calculated using the CALEEMOD model discussed in Section 3.6.1. Typical sources of operational emissions included the following:

- Paved roadways: Vehicular traffic on paved roads that are used to accesses large residential, commercial, or industrial projects can generate significant dust emissions.

- Off and/or on-site unpaved roads or surfaces: Even at low traffic volume, vehicular traffic on unpaved roads or surfaces that are used to accesses residential, commercial, or industrial operations or that accesses special events, etc. can generate significant dust emissions
- Industrial and/or commercial operations: Certain industrial operations can generate significant dust emissions associated with vehicular access, commercial or industrial activities.

Any of the above referenced land uses or activities can result in dust emissions that exceed the APCD significance thresholds, cause violations of an air quality standard, or create a nuisance impact in violation of APCD Rule 402 *Nuisance*. In all cases where such impacts are predicted, appropriate fugitive dust mitigation measures shall be implemented.

3.5.5 Carbon Monoxide (CO) Emissions

Carbon monoxide is a colorless, odorless, tasteless gas emitted during combustion of carbon-based fuels. While few land use projects result in high emissions of CO, this pollutant is of particular concern when emitted into partially or completely enclosed spaces such as parking structures and garages. Projects which emit more than 550 lbs/day of carbon monoxide (CO) and occur in a confined or semi-confined space (e.g., parking garage or enclosed indoor stadium) must be modeled to determine their significance. In confined or semi-confined spaces where vehicle activity occurs, CO modeling is required. If modeling shows the potential to violate the State CO air quality standard, mitigation or project redesign is required to reduce CO concentrations to a level below the health-based standard.

3.5.6 Greenhouse Gas Emissions

GHGs (CO_2, CH_4, N20, HFC, CFC, F6S) from all projects subject to CEQA must be quantified and mitigated to the extent feasible. The thresholds of significance for a project's amortized construction plus operational-related GHG emissions are:

- For land use development projects, the threshold is compliance with a qualified GHG Reduction Strategy (see Section 3.3); OR annual emissions less than 1,150 metric tons per year (MT/yr) of CO_2e; ORr 4.9 MT CO_2e/service population (SP)/yr (residents + employees2). Land use development projects include residential, commercial and public land uses and facilities. Lead agencies may use any of the three options above to determine the significance of a project's GHG emission impact to a level of certainty.

- For stationary-source projects, the threshold is 10,000 metric tons per year (MT/yr) of CO_2e. Stationary-source projects include land uses that would accommodate processes and equipment that emit GHG emissions and would require an APCD permit to operate.

The APCD's GHG threshold is defined in terms of carbon dioxide equivalent (CO_2e), a metric that accounts for the emissions from various greenhouse gases based on their global warming potential. If annual emissions of GHGs exceed these threshold levels, the proposed project would result in a cumulatively considerable contribution of GHG emissions and a cumulatively significant impact to global climate change. More detailed information on the greenhouse gas thresholds can be found in the APCD's *Greenhouse Gas Thresholds and Supporting Evidence* document (March 28, 2012) that is available at www.slocleanair.org.

3.6 SPECIAL CONDITIONS

Projects may require additional assessments as described in the following section.

2 For projects where the employment is unknown, please refer to Appendix 4.7 "Employees per 1000sf" to estimate the number of employees associated with any project.

3.6.1 Toxic Air Contaminants

Health Risk Assessments

If a project has the potential to emit toxic or hazardous air pollutants, or is located in close proximity to sensitive receptors, impacts may be considered significant due to increased cancer risk for the affected population, even at a very low level of emissions. Such projects may be required to prepare a risk assessment to determine the potential level of risk associated with their operations. The SLO County APCD should be consulted on any project with the potential to emit toxic or hazardous air pollutants. Pursuant to the requirements of California Health and Safety Code Section 42301.6 (AB 3205) and Public Resources Code Section 21151.8, subd. (a)(2), any new school, or proposed industrial or commercial project site located within 1000 feet of a school must be referred to the SLO County APCD for review. Further details on requirements for projects in this category are presented in Section 4.1.

In April of 2005, the California ARB issued the *AIR QUALITY AND LAND USE HANDBOOK: A COMMUNITY HEALTH PERSPECTIVE* (Land Use Handbook). The ARB has determined that emissions from sources such as roadways and distribution centers and, to a lesser extent gas stations, certain dry cleaners, marine ports and airports as well as refineries can lead to unacceptably high health risk from diesel particulate matter and other toxic air contaminants (TACs). Groups such as children and the elderly, as well as long-term residential occupants, are particularly at risk from toxic exposure.

In July 2009, the California Air Pollution Control officers Associations (CAPCOA) adopted a guidance document *HEALTH RISK ASSESSMENTS FOR PROPOSED LAND USE PROJECTS* to provide uniform direction on how to assess the health risk impacts from and to proposed land use projects. The CAPCOA guidance document focuses on how to identify and quantify the potential acute, chronic, and cancer impacts of sources under CEQA review. It also outlines the recommended procedures to identify when a project should undergo further risk evaluation, how to conduct the health risk assessment (HRA), how to engage the public, what to do with the results from the HRA, and what mitigation measures may be appropriate for various land use projects.

As defined in the CAPCOA guidance document there are basically two types of land use projects that have the potential to cause long-term public health risk impacts:

- Type A Projects: new proposed land use projects that generate toxic air contaminants (such as gasoline stations, distribution facilities or asphalt batch plants) that impact sensitive receptors. Air districts across California are uniform in their recommendation to use the significance thresholds that have been established under each district's "Hot Spots" and permitting programs. The APCD has defined the excess cancer risk significance threshold at **10 in a million** for Type A projects in SLO County; and,

- Type B Projects: new land use projects that will place sensitive receptors (e.g., residential units) in close proximity to existing toxics sources (e.g., freeway). The APCD has established a CEQA health risk threshold of **89 in-a-million** for the analysis of projects proposed in close proximity to toxic sources. This value represents the population weighted average health risk caused by ambient background concentrations of toxic air contaminants in San Luis Obispo County. The APCD recommends Health Risk screening and, if necessary, Health Risk Assessment (HRA) for any residential or sensitive receptor development proposed in proximity to toxic sources.

If a project is located near a sensitive receptor (e.g., school, hospital, dwelling unit(s), etc.), it may be considered significant even if other criteria do not apply. The health effects of a project's emissions may be more pronounced if they impact a considerable number of children, elderly, or people with compromised respiratory or cardiac conditions.

Diesel PM

In October of 2000, the ARB issued and adopted the Diesel Risk Reduction Plan to reduce particulate matter emissions from diesel-fueled engines and vehicles. This plan identified that 70% of the airborne toxic risk in California is from diesel particulate matter.

The plan called for a 90% reduction in this Toxic Air Contaminant by 2020 through:

a. Adoption of new regulatory standards for all new on-road, off-road, and stationary diesel-fueled engines and vehicles;

b. Requiring feasible and cost-effective diesel PM reducing retrofit requirements for the existing fleets and stationary engines; and,

c. Reducing the sulfur content in diesel-fuel sold in California to 15 parts per million.

At a minimum, fleets must meet the diesel emission reduction requirements that have been adopted in the State's Diesel Risk Reduction Plan. These fleets may also be required to provide additional mitigation depending on the project's emissions and location.

Asbestos / Naturally Occurring Asbestos

Naturally occurring asbestos (NOA) has been identified by the state Air Resources Board as a toxic air contaminant. Serpentine and ultramafic rocks are very common throughout California and may contain naturally occurring asbestos. The SLO County APCD has identified areas throughout the County where NOA may be present (see Technical Appendix 4.4). Under the ARB's Air Toxic Control Measure (ATCM) related to quarrying, and surface mining operations, a geologic evaluation is required to determine if NOA is present prior to any grading activities at a project site located in the candidate area.

If NOA is found at the site the applicant must comply with all requirements outlined in the Asbestos ATCM for Quarrying, and Surface Mining Operations. These requirements may include but are not limited to:

a. Development of an Asbestos Dust Mitigation Plan which must be approved by the APCD before operations begin, and,

b. Development and approval of an Asbestos Health and Safety Program (required for some projects).

If NOA is not present, an exemption request must be filed with the Air District. More information on NOA can be found at http://www.slocleanair.org/business/asbestos.asp.

3.6.2 Agricultural Operations

Wineries, Tasting Rooms and Special Events

Reactive organic gas emissions (ethanol) generated during wine fermentation and storage, as well as emissions from equipment used in wine production, can cause significant air quality impacts. Thus, the emissions for new or modified winery operations and activities should be evaluated and appropriate mitigation specified when necessary. New or expanding wineries with storage capacity of 26,000 gallons per year or more may also require a Permit to Operate from the APCD.

Wine production facilities can also generate nuisance odors during various steps of the process. Proven methods for handling wastewater discharge and grape skin waste need to be incorporated into the winery practices to minimize the occurrence of anaerobic processes that mix with ambient air which can result in offsite nuisance odor transport. Odor complaints could result in a violation of the SLO County APCD Rule 402 *Nuisance*.

Agricultural Burns

Agricultural operations must obtain an APCD Agricultural Burn Permit to burn dry agricultural vegetation on Permissive Burn Days. The ARB provides educational handbooks on agricultural burning (English and Spanish) to growers which are available at the following websites:

-www.arb.ca.gov/cap/handbooks/agburningsmall.pdf
-www.arb.ca.gov/cap/handbooks/agburningspanishsmall.pdf.

3.6.3 Fugitive Dust

Fugitive dust can come from many sources, such as unpaved roads, equestrian facilities and confined animal feeding operations. Dust emissions from the operational phase of a project should be managed to ensure they do not impact offsite areas and do not exceed the 20% opacity limit identified in SLO County APCD Rule 401 *Visible Emissions*. A list of approved dust control suppressants is available in Technical Appendix 4.3. The approved suppressants must be reapplied at a frequency that ensures dust emissions will not exceed the limits stated above. Any chemical or organic material used for stabilizing solids shall not violate the California State Water Quality Control Board standards for use as a soil stabilizer. Any dust suppressant must not be prohibited for use by the US Environmental Protection Agency, the California Air Resources Board, or other applicable law, rule, or regulation.

Equestrian Facilities

Another potential source of fugitive dust can come from equestrian facilities, which may be a nuisance to local residents. To minimize nuisance impacts and to reduce fugitive dust emissions from equestrian facilities the following mitigation measures should be incorporated into the project:

- Reduce the amount of the disturbed area where possible;
- Use water trucks or sprinkler systems in sufficient quantities to prevent airborne dust from leaving the site. Increased watering frequency whenever wind speeds exceed 15 mph. Reclaimed (non-potable) water shall be used whenever possible;
- Permanent dust control measures shall be implemented as soon as possible following completion of any soil disturbing activities;
- All disturbed soil areas not subject to revegetation shall be stabilized using approved chemical soil binders, jute netting, or other methods approved in advance by the Air District;
- All access roads and parking areas associated with the facility shall be paved to reduce fugitive dust; and,
- A person or persons shall be designated to monitor for dust and implement additional control measures as necessary to prevent transport of dust offsite. The monitor's duties shall include holidays and weekend. The name and telephone number of such persons shall be provided to the Air District prior to operation of the arena.

Dirt Roads and Unpaved Areas

When a project is accessed by unpaved roads and or has unpaved driveways or parking areas, a PM_{10} emission estimate needs to be conducted using the CALEEMOD model. When the model's emission estimate demonstrates an exceedance of the 25 lbs of PM_{10}/day or 25 tons of PM_{10}/year APCD thresholds, the following mitigation is required:

For the unpaved road leading to the project location, implement one of the following:

a. For the life of the project, pave and maintain the driveway; or,

b. For the life of the project, maintain the private unpaved driveway with a dust suppressant (See Technical Appendix 4.3 for a list of APCD-approved suppressants) such that fugitive dust emissions do not impact off-site areas and do not exceed the APCD 20% opacity limit.

To improve the dust suppressant's long-term efficacy, the applicant shall also implement and maintain design standards to ensure vehicles that use the on-site unpaved road are physically limited (e.g., speed bumps) to a posted speed limit of 15 mph or less.

If the project involves a city or county owned and maintained road, the applicant shall work with the Public Works Department to ensure road standards are followed. The applicant may propose other measures of equal effectiveness as replacements by contacting the APCD Planning Division.

Special Event Mitigation

When a special event is accessed by unpaved roads and or has unpaved driveways or parking areas, a PM_{10} emission estimate must to be conducted using the CALEEMOD model. If the model shows an exceedance of the 25 lbs/day of PM_{10} significance threshold, the following mitigation is required on the day(s) of the special event:

a. Designated parking locations shall be:
   1. Paved when possible;
   2. Sited in grass or low cut dense vegetative areas; or,
   3. Treated with a dust suppressant such that fugitive dust emissions do not impact offsite areas and do not exceed the APCD 20% opacity limit (see Technical Appendix 4.3).

b. Any unpaved roads/driveways that will be used for the special event shall be maintained with an APCD-approved dust suppressant such that fugitive dust emissions do not impact offsite areas and do not exceed the APCD 20% opacity limit.

The applicant may propose alternative measures of equal effectiveness by contacting the APCD Planning Division.

3.6.4 Air Quality Nuisance Impacts

If a project has the potential to cause an odor or other nuisance problem which could impact a considerable number of people, then it may be considered significant. A project may emit a pollutant in concentrations that would not otherwise be significant except as a nuisance. Odor impacts on residential areas and other sensitive receptors warrant the closest scrutiny, but consideration should also be given to other land uses where people may congregate, such as recreational facilities, work sites and commercial areas.

When making a determination of odor significance, determine whether the project would result in an odor source located next to potential receptors within the distances indicated in Table 3-3. The Lead Agency should evaluate facilities not included in Table 3-3 or projects separated by greater distances than indicated in Table 3-3 if warranted by local conditions or special circumstances. The list is provided as a guide and, as such, is not all-inclusive.

If a project is proposed within the screening level distances in Table 3-3, the APCD Enforcement Division should be contacted for information regarding potential odor problems. For projects that involve new receptors located near an existing odor source(s), an information request should be submitted to the SLO County APCD to review the inventory of odor complaints for the nearest odor emitting facility(ies) during the previous three years. For projects involving new receptors to be located near an existing odor source where there is currently no nearby development, and for new odor sources locating near existing receptors, the information request and analysis should be based on a review of odor complaints for similar facilities.

Table 3-3: Project Screening Distances for Nuisance Sources

PROJECT SCREENING DISTANCES	
Type of Operation	**Project Screening Distance**
Asphalt Batch Plant	1 mile
Chemical Manufacturing	1 mile
Coffee Roaster	1 mile
Composting Facility	1 mile
Fiberglass Manufacturing	1 mile
Food Processing Facility	1 mile
Oil Field	1 mile
Painting/Coating Operations (e.g. auto body shops)	1 mile
Petroleum Refinery	2 miles
Rendering Plant	1 mile
Sanitary Landfill	1 mile
Transfer Station	1 mile
Wastewater Treatment Plant	1 mile

Note: This list is provided as a guide and is not all-inclusive.

For a project that will be located near an existing odor source the project should be identified as having a significant odor impact, if it will be as close or closer to the any location that has experienced: 1) more than one confirmed complaint per year averaged over a three year period, or 2) three unconfirmed complaints per year averaged over a three year period.

If a proposed project is determined to result in potential odor problems, mitigation measures should be identified. For some projects, add-on controls or process changes, such as carbon absorption, incineration or an engineering modification to stacks/vents, can reduce odorous emissions. In many cases, however, the most effective mitigation strategy is the provision of a sufficient distance, or buffer zone, between the source and the receptor(s).

The SLO County APCD should be consulted whenever any of these additional special conditions may be applicable for a proposed project.

3.7 METHODS FOR CALCULATING PROJECT OPERATIONAL EMISSIONS

Operational phase air pollutant emissions from urban development can result from a variety of sources, including motor vehicles, wood burning appliances, natural gas and electric energy use, combustion-powered utility equipment, paints and solvents, equipment or operations used by various commercial and industrial facilities, construction and demolition equipment and operations, and various other sources. The amount and type of emissions produced, and their potential to cause significant impacts, depends on the type and level of development proposed. The following sections describe the recommended methods generally used to calculate emissions from motor vehicles, congested intersections and roadways, non-vehicular sources at residential and commercial facilities, and industrial point and area sources. Calculation and mitigation of construction emissions are described separately in Chapter 2.

Submittals describing project assessments must include spreadsheets with project calculations and a description of calculations so that the APCD can verify project quantification. **Calculations must be based on San Luis Obispo County default conditions unless the default settings are not representative of the project** (see below). The project report must detail assumptions made and provide sample calculations. Prior to finalizing the calculations, contact the APCD Planning and Outreach Division to review assumptions that do not have solid evidential support.

3.7.1 Determining Motor Vehicle Emissions

Motor vehicles are a primary source of long-term emissions from many residential, commercial, institutional, and industrial land uses. These land uses often do not emit significant amounts of air

pollutants directly, but cause or attract motor vehicle trips that do produce emissions. Such land uses are referred to as indirect sources.

Motor vehicle emissions associated with indirect sources should be calculated for projects which exceed or are within 10 % of the screening criteria listed in Table 1-1. Calculations should be performed using the latest version of CALEEMOD; this software incorporates the most recent vehicle emission factors from the EMFAC model (i.e., EMission FACtors) provided by the California Air Resources Board (ARB), and average trip generation factors published by the Institute of Transportation Engineers (ITE). The latest version of this program should always be used and can be downloaded free of charge at www.caleemod.com.

CalEEMod is a planning tool for estimating vehicle miles travel, fuel use and resulting emissions related to land use projects throughout California. The model calculates emissions of ROG, NO_x, CO, and CO_2 and other GHGs as well as dust and exhaust PM_{10} from vehicle use associated with new or modified development such as shopping centers, housing, commercial services, industrial land uses, etc. CALEEMOD includes many default values for parameters such as

- Seasonal Average Temperature;
- Humidity;
- Wood and gas stoves in a residential development and their usage;
- Fleet mix;
- Average vehicle speed and age;
- Average urban, rural, commute, shopping, and other trip type distances; and,
- Average trip rates for each land use.

When modeling project emissions, the user must specify that the project is located in SLO County so that the appropriate default values are used for the modeling. Motor vehicle-related defaults should not be changed without justification for doing so; solid documentation of rationale for any changes made need to be provided to APCD as part of the air quality report. Defaults that need to be evaluated and modified based on the project location and specifications include:

- **Trip Length:** For projects that are located in rural areas of the county where commercial services are not readily available, the trip length default values in the Operational – Mobile Vehicle Trips CalEEMod tab need be set at 13 miles for all trip distances; this happens automatically if the "Rural" Land Use Setting.

- **Fleet Mix:** Projects that attract a mix of vehicles which clearly differs from the default vehicle fleet in SLO County should make the appropriate changes to the FleetMix fraction section on the Annual, Summer, and Winter subtabs under the CalEEMod Operational – Mobile Vehicle Emissions Tab. Some examples include large commercial retail with heavy on-road truck use and heavy industry.

- **Dirt and Roads:** Projects which include on- and off-site dirt access roads should modify the default Road Dust component to accurately assess the project's PM_{10} emissions. For general traffic, SLO County APCD recommends using the ARB's unpaved road emission factor of 2 pounds of particulate matter emissions per one mile of unpaved vehicle mile traveled (www.arb.ca.gov/ei/areasrc/fullpdf/FULL7-10.pdf). This value is not appropriate for heavy duty diesel truck travel on unpaved roads.

  The following are the APCD recommended values to use in CalEEMod's Operational – Mobile Road Dust tab to yield PM10 emissions using variable values that emulate the ARB's above identified unpaved road emission factor:

  - Under the "Paved Road Dust" section:

- Change the "% Pave" value to define your project's paved road component by entering the results of the following calculation:
  - In general, the total distance of paved road driving (miles) is determined with:
    - [1 – (A/B)] x 100%
    - Where A = The unpaved road distance to access the project
    - Where B is typically = to the county average one way trip distance of 13 miles)

- Under the "Unpaved Road Dust" section:
  - Use a value of 9.3 for "Material Silt Content (%)"
  - Use a value of 0.1 for "Material Moisture Content (%)"
  - Use a value of 32.4 for "Mean Vehicle Speed (mph)"

If the project has a total distance of unpaved road greater than 13 miles, the actual distance of the unpaved road should be compared to the total one-way trip length to determine the percentages of paved and unpaved road distances. In addition, the Trip Length in the Operational – Mobile Vehicle Trips tab needs to be updated by entering the total length of a one way trip for the project.

CalEEMod reports submitted as part of a CEQA evaluation need to include the following:

a. A winter, summer, and annual report;

b. The model files associated with the reports;

c. The SLO County APCD CEQA operational criteria pollutant thresholds should be compared to the Overall Operational winter total emissions (Note: ROG and NOx emission values are combined and compared to the 25 lb/day threshold);

d. The SLO County APCD CEQA operational GHG numerical threshold should be compared to the Overall Operational annual total CO2e emissions;

e. When summarizing modeling results in a CEQA document summary table always list the pollutants in the order they are listed in the model for ease of review; and,

f. Changes to any SLO County defaults need to be identified and a solid defensible explanation for those changes need to be provided to the APCD.

3.7.2 Non-Vehicular Emissions from Residential and Commercial Facilities

Non-vehicular emission sources associated with most residential and commercial development include energy use to power lights, appliances, heating and cooling equipment, evaporative emissions from paints and solvents, fuel combustion by lawnmowers, leaf blowers and other small utility equipment, residential wood burning, household products, and other small sources. Collectively, these are referred to as "area sources" and are important from a cumulative standpoint even though they may appear insignificant when viewed individually. The CALEEMOD model provides emissions estimations from area sources based on land use types; however it underestimates all emissions associated with electricity use and water consumption.

One CALEEMOD default area source value which has a significant impact on project emissions and may need to be changed is hearth fuel combustion – it is enabled by default and should be disabled or modified if the project excludes wood-burning devices.

3.7.3 Industrial Emission Sources

From an emissions standpoint, industrial facilities and operations are typically categorized as being "point" or "area" sources. Point sources are stationary and generally refer to a site that has one or more emission sources at a facility with an identified location (e.g., power plant, refinery, etc.). Area sources can be:

- Stationary or mobile and typically include categories of stationary facilities whose emissions are small individually, but may be significant as a group (e.g., gas stations, dry cleaners, etc.);
- Sources whose emissions emanate from a broad area (e.g., fugitive dust from storage piles and dirt roads, landfills, etc.); and,
- Mobile equipment used in industrial operations (e.g., drill rigs, loaders, haul-trucks, etc.).

Emissions from new, modified or relocated point sources are directly regulated through the APCD Rule 204 *New Source Review* requirements and facility permitting program. A general list of the type of sources affected by these requirements is provided in Section 4.1. New development that includes these source types should be forwarded to the SLO County APCD for a determination of APCD permitting and control requirements. Through the CEQA analysis, all air quality impacts are evaluated including the stationary point, area and mobile sources. While a specific piece of equipment or process may be covered by an APCD permit it is not excluded from the CEQA evaluation process.

3.7.4 Health Risk Assessment

Health risk is a common metric used by air quality and health scientists to describe the potential for an individual or group of people (population) in a given area to suffer serious health effects from long-term or short-term exposure to one or more toxic air contaminants (TACs). In July 2009, the California Air Pollution Control officers Association (CAPCOA) released a guidance document titled *HEALTH RISK ASSESSMENT FOR LAND USE PROJECTS*, which is available for download at www.capcoa.org. Attachment 1 of the CAPCOA document provides specific guidance on how to model emissions of toxic substances from various source types to determine the potential cancer risk as well as acute and chronic non-cancer health risks for nearby receptors.

A screening-level and/or refined health risk assessment (HRA) may be required for projects which may result in the exposure of sensitive receptors (e.g., school, hospital, dwelling unit(s), etc.) to TACs. Projects which involve the siting of **either** the TAC source itself **or** sensitive receptors in close proximity to a TAC should be evaluated for risk exposure. Various tools are available to perform a screening analysis from stationary sources impacting receptors (Type A projects).

For projects being impacted by existing sources (Type B projects), a distance table screening tool is available in the ARB Land Use Handbook which provides recommended buffer distances associated with types of most common toxic air contaminant sources (see Technical Appendix 4.2).

If a screening risk assessment shows that the potential risk exceeds the APCD's thresholds, then a more refined analysis may be required. The assessment should include the evaluation of both mobile and stationary sources. Risk assessments are normally prepared in a tiered manner, where progressively more input data is collected to refine the results. The refined analysis for the project should provide more accurate information for decision makers.

3.7.5 Greenhouse Gas Emissions

To quantify GHG emissions from a proposed development, the APCD recommends using CalEEMod for mobile sources and a partial characterization of area source impacts. In certain cases (e.g., drive-through restaurants), the use of alternative methodologies to quantify GHG impacts will be required. Please consult APCD Planning Division staff for current calculation methods.

3.8 OPERATIONAL EMISSION MITIGATION

Emissions from motor vehicles that travel to and from residential, commercial, and industrial land uses can generally be mitigated by reducing vehicle activity through site design (e.g., transit oriented design, infill, mixed use, etc.), implementing transportation demand management measures, using clean fuels and vehicles, and/or off-site mitigation. In addition, area source operational emissions from energy consumption from land uses can be mitigated by improving energy efficiencies, conservation measures and use of alternative energy sources. The mitigation measures in this section are intended to reduce emissions of ROG, NO_x, Diesel PM (DPM), Dust PM, and GHGs. The following three categories best capture the types of mitigation measures that can reduce air quality impacts from project operations:

- **Site Design Mitigation Measures:** Site design and project layout can be effective methods of mitigating air quality impacts of development. Land use development that incorporates urban infill, higher density, mixed use and walkable, bikeable, and transit oriented designs can significantly reduce vehicle activity and associated air quality impacts. As early as possible in the scoping phase of a project, the SLO County APCD recommends that developers and planners refer to the document *CREATING TRANSPORTATION CHOICES THROUGH DEVELOPMENT DESIGN AND ZONING* and Appendix E of the APCD Clean Air Plan *LAND USE AND CIRCULATION MANAGEMENT STRATEGIES.* APCD Planning Division staff is available to discuss project layout and design factors which can influence indirect source emissions and reduce mobile source emissions.

- **Energy Efficiency Mitigation Measures:** Residential and commercial energy use for lighting, heating and cooling is a significant source of direct and indirect air pollution nationwide. Reducing site and building energy demand will reduce emissions at the power plant source and natural gas combustion in homes and commercial buildings. The energy efficiency of both commercial and residential buildings can be improved by orienting buildings to maximize natural heating and cooling.

- **Transportation Mitigation Measures:** Vehicle emissions are often the largest continuing source of emissions from the operational phase of a development. Reducing the demand for single-occupancy vehicle trips is a simple, cost-effective means of reducing vehicle emissions. In addition, using cleaner fueled vehicles or retrofitting equipment with emission control devices can reduce the overall emissions without impacting operations. In today's marketplace, clean fuel and vehicle technologies exist for both passenger and heavy-duty applications.

3.8.1 Guidelines for Applying ROG, NO_x and PM_{10} Mitigation Measures

In general, projects which do not exceed the 25 lb/day ROG+NO_x threshold do not require mitigation. For projects which exceed this threshold, the SLO County APCD has developed a list of mitigation strategies for residential, commercial and industrial projects. Alternate mitigation measures may be suggested by the project proponent if the APCD-suggested measures are not feasible. Project mitigation recommendations should follow the guidelines listed below and summarized in Table 3-4:

a. Projects with the potential to generate 25 - 29 lbs/day of combined ROG + NO_x or PM_{10} emissions should select and implement at least **8** mitigation measures from the list;

b. Projects generating 30 - 34 lbs./day of combined ROG + NO_x or PM_{10} emissions should select and implement at least **14** mitigation measures list;

c. Projects generating 35 - 50 lbs./day of combined ROG + NO_x or PM_{10} emissions should implement at least **18** measures from the list;

d. Projects generating 50 lbs/day or more of combined ROG + NO_x or PM_{10} emissions should select and implement **all feasible** measures from the list. Further mitigation measures may also be necessary, including off-site measures, depending on the nature and size of the project and the effectiveness of the mitigation measures proposed; and,

e. Projects generating 25 tons per year or more of combined ROG + NO_x or PM_{10} emissions will need to implement **all feasible** measures from the list as well as **off-site** mitigation measures, depending on the nature and size of the project and the effectiveness of the onsite mitigation measures proposed.

Table 3-4: Mitigation Threshold Guide

Combined ROG+NO_x or PM_{10} Emissions (lbs/day)	Mitigation Measures Recommended	
	Residential, Commercial or Industrial	Off-Site Mitigation
< 25	None	None
25 – 29	8	*
30 – 34	14	*
35 – 50	18	*
≥ 50	All Feasible	*
≥ 25 ton/yr	All Feasible	Yes

* Will be dependent on the effectiveness of the mitigation measures, location of project and high vehicle dependent development. Examples of projects potentially subject to off-site mitigation include: rural subdivisions, drive-through applications, commercial development located far from urban core.

3.8.2 Standard Mitigation Measures

The recommended standard air quality mitigation measures have been separated according to land use (i.e., residential, commercial and industrial), measure type (i.e., site design, energy efficiency and transportation) and pollutant reduced (i.e., ozone, particulate, diesel PM, and GHGs). Any project generating 25 lbs/day or more of ROG + NO_x or PM_{10} should select the applicable number of mitigation measure as outlined above from Table 3-5 to reduce the air quality impacts from the project below the significance thresholds. This table also provides recommended mitigations for diesel PM and GHG emissions. For projects that exceed the DPM threshold (i.e., 1.25 lbs/day) due to significant diesel vehicle activity (e.g., mining operations, distribution facilities, etc.), project emissions must be recalculated to demonstrate that the project emissions are below the APCD DPM threshold of significance when mitigation measures are included.

Table 3-5: Mitigation Measures

LAND USE Residential (R) Commercial (C) Industrial (I)	Measure Type	MITIGATION MEASURE	POLLUTANT REDUCED Ozone (O) Particulate (P) Diesel Particulate Matter (DPM) Greenhouse Gas (GHG)
R, C, I	Site design, Transportation	Improve job / housing balance opportunities within communities.	O, P, GHG
R, C, I	Site design	Orient buildings toward streets with automobile parking in the rear to promote a pedestrian-friendly environment.	O, P, GHG
R, C, I	Site design	Provide a pedestrian-friendly and interconnected streetscape to make walking more convenient, comfortable and safe (including appropriate signalization and signage).	O, P, GHG
R, C, I	Site design	Provide good access to/from the development for pedestrians, bicyclists, and transit users.	O, P, GHG
R, C, I	Site design	Incorporate outdoor electrical outlets to encourage the use of electric appliances and tools.	O, P, GHG
R, C, I	Site design	Provide shade tree planting in parking lots to reduce evaporative emissions from parked vehicles. Design should provide 50% tree coverage within 10 years of construction using low ROG emitting, low maintenance native drought resistant trees.[3]	O P GHG
R, C, I	Site design	Pave and maintain the roads and parking areas	P
R, C, I	Site design	Driveway design standards (e.g., speed bumps, curved driveway) for self-enforcing of reduced speed limits for unpaved driveways.	P
R, C, I	Site design	Use of an APCD-approved suppressant on private unpaved roads leading to the site, unpaved driveways and parking areas; applied at a rate and frequency that ensures compliance with APCD Rule 401, visible emissions and ensures offsite nuisance impacts do not occur.	P
R, C	Site design	Development is within 1/4 mile of transit centers and transit corridors.	O, P, GHG
R, C	Site design	Design and build compact communities in the urban core to prevent sprawl.	O, P, GHG
R, C	Site design	Increase density within the urban core and urban reserve lines.	O, P, GHG
R, C	Site design	For projects adjacent to high-volume roadways or railroad idling zones, design project to include provide effective buffer zone between the source and the receptor.	DPM
R, C	Site design	For projects adjacent to high-volume roadways, plant vegetation[4] between receptor and roadway.	DPM, P
R	Site design	No residential wood burning appliances.	O, P, GHG
R, C, I	Site design, Transportation	Incorporate traffic calming modifications to project roads, such as narrower streets, speed platforms, bulb-outs and intersection designs that reduce vehicles speeds and encourage pedestrian and bicycle travel.	O, P, GHG
R, C, I	Site design, Transportation	Increase number of connected bicycle routes/lanes in the vicinity of the project.	O, P, GHG
R, C, I	Site design, Transportation	Provide easements or land dedications and construct bikeways and pedestrian walkways.	O, P, GHG
R, C, I	Site design, Transportation	Link cul-de-sacs and dead-end streets to encourage pedestrian and bicycle travel to adjacent land uses.	O, P, GHG
R, C, I	Site design, Transportation	Project is located within one-half mile of a 'Park and Ride' lot or project installs a 'Park and Ride' lot with bike lockers in a location of need defined by SLOCOG.	O, P, GHG
C, I	Site design, Transportation	Provide onsite housing for employees.	O, P, GHG

3 Trees must be maintained for life of project
4 Certain types of vegetation provide maximum effectiveness. Vegetation must be maintained over the life of the project.

LAND USE Residential (R) Commercial (C) Industrial (I)	Measure Type	MITIGATION MEASURE	POLLUTANT REDUCED Ozone (O) Particulate (P) Diesel Particulate Matter (DPM) Greenhouse Gas (GHG)
C, I	Site design, Transportation	Implement on-site circulation design elements in parking lots to reduce vehicle queuing and improve the pedestrian environment.	O, P, GHG
C, I	Site design, Transportation	Provide employee lockers and showers. One shower and 5 lockers for every 25 employees are recommended.	O, P, GHG
C, I	Site design, Transportation	Parking space reduction to promote bicycle, walking and transit use.	O, P, GHG
R	Site design	Tract maps resulting in parcels of one-half acre or les shall orient at least 75% of all lot lines to create easy due south orientation of future structures.	GHG
R	Site design	Trusses for south-facing portions of roofs shall be designed to handle dead weight loads of standard solar-heated water and photovoltaic panels. Roof design shall include sufficient south-facing roof surface, based on structures size and use, to accommodate adequate solar panels. For south facing roof pitches, the closest standard roof pitch to the ideal average solar exposure shall be used.	O, GHG
R, C, I	Energy efficiency	Increase the building energy rating by 20% above Title 24 requirements. Measures used to reach the 20% rating cannot be double counted.	O, GHG
R, C, I	Energy efficiency	Plant drought tolerant, native shade trees along southern exposures of buildings to reduce energy used to cool buildings in summer.[5]	O, GHG
R, C, I	Energy efficiency	Utilize green building materials (materials which are resource efficient, recycled, and sustainable) available locally if possible.	O, DPM, GHG
R, C, I	Energy efficiency	Install high efficiency heating and cooling systems.	O GHG
R, C, I	Energy efficiency	Orient 75 percent or more of homes and/or buildings to be aligned north / south to reduce energy used to cool buildings in summer.	O GHG
R, C, I	Energy efficiency	Design building to include roof overhangs that are sufficient to block the high summer sun, but not the lower winter sun, from penetrating south facing windows (passive solar design).	O, GHG
R, C, I	Energy efficiency	Utilize high efficiency gas or solar water heaters.	O, P, GHG
R, C, I	Energy efficiency	Utilize built-in energy efficient appliances (i.e. Energy Star®).	O, P GHG
R, C, I	Energy efficiency	Utilize double-paned windows.	O, P, GHG
R, C, I	Energy efficiency	Utilize low energy street lights (i.e. sodium).	O, P, GHG
R, C, I	Energy efficiency	Utilize energy efficient interior lighting.	O, P, GHG
R, C, I	Energy efficiency	Utilize low energy traffic signals (i.e. light emitting diode).	O, P, GHG
R, C, I	Energy efficiency	Install door sweeps and weather stripping (if more efficient doors and windows are not available).	O, P, GHG
R, C, I	Energy efficiency	Install energy-reducing programmable thermostats.	O, P, GHG
R, C, I	Energy efficiency	Participate in and implement available energy-efficient rebate programs including air conditioning, gas heating, refrigeration, and lighting programs.	O, P, GHG

5 Trees must be maintained for the life of the project

LAND USE Residential (R) Commercial (C) Industrial (I)	Measure Type	MITIGATION MEASURE	POLLUTANT REDUCED Ozone (O) Particulate (P) Diesel Particulate Matter (DPM) Greenhouse Gas (GHG)
R, C, I	Energy efficiency	Use roofing material with a solar reflectance values meeting the EPA/DOE Energy Star® rating to reduce summer cooling needs.	O, P, GHG
R, C, I	Energy efficiency	Utilize onsite renewable energy systems (e.g., solar, wind, geothermal, low-impact hydro, biomass and bio-gas).	O, P, GHG
R, C, I	Energy efficiency	Eliminate high water consumption landscape (e.g., plants and lawns) in residential design. Use native plants that do not require watering and are low ROG emitting.	O, GHG
R, C, I	Energy efficiency	Provide and require the use of battery powered or electric landscape maintenance equipment for new development.	O, GHG
C, I	Energy efficiency	Use clean engine technologies (e.g., alternative fuel, electrification) engines that are not subject to regulations.	O, DPM, GHG
R, C, I	Transportation	Provide and maintain a kiosk displaying transportation information in a prominent area accessible to employees and patrons.	O, P, GHG
R, C, I	Transportation	Develop recreational facility (e.g., parks, gym, pool, etc.) within one-quarter of a mile from site.	O, P, GHG
R, C, I	Transportation	If the project is located on an established transit route, provide improved public transit amenities (i.e., covered transit turnouts, direct pedestrian access, covered bench, smart signage, route information displays, lighting etc.).	O, P, GHG
R, C, I	Transportation	Project provides a display case or kiosk displaying transportation information in a prominent area accessible to employees or residents.	O, P, GHG
R, C, I	Transportation	Provide electrical charging station for electric vehicles.	O, P, GHG
R, C, I	Transportation	Provide neighborhood electric vehicles / car share program for the development.	O, P, GHG
R, C, I	Transportation	Provide bicycle-share program for development.	O, P, GHG
R, C, I	Transportation	Provide preferential parking / no parking fee for alternative fueled vehicles or vanpools.	O, P, GHG
R, C, I	Transportation	Provide bicycle lockers for existing 'Park and Ride' lots where absent or insufficient.	O, P, GHG
R C I	Transportation	Provide vanpool, shuttle, mini bus service (alternative fueled preferred).	O, P, DPM, GHG
C, I	Transportation	Provide secure on-site bicycle indoor storage, lockers, or racks.	O, P, GHG
C, I	Transportation	For large developments, provide day care facility on site.	O, P, GHG
C, I	Transportation	Provide on-site bicycle parking both short term (racks) and long term (lockers, or a locked room with standard racks and access limited to bicyclist only) to meet peak season maximum demand. One bike rack space per 10 vehicle/employee space is recommended.	O, P, GHG
C, I	Transportation	On-site eating, refrigeration and food vending facilities	O, P, GHG
C, I	Transportation	Implement a Transportation Choice Program to reduce employee commute trips. The applicant shall work with Rideshare for free consulting services on how to start and maintain a program.	O, P, GHG
C, I	Transportation	Provide incentives (e.g., bus pass, "Lucky Bucks", etc.) to employees to carpool/vanpool, take public transportation, telecommute, walk bike, etc.	O, P, GHG
C, I	Transportation	Implement compressed work schedules (i.e., 9–80s or 4–10s).	O, P, GHG
C, I	Transportation	Implement a telecommuting program.	O, P, GHG
C, I	Transportation	Implement a lunchtime shuttle to reduce single occupant vehicle trips.	O, P, GHG

LAND USE Residential (R) Commercial (C) Industrial (I)	Measure Type	MITIGATION MEASURE	POLLUTANT REDUCED Ozone (O) Particulate (P) Diesel Particulate Matter (DPM) Greenhouse Gas (GHG)
C, I	Transportation	Include teleconferencing capabilities, such as web cams or satellite linkage, which will allow employees to attend meetings remotely without requiring them to travel out of the area.	O, P, DPM, GHG
C, I	Transportation	If the development is or contains a grocery store or large retail facility, provide customers home delivery service in clean fueled vehicles	O, P, DPM, GHG
C, I	Transportation	At community event centers (i.e., amphitheaters, theaters, and stadiums) provide valet bicycle parking.	O, P, GHG
C, I	Transportation	Implement a "No Idling" program for heavy-duty diesel vehicles, which includes signage, citations, etc.	DPM, GHG
C, I	Transportation	Develop satellite work sites.	O, GHG
C, I	Transportation	Require the installation of electrical hookups at loading docks and the connection of trucks equipped with electrical hookups to eliminate the need to operate diesel-powered TRUs at the loading docks.	DPM, GHG
C, I	Transportation	If not required by other regulations (ARB's on-road or off-road diesel), restrict operation to trucks with 2007 model year engines or newer trucks.	O, DPM, GHG
C, I	Transportation	If not required by other regulations (ARB's on-road or off-road diesel), require or provide incentives to use diesel particulate filters for truck engines.	DPM
R	Transportation	Provide storage space in garage for bicycle and bicycle trailers, or covered racks / lockers to service the residential units.	O, P, GHG
R	Transportation	Provide free-access telework terminals and/or wi-fi access in multi-family projects.	O, P, GHG
C	Transportation	Develop core commercial areas within 1/4 to 1/2 miles of residential housing or industrial areas.	O, P, GHG

3.8.3 Off-Site Mitigation

Operational phase emissions from large development projects that cannot be adequately mitigated with on-site mitigation measures alone will require off-site mitigation in order to reduce air quality impacts to a level of insignificance if emissions cannot be adequately mitigated with on-site mitigation measures alone. Whenever off-site mitigation measures are deemed necessary, it is important that the developer, lead agency and APCD work together to develop and implement the measures to ensure successful outcome. This work should begin at least six months prior to issuance of occupancy permits for the project.

The first step in determining whether off-site mitigation is required is to compare the estimated operational phase emissions to the APCD significance thresholds. If the sum of ROG + NO_x emissions exceeds 25 tons/year, off-site mitigation will be required. Off-site mitigation may also be required for development projects were emissions exceed the 25 lb/day threshold. Examples of projects potentially subject to off-site mitigation include rural subdivisions, drive-through facilities and commercial development located far from the urban core.

If off-site mitigation is required, potential off-site mitigation measures may be proposed and implemented by the project proponent following APCD approval of the appropriateness and effectiveness of the proposed measure(s). Alternatively, the project proponent can pay a mitigation fee based on the amount

of emission reductions needed to bring the project impacts below the applicable significance threshold. The APCD shall use these funds to implement a mitigation program to achieve the required reductions. The following outlines how to calculate the amount of off-site mitigation fees required for a given project:

a. Calculate the operational phase emissions for the project using CALEEMOD, or an equivalent calculation tool approved by the APCD; include the emission reduction benefits of any onsite mitigation measures included in the project. Any project emissions calculated to be above the APCD significance thresholds are defined as excess emissions and must be reduced below the emission thresholds by off-site mitigation.

b. Project emissions above the lbs/day threshold must be converted to tons/year and divided by the daily-to-annual equity ratio value of 5.5 to obtain an equivalent tons/year value.

c. The excess tons/year emissions are then multiplied by the project life (i.e., 50 years for residential projects and 25 years for commercial projects) and the most current cost-effectiveness[6] value as approved for the Carl Moyer grant program.

Off-site emission reductions can result from either stationary or mobile sources, but should relate to the on-site impacts from the project in order to provide proper "nexus" for the air quality mitigation. For example, NO_x emissions from increased vehicle trips from a large residential development could be reduced by funding the expansion of existing transit services in close proximity to the development project to reduce NO_x emissions. An off-site mitigation strategy should be developed and agreed upon by all parties prior to the start of construction.

The off-site mitigation strategies include but are not limited to the list provided below:

- Develop or improve park-and-ride lots;
- Retrofit existing homes in the project area with APCD-approved natural gas combustion devices;
- Retrofit existing homes in the project area with energy-efficient devices;
- Retrofit existing businesses in the project area with energy-efficient devices;
- Construct satellite worksites;
- Fund a program to buy and scrap older, higher emission passenger and heavy-duty vehicles.
- Replace/repower transit buses;
- Replace/repower heavy-duty diesel school vehicles (i.e. bus, passenger or maintenance vehicles);
- Fund an electric lawn and garden equipment exchange program;
- Retrofit or repower heavy-duty construction equipment, or on-road vehicles;
- Install bicycle racks on transit buses;
- Purchase Verified Diesel Emission Control Strategies (VDECS) for local school buses, transit buses or construction fleets;
- Install or contribute to funding alternative fueling infrastructure (i.e. fueling stations for CNG, LPG, conductive and inductive electric vehicle charging, etc.);
- Fund expansion of existing transit services;
- Fund public transit bus shelters;
- Subsidize vanpool programs;
- Subsidize transportation alternative incentive programs;
- Contribute to funding of new bike lanes;
- Install bicycle storage facilities; and,

6 Cost-effectiveness is a measure of the dollars needed to reduce a ton of emissions. The cost-effectiveness used to calculate off-site mitigation is based on the Carl Moyer Grant Program and is updated on a periodic basis. The Carl Moyer cost effectiveness value as of 2009 is $16,000 per ton. There will be a 10% administration fee charged for grant administration.

- Provide assistance in the implementation of projects that are identified in city or county Bicycle Master Plans.

3.9 EVALUATION OF PROJECT CHANGES

If the scope or project description is modified after final project approval, the project will need to be re-evaluated by the APCD to determine if additional air quality impacts will result from the proposed modifications. If additional impacts are expected, the cumulative impacts from the total project must be evaluated.

3.10 MITIGATION MONITORING

In order to ensure the operational phase air quality mitigation measures and project revisions identified in the EIR or mitigated negative declarations are implemented, the APCD may conduct site visits to ensure that the mitigation measures are fully implemented. The lead agency may also review project mitigation for consistency with project conditions. Beyond verifying mitigation implementation, this monitoring can result in compliance requirements if mitigation measures are not sufficiently being implemented.

ATTACHMENT 13

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August 13, 2015

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Re: Phillips 66 Company Rail Project

Dear Ms. McDonald,

The Revised Draft EIR ("EIR") correctly states that San Luis Obispo County ("County") did not identify the Phillips 66 Santa Maria Refinery Rail Project ("Project") area as unmapped Environmentally Sensitive Habitat Area ("ESHA") at, or before, the time of Phillips 66 Company's project application. The best available information supports the conclusion that there is no ESHA in or adjacent to the Project site. Additionally, the County's original no-unmapped-ESHA finding is, as a matter of law, final and impervious to collateral attack. As explained in greater detail below, the County therefore should stand by its original no-unmapped-ESHA finding.

I.
THERE IS NO UNMAPPED ESHA IN OR AROUND THE PROJECT SITE

The County's Coastal Zone Land Use Ordinance (CZLUO) recognizes two types of ESHA: mapped ESHA and unmapped ESHA. Mapped ESHA is defined as follows:

> "A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily [be] disturbed or degraded by human activities and development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats and are mapped as Land Use Element combining designations. Is the same as an Environmentally Sensitive Habitat."

CZLUO § 23.11.030.

By contrast, Unmapped ESHA is defined as follows:

> "A type of Sensitive Resource Area where plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and development. They include, but are not limited to, known wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats that may not be mapped as Land Use Element combining designations. The existence of Unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information. Unmapped ESHA includes but is not limited to:
>
> a. Areas containing features or natural resources when identified by the County or County approved expert as having equivalent characteristics and natural function as mapped other environmental sensitive habitat areas;
>
> b. Areas previously known to the County from environmental experts, documents or recognized studies as containing ESHA resources;
>
> c. Other areas commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection."

Id.

Collectively, the two types of ESHA are defined both by ecological characteristics (*e.g.*, rare or especially valuable resources) and legal criteria (*e.g.*, legislative designations by mapping versus *ad hoc* designations made at or before the time of application acceptance, based on policy judgments about what can and should be protected). The County designated mapped ESHA on the portion of the Phillips 66 property that lies west of the Union Pacific Railroad (UPRR) property that bisects the Phillips 66 property. No other mapped ESHA occurs on the Phillips 66 property.

As stated above, the County made no determination at or before the time of Phillips 66 Company's application that the Project area contains or is surrounded by *unmapped* ESHA. In its application, Phillips 66 provided the County and the public with a comprehensive assessment of the ecological setting, including detailed characterization

of the botanical and wildlife resources of the area in and adjacent to the Project, as well as a quantitative assessment of potential Project impacts. *See Botanical Assessment* and *Wildlife and Habitat Assessment* in Phillips 66's Land Use Application (June 2013). These documents provide species lists, plant community composition data, and resource mapping to allow for a full understanding of the ecological setting.

Biologically, the County's no-unmapped-ESHA finding is supported by the ecological characteristics of the Project area. The Project area has been grazed for decades and, in large areas, the dominant plant species are non-native species including veldt grass (*Ehrharta calycina*), mustard (*Brassica tourneforii*), stork's-bill filaree (*Erodium botrys*), foxtail barley (*Hordeum murinum*) and others. Even the highest-quality native vegetation types within the Project area are degraded with significantly lower species diversity and cover than in the same vegetation types in the mapped ESHA west of the UPRR property.

For example, within the mapped *Lupinus chamissonis – Ericameria ericoides* Shrubland Alliance, the sampling transects revealed a total mean vegetation cover of 58.6% (the remaining area being bare ground without vegetation). Of the 58.6% vegetation cover, 47.2% was by non-native species. In other words, more than 80% of the vegetation is non-native, though the area is mapped as a native vegetation type. This reflects the high level of disturbance associated with decades of grazing in the Project area. In undisturbed high quality stands of this same plant community, such as in the mapped ESHA on the western portion of the Phillips 66 property, these ratios are reversed with non-native weed cover comprising less than 20% of the total cover. The low cover by native species in the disturbed area reduces the biodiversity and biological functionality of the land. Foraging and cover opportunities for wildlife are also lowered by the level of disturbance. Additionally, the Phillips 66 property east of the UPRR property is surrounded by developed industrial, residential, and agricultural land.

Moreover, the Project area does not support known wetlands, coastal streams or riparian vegetation, or marine habitats. No state or federally listed threatened or endangered botanical or wildlife species are known to occur or are expected to occur within the rail project footprint area. Conversely, the area designated by the County as mapped ESHA supports a unique assemblage of native plant species with high species diversity and native plant cover.

In July 2015, two focused field studies were completed to further evaluate vegetation types on the Phillips 66 property—one east and one west of the railroad property. *See* "Sensitive Resources Report—Botanical Addendum," prepared by ARCARDIS (July 2015) and attached as Exhibit A. The goals of the field studies were to (1) compare vegetation east and west of the railroad to determine if there is equivalency of environmental sensitivity, and (2) further evaluate the previously mapped *Saliva mellifera* Shrubland Alliance, and the relationship between *Ericameria* and *Saliva*-dominated vegetation. The studies conclude that the vegetation on the west side of the

railroad property differs significantly—both quantitatively and qualitatively—from the vegetation on the east side. Among other findings, the studies establish that vegetation types west of the railroad are more complex, are less degraded, and exhibit a higher level of ecological health than vegetation types east of the railroad. Simply put, habitats to the west and to the east of the railroad property lack equivalency in terms of their characteristics or their natural function. The studies support the same conclusion drawn from the best available information existing at the time of acceptance of the Project application: The Project site has no unmapped ESHA.

II.
EVEN IF THERE WERE UNMAPPED ESHA IN OR AROUND THE PROJECT SITE, THE PROJECT AS PROPOSED COULD STILL BE APPROVED

Even if there were unmapped ESHA in or adjacent to the Project site, the Project could still be approved consistent with the County's Local Coastal Program ("LCP"). Indeed, the LCP affirmatively supports certain developments, including the Project, in and around alleged ESHA.

By way of background, Section 23.07.170 of the CZLUO clearly contemplates that development can occur in or adjacent to ESHA. For example, subsection (a) sets forth the requirements for "[a] land use permit application for a project on a site located within or adjacent to an Environmentally Sensitive Habitat"; if a project in or near ESHA were categorically prohibited, no such application process would be needed. CZLUO § 23.07.170(a). Similarly, subsection (b) sets forth the required findings before the County may grant "[a]pproval of a land use permit for [such] a project." *Id.* § 23.07.170(b). And subsection (e) requires that development in or adjacent to ESHA "shall be designed and located in a manner which avoids any *significant* disruption or degradation of habitat values," establishing that projects with less-than-significant impacts on habitat values are allowed. *Id.* § 23.07.170(e) (emphasis added).

Against this permissive backdrop, section 23.07.170(e) contains a nonexclusive list of "[c]ircumstances in which a development project would be allowable within an ESHA." The list is illustrative of the kinds of approvable projects in ESHA and the relevant conditions of approval. Among these are projects that involve "habitat creation and enhancement," like Phillips 66's proposed rail spur extension.

Under 23.07.170(e), where a project "results in an unavoidable loss (*i.e.*, temporary or permanent conversion) of habitat area, replacement habitat and/or habitat enhancements shall be provided and maintained by the project applicant." CZLUO § 23.07.170(e). "Generally, replacement habitat must be provided at recognized ratios to successfully reestablish the habitat at its previous size, or as is deemed appropriate in the particular biologic assessment(s) for the impacted site. Replacement and/or enhanced habitat, whenever feasible, shall be of the same type as is lost ('same-kind') and within

the same biome ('same-system'), and shall be permanently protected by a deed restriction or conservation easement." *Id.*

Phillips 66 has proposed and the EIR requires on-site restoration of dune habitat ("same-kind"); Phillips 66 has prepared a dune habitat restoration plan; and Phillips 66 has identified a suitable location on its property ("same-system") to implement the restoration. The proposed on-site native habitat restoration meets or exceeds the 2:1 replacement ratio specified in the EIR (Mitigation Measure BIO 5-a), and results in a *net increase* in high quality native dune habitat on the Phillips 66 property following development of the Project.

Moreover, the County's Coastal Plan Policies affirm the vital economic importance of the energy-development industry, including refineries like Phillips 66 that are "coastal-dependent." A "Coastal-Dependent Development or Use" is "[a]ny development or use that requires a permanent location on or adjacent to the ocean." Coastal-dependent development has "priority" over other development on the coast, and "shall be encouraged to . . . expand within existing sites and shall be permitted reasonable long-term growth." Coastal Plan Policies (Revised June 2004), Chapter 4, at 4-1 (quoting Public Resources Code sections 30001.5, 30255, and 30260). Importantly, "where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of [the Coastal Act], they may nonetheless be permitted . . . if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible." *Id.* at 4-1 to 4-2 (quoting Public Resources Code section 30260).

The Project clearly is "coastal dependent," because it must, by definition, occur adjacent to the ocean, where both the refinery and the mainline rail to which the proposed rail spur is to be extended are located; no other permanent location for the proposed extension is possible. More generally, the Project is inextricably tied to a facility that is itself coastal dependent, as evidenced by the fact that it operates under a National Pollutant Discharge Elimination System ("NPDES") permit for outfall into the Pacific Ocean. In addition, as described above, the Project goes beyond mitigating for impacts and actually results in a net increase of native habitat. Moreover, barring the Project would seriously undermine the public welfare. Extending the rail spur is critical for Phillips 66 and the approximately 200 permanent jobs it provides in the community. The needs of "hundreds of thousands of consumers" are met by energy-related facilities like Phillips 66—and their ability to remain competitive and viable under increasingly challenging business conditions. Coastal Plan Policies, supra, at 4-5.

The County's Coastal Policies also state that "when new sites are needed for industrial or energy-related development, expansion of facilities on existing sites or on land adjacent to existing sites shall take priority over opening up additional areas or the

construction of new facilities" and that "adverse environmental impacts from the siting or expansion of coastal-dependent industrial or energy developments shall be mitigated to the maximum extent feasible." Coastal Plan Policies, supra, at 4-6 (Policy 1). This Project clearly promotes this policy, as it involves the expansion of an existing facility on an existing site, and offers generous mitigation for adverse environmental impacts.

Finally, even with unmapped ESHA in or near the Project area, the County can and should approve the Project as proposed in order to avoid a takings problem. Under the Fifth and Fourteenth Amendments to the United States Constitution, government action that takes private property without just compensation is unconstitutional. Importantly, government can effect an unconstitutional taking by regulation—for example, by declaring property to be undevelopable ESHA. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *McAllister v. California Coastal Comm'n*, 169 Cal. App. 4th 912, 937-38.

Neither the Coastal Act nor the County's CZLUO authorizes permit actions that result in uncompensated takings. To the contrary, such actions are expressly prohibited. CZLUO § 23.07.17(e)(2); *see also* Pub. Res. Code § 30010 (declaring that the Coastal Act "shall not be construed as authorizing the commission . . . or local government acting pursuant to this [Act] to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor."). Consequently, if designating a parcel as ESHA threatens an uncompensated taking, the legally mandated response is to nevertheless allow the parcel to be developed enough to avoid a taking. Given how modest Phillips 66's Project is, and the extent to which it mitigates for alleged impacts to environmental values, there is little question that these takings considerations militate in favor of Project approval.

III.
THE COUNTY CODE PRECLUDES BELATED DESIGNATIONS OF UNMAPPED ESHA

The County's no-unmapped-ESHA determination finds full support, not just in the science, but in the law as well. As described below, the County's LCP—certified by the California Coastal Commission ("Commission")—authorizes unmapped-ESHA determinations only under extremely limited circumstances. Importantly, the County may designate unmapped ESHA in a project area only before or at the time of its acceptance of the project application. CZLUO § 23.11.030.

A. Background

Some historical context for section 23.11.030's "unmapped ESHA" provision sheds light on its meaning and purpose. In 2001, the Commission undertook a review of the County's LCP, comprised of its Land Use Plan and its implementing CZLUO. The

Commission found that, at the time, the County was not effectively implementing its LCP consistent with Coastal Act policies. One issue with which the Commission was particularly concerned was the LCP's treatment of ESHA. Among other things, the Commission demanded that the County clarify the definition of ESHA, identify standards for mapping ESHA and updating ESHA maps, and, most relevantly for purposes of this letter, adopt a clear process for identifying *unmapped* ESHA. *See, e.g.*, California Coastal Commission Staff Report, "Adopted Report: Periodic Review of the Implementation of San Luis Obispo County's Local Coastal Program" at 15-17 (July 12, 2001; as revised August 24, 2001).

The Commission and the County conducted multiple hearings throughout the LCP-amending process. All the County's stakeholders—homeowners, businesses, farmers, and environmentalists—had the opportunity to comment on proposed changes. There was broad agreement on the proposition that ESHA maps would be the main tool for protecting ESHA, but that a mechanism should exist for protecting *unmapped* ESHA, including in the context of a particular permit application. *See, e.g.*, *id.* at 137. Even the representatives of the environmental community, which called for the "entire coastal zone" to be treated as ESHA, acknowledged that such an extreme measure should apply only "[w]hile the necessary updates to ESHA maps and LCP procedures are being developed." *Id.* at 135. After all, if the County or Commission could declare non-developable ESHA at any time, without regard to maps and even on the eve of permit approval, project applicants would face undue hardship in terms of both the unpredictability of land use and the significant expenditures of resources required to see an application through to final permit decision.

After years of negotiation with Commission staff, the County amended section 23.11.030 of its Coastal Zone Land Use Ordinance ("CZLUO") to include a definition of "Unmapped ESHA" that balanced the need to protect ESHA, and the rights of project applicants to some level of certainty. As discussed above, the definition provides in part that "[t]he existence of Unmapped ESHA is determined by the County ***at or before*** the time of application acceptance ***and*** shall be based on the best available information." CZLUO § 23.11.030 (emphasis added). No other provision in either the Ordinance or any other law authorizes the designation of unmapped ESHA *after* the time of application acceptance. The County's amendment took effect on January 7, 2009, when the Commission officially certified the definition as conforming to, and adequate to implement, the County's Land Use Plan.

B. The CZLUO Bars Belated Designations of Unmapped ESHA

Phillips 66 filed a land-use permit application for the Rail Spur Project in December 2012, and the County accepted a revised application as complete on July 12, 2013. The County made no determination, either at or before the time of acceptance of the original or revised application, that unmapped ESHA was located in or adjacent to the

Project site. The County correctly acknowledged this fact in its Revised Draft EIR, at p. 4.4.-24. The time to lawfully designate unmapped ESHA—a strict limitation that both the County and the Commission approved—passed almost two years ago. CZLUO § 23.11.030.

Importantly, the requirement that an unmapped-ESHA determination "be based on the best available information" in no way eliminates the prior requirement that it be made "at or before the time of application acceptance." To the contrary, Section 23.11.030 joins these two requirements in the conjunctive ("and"), such that an unmapped-ESHA designation must be based on the "best available information" existing "at or before the time of application acceptance." To read the "best available information" clause as authorizing ever-evolving "unmapped ESHA" determinations at any time during the application-review process is to nullify the express requirement that such determinations be made "at or before the time of application acceptance." Reading an ordinance in a way that renders part of it meaningless or inoperative violates fundamental rules of construction and must therefore be avoided. *Hassan v. Mercy American River Hosp.*, 31 Cal. 4th 709, 715-16 (2003) ("The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. These canons generally preclude judicial construction that renders part of the statute meaningless or inoperative." (internal citations and quotation marks omitted)); *Audio Visual Servs. Group, Inc. v. Sup. Ct.*, 233 Cal. App. 4th 481, 491 (2015) ("In reviewing the text of an Ordinance, however, we must follow the fundamental rule of statutory construction that requires every part of the Ordinance to have some effect and not be treated as meaningless.").

Indeed, even the Commission recognizes the benefits of making unmapped-ESHA determinations "early" in the application-review process. For example, in its 2008 review of the County's LCP amendments, the Commission observed the following about the County's proposed power to designate unmapped ESHA:

> Expanding the Combining Designation map boundaries will help improve ESHA identification, but getting current and accurate information regarding the type and extent of habitats that may exist on a site is equally as important. ***Utilizing the best available information early in the development review stage*** will help address the shortfalls of the current map based identification system. Suggested modifications build on proposed standards by adding additional language to improve habitat information gathering at the permit application stage and establishes some more definitive criteria to be used for identifying and delineating the extent of ESHA on a project site.

California Coastal Commission's Staff Report (prepared July 8, 2008), entitled "Staff Report Addendum for Th16a SLO-MAJ-2-04 Part 2 (Estero Area Plan Update)."

The time limitation and "best available information" requirement work hand-in-hand to promote important public-policy goals. The law's expiration date on unmapped-ESHA designations provides project applicants some level of predictability in the permit process and protects the County against the constant threat of legal attack based on allegedly evolving information. On the other hand, the "best available information" requirement helps to protect environmental values by ensuring that the County's unmapped-ESHA determination is based on sound science. As described in detail in Part I, sound science was readily available to the County to support its "no unmapped ESHA" finding. That sound science constituted the "best available information" at that time and finds continued support in the latest field studies of habitat both west and east of the railroad property (including in and adjacent to the project site). *See* Exhibit A.

In sum, the County accepted the application, including the above "best available information." On that basis, the County made no "Unmapped ESHA" finding. By requiring the County to make any "Unmapped ESHA" determination before or at the time of application acceptance, section 23.11.030 of the CZLUO prohibits any *post hoc*, collateral attack on the "best . . . information" <u>available at the time of such determination</u>. As a consequence, the County's finding of "no unmapped ESHA" and the substantial evidence supporting it are legally conclusive.

Even absent section 23.11.030's express limitation, the County still should resist any call to make belated unmapped-ESHA designations in the permit context. A policy of designating unmapped ESHA at any time after application acceptance would wreak havoc on the County's land-use planning process, and on the project applicants who rely on clear and predictable rules. In this case, Phillips 66 has expended about $2,000,000 to advance the application to final permit approval since the application's acceptance by the County in July 2013. Phillips 66 made the significant expenditure in reasonable reliance on the County's "no unmapped ESHA" finding. To declare unmapped ESHA now would be grossly unfair to Phillips 66—and to the countless other project applicants in the County who would no longer be able to reasonably rely on orderly and predictable zoning regulation of their lands.

Finally, CEQA does not require the County to revisit its "no unmapped ESHA" determination. While the Act may require that EIRs provide the most accurate information about a project and its potential impacts, it does not require that particular *legal conclusions* be drawn, like whether certain facts justify designating an area as "unmapped ESHA." Nowhere does CEQA obligate the County to make the legal conclusion that a site has ESHA (mapped or unmapped), let alone dictate the factual or scientific basis for its conclusion. *Banning Ranch Conservancy v. City of Newport Beach*, 236 Cal. App. 4th 1341, 1359 n. 13 (2015) (holding that CEQA did not require city to identify ESHA (a "legal conclusion" in its EIR)). The *only* legal authority that dictates the criteria and procedure for "unmapped ESHA" determinations is section

23.11.030, and that section requires only that the determination be based on "the best available information" "at or before the time of application acceptance."

C. The County's Decision To Stand by Its Original "No Unmapped ESHA" Determination Is Well Insulated from Reversal by the Coastal Commission

From the perspective of a potential appeal to the Coastal Commission, the County has very strong grounds to stand by its "no unmapped ESHA" determination. The County has the comprehensive assessments and biological supplement to support that determination as a scientific matter. But even more fundamentally, as a matter of law, the Commission lacks the authority to disturb the County's unmapped ESHA determinations made at or before the time of application acceptance.

1. Under the CZLUO, Only the County Can Make Unmapped-ESHA Determinations Early in the Application Process

Again, section 23.11.030 provides, in relevant part, that "[t]he existence of Unmapped ESHA is determined by the County at or before the time of application acceptance and shall be based on the best available information." CZLUO § 23.11.030. The plain language of section 23.11.030 supports the view that only the County has authority over unmapped ESHA within its boundaries and that, as a consequence, the Commission lacks jurisdiction over the issue. Importantly, the section makes clear that the existence of unmapped ESHA "is determined by" a specific permit authority—namely, "the County." *Id.* (emphasis added).

If the County and the Commission had intended for *both* permitting authorities to have the power to designate unmapped ESHA, they could easily have drafted section 23.11.030 to say that "the existence of Unmapped ESHA is determined by the County *or the Commission on appeal*." That language is employed elsewhere in the CZLUO and in the Coastal Act itself. *See, e.g.*, CZLUO § 23.04.097(a) ("The Review Authority [i.e., the County] (or the Coastal Commission on appeal) may approve a density greater than that allowed by the underlying land use and zone district designations for affordable residential projects . . . ."); *id.* § 23.04.097(b) ("The Review Authority [i.e., the County] (or the Coastal Commission on appeal) may approve modifications of development standards for residential, commercial, industrial, and other projects . . . ."); *see also, e.g.*, Pub. Res. Code §§ 30520, 30604 (granting both local governments, and the Coastal Commission on appeal, regulatory authority to make particular decisions).

The fact that only the County can make unmapped ESHA determinations is buttressed by the requirement that such determinations be made "at or before the time of application acceptance." This strict time limitation on a power to make a particular substantive finding is unique in the CZLUO; no other provision has it. More importantly, the time limitation makes it impossible for the Commission to designate unmapped

ESHA, even if section 23.11.030 gave it the authority to do so: Any attempt by the Commission to designate unmapped ESHA would be made on appeal from a County permit decision—and therefore many months, if not years, after application acceptance, in direct contravention of the mandate that such a designation be made "at or before the time of application acceptance."

2. The CZLUO Effectively Removes Unmapped-ESHA Determinations from the Commission's Appeal Jurisdiction

The CZLUO section defining the Coastal Commission's appeal jurisdiction supports the conclusion that the County's unmapped-ESHA determinations are not subject to review by that agency. Section 23.1.043(c) contains an exhaustive and detailed list of the types of development over which the Commission has appeal jurisdiction. One type of appealable development involves ESHA. *Id.* § 23.01.043(c)(3)(i).

Section 23.01.043(c)(3)(i) makes development in ESHA appealable, *but only if the ESHA is mapped*. CZLUO § 23.01.043(c)(3)(i) ("Special marine and land habitat areas, wetlands, lagoons, and estuaries mapped and designated as Environmentally Sensitive Habitats (ESHA) in the Local Coastal Plan" are appealable.). It specifically removes from the Commission's appeal jurisdiction those "areas determined by the County to be Unmapped ESHA." *Id.* In other words, projects approved in areas determined by the County to be unmapped ESHA are not appealable to the Commission, despite the projects' potential impacts to environmentally sensitive habitat. If projects in unmapped ESHA are outside the Commission's appeal jurisdiction, then, *a fortiori*, projects in areas *neither* mapped as ESHA *nor* determined by the County to contain unmapped ESHA must be, too. After all, these projects—containing neither mapped nor unmapped ESHA—are the least likely to affect sensitive habitat and, therefore, the least likely to require the added procedural protection of appellate review by the Commission. It is perhaps for this reason that section 23.01.043(c)(3)(i) does not bother to make any mention whatsoever of resource areas that the County simply confirms as having no ESHA, consistent with the County's maps.

If the Commission had wanted to retain appeal jurisdiction over unmapped-ESHA areas, it could have conditioned LCP-certification on explicit recognition of that power. Instead, it approved of and certified the County's proposed language, including the special exemption for "unmapped ESHA" determinations:

> The LCP currently designates mapped ESHAs as Sensitive Coastal Resource Areas (SCRAs) for purposes of applying heightened procedural protections, including the extension of the Commission's appeal jurisdiction over development within an ESHA. However, the County proposes to amend CZLUO section 23.01.043c(3)(i) to clearly state that ***development in 'unmapped ESHA' would not trigger the Commission's***

> ***appeal jurisdiction*** (see Exhibit 1). Although the LUP does not provide any basis for distinguishing mapped and unmapped ESHA for such purposes, ***the decision to not include unmapped ESHA in the appeal jurisdiction is not inconsistent with the LUP***.

See California Coastal Commission's Staff Report, prepared June 27, 2008, entitled "San Luis Obispo Local Coastal Program Major Amendment No. 2-04 (Part 3) Title 23 Coastal Zone Land Use Ordinance Amendment," at 17-18 n.1 (emphasis added).

The Commission's own broad reading of section 23.01.043(c)(3)(i) is revealing. Again, in the Commission's view, "development in 'unmapped ESHA' [does] not trigger the Commission's appeal jurisdiction"—***period***. The evident intent of section 23.01.043(c)(1), as understood by the Commission itself and consistent with section 23.11.030, is to keep "unmapped ESHA" determinations at the County level. Thus, even if a project occurs between the sea and the first public road—another basis for the Commission's appeal jurisdiction—section 23.01.043(c)(1) provides it no authority to review the County's "unmapped ESHA" determination made under section 23.11.030.

Importantly, section 23.11.030 provides no valid grounds for an appeal. In this case, an appeal challenging the County's "no unmapped ESHA" determination would have to be based on the allegation that the determination lacks support in the ***latest*** information about the site's ecological setting. Even if true—which it is not[1]—the allegation would fail to identify a *violation* of the LCP, which is the *only* grounds for appeal. Pub. Res. Code § 30603(b)(1) ("The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program . . . ."). Specifically, nothing in the LCP, let alone 23.11.030, requires that unmapped-ESHA determinations be based on the *latest* science; quite the contrary, as explained above, the County need only rely on the best information available "at or before the time of application acceptance." Thus, an unmapped-ESHA determination based on the best available information at or before the time of application acceptance is legally immune from appellate review, because it is perfectly consistent with the requirements of section 23.11.030. Without an LCP violation, no valid grounds for an appeal exist. Pub. Res. Code § 30603(b)(1).

With sections 23.01.043(c)(3)(i) and 23.11.030 insulating "unmapped ESHA" determinations from appellate review, the Commission would be bound on appeal by the County's maps, which identify where ESHA does and does not occur (an element of the Commission-certified LCP). Any attempt by the Commission to designate a parcel as

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[1] To be clear, as a matter of science, the latest and best available information easily supports a finding of no-unmapped ESHA on the project site. But the scientific support for the County's "no unmapped ESHA" determination is relevant only if an appeal challenging the County's determination is legally cognizable.

ESHA, contrary to the relevant map for that parcel, would be an attempt to change the content of the County's LCP and therefore be an unlawful exercise of its jurisdiction. *See, e.g., Security National Guarantee, Inc. v .Cal. Coastal Comm'n*, 159 Cal. App. 4th 402, 422-23 (2008) (declaring unlawful Commission's attempt to declare a parcel "ESHA" on the appeal of city's permit approval, where city's LCP maps identified no ESHA on that parcel). "The Coastal Act expressly vests in local governments, rather than the Commission, the responsibility for determining the content of their LCP's," including ESHA maps, and "the Commission has no statutory authority to amend an LCP during the CDP appeal process." *Id.* at 419-20.

Here, there is mapped ESHA on the west side of the Union Pacific railroad tracks, but not on the east side, where the project site is located. To make an "unmapped ESHA" determination on appeal would be to amend *both* the LCP map *and* the LCP section delegating the power to make such determinations solely to the County, early in the application process (section 23.11.030). Therefore, any attempt on appeal to make an "unmapped ESHA" determination would be beyond the Commission's appeal jurisdiction.

Finally, the fact that an "unmapped ESHA" determination is not appealable *to the Commission* does not mean that such a determination evades any and all review. The LCP provides an appeal process for any "action, decision or determination" of the Planning Department, which generally makes the "unmapped ESHA" determination when it approves a land-use application. *See* CZLUO § 23.01.042a(3). In this case, the Planning Department certified Phillips 66's application as complete and, in light of the comprehensive assessments of the site's ecological setting, made no unmapped-ESHA finding either before or at that time. An appeal challenging the Department's acceptance of the application could have been made to the Planning Commission, and ultimately to the Board, on the grounds that the Department should have found unmapped ESHA on the site. *Id.* § 23.01.042b(1)(i). Any such appeal would have been resolved within a relatively short period of time—and well before Phillips 66 and the County expended significant time and resources to move the application forward. No appeal was filed, making that early determination final and immune from collateral attack. The point is that the County's "unmapped ESHA" determinations potentially are subject to multiple layers of review, even if such review does not traverse through the Commission.

If a different procedure for designating and protecting unmapped ESHA is preferred, the answer is not to change the rules at the end of a costly and lengthy application-review process. The proper course is for the Commission to make suggested modifications to sections 23.11.030 and 23.01.043(c)(3)(i) during its periodic review of the LCP, and for the Commission and the County to agree upon different procedural protections. Pub. Res. Code § 30519.5. In the meantime, Phillips 66 is "entitled to have its development proposal judged by the standards of the certified LCP in effect at the time of its application." *Security National*, 159 Cal. App. 4th at 422.

CONCLUSION

Phillips 66 appreciates the County's concern for protecting ESHA and will continue to work hand-in-hand with the County to mitigate for Project impacts to biological resources. But, for the reasons stated above, the County's original "no unmapped ESHA" finding should stand. The "best available information" at the time of application acceptance, along with the most recent data compiled and analyzed in the July 2015 "Sensitive Resources Report—Botanical Addendum," support the County's no-unmapped ESHA finding. And the County Code makes that finding final and irreversible.

If you have any questions or concerns, please feel free to contact me by email at paul.beard@alston.com or by phone at 916-498-3354.

Sincerely,

Paul J. Beard II
Counsel
Alston & Bird LLP

Enclosure: Exhibit A

cc: Jimmy Greene, Esq., Phillips 66 Company

ATTACHMENT 14

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAVIS, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION

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Th5b

February 2, 2001

TO: COMMISSIONERS AND INTERESTED PERSONS

FROM: Peter Douglas, Executive Director
Tami Grove, Deputy Director
Elizabeth Fuchs, *AICP*, Coastal Program Manager
Charles Lester, Central Coast District Manager
ReCAP Project Staff

SUBJECT: **EXECUTIVE SUMMARY: PRELIMINARY REPORT ON THE PERIODIC REVIEW OF THE SAN LUIS OBISPO COUNTY LCP**

California Coastal Act section 30519.5 requires that the Coastal Commission periodically review certified Local Coastal Programs to determine whether they are being effectively implemented in conformance with the Coastal Act. Accordingly, staff has prepared a report that identifies preliminary options for improving LCP implementation in San Luis Obispo County. The *Preliminary Report on the Periodic Review of the San Luis Obispo County LCP* provides an initial framework for important public policy discussions concerning a variety of coastal resource protection issues in the County. These include environmentally-sustainable urban development, coastal water quality protection, maintaining agriculture and scenic rural landscapes, and preservation of sensitive species and habitats. Before summarizing these issues, it is important to understand the fundamental role of *Periodic Review* in the Commission's coastal management program.

LCP PERIODIC REVIEW & THE PARTNERSHIP WITH LOCAL GOVERNMENT

The Commission's partnership with local government is the cornerstone of coastal management in California. Under the Coastal Act, counties and cities are responsible for achieving statewide coastal resource protection goals through the implementation of Local Coastal Programs (LCPs). Working with local governments, the Commission initially assures that the goals of the Coastal Act are integrated into these LCPs, and that they contain policies and procedures adequate to protect coastal resources of local and statewide importance. But once an LCP is certified by the Commission, local governments assume the principal responsibility for issuing coastal development permits. Local governments such as San Luis Obispo County also become the custodians of their LCPs, and play a vital role in keeping these plans current and responsive to environmental and social change. Since certification of its LCP in 1988, San Luis Obispo County has amended its LCP 26 times. Of course, many of these were piecemeal changes to the LCP, highlighting the need for comprehensive updates. Most recently, the County and its Advisory Councils have been developing comprehensive planning updates for the sensitive North Coast and Estero coastal areas. Overall, since LCP certification the County has been working on a variety of fronts, along with an informed and active citizenry, to respond to the complex and dynamic challenges of coastal resource protection through local implementation.

- Evaluate particular areas, particularly urban areas, where it may be appropriate to exclude new development from the need to provide a biological inventory as part of the application process. Incorporate such exclusions into the LCP based on scientific evidence demonstrating the absence of ESHA in such areas.

- Develop comprehensive habitat conservation and management programs for areas with particular habitat protection needs (e.g., Los Osos dune scrub and maritime chaparral habitats, Cambria Pine Forest; please see recommendation 2c). Upon incorporation of such programs into the LCP, development within particular habitat areas may be excluded from the need to provide site-specific biological investigations and reports. Instead, the biological information required at the application stage would be related to implementation of the area wide habitat protection program (e.g., contribution to area wide program that retires development potential in ESHA).

- Where the required biological inventory identifies the presence or potential presence of any sensitive habitat type, natural community, and/or particular plant or animal species that meets the revised definition of ESHA, a biological report should be required. Minimum requirements for biological inventories and reports should be coordinated with state and federal resource management agencies and specified in CZLUO Section 23.07.170 a.

- The location and extent of ESHA on and adjacent to a development site should be described and mapped by the Biology Report, in a format that allows it to be incorporated into a GIS based Combining Designation map system (see Preliminary Recommendation 1b above). The delineation should not be limited to the particular locations where rare plants or animals are observed at one point in time. Rather, it should consider the full range of the sites physical characteristics (e.g., soil type, vegetation, topographical features) represent potential habitat for such rare plant and animal species. In addition, where previously disturbed but restorable habitat for rare and sensitive plant and animal species exist on a site that is surrounded by other valuable habitat areas, these areas should be delineated and protected as ESHA as well. Implementation of this recommendation will also require the incorporation of additional standards for Biological Reports within CZLUO Section 23.07.170.

- Biological reports and their accompanying ESHA delineations should be submitted for the review and comment of the California Department of Fish and Game, the US Fish and Wildlife Service, and the California Coastal Commission before applications for development in or adjacent to ESHA are filed as complete. The incorporation of such a requirement into the LCP (e.g., within Section 23.07.170 of the CZLUO) could be accompanied by a specific time frame for such reviews to ensure that they would not result in undue delays in the development review process.

ATTACHMENT 15

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAV

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PRELIMINARY REPORT

PERIODIC REVIEW OF THE SAN LUIS OBISPO COUNTY

CERTIFIED LOCAL COASTAL PROGRAM

EXHIBIT A IN REPORT OF JULY 12, 2001

CALIFORNIA COASTAL COMMISSION
FEBRUARY 2, 2001
(AS REVISED TO INCORPORATE ERRATA/CLARIFICATIONS OF THE JULY 12, 2001 ACTION)

STATE OF CALIFORNIA—THE RESOURCES AGENCY GRAY DAV

CALIFORNIA COASTAL COMMISSION

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PRELIMINARY REPORT
PERIODIC REVIEW OF THE SAN LUIS OBISPO COUNTY CERTIFIED LOCAL COASTAL PROGRAM

FEBRUARY 2, 2001

(AS REVISED TO INCORPORATE ERRATA/CLARIFICATIONS OF THE JULY 12, 2001 ACTION)

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This report was prepared with financial assistance from the Office of Ocean and Coastal Resource Management, National Oceanic and Atmospheric Administration, under the provisions of Section 309 of the Coastal Act Reauthorization Amendments of 1990.

***Acknowledgements**: Commission staff appreciates the assistance of the San Luis Obispo County staff in providing data, mapping assistance and research as part of this report.*

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4. ENVIRONMENTALLY SENSITIVE HABITATS AND WETLANDS

Overview

Summary of *Preliminary Periodic Review* Findings (Exhibit A, pg. 101-184)

The Preliminary Report analyzed the effectiveness of the certified LCP, as implemented by the County, at protecting Environmentally Sensitive Habitat Areas (ESHA) consistent with Coastal Act policies. The Report evaluated the process by which an ESHA is identified during the development review, and whether this process successfully avoided, minimized and mitigated adverse impacts. The major implementation issues identified include:

- A reliance on outdated maps to delineate and protect ESHA;
- Lack of sufficient biological reviews, alternative analyses, and mitigation standards;
- Reluctance to stringently implement ESHA protection requirements as a result of takings concerns; and,
- The need for comprehensive regional and sub regional habitat protection plans.

With respect to the protection of streams and riparian vegetation, the Preliminary Report found that implementation of the LCP:

- May be resulting in excessive alterations of riparian habitats;
- Is not always effectively coordinated with the Department of Fish and Game or other involved wildlife agencies; and,
- Does not always provided adequate habitat buffers.

A review of the way in which the County has carried out LCP wetland protection observed the following:

- Wetland habitats are not always identified;
- Wetland setbacks requirements have not been adequately enforced;
- New programs and standards are needed to effectively coordinate wetland monitoring and restoration activities, as well as to regulate the breaching of coastal lagoons; and,
- Mosquito abatement practices should be reviewed and permitted in accordance with LCP requirements

The Preliminary Report found that the County's implementation of the Terrestrial Habitat protection provisions could be improved through the following actions:

Specific Constraints Analysis identifies the presence, or potential presence, of any sensitive habitat type, natural community, and/or particular plant or animal species that meets the revised definition of ESHA, a biological report should be required.

- ~~To determine when a biological report may be required for a development site that has not been previously mapped as, or determined to be ESHA, require a habitat and biological inventory prepared by a qualified biologist as part of development permit applications. Where it is clearly evident that a development site has the potential to support sensitive habitats based on the initial inspection of County planning staff, a biological report may be required without a biological inventory.~~

- Evaluate particular areas, particularly urban areas, where it may be appropriate to exclude new development from Site Specific Constraints Analyses ~~the need to provide a biological inventory as part of the application process~~. Incorporate such exclusions into the LCP based on scientific evidence demonstrating the absence of ESHA in such areas.

- Develop comprehensive habitat conservation and management programs for areas with particular habitat protection needs (e.g., Los Osos dune scrub and maritime chaparral habitats, Cambria Pine Forest, coastal watersheds that support Steelhead trout, and Cayucos Creeks; please see recommendation ~~2e~~ 4.6). Upon incorporation of such programs into the LCP, development within particular habitat areas may be excluded from the need to provide site-specific biological investigations and reports. Instead, the biological information required at the application stage would be related to implementation of the area wide habitat protection program (e.g., contribution to area wide program that retires development potential in ESHA).

- ~~Where the required biological inventory identifies the presence or potential presence of any sensitive habitat type, natural community, and/or particular plant or animal species that meets the revised definition of ESHA, a biological report should be required. Minimum requirements for biological inventories and reports should be coordinated with state and federal resource management agencies and specified in CZLUO Section 23.07.170 a.~~

- Update the minimum requirements for biological reports specified by CZLUO Section 23.07.170 in coordination with state and federal resource management agencies.

- The location and extent of ESHA on and adjacent to a development site should be described and mapped by the Biology Report, in a format that allows it to be incorporated into a GIS based Combining Designation map system (see Preliminary Recommendation 4.2 above). The delineation should not be limited to the particular locations where rare plants or animals are observed at one point in time. Rather, it should consider the full range of the sites physical characteristics (e.g., soil type, vegetation, topographical features) represent potential habitat for such rare plant and animal species. In addition, where previously disturbed but restorable habitat for rare and sensitive plant and animal species exist on a site that is surrounded by other valuable habitat areas, these areas should be delineated and protected as ESHA as well. Implementation of this recommendation will also require the incorporation of additional standards for Biological Reports within CZLUO Section 23.07.170.

- Biological reports and their accompanying ESHA delineations should be submitted for the review and comment of the California Department of Fish and Game, the US Fish and Wildlife Service, and to the National Marine Fisheries Service (as applicable), ~~and~~ as well as to the California Coastal Commission, before applications for development in or adjacent to ESHA are filed as

> complete. The incorporation of such a requirement into the LCP (e.g., within Section 23.07.170 of the CZLUO) ~~e~~should be accompanied by a specific time frame for such reviews (e.g., 14 days) to ensure that they would not result in undue delays in the development review process.

CNPS preference for the NCCP process, and concern about the HCP process are addressed in a subsequent section of this chapter, as is the Los Osos Community Advisory Council's request for a "top down" approach.

4. Conclusion

Recommendations 4.1 – 4.3 call for updates to LCP ESHA definitions and maps, and propose supplementing the use of LCP maps with site specific evaluations to determine the presence of ESHA, in order to ensure that the LCP is implemented consistent with Coastal Act Sections 30107.5, 30230, 30231, and 30240. They incorporate the revised methodology proposed by the County to improve administration of these recommendations, which also responds to concerns regarding the previously recommended requirement for biological inventories.

B. Avoiding and Minimizing Impacts to ESHA

Limiting Development in ESHA to Resource Dependent Uses

1. Summary of *Preliminary Periodic Review* Findings (Exhibit A, pages 125 – 128)

The Preliminary Report identified the need to improve implementation of the resource dependent criteria for development in ESHA established by the Coastal Act and LCP. The report therefore proposed changes to Table O that would make all uses other than resource dependent as conditional, and stressed the importance of better implementing existing standards that prohibit additional subdivisions in ESHA.

2. Comments Received

San Luis Obispo County Response (Exhibit C)
To limit non-resource dependent development in ESHA, the County response proposes to add a preamble to Table O stating that anything other than a "P" use in ESHA as conditional. With respect to subdivisions in ESHA, the County response proposes to revise the current LCP prohibition "to include concepts of ESHA protection".

3. Analysis

The proposed preamble to Table O would not appear to be any different than the current provisions of Table O; as detailed in Chapter 12, anything that is not identified as a P use is

ATTACHMENT 16

DECLARATION OF BILL SCHROLL

I, Bill Schroll, declare:

1. I am the Site Manager for the Phillips 66 Company ("Phillips 66") Santa Maria Refinery. I make this declaration in support of Phillips 66's Rail Spur Extension and Crude Unloading Project ("Project"). I have personal knowledge of the facts set forth in this declaration and if called as a witness, I could and would testify competently to them.

2. I have been the Site Manager for the Phillips 66 Santa Maria Refinery since August 2014. Prior to becoming the Site Manager for the Phillips 66 Santa Maria Refinery, I was the Capital/Maintenance Manager for Valero Benicia, CA.

3. Altogether, I have been employed by Philips 66 and its predecessors (including ConocoPhillips Company and Phillips Petroleum Company) for approximately 1 and a half years. For all of those years, I have held management positions.

4. Phillips 66's Santa Maria Refinery ("Refinery") is located in unincorporated San Luis Obispo County in California.

5. As the Site Manager of the Santa Maria Refinery, my responsibilities include the profit/loss performance of the Santa Maria Refinery, along with all aspects of refinery operations. I am familiar with the equipment and operations of the Santa Maria Refinery, including the crude oil and other raw materials and intermediate products procured for the Refinery, and the products and co-products produced by the refinery. Crude oil selection has a substantial influence on the performance of the Refinery. I am also familiar with the Project and the planning and preparation that Phillips 66 has undertaken in support of the Project.

6. As a member of the Refinery management team, I participate in management decisions relating to the Santa Maria Refinery. I am familiar with the

business objectives established by Phillips 66. I am responsible for implementation of corporate objectives that are relevant to the operation of the Santa Maria Refinery.

7. Currently, one of the objectives set by corporate management is to use what the company refers to as "advantaged crude." As explained further in the Declaration of Maureen McCabe submitted currently herewith, the term "advantaged crude" as used by Phillips 66 simply means crude oil that costs less than the cost of the global benchmark crude, North Sea Brent. For Phillips 66-owned refineries in the United States, advantaged crude oil can include heavy crude from Canada and Latin America, lighter Canadian grades, West Texas Intermediate, Bakken in North Dakota, and the Eagle Ford in Texas. (See Exhibit A, Phillips 66 Delivers on Advantaged Crude Strategy.)

8. The objective of running advantaged crude oil is only one of many factors to be considered in selecting the crude oils for a particular refinery. The paramount considerations in selecting crude oils are whether they are compatible with the design of the refinery, either alone or when blended with other crudes, and whether they can be refined to yield the product slate desired for that refinery's market, while adhering to Phillips 66's mission of operating safely, reliably, and in compliance with environmental laws. The crude should present the highest value relative to other available crudes considering the crude characteristics, the refinery configuration, and the products the refinery intends to produce. For a particular refinery, advantaged crudes are selected from among the range of crudes compatible with the design and desired product slate for that refinery, and that can feasibly be delivered to that refinery.

9. Whether a particular crude is considered advantaged varies by refinery and can change from time to time.

10. Crude oil can also be presented at an advantaged price because of unexpected events. Phillips 66 calls these "distressed crudes," and they are also considered advantaged crudes. For example, if another company purchases crude oil but

then suffers an unexpected breakdown and cannot receive it, we are sometimes able to negotiate purchase of those "distressed crudes" on favorable terms due to the distressed circumstances. It is impossible to forecast where distressed crudes will originate because the price advantage is unrelated to the factors that usually affect price.

11. With the Project, Phillips 66 proposes to modify the existing rail spur on the southwest side of the Santa Maria Refinery to build and operate a crude oil rail unloading facility. The Project would include an eastward extension of the existing rail spur, a railcar crude oil unloading facility, and associated above-ground pipelines. By improving rail access at the Refinery, the Project will further improve the competitiveness of some crudes currently used by the Refinery as well as that of other crudes compatible with the Refinery's design and operating profile.

12. The Santa Maria Refinery is currently configured to process primarily heavy, sour crude oil, which is sometimes blended with other lighter, sweeter crudes. The Project will not change the Refinery's design or the type of crude oil that it can process. Further, the permitted limits for the Refinery will not change as part of the Project. Crude oil received by rail as part of the Project must be consistent with the emissions and throughput limits already established for the Refinery by the San Luis Obispo County Department of Building and Planning and the Air Pollution Control District. Therefore, the crude oils that will be received at the Refinery as a result of the Project will be comparable to those currently or recently processed by the Refinery.

13. In March 2015, after the County conducted a full environmental review, the County provided Phillips 66 with Notice to Proceed on its prior-approved project to increase the throughput limit at the Refinery by 10%. Since then, the Refinery has achieved processing rates that reach that new throughput limit.

14. Phillips 66 submitted its Land Use Permit Application package for the Project to San Luis Obispo County's Department of Planning and Building on or around June 18, 2013.

15. Since San Luis Obispo County accepted the application for the Project on or around July 12, 2013, Phillips 66 has incurred the following costs to prepare environmental review documents and other materials in support of the Project:

a. Phillips 66 has paid approximately $286,579 to the County for the County's staff time to prepare and review documents related to the Project.

b. Phillips 66 has paid approximately $1,137,319 to the County as reimbursement for the County's cost of retaining consultants to prepare and review documents related to the Project.

c. Phillips 66 has paid approximately $1,854,254 to its own third party consultants to prepare and review documents related to the Project, including an environmental consultant and legal counsel.

d. Phillips 66 has paid approximately $21,649 to the San Luis Obispo County Air Pollution Control District as reimbursement costs for the District's staff time and third party consultant time to review documents related to the Project.

In addition, Phillips 66 has incurred additional costs for engineering work, including work required to respond to the County's information requests related to the application and the environmental review.

16. Of the incurred costs described above in paragraph 15, Phillips 66 incurred approximately $354,858 in costs since June 4, 2015.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 29 day of January, 2016, in ARROYO GRANDE, California.

WD Schroll

Bill Schroll

Exhibit A

Phillips 66 Delivers on Advantaged Crude Strategy

Phillips 66 is steadily making a number of commitments to transportation infrastructure to deliver advantaged, or lower cost, crude oil to its U.S. refineries, resulting in significant cost savings and increased profitability for the company.

The company's biggest operating cost by far is the purchase of approximately 2 million barrels of crude oil per day (BPD), or 730 million barrels per year -- enough oil to fill Reliant Stadium in Houston 29 times. With crude oil prices fluctuating between $90 and $120 per barrel, that equates to more than $80 billion a year for crude oil purchases.

- **Recent Advantaged Crude Activities**
- **Advantaged Crude by the Numbers**
- **Delivery Taken on First Railcars**

"Crude oil and energy consumption account for approximately 70 percent of our refining business' cost structure," said Chairman and Chief Executive Officer Greg Garland. "The single biggest lever we have to improve value in our refining business is through lowering our feedstock costs. A savings of $1 per barrel across our refining system is worth about $450 million of net income to us."

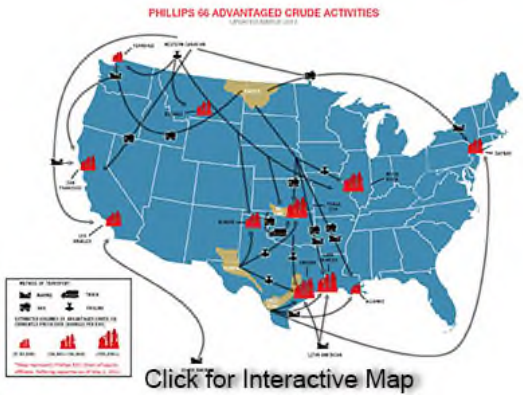
"The single biggest lever we have to improve value in our refining business is through lowering our feedstock costs. A savings of $1 per barrel across our refining system is worth about $450 million of net income to us."

Advantaged crude oil sells at a discount relative to crude oils tied to the global benchmark, North Sea Brent crude. For Phillips 66, advantaged crude oil includes heavy crude oil from Canada and Latin America, lighter Canadian grades, and West Texas Intermediate (WTI). Increasingly, it also includes shale crude oil from places like the Bakken in North Dakota and the Eagle Ford in Texas. The price for U.S. shale crude is typically tied to the WTI domestic benchmark which has recently been trading $20 less per barrel than Brent crude.

"Running more advantaged crude oil in our refineries allows us to run less of the more expensive globally priced crude oils," said Garland. "This is a key element of the company's strategy for enhancing returns on capital and we think we can drive 2 to 3 percent improvement on our return on capital employed for our Refining business by incorporating more advantaged crude oil into our supply."

In the fourth quarter of 2012, 67 percent, or about 1 million BPD, of Phillips 66's U.S. refining crude slate was considered advantaged crude oil – most of it WTI and heavy crude from Canada and Latin America, along with about 135,000 BPD of shale oil. By 2017, the company expects to be processing 500,000 BPD of new or increasingly advantaged crude oils.

The challenge for refiners like Phillips 66 is getting the advantaged crude oil to the refineries that are equipped to process it. While vast resources of advantaged crude oil are being produced in Canada and in the United States, there is not enough pipeline capacity in the right locations to carry the oil to where it's needed.



A number of pipeline projects that are planned or already under way could significantly increase the volumes of advantaged crude oil available to refineries in the Midcontinent and Gulf Coast regions, such as the proposed Keystone XL pipeline, the Seaway pipeline reversal and expansion, the Ho-Ho pipeline reversal and others. In the meantime, Phillips 66 is seeking alternative means to transport advantaged crude oil to its refineries.

"We are looking at pipe, rail, truck, barge and ship -- just about any way we can get advantaged crude to the front end of the refineries," said Garland.

Phillips 66 has established a cross-functional team from its Business Development, Commercial, Refining and

Transportation businesses to develop strategies for accessing and moving advantaged crude oil into its refineries. This team has moved quickly to complete a number of logistics and supply agreements with third parties over the past 12 months as well as identified opportunities to grow existing wholly owned transportation assets that supply the refineries.

"Until new pipeline projects come online, rail is in many cases the easiest and most cost efficient way to get advantaged crude to some of our refineries"

"Until new pipeline projects come online, rail is in many cases the easiest and most cost efficient way to get advantaged crude to some of our refineries," said Jay Clements, manager, Business Development, and leader of the advantaged crude strategy team. "New rail projects can be built much faster than pipelines, allowing quicker access to the new and growing shale plays. However, our refineries are not currently set up to take delivery of large volumes of crude oil from trains, so we're looking at building rail offloading facilities at several refineries including the Bayway Refinery in Linden, N.J., and the Ferndale, Wash., refinery."

Phillips 66 has secured access to a third-party rail loading facility in North Dakota and the company has received the first batch of railcars from the 2,000 ordered in 2012. These railcars initially will be used to deliver Bakken crude oil west to the Ferndale Refinery and east to the Bayway Refinery.

The company is already processing 75,000 BPD of Bakken crude oil at Bayway and is processing smaller volumes of Bakken crude at Ferndale, with plans to significantly grow those volumes as the new rail car fleet is delivered. The oil is being delivered through third-party rail facilities and then by barge to the refineries. A proposed new rail offloading facility planned for Bayway would enable the delivery of 70,000 barrels per day of Bakken crude directly into the refinery. Smaller volumes of Bakken crude also are being delivered to the company's Midcontinent refineries via existing pipeline systems and to its Gulf Coast refineries through a combination of rail, pipelines and barges.

"Our U.S. refining network occupies the broadest geographic footprint within our peer group which we think gives us a competitive advantage. It's a great platform for capturing advantaged feedstock"

The Ponca City Refinery in Oklahoma is situated on top of the Mississippian Lime formation and the company has signed an agreement with a third-party pipeline operator to supply the refinery with approximately 20,000 BPD of crude oil from this local source. In addition, the company is enhancing its own transportation facilities that will enable delivery of another 40,000 BPD of Mississippian Lime crude oil to Ponca City by mid-2014.

The Sweeny Refinery in Texas is in close proximity to the Eagle Ford shale and another recent pipeline agreement will supply up to 30,000 BPD of Eagle Ford crude oil to that refinery beginning in 2014. Eagle Ford crude oil also is being delivered to Phillips 66's Gulf Coast refineries and to the Bayway Refinery via barges and tankers. The company recently signed time charter agreements for two medium-range U.S.-flagged tankers that supply Eagle Ford crude oil to the Bayway Refinery, the Alliance Refinery in Louisiana and potentially the company's other Gulf Coast refineries.

While many of Phillips 66's U.S. refineries are already processing some advantaged crudes, the company is making small modifications to several refineries, including the Lake Charles Refinery in Louisiana and the Ponca City, Sweeny, Alliance and Wood River refineries that will enable those facilities to process even more advantaged crude oil. The next challenge for the company is identifying strategies to get more advantaged crude oil to its California refineries.

"The California refineries are capable of running a wide range of crude oils which creates opportunities throughout North America to supply California if we can find a cost effective mode of transportation," says Clements.

Garland believes the geographic diversity of the company's U.S. refining network, especially the company's significant presence in the Midcontinent and Gulf Coast regions, is a major strength and positions the company to be able to benefit from advantaged crude sources for years to come.

"Our U.S. refining network occupies the broadest geographic footprint within our peer group which we think gives us a competitive advantage. It's a great platform for capturing advantaged feedstock," said Garland. "Over the next several years, we are expecting 2 to 3 million barrels a day of light, sweet crude coming out of new U.S. shale plays and ultimately there will be 2 to 3 million barrels a day of Canadian heavy crude oil that comes south. We're going to make investments in infrastructure and aggressively pursue every angle we can to ensure we can bring as much advantaged crude as possible to our refineries."

CAUTIONARY STATEMENT FOR THE PURPOSES OF THE "SAFE HARBOR" PROVISIONS OF THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995

This story contains certain forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended, which are intended to be covered by the safe harbors created thereby. Words and phrases such as "is anticipated," "is estimated," "is expected," "is planned," "is scheduled," "is targeted," "believes," "intends," "objectives," "projects," "strategies" and similar expressions are used to identify such forward-looking statements. However, the absence of these words does not mean that a statement is not forward-looking. Forward-looking statements relating to Phillips 66's operations (including joint venture operations) are based on management's expectations, estimates and projections about the company, its interests and the energy industry in general on the date this story was prepared. These statements are not guarantees of future performance and involve certain risks, uncertainties and assumptions that are difficult to predict. Therefore, actual outcomes and results may differ materially from what is expressed or forecast in such forward-looking statements. Factors that could cause actual results or events to differ materially from those described in the forward-looking statements include fluctuations in crude oil, NGL, and natural gas prices, refining and marketing margins and margins for our chemicals business; unexpected changes in costs for constructing, modifying or operating our facilities; unexpected difficulties in manufacturing, refining or transporting our products; lack of, or disruptions in, adequate and reliable transportation for our crude oil, natural gas, NGL, and refined products; potential liability for remedial actions, including removal and reclamation obligations, under environmental regulations; potential liability resulting from litigation; limited access to capital or significantly higher cost of capital related to illiquidity or uncertainty in the domestic or international financial markets; and other economic, business, competitive and/or regulatory factors affecting Phillips 66's businesses generally as set forth in our filings with the Securities and Exchange Commission, including our filings with the Securities and Exchange Commission. Phillips 66 is under no obligation (and expressly disclaims any such obligation) to update or alter its forward-looking statements, whether as a result of new information, future events or otherwise.

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ATTACHMENT 17

ATTACHMENT 17

Informal Transcript of Excerpts from
San Luis Obispo County Planning Commission Hearing of
December 13, 2012, Agenda Item 2

County Planner Murray Wilson [Video 1:46:39]	Murray Wilson, Planning Staff. Real quickly, I'd just like to mention that there are some improvements I want to clarify. This project, there is no new ground disturbance, there is no new facilities being constructed. There are some mitigation measures that require replacement of some of the existing facilities with best available control technology for air pollution measures. At this point we don't know exactly what those will be. They need to go through the process of determining how to most efficiently and effectively reduce those emissions and they will likely require a construction permit of some sort by the department of building, but at this point we don't know exactly what those are or if they would require a permit. So I just want to clarify that while there is no additional ground disturbance or no new facility development, there may be some construction permits required as a part of the improvements through the mitigation measures. It sounds like everybody is basically on the same page with coastal access. What I'll follow up with is that staff acknowledges the challenges about complying with the coastal access section of the ordinance and that was why we chose to provide some additional time and not require them to implement it now because it would become very problematic to accomplish that in a reasonable time frame and allow them to implement their project.
Commission Chairman O'Grady	So issues with the railroad and public safety can be worked out as part of the process? Is that what I hear everybody saying?
Wilson	Yes, we understand there are both potential environmental concerns associated with alignment and safety issues associated with the railroad and the facility itself. The alignment that was identified in that exhibit was chosen to keep all people on that path outside of the security fencing. That was the first kind of swath effort of the department to identify the location and through that analysis will determine if in fact we do have safety concerns and whether or not it's appropriate that time.
Chairman O'Grady	Yeah, so you've narrowed it down somewhat.

Wilson	Correct.
Chairman O'Grady	On this, I have 3 commissioner lights on. If they are on this particular topic, then, Commissioner Irving.
Commissioner Irving	Thank you. Murray, could you bring up the exhibit on map 2 on 2-45 of the staff report and explain some things to me about that, as long as we're talking? So could you walk me through, what's the big loop up at the top of property boundary of the facility and then this looping road that goes down, I guess it's going down to the coast but it stops at State Park. Is that correct?
Wilson	That's correct. So the ordinance requirement acknowledges the need to provide access from the nearest public location or road, which is this portion in the northeastern portion of the picture, the corner at Willow Road where it goes, it turns from north-south direction to east and west. That's the entrance to the facility um outside of their security gates. So what we've tried to identify is in order to get the public from the location where they are authorized to be to a point at the property line, which is this location here along that access road, which is the edge of their property and anything associated with this entitlement provide that access point and in general where that follows is the entrance road down towards the employee and guest parking area on the site outside the security fencing, across the existing railroad crossing which staff and the applicant acknowledge there are some concerns that need to be addressed there, and then following in general the location of the existing road to minimize any additional disturbance within that open space area.
Commissioner Irving	Do you have an idea or sense of how, what that distance is? From the upper corner to where we get down to the state park?
Wilson	Well if you'd like to bear with me I can pull off a measurement.
Commissioner _____	You want to show your expertise, absolutely.
Commissioner Irving	I'm curious.
Commissioner _____	He's good.

Wilson — It's going to be quick and dirty, it's going to be close. So that's approximately 8,000 feet or a little over, I guess, a mile and a half.

Commissioner Irving — Okay. Then, as I was understanding Ms. St. Martin's comments about if we get into this process and they're unable to come to an accord with the railroad, then that qualifies it for exception and therefore no access is required. Is that--

Wilson — Well that would be their assertion of why it met the exception and staff would evaluate that as to whether they had fully went--

Made the effort--

Wilson — The extent they went to to exhaust that effort--

Commissioner Irving — Right. What about the issue of, the safety issues with regard to the facility, the operation of the facilities? Having the public walking along the outside edge of the facility? I'm not aware of what kind of security fence is there. Do you want to comment on that at all, or is this all just premature and we're just kind of drawing a big line and saying we hope we can work this out.

Wilson — We're acknowledging that there are some concerns with both the railroad and security at the facility. Staff does not disagree with that. We are also acknowledging that we need to have a dedication consistent with the ordinance requirements and luckily the ordinance has been set up in a way to allow that evaluation to occur in a linear process. So we're taking advantage of how the ordinance is set up and will play that out through a subsequent plan or use permit.

Commissioner Irving — Okay. The two last points, you're making that contention saying that this is new development therefore the ordinance applies.

Wilson — That's correct.

Commissioner Irving — And while they disagree with it, they're going along with it. The other question from a potential user of this map, what I was curious, my question to you earlier about the division between the vehicle portion of the coast and the non-vehicle portion is where this emptied out. Does it empty it out into the vehicle portion or into the non-vehicle portion and the implications of that? You

had said I think earlier that this would only be for pedestrians so it couldn't be developed as another vehicular access point.

Wilson — It's feasible that it could. I-- Based upon the resources on the site, from a staff perspective, vehicular access could be problematic. So in order to determine whether or not vehicular access was appropriate, that will also be looked at in combination with the environmental resources, the safety concerns. There may be an agreement that can be reached between the applicant and the railroad that says you can put additional people over here with some additional safety improvements but not additional vehicles. We don't know how it will play out. And I believe, but I would ask the applicant to confirm this, where the existing maintenance road outlets into the state parks area, I'm not one hundred percent sure that it's right at the boundary of the off-road vehicle area. I believe it may be in an off-limit area until you're further out onto state parks property, but I would ask that the applicant verify that.

Commissioner Irving — Those are my questions on this topic. Thank you.

Chairman O'Grady — Okay. So long as we're staying on this topic, Commissioner Topping.

Commissioner Topping — I just want to get this on the record. This is strictly for pedestrian access, right?

Male — No.

Commissioner Topping — So what, what would, okay so -- What types of vehicles would go across there?

Wilson — At this point, I cannot tell you with certainty whether vehicles are appropriate for this use or this access way. That is what we would determine through the subsequent minor use permit and/or development plan on the project site.

Commissioner Topping — So you might have off-road vehicles accessing this, through this route?

Wilson — I will say it's theoretically possible but the criteria to determine the intensity of use and the siting of that road will be provided-- the applicant will need to submit information to the department

	to say how they would or would not be in compliance with the siting criteria and the proposed intensity of that. We'll review those and probably contact the state parks because it's going to be going right into their back door. Make sure that it's consistent with everything that would need to be completed such as providing access to a vehicle area or a non-vehicle area. That may be the limiting factor.
Commissioner Topping	Okay. And how is this covered, forgive me, in the EIR, the potential off-road vehicle access?
Wilson	This is not part of the proposed project.
Commissioner Topping	Okay.
Wilson	So this was conditioned as a requirement of the ordinance, so it's not covered in the EIR.
Commissioner Topping	Okay.
Chairman O'Grady	Commissioner Murphy.
Commissioner Murphy	So actual condition of approval we're talking about is that they comply with the ordinance.
Wilson	That's correct.
Commissioner Murphy	But they were saying they have to comply prior to a notice to proceed, so that implies that there has to be some agreement reached as to whether there's an exception or no exception, whether this is feasible, possibly what the site of the access is going to be, prior to this permit being implemented.
Wilson	Well they need to … they need to provide an easement with the metes and bounds description and the approximate location that was shown on Exhibit 2. If--
Murphy	Or they need to take the position that the ordinance exempts them.
Wilson	I might defer to counsel on that one.

Murphy

I guess that's what I'm saying. My impression here is to-- We're requiring them to comply with the ordinance. Well, there's an ordinance that has exemptions in it, and they're indicating they may feel they are exempt from having to provide an access. So at this point we're only requiring compliance, but the issues are going to have to resolve prior to notice to proceed, based on our condition here.

Wilson

And I believe the way the condition is written that it requires compliance with the ordinance section but it also specifically requires the dedication of that easement and then it provides the timeframes for evaluation for construction of improvements. So I believe unless Ms. McDonald has a different perspective that this permit would actually require the dedication and if at a later time it was determined to be infeasible, then they could amend this permit condition through that future action. And that's the part that I would like counsel to verify.

Chairman O'Grady

Ms. McDonald.

McDonald

[Video 2:01:32]

Thank you. I do think that Murray's characterization is correct, that we would require the offer to dedicate before they get their notice to proceed. But it could be that in an exploration of how the exact access way would be drawn, potential for construction of facilities, if it turns out that it's not actually feasible given the site constraints and railroad crossing, the offer to dedicate is on the books but we could reject it at that point and just move on. Whether or not that in itself would basically require an amendment to their permit is a little bit of a nuance that I'm not sure about but I do think that there is a possibility that they would not have to do anything further than just the offer itself. And if further evaluation shows that it's not going to work well, we can reject the offer and it would basically be off the books at that point.

Chairman O'Grady

Yeah, the County isn't even obligated to accept the responsibility. Isn't that correct?

McDonald

Correct.

Murphy — So, it's the, I mean, we don't, it doesn't specifically say anywhere in here that they have to do an offer to dedicate. You're falling back on the ordinance for that language? Is that correct?

Chairman O'Grady — I thought it did say --

Murphy — It's not. That's not stated specifically in this one condition.

Chairman O'Grady — Which condition is that?

Murphy — I'm looking at 17.

Chairman O'Grady — 17, okay.

Murphy — Which is a condition that addresses coastal access.

Wilson — Yes, you are correct. What I did was under the ordinance section… which… I'll see… Under that ordinance section there is a procedure for acquisition and the first step, Step A, is offer the easement area. Step 2 requires construction prior to the entitlement unless you dictate the timeframe. So consistent with that section, we would require, but I would also defer here to Ms. McDonald of whether or not they could potentially show that they are exempt pursuant to that. And I'll try and get the language up so everybody can look at it right here.

McDonald — And I think to jump in here, it could be that before they get their notice to proceed they're able to come up with additional information for us that shows that an exemption would apply. And so maybe we catch it before they even provide that offer for dedication. So it kind of depends on timing, when the notice to proceed is going to be issued, and how far things have gotten with the other, you know, the other potential parties here and evaluation of the site. So we've got a few options.

Murphy — And that's how I read this. They've got to comply with this ordinance before the notice to proceed. So you're going to either meet and agree or not with them. And if not, I guess, you know, you'll fight it out so to speak. But at this point, they're not necessarily agreeing that they even have to provide the access, only that they'll comply with the ordinance, and that's what the condition says, right?

McDonald	Correct.
Murphy	Okay.
Chairman O'Grady	Commissioner Topping.
Commissioner Topping	Yeah, County Counsel, am I missing something here? Is this--
Murphy	It's not in there.
Commissioner Topping	It's not in there. So, so--
Commissioner ?	It's not applicable.
Commissioner Topping	Yeah, okay, but what if the access provided had a stimulative effect on the use of the adjourning state property? Is that--
Wilson	Well then--
Commissioner Topping?	Well that would be a separate, a wholly separate issue done, handled separately by a different EIR and whatever regulatory function goes with the state property?
McDonald	Correct. So I think whatever-- whatever the final design of the access way, you know, once we get to that point, and it's more definite, we would have some further discretionary review. In which case we would do our required environmental review of however it's being laid out at that point in time.
Commissioner Topping	Yeah. The reason I'm asking is because particulates coming off the state property have been at issue here locally of course and just wanted to make sure that this is not in any way a backdoor to that, or aggravation of that.
Chairman O'Grady	Commissioner Irving, did you have something else on this topic?
Commissioner Irving	For Ms. McDonald, the wording of Condition 17 right now, should it not be modified in some way to say that allows-- As you just mentioned, if they came up with some information to you that indicated that this was, it was not possible to achieve the necessary easements or dedication or permissions from the

railroad that this condition no longer applied. I mean, in other words, to ease that process of, it sounds like--

"If required." "Condition of … if required."

I'm not certain that the wording of this is clear enough that if they gave you information that said otherwise, that we can't come up with a safe access point or safe route, that it wouldn't apply. But you think it's sufficiently worded here?

McDonald — It is.

Commissioner Irving — By the wording of "if required"? I don't, do you get my question here?

McDonald — I do. I think it's, because it says that they shall comply with that section of our ordinance and if it turns out under that ordinance they've complied because it's not required, I think that would cover it.

[Video 2:04:35]

Commissioner Irving — Okay. All right. I was--

Chairman O'Grady ? — Or if the County decides that this is not a good thing, uh, that's another way out.

Commissioner Irving — But they'd still have to-- Before the County could decide that, they'd have to come to you with that offer of dedication?

McDonald — Either the offer or--

Commissioner Irving — There'd be some preliminary-- At some preliminary point before we even got to that point, you guys could come to this agreement and say, uh, you're right, doesn't apply? Okay. Thank you.

Chairman O'Grady — Okay. Mr. Wilson was there any other topic that you wanted to comment on for public comment or the applicant presentation?

Wilson — There was two other comments about fire issues and what I'd like to do is introduce Mr. Lewin from CalFire to speak to those issues. He would be most appropriate to speak to those.

Chairman O'Grady — That would be great.

Chief Lewin

Thank you, Honorable Chair and Commissioners. My name is Robert Lewin. I'm the Fire Chief for the County in CalFire. I do want to echo what the Phillips 66 representatives said. We do have an outstanding relationship with the refinery and have for many years as well a cooperative relationship with the fire brigade that exists at the facility.

We have a fire station nearby but of course a refinery fire or any other type of emergency requires, you know, a significant force of people to mitigate. I have looked back in my history in the early 80's I responded to a fire myself at the refinery holding tank, a gasoline holding tank that was on fire, and I assure you the imprint of that memory is still within me.

We did ask for some late conditions and I appreciate your support on these conditions. They were-- I'm sorry that they were added so late. Both-- I apologize to the Phillips 66 folks and to you to have to bring them forward at this time, but I do believe they add value to the project. And I'm sure that we're both have complying with existing conditions and the first condition we added, 22, does that. It doesn't state that they're not doing that now; it just ensures that they continue to do that. And then the other condition, 23, is necessary because of the specialized training that's required to deal with incidents at the facility, incidents such as confined space rescue which is must more advanced now in this current era than it was in the early 80's when I was responding out there myself.

It also, we have hazardous materials team training requirements. And these are continuous, people come and go as you know from fire departments and from hazardous materials response teams so we need to make sure that these people are continuing to get training along the way so this condition will ensure that we have the resources available, be able to make sure they're getting that specialized training. And therefore we hope that you'll support those conditions.

ATTACHMENT 18

Phillips 66
Santa Maria Refinery
2555 Willow Road
Arroyo Grande, CA 93420

January 23, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Jessica Reed
Senior Legal Analyst
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Offer to Dedicate Coastal Access
Phillips 66 Santa Maria Refinery

Dear Ms. Reed:

Thank you for your letter of January 5, 2015, concerning the forms prepared for an offer to dedicate a vertical public access easement across property that Phillips 66 owns in San Luis Obispo County. This response will describe the changes we have made to the various documents, and provide additional information responsive to your questions.

We agree that there is no need for a subordination agreement, as there are no deeds of trust against the property. We also do not object to your suggested re-phrasing of the Purpose provision. We understand that the County will make the necessary changes to the draft offer to dedicate form in light of these two items.

The first, third and fourth bullets in your letter concern Exhibit C to the offer to dedicate. These items are easily addressed. Our surveyor has made the necessary changes, and we have submitted the revised documents to the County.

Your second bullet raises a number of questions regarding the railroad depicted on Exhibit D to the Staff Report The railroad is very much in use, carrying passengers and freight along the central California coast. As the only coastal railroad route between Los Angeles County and the San Francisco Bay Area, it is the exclusive railroad linking the Counties of Ventura, Santa Barbara, San Luis Obispo, Monterey and Santa Cruz to the remainder of the national rail network. We understand that the railroad is owned by Union Pacific Railroad, but is considered "shared track" used by multiple service providers. The route carries approximately six passenger trains per day (3 round trips total by the Coast Starlight and the Pacific Surfliner), two long-haul freight trains per day, as well as additional local freight trains.

Phillips 66 owns property on either side of the railroad, but does not own or control the land underlying the railroad corridor. In 1891, the then-owner, Henry Bosse, sold the land to the Southern Pacific Railroad Company for purposes of construction and operation of a railroad line and related infrastructure. A copy of the 1891 deed is attached. Even upon the County's

acceptance of the subject offer to dedicate, the underlying easement cannot provide access to the shore because Phillips 66 does not own uninterrupted property from Highway 1 to the shore The County would need to separately acquire access across the railroad property. Phillips 66 surmises that the property underlying the railroad is currently owned in fee by Union Pacific Railroad; however, we do not have sufficient information on the railroad property (e.g., parcel numbers) to be able to research title.

You asked whether the railroad has been contacted to allow a crossing. We have contacted Union Pacific Railroad Company, and the company has notified us that it opposes public access across the railroad from the Phillips 66 land on either side. Attached is a copy of a letter dated August 6, 2013, from Melissa Greenidge, attorney for Union Pacific Railroad Company, to James Anderson of Phillips 66, which states: "Union Pacific does not consent to use of its property for public access."

You asked whether the railroad was discussed in the public hearings on the Phillips 66 crude throughput increase project. There was extensive discussion of this matter before the Planning Commission on December 13, 2012. In light of the public safety concerns presented by the rail corridor, Phillips 66 stated at the hearing that it believes compliance with the coastal access ordinance can be achieved through application of the exemption in Section 23.04.420 c. of the County's ordinances. This section exempts new development from the coastal access requirement "where ... [a]ccess would be inconsistent with public safety, military security needs or the protection of fragile coastal resources." At the Planning Commission hearing, County staff acknowledged the safety concerns presented by the rail crossing, and counsel confirmed that application of an exemption may be a potential outcome Counsel commented that the County could reach this decision before submission of an offer to dedicate by Phillips 66, in which case no offer would be required. Alternatively, the County could consider the exemption question after it receives the offer to dedicate. Counsel explained that, in the latter case, if the County concludes that an exemption applies, the County would simply decline the offer. As yet, the County has not yet determined whether the public safety exemption applies.

We note that there are also fragile coastal resources on the Phillips 66 parcels, as well as on the State Parks lands that lie between the Phillips 66 parcels and the shore. (At its westernmost point, the easement described in the offer to dedicate is still more than a mile from the shore.) For this reason, we believe that the evidence supports two exemptions from the access requirements.

To avoid further confusion regarding ownership of the railroad corridor, additional edits have been made to the Legal Description of Easement Area (Exhibit "C" to the offer to dedicate). In particular, at the end of the Parcel A description, the text formerly stated that the sidelines of the easement strip "shall be lengthened or shortened so as to terminate on said easterly right of way of Union Pacific Railroad..." A similar statement was included in the description for Parcel B relating to the westerly right of way of the Union Pacific Railroad. The descriptions have been revised by the surveyor to state that the sidelines "shall be lengthened or shortened so as to terminate on said [easterly/westerly] boundary line of Union Pacific Railroad property..." In addition, the description of Parcel B previously stated: "Except therefrom that portion lying

within the Union Pacific Railroad right of way." This language has been deleted because it is unnecessary. Again, Phillips 66 does not own or control the railroad property, and the land underlying the railroad is not part of the parcels owned by Phillips 66.

We apologize for any confusion caused by the legal description of the easement area for the offer to dedicate. With these changes, we believe that Exhibit C to the offer to dedicate is now correct. Please do not hesitate to contact me if you have further questions.

Respectfully yours,

Kristen M. Kopp
Principal Environmental Consultant

KMK:bes

Attachment 1 - 1891 Deed (copy of original handwritten deed)
Attachment 2 - August 6, 2013 Letter, from Melissa Greenidge on behalf of UPRR

cc (w/attachments): Murry Wilson

Offer to Dedicate Coastal Access
Phillips 66 Santa Maria Refinery

Attachment 1
1891 Deed
(Copy of original handwritten deed)

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and official seal. Chas. C. King Notary Public. Filed for record at request of W. E. Phillips, February 20th A.D. 1891 at 20 min. past 10 o'clock A.M.

J. T. Fuller,
Recorder

Henry Bose to S.P.R.R. Co	Know all Men by these Presents: That Henry Bose of the County of San Luis Obispo and State of California, in consideration of the benefits to be derived by me on the construction of the Southern Pacific Rail Road Company's Railroad, and of One Dollar to me in hand paid the receipt whereof is hereby acknowledged do hereby bargain and agree to and with the Southern Pacific Railroad Company, upon the payment to me or my legal representatives of the sum of Five hundred Dollars to sell and convey to said Company all that certain piece or parcel of land situated in the County of San Luis Obispo, State of California and the conveyance shall contain the following conditions And said first party hereby grants to said second party the right to extend the slopes of their cuttings or embankments and to build and maintain culverts and surface ditches beyond the limits of the herein described right of way, which may be necessary for the proper construction and maintenance of the said second party's railroad also the right to quarry and hold stone for the construction of culverts and bridges from and to enter upon the lands of said first party, and camp men and haul material and supplies for the construction and maintenance of said rail road, upon the condition that said second party shall fence said railroad right of way, and grade such as required by said first party, as soon as practicable after said rail road is constructed; and that said second party shall build and maintain suitable over crossings or grade or gate or cattle-guard crossings at such points as said first party shall show to be necessary for access to and use of the lands herein described such crossings are deemed practicable by the Chief Engineer of said second party, and not detrimental to the interests of said second party, and provided such crossings are demanded and asked for by said first party, prior to the [illegible] of said second party, and said crossings shall be erected [illegible]

Attachment 1
1891 Deed
(Copy of original handwritten deed)

DEEDS BOOK
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PAGE
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being a portion of the Rancho Bolsa de Chemical San Luis Obispo Co Cala. and generally designated as Co Tract and being that portion of said Rancho Bolsa de Chemical lying South of Laguna Nigra and West of Rancho Guadalupe said County of San Luis Obispo Cal and more particularly described as follows, to wit – Commencing for the same at a point on the center line of the Southern Pacific Rail Road Co's Railroad where the line of the same as finally located may be shall intersect the Northerly line of said Co Tract and running thence Southerly along said center line of said Southern Pacific Rail Road Co's railroad, and embracing a strip of land fifty (50) feet wide on each side of said center line, to the Southerly boundary line of the lands of said Henry Bosse at or near the Northerly boundary line of the Rancho Guadalupe San Luis Obispo County California together with all the appurtenances thereto belonging And the Engineers, Agents, employees, and Contractors of said Company are hereby authorized to enter upon said land for the purposes of the survey and construction of said Railroad In case said Railroad shall not be located on said land this agreement shall be null and void. In Witness Whereof I have hereunto set my hand and seal, this 27th day of December 1890 Henry Bosse (Seal) Signed, Sealed and delivered in the presence of H. L. Carpenter

State of California)
County of San Luis Obispo } On this Twenty seventh day of December, in the year 1890, before me Chas E King a Notary Public in and for the said County of San Luis Obispo personally appeared Henry Bosse known to me to be the same person described in whose name is subscribed to the within instrument, and he acknowledged to me that he executed the same Witness my hand and official seal Chas E King Notary Public

(Seal)

Filed for record at request of C. H. Phillips February 7th A.D. 1891 at 10 minutes past 8 o'clock A.M.

C. E. Fredericks
Recorder

Randolph Cregger & Chalfant LLP
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Melissa S. Greenidge
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August 6, 2013

Sent Via U.S. Mail and Facsimile
Phillips 66 Company
c/o James Anderson, Superintendent-Maintenance
2555 Willow Road
Arroyo Grande, CA 93420

Re: Phillips 66 Land Use Permit Application, Santa Maria Refinery Rail Project

Dear Mr. Anderson:

Thank you for contacting Union Pacific Railroad Company ("Union Pacific") regarding San Luis Obispo County's ("County") conditions for approval of Phillips 66's Land Use Permit for the Santa Maria Refinery Rail Project. This letter specifically addresses Union Pacific's position on the County's requirement for coastal access as a condition for permit approval.

Union Pacific owns and operates mainline railroad tracks that bisect the Phillips 66 parcel. Both passenger and freight trains operate on this segment of tracks; the maximum train speed for passenger trains is 70 m.p.h. and 60 m.p.h. for freight trains.

For many years, Union Pacific has collaborated with the Federal Railroad Administration ("FRA"), California Public Utilities Commission ("CPUC"), and local communities to reduce safety risks relating to railroad operations. These efforts have become increasingly important in coastal communities, where there is a demand for public access over railroad tracks.

Union Pacific understands that the County has conditioned the approval of its Land Use Permit on the requirement that Phillips 66 provide public coastal access over its parcel. To do so, however, Phillips 66 would have to provide access over railroad tracks owned by Union Pacific. Union Pacific does not consent to use of its property for public access.

The CPUC has exclusive jurisdiction over railroad crossings in California. *See* Pub. Util. Code §§1201-1202. Therefore, should the County or Phillips 66 wish to pursue a public crossing for coastal access, it must file an application with the

Randolph
Cregger &
Chalfant LLP

CPUC. As a matter of policy, a new crossing must be grade-separated. *See In re Pasadena Metro Blue Line Construction Authority*, D.02-05-047, pg. 13 (Cal. P.U.C. Oct. 3, 2002); P.U.C. R. Prac. & Proc. 3.7(c) (1)-(3). Union Pacific would require any grade-separated structure to clear-span its right-of-way, which is 100 feet in width in this area. Finally, Union Pacific acknowledges that a private railroad crossing currently exists at Phillips 66's parcel, but does not consent to use of the private crossing for public purposes.

Union Pacific is committed to working with Phillips 66 and the County to enhance public safety. Please do not hesitate to contact my office should you have any questions or concerns.

Sincerely,

RANDOLPH CREGGER & CHALFANT, LLP

Melissa Greenidge
Attorneys for Union Pacific Railroad Company

cc: Liisa Stark, UPRR
David Pickett, UPRR
Kenneth Tom, UPRR

ATTACHMENT 19

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March 23, 2015

VIA EMAIL 03/23/15
& REGULAR U.S. MAIL 03/24/15

Jessica Reed
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San Francisco, CA 94105-2219
Email: Jessica.Reed@coastal.ca.gov

Re: Coastal Public Access Easement
Minor Use Permit/Coastal Development Permit DRC 2008-00146 (Phillips 66)

Dear Ms. Reed:

Thank you for your review of the revised draft Irrevocable Offer to Dedicate Vertical Public Access Easement and Declaration of Restrictions (OTD) associated with the above-referenced Coastal Development Permit (CDP), and for your letter dated March 9, 2015. The County Department of Planning and Building and the Office of the County Counsel (collectively referenced herein as "County") have carefully considered the concerns raised in that letter and would like to make the following observations.

We believe the OTD, as currently drafted, does meet the requirements of Condition 17 of the CDP and Section 23.04.420 of the County Code. Condition 17 states:

> **Prior to issuance of the Notice to Proceed authorizing an increase in Refinery throughput**, the applicant shall comply with Section 23.04.420 – Coastal Access Required. Construction of improvements associated with vertical public access (if required) shall occur within 10 years of the effective date of this permit (including any required Coastal Development Permit to authorize such construction) or at the time of any subsequent use permit

> approved at the project site, whichever occurs first. The approximate location of the vertical access required by this condition of approval shall be located within or immediately adjacent to the existing maintenance road as shown in Exhibit D – Project Graphic (Coastal Access Location Map 1 and 2).

The Coastal Access Location Maps 1 and 2 (enclosed herewith for ease of reference) were attached to the County Planning Commission staff report dated December 13, 2012. Map 1 is an aerial photo showing the outline of the applicant's property and a large red circle showing the general area intended to provide access to the coast. Map 2 is an enlarged aerial photo of the area within the large red circle with black lines encompassing the existing dirt maintenance road from the entrance of the refinery to the edge of the applicant's property. That map depicts the approximate location of the required vertical access, as referenced in Condition 17. It also shows the railroad tracks owned and operated by Union Pacific Railroad ("Union Pacific"), which bisect the subject area.

During the hearings before the County Planning Commission and the Board of Supervisors, representatives of the applicant, Phillips 66 ("Phillips"), notified the County and the public that access could not be granted across the railroad tracks. While Phillips's existing dirt maintenance road does cross the tracks, that road is only allowed to be used by Phillips for maintenance purposes.[1] Neither Union Pacific nor the California Public Utilities Commission ("CPUC") has permitted the public to cross the tracks at that location. The County understood this at the time it approved the CDP subject to Condition 17. (See video of December 13, 2012 Planning Commission meeting at 01:29:56-01:32:22, 01:35:30-01:36:48, 01:47:45-01:55:00; see also video of February 26, 2013 Board of Supervisors meeting at 06:15:25-48.)

Accordingly, the OTD does not include an offer to dedicate land over the railroad tracks for public access purposes. Instead, it includes a 10-foot wide path within the area depicted in Map 2 that leads up to and the then from Union Pacific's property to the edge of Phillips's property bordering the California State Park. The County believes that this OTD satisfies the requirements of Condition 17 and Section 23.04.420 of the County Code.

Although Map 2 referenced in Condition 17 shows a continuous road from the refinery entrance to the State Park border, the map represents an "approximate location" of the required access. The depiction of that area in Map A was intended to give some guidelines for location of the easement within a previously disturbed area. It was not intended to require Phillips to

[1] According to testimony by Phillips representatives at the Board of Supervisors, Phillips must provide advanced notice to Union Pacific before it crosses the tracks. (See video of the February 26, 2013, Board of Supervisors meeting at 06:11:14-35.)

acquire any additional property from Union Pacific. Rather, the condition aims to obtain compliance with Section 23.04.420 by requiring Phillips to assure the opportunity for access to the public in the future. (See 23.04.420.g. ("...the method and form of such access guarantee shall be approved by County Counsel, and shall be recorded in the office of the County Recorder, identifying the precise location and *area to be set aside* for public access.").) The OTD as it is currently drafted offers public access to the maximum extent possible at this time. Any deviations from Map 2 that are reflected in the easement area described in the OTD would be deemed to be in substantial conformity with the approved CDP as allowed by Section 23.02.038 of the County Code.

Consistent with 23.04.420, the access easement will not be opened to the public until a public agency or private association agrees to accept responsibility for maintenance and liability and until legal access may be obtained across the railroad tracks. As discussed in your March 9th letter, options for fulfilling these requirements are being explored in the Environmental Impact Report prepared for Phillips's Rail Spur Project. In the meantime, the OTD sets the area aside for future public access. The County believes this meets the intent of Condition 17.

Thank you for your thorough review of the OTD and for your continued examination of these issues. If I may be of any further assistance, please do not hesitate to contact me.

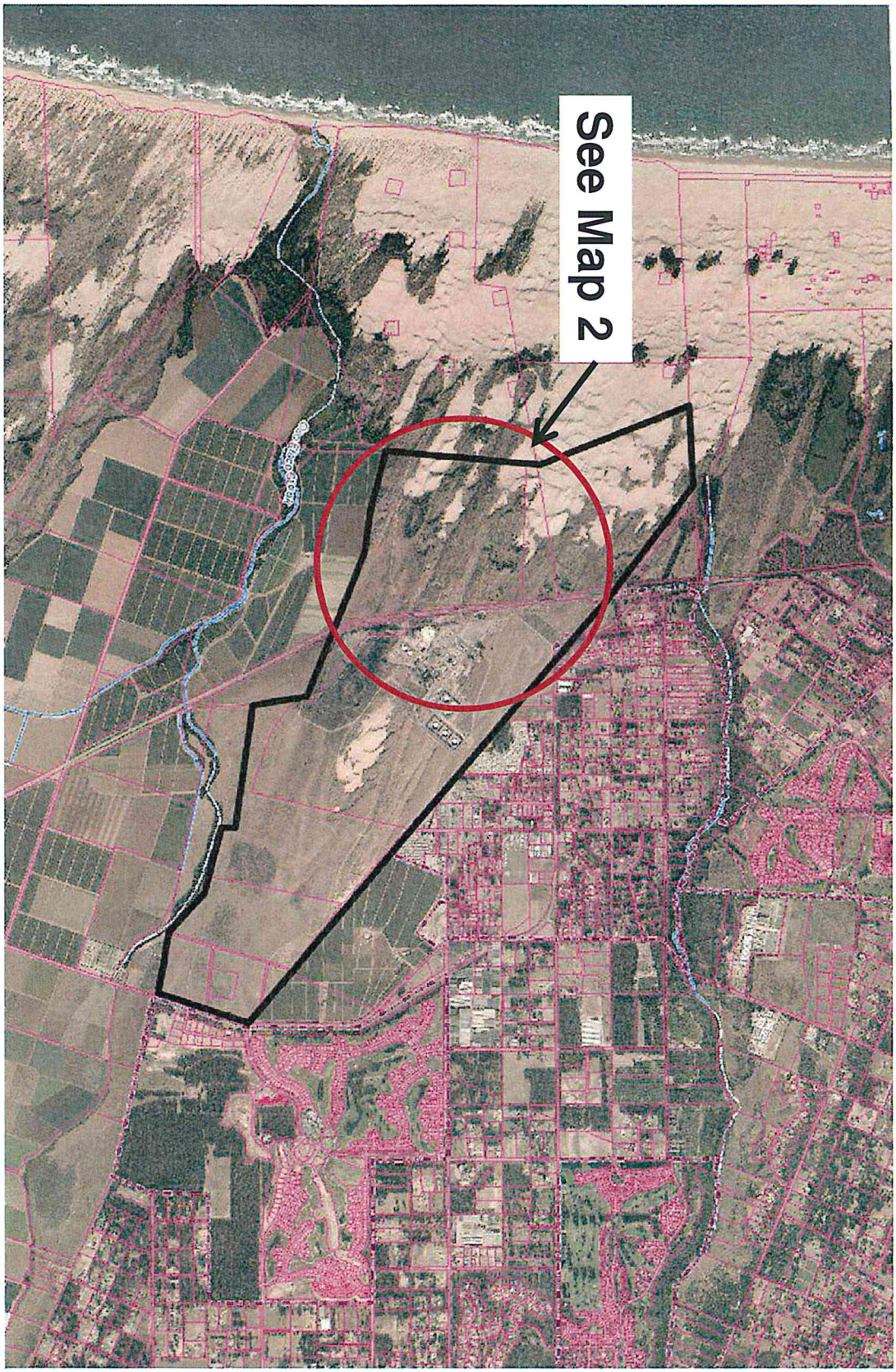
Very truly yours,

RITA L. NEAL
County Counsel

By: Whitney McDonald
Deputy County Counsel

WM:lj
1461ljltr.docx

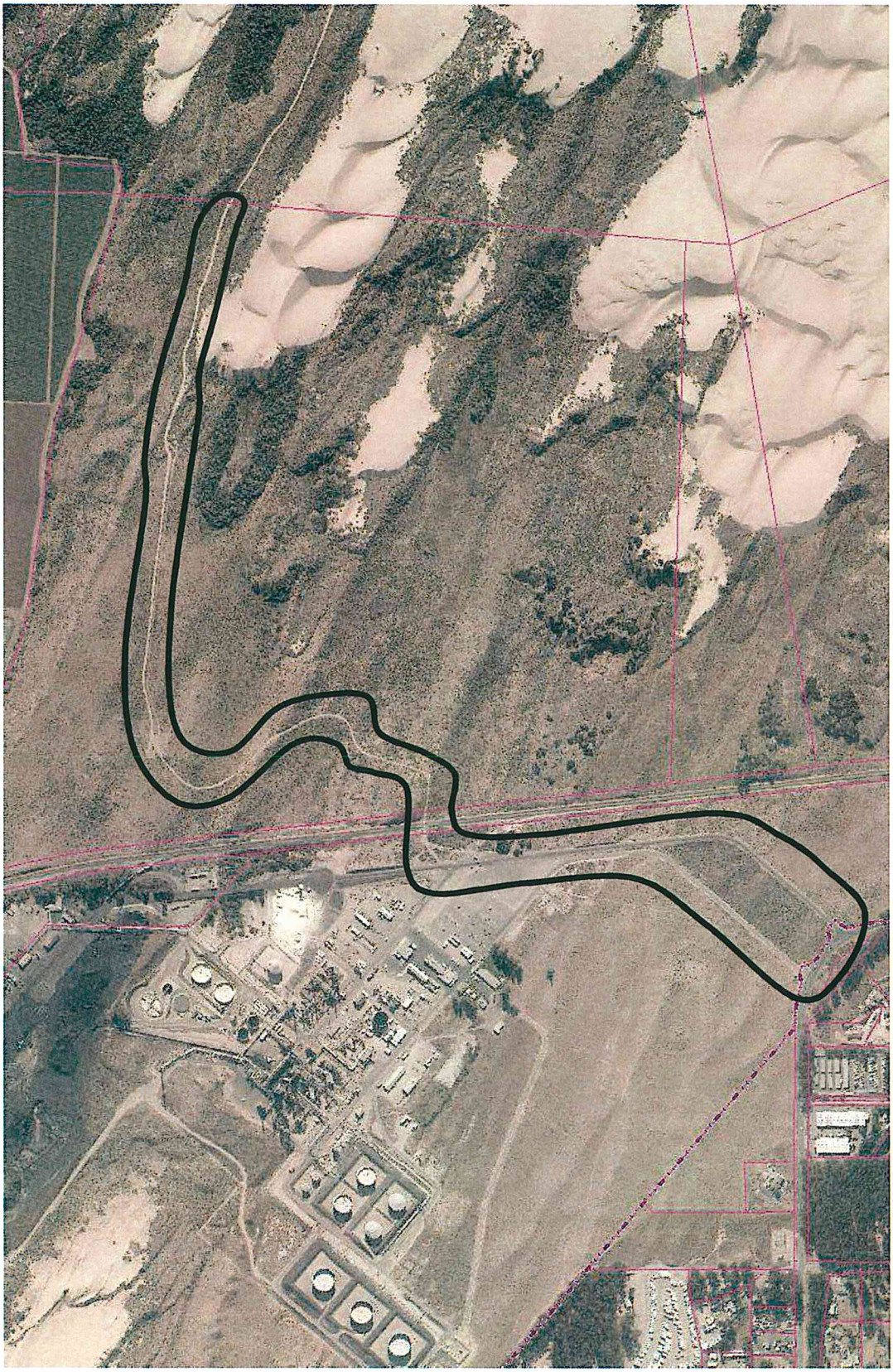
cc: Rob Fitzroy
Kristin Kopp
Jocelyn Thompson, Esq.
Paul J. Beard, II, Esq.



SAN LUIS OBISPO COUNTY DEPARTMENT OF PLANNING AND BUILDING

PROJECT
Phillips 66 – Development Plan
DRC2008-00146

EXHIBIT
Coastal Access Location Map 1



SAN LUIS OBISPO COUNTY DEPARTMENT OF PLANNING AND BUILDING

PROJECT
Phillips 66 – Development Plan
DRC2008-00146

EXHIBIT
Coastal Access Location Map 2

ATTACHMENT 20

ARCADIS Design & Consultancy for natural and built assets

ATTACHMENT 20

Project Consistency With County Policies

Coastal Zone Land Use Ordinance

- Section 23.07.170, Environmentally Sensitive Habitats (ESHA) – **CONSISTENT**
    - There are no rail project impacts to mapped Environmentally Sensitive Habitat Areas (ESHA); as the FEIR states, the only mapped ESHA on the Phillips property occurs west of the UPRR railroad tracks (see FEIR, pp. 4.4-26, 4.4-30). Nor are there any rail project impacts to Unmapped ESHA, because the County defines unmapped ESHA with the requirement that it be designated at or before the time of application acceptance. As indicated in the FEIR, no unmapped ESHA was designated at or before the application was accepted (or in the Draft EIR, or in the Revised Draft EIR) (see FEIR, p. 4.4-30). Comprehensive botanical, habitat, and wildlife reports, prepared consistent with the County's biological report standards, were submitted as part of the project application package and were reviewed by the County prior to acceptance of the application. No new information regarding the distribution or species composition of the plant communities on the property has been developed in preparation of the FEIR. The data provided in the initial biological reports accurately describes the plant communities on the site and are entirely consistent with the descriptions in the FEIR. The project is consistent with this standard because the project is not located within or adjacent to mapped or unmapped ESHA.
    - Note: The FEIR incorrectly and inappropriately substitutes the term "environmentally sensitive vegetation" as defined by CDFW for "environmentally sensitive habitat" as defined by the County in its Coastal Commission-certified Local Coastal Plan. From a practical and regulatory perspective these are two entirely different things. Impacts to native vegetation are fully analyzed in the FEIR and fully mitigated to a less than significant level.

Coastal Plan Policies

- Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats – **CONSISTENT**
    - As detailed above, there are no rail project impacts to mapped ESHA. As the FEIR states, there is no mapped ESHA east of the railroad tracks (see FEIR, pp. 4.4-26, 4.4-30); nor are there any rail project impacts to Unmapped ESHA because no unmapped ESHA was designated at or before the time of application acceptance, as indicated in the FEIR (see FEIR, p. 4.4-30). Impacts to native vegetation are fully analyzed in the FEIR, and as stated in the FEIR are fully mitigated to a less than significant level (see FEIR, pp. 4.4-31 to 4.4-80).
- Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats – **CONSISTENT**
    - As detailed above, there are no rail project impacts to mapped ESHA as there is no mapped ESHA east of the railroad tracks (see FEIR, pp. 4.4-26, 4.4-30); nor are there any rail

project impacts to Unmapped ESHA because no unmapped ESHA was designated at or before the time of application acceptance, as indicated in the FIER (see FEIR, p. 4.4-30). Impacts to native vegetation are fully analyzed in the FEIR and the FEIR indicates those impacts will be fully mitigated to a less than significant level (see FEIR, pp. 4.4-31 to 4.4-80). The on-site habitat restoration would improve ecosystem functions and values for the entire ecological community (see FEIR, pp. 4.4-40 to 4.4-43). The small footprint of the rail spur and offloading facility (approximately 20 acres) in the grazing area (approximately 900 acres) poses a less than significant impact on the ecological functions and values of the area as is described in the FEIR.

- Environmentally Sensitive Habitats, Sensitive Habitats, Policy 36, Protection of Dune Vegetation – **CONSISTENT**
    - As detailed above, there are no rail project impacts to mapped ESHA; nor are there any rail project impacts to Unmapped ESHA as defined by the County because no unmapped ESHA was designated at or before the time of application acceptance, as indicated in the FEIR (see FEIR, p. 4.4-30). Impacts to native vegetation are fully analyzed in the FEIR and fully mitigated to a less than significant level. As the FEIR explains, the dune vegetation in the project area is highly degraded from decades of cattle grazing (see, e.g., FEIR, pp. 4.4-6, 4.4-7, 4.4-31, 4.4-40, 4.4-43). The FEIR further explains that the County mapped ESHA west of the UPRR railroad tracks in the non-grazed dune vegetation and did not map ESHA east of the UPRR railroad tracks, presumably in recognition of the significant difference in habitat quality (see FEIR, p. 4.4-31). The proposed on-site habitat restoration would improve ecosystem functions and values for the entire ecological community (see FEIR, p.4.4-40 to 4.4-43). The small footprint of the proposed rail spur and offloading facility (approximately 20 acres) in the grazing area (approximately 900 acres) poses a less than significant impact on the ecological functions and values of the area.

<u>Coastal Zone Framework for Planning</u>

- Land Use Goal 4 – **CONSISTENT**
    - The refinery was built in 1955. As the FEIR explains, grazing has been conducted on the property for decades without issue, as have the surrounding agricultural operations (see, e.g., FEIR, pp. 4.4-6, 4.4-7, 4.4-31, 4.4-40, 4.4-43). Through time, large residential neighborhoods have been developed around the refinery in recognition of the compatibility of residential, industrial, and agricultural operations (see FEIR, p. 4.8-1). The area currently supports active rail operations, refinery operations, agricultural operations, and residential uses; the project does not alter or conflict with the existing land uses.

- Strategic Growth Goal 1, Objective 2. Air Quality – **CONSISTENT (3 Trains/week)**
    - The DPM threshold of 1.25 lbs/day is not a sound measure of the health impacts of a project, and where that threshold is exceeded, a Health Risk Assessment can determine whether the project is consistent with the objective of providing a safe and healthful living environment. The 3 train per week alternative eliminates the exceedance of the health risk level thresholds determined by the SLOAPCD as documented in the Health Risk Assessment (see FEIR, Appendix B.2). Additionally, although SLOAPCD does not have an Air Emissions Credit program for DPM, Phillips 66 proposes to offset the DPM with PM, and provide the result of the Health Risk Assessment to demonstrate that this is adequate

to protect human health and the environment within the level established by the SLOAPCD. Therefore, the project would be consistent with this policy.

- Combining Designations, SRA – Sensitive Resource Area, General Objectives: 1. – **CONSISTENT**
    - There are no rail project impacts to mapped ESHA/Combining Designations. Mapped ESHA occurs west of the UPRR railroad tracks, outside the project area (see FEIR, pp. 4.4-26, 4.4-30). Although not a combining designation, there are no rail project impacts to Unmapped ESHA because no Unmapped ESHA was designated on the Project site at or before the time of application acceptance, as indicated in the FEIR (see FEIR, p. 4.4-30). Impacts to native vegetation are fully analyzed in the FEIR, and as stated in the FEIR are fully mitigated to a less than significant level (see FEIR, pp. 4.4-31 to 4.4-80).

<u>Conservation and Open Space Element of the General Plan</u>

- Air Quality Policy AQ 3.2, Attain Air Quality Standards – **CONSISTENT**
    - As the FEIR states, all emissions generated from project operational activities at the refinery would be mitigated and offset (see FEIR, pp. 4.3-38 to 4.3-86). Emissions generated by mainline rail activities are exempted through federal pre-emption and are not subject to this County policy. Therefore, the activities subject to this policy are consistent with the policy.
- Air Quality Policy AQ 3.3, Avoid Air Pollution Increases – **CONSISTENT**
    - As the FEIR states, all emissions generated from project operational activities at the refinery would be mitigated and offset (see FEIR, pp. 4.3-38 to 4.3-86). The 3 train per week alternative would lower the modeled refinery health risk to below current (non-project) levels (see FEIR, Appendix B.2). Emissions generated by mainline rail activities are exempted through federal pre-emption and are not subject to this County policy. Therefore, the activities subject to this policy are consistent with the policy.
- Air Quality Policy AQ 3.4, Toxic Exposure – **CONSISTENT**
    - As identified in the FEIR, the 3 train per week alternative would result in cancer risk levels that are lower than the acceptable cancer risk levels established by the SLOAPCD, based upon a health risk assessment (see FEIR, Appendix B.2). Therefore, the 3 train per alternative would be consistent with this policy.
- Air Quality Policy AQ 3.5, Equitable Decision Making – **CONSISTENT**
    - As stated in the FEIR, the 3 train per week alternative does not exceed the cancer risk threshold (see FEIR, Appendix B.2). As the FEIR states, all emissions generated from project operational activities at the refinery would be offset (see FEIR, pp. 4.3-38 to 4.3-86). Emissions generated by mainline rail activities are exempted through federal pre-emption and are not subject to this County policy. Therefore, the activities subject to this policy are consistent with the policy.
- Biological Resources Policy 1.2, Limit Development Impacts – **CONSISTENT**
    - As stated in the FEIR, impacts to native vegetation are less than significant (see FEIR, pp. 4.4-31 to 4.4-80). The required 40-acre habitat restoration would result in a net increase in

the acreage of high quality native habitat on the Phillips 66 property. The project footprint (approximately 20 acres) in the degraded grazing area (approximately 900 acres) has been strictly designed to avoid and minimize impacts to natural resources.

- Non-Renewable Energy Facility Siting Policy E 7.1 – **CONSISTENT**
    - The project footprint (approximately 20 acres) in the degraded grazing area (approximately 900 acres) has been strictly designed to avoid and minimize impacts to natural resources. The project includes a relatively small expansion of the refinery footprint that is environmentally appropriate for the industrial site. As stated in the FEIR, the 3 train per week alternative does not exceed the cancer risk threshold at the refinery (see FEIR, Appendix B.2). As the FEIR states, all emissions generated from project operational activities at the refinery would be offset (see FEIR, pp. 4.3-38 through 4.3-86). Emissions generated by mainline rail activities are exempted through federal pre-emption and are not subject to this County policy. As noted above, the required habitat restoration would result in a net increase in high quality native habitat on the Phillips 66 property mitigating the impact to highly degraded vegetation. Therefore, the mitigated 3 train per week project would be consistent with this policy.

<u>South County Coastal Area Plan</u>

- Land Use, Rural Area Land Use, Industrial – **CONSISTENT**
    - This policy specifically identifies the process (Development Plan) for modification or expansion of the refinery. The installation of the Rail Spur Project allows for a continued buffer of over ½ mile from adjacent uses. The Rail Spur Project does not include any sources of wind-carried pollutants that can be deposited on site. Therefore, the Rail Spur Project is consistent with this policy.

- Industrial Air Pollution Standards – **CONSISTENT**
    - The DPM threshold of 1.25 lbs/day is not a sound measure of the health impacts of a project, and where that threshold is exceeded, a Health Risk Assessment can determine whether the project poses an unacceptable cancer health risk to the surrounding community. As identified in the FEIR, the 3 train per week alternative would result in cancer risk levels that are lower than the acceptable cancer risk levels established by the SLOAPCD, based upon a health risk assessment (see FEIR, Appendix B.2). Although SLOAPCD does not have an Air Emissions Credit program for DPM, Phillips 66 proposes to offset the DPM with PM, and provide the result of the Health Risk Assessment to demonstrate that this is adequate to protect human health and the environment within the level established by the SLOAPCD. In addition, the DPM from on-site activities would not contribute to additional localized exceedences of the state PM_{10} air quality standard because the meteorological conditions causing the current exceedences (i.e., strong winds out of the northwest) would actually "produce substantial dispersion of the diesel PM emissions from the project site." FEIR p. 4.3-53. Therefore, the project would be consistent with this policy.

ATTACHMENT 21

DECLARATION OF MAUREEN McCABE

I, Maureen McCabe, declare:

1. I am the West Coast Domestic Crude Trader for Phillips 66 Company ("Phillips 66"). I make this declaration in support of Phillips 66's Rail Spur Extension and Crude Unloading Project ("Project"). I have personal knowledge of the facts set forth in this declaration and if called as a witness, I could and would testify competently to them.

2. I have held the position of West Coast Domestic Crude Trader since 2008. Altogether, I have been employed by Phillips 66 and its predecessors (including ConocoPhillips Company and Phillips Petroleum Company) for over 18 years. For twelve of those years, I have been involved in crude trading, procurement, or delivery.

3. Phillips 66's Santa Maria Refinery ("Refinery") is located in unincorporated San Luis Obispo County in California.

4. In my current position, my responsibilities include purchasing crude and optimizing crude supply for the Phillips 66 West Coast refineries. I am familiar with the equipment and operations of the Santa Maria Refinery as they affect my responsibilities for procurement of crude oil and other feedstocks.

5. Currently, one of the objectives set by corporate management is to use what the company refers to as "advantaged crude." As used by Phillips 66, this term simply means crude oil that costs less than the cost of the global benchmark crude, North Sea Brent. For Phillips 66-owned refineries in the United States, advantaged crude oil can include heavy crude from Canada and Latin America, lighter Canadian grades, West Texas Intermediate, Bakken in North Dakota, and the Eagle Ford in Texas.

6. The cost comparison for determining whether a crude is advantaged is based on the "landed" price at a particular location. As Phillips 66's management has stated: "[W]e define advantaged as crudes that land at our refineries at a discount to

landed Brent." (See Exhibit A, Phillips 66 Analyst Meeting, April 10, 2014, edits transcript, p. 12.) The landed price includes the per barrel purchase price of the crude oil as well as transportation costs and other costs.

7. Transportation costs vary significantly depending upon the mode of transportation, e.g., truck, pipeline, train, marine vessel, barge or some combination of these. Within a given mode of transportation, the transportation cost may be affected by distance, by equipment availability, or potentially by constraints along the route. For example, it generally costs more per barrel to transport crude oil by rail from the Midwest to California than it does to transport the same crude oil to the East Coast.

8. Phillips 66 operates 11 refineries located in the United States. Since the cost comparison for determining an advantaged crude is based on the landed price for a refinery, there is a wide variation among the refineries as to which crudes are considered advantaged.

9. Across the company, the Phillips 66 refineries operated at approximately 93% advantaged crude oil in 2015.

10. In recent years, the primary sources of crude oil for the Santa Maria Refinery have included the Outer Continental Shelf (60-85%), Price Canyon/Santa Maria Valley/San Joaquin Valley (5-20%), San Ardo (5-10%) and Canada (2-7%). With these crudes, the Santa Maria Refinery already runs at nearly 100% advantaged crudes.

11. Certain public comments on the Revised Draft Environmental Impact Report for the Project inaccurately describe what may constitute an advantaged crude in general or for the Santa Maria Refinery in particular. For example, one comment states that "[a]dvantaged crudes are competitively priced because they are stranded, with no pipeline access, and must be delivered by rail." (See Exhibit B, Excerpts of Letter from Adams Broadwell Joseph & Cardozo, November 18, 2014, at p. 15.) As explained above in paragraphs 5 through 8, an advantaged crude means only that a crude is less than the benchmark Brent crude price, accounting for the transportation costs of that crude to a

particular refinery. Advantaged crudes may be transported by pipe, rail, truck, barge, or ship, and are not necessarily transported by rail.

12. The same comment letter also incorrectly states that "Canadian tar sands crudes have been identified as the most competitively priced crudes to import into California by rail", citing to a presentation from another energy company, Valero. (See Exhibit C, Excerpts from Presentation, Valero – UBS Global Oil and Gas Conference, May 21-22, 2013, at p. 10.) Page 10 of the referenced presentation does not actually make this statement with respect to Valero's California refineries. More importantly, the Valero presentation is irrelevant to Phillips 66's decisions regarding crude purchases and refinery operations. The Valero presentation does not explain what Valero means by "cost-advantaged" crude oil, or whether it uses the term in the same manner as Phillips 66. Also, Valero owns and operates a different suite of refining facilities than Phillips 66. The companies own refineries in different locations, with different access to the worldwide transportation network. For example, Valero does not own a refinery in San Luis Obispo County. Even where both companies have refineries in the same general region, each company's refinery may have a different design, different desired product slate, different crude storage capacity and configuration, different transportation infrastructure, etc., all of which affects whether a particular crude is appropriate for a particular refinery or can be obtained at an attractive price. Accordingly, Valero's statements regarding the cost of Canadian heavy crudes provides no insight into whether those crudes meet Phillips 66's definition of a cost-advantaged crude for the Phillips 66 Santa Maria Refinery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 1 day of February 2016, in Houston, ~~California.~~ Texas

Maureen McCabe

Exhibit A

THOMSON REUTERS STREETEVENTS

EDITED TRANSCRIPT

PSX - Phillips 66 Analyst Meeting

EVENT DATE/TIME: APRIL 10, 2014 / 06:30PM GMT

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THOMSON REUTERS

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Greg Garland *Phillips 66 - Chairman and CEO*

Tim Taylor *Phillips 66 - EVP of Commercial, Marketing, Transportation & Business Development*

Greg Maxwell *Phillips 66 - EVP of Finance and CFO*

CONFERENCE CALL PARTICIPANTS

Arjun Murti *Goldman Sachs - Analyst*

Doug Leggate *BofA Merrill Lynch - Analyst*

Ed Westlake *Credit Suisse - Analyst*

Paul Cheng *Barclays - Analyst*

Blake Fernandez *Howard Weil Incorporated - Analyst*

Paul Sankey *Wolfe Research - Analyst*

Evan Calio *Morgan Stanley - Analyst*

Faisel Khan *Citigroup - Analyst*

Roger Read *Wells Fargo Securities - Analyst*

Jeremy Tonet *JPMorgan - Analyst*

PRESENTATION

Clayton Reasor - *Phillips 66 - SVP of IR, Strategy & Corporate Affairs*

Good afternoon, and welcome to the Phillips 66 2014 analyst meeting. And on behalf of the entire management team of Phillips 66, let me express our thanks to those of you here in the room and those listening on the webcast. We appreciate your interest in our Company and hope you find the next couple hours of interest. My name is Clayton Reasor; I have responsibility for investor relations at Phillips 66.

In 2012, a new Company was formed. A Company with leading midstream; a global chemicals and integrated refining, marketing and transportation business. A Company that was constructed in a way to allow it to capitalize on the remarkable growth in domestically produced oil, natural gas, and shale NGLs. And over the last two years, Phillips 66 has been able to translate this production growth into strong earnings and cash flows.

We operated well; we increased our financial flexibility; created a great place to work for our employees, while being a good neighbor in the communities we operate in. And our share price reflects this performance.

But we are not here today to talk about our past or tell you what a good job we have done. Rather, we want to talk about our future. We plan to use the next two hours to share our plans for creating sustainable shareholder value with new specifics on growth, returns, distributions, and capital allocation.

We will have three speakers today, with our Chairman and CEO leading off. Greg Garland will discuss how the realization of our vision and execution of our strategy will create differentiated returns for our shareholders. Next up will be Phillips 66 Executive Vice President Tim Taylor, and Tim will provide new information about our exciting midstream growth plans and what is driving capital efficiency in refining. Greg Maxwell, our CFO, will provide an update on financial plans, an important topic given the value of maintaining a strong balance sheet in a business as cyclical as ours. Immediately following our CEO, Greg Garland, we'll come back to the podium and lead a Q&A session.

As part of our presentation and in response to your questions, we will be making forward-looking statements. Actual results may differ materially from the comments we make today, and factors that could cause those results to differ can be found on page 3 of this presentation, as well as in our filings with the SEC.

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So this is what we told you in December of 2012 that we wanted to accomplish in 2013. We checked the boxes. We are delivering on both the financial and the operating results. We IPO'd our MLP, Phillips 66 Partners. Chevron Phillips Chemical Company is advancing the first world-scale petrochemical complex we built on the US Gulf Coast in more than a decade.

When you think about our returns in refining, we've improved those by putting advantaged crudes to the front of the refineries. We exited last year at about a 90% advantaged crude rate. This reflects not only a market shift in crudes versus Brent but also our ability to put advantaged crudes to the front of the refineries.

We told you were going to acquire 2,000 railcars. We have done that. They are in service. Tim is going to tell you later today, we are in the process of acquiring another 1,200 cars.

We signed significant third-party agreements to load and unload advantaged crude. We will be able to extend our capabilities in advantaged crude, and we will highlight some of those today. We returned over $6 billion of capital to shareholders since May of 2012. At the same time, we've reshaped and reinvested in our portfolio.

We've increased dividends from $0.80 annually to $1.56. And as I said, we took in about 10% of the shares of the Company.

We also said that in 2012 and 2013 we were going to repay $2 billion of debt. We have done that, so we strengthened our balance sheet capability and our flexibility.

So as we think about the strategic drivers for our strategy, the underlying businesses of our Company have been around for more than 100 years. As you know, external environment has undergone significant recent change. Growing natural gas, natural gas liquids, crude oil production is reshaping our industry. We've gone from a period of extended resource constraint to volume production -- one of abundance and growing production.

We think US refining has a structural price advantage and energy cost advantage. It's going to allow us as an industry to effectively meet domestic demand and also compete for growing share of export markets. We think that global demand that's spurred by growth in developing countries like China, India, Brazil will grow more than 1 million barrels a day annually.

We think that investors will continue to place a higher multiple on businesses that have stable cash flows and significant growth potential. So refining is a significant source of cash for us, but it was, it is, and always will be a very volatile business. So part of our rationale for shifting the portfolio to more midstream and chemicals is the expectation for more stable cash flow and higher valuations. We also believe that the uplift from natural gas to natural gas liquids to petrochemicals is more durable and more sustaining than the value uplift from crude to refined products.

Move on and talk just a couple macro slides if I can. Here's midstream. These are our expectations for midstream growth. 2010, over 2 million barrels a day. We think by the end of the decade, between 3 million and 5 million barrels a day of natural gas liquids production. This is creating tremendous investment opportunities in the industry for gathering, processing NGL fractionation; LPG export. We think the industry will invest between $100 billion and $150 billion in new infrastructure.

We continue to think that expanding in US petrochemicals makes sense. By the end of the decade, we see between 600,000 and 1 million barrels a day of new ethane in the US. We think the US is going to be a competitively advantaged place to make petrochemicals. In fact, we think it's the best place in the world to make petrochemical investments today.

Fundamentally, we believe that our olefins and polyolefins chain, because of this global leading technology position and global leading market position and the fact that we have concentration of assets in the Middle East and North America, this asset will continue to be the highest-returning asset in our portfolio, and it's one we want to grow.

Moving on to the refining macro environment. You can see significant growth in crude coming from Canada, Texas, and North Dakota. This production is going to displace crudes that have historically been imported in the US. By the end of this decade, we expect to have displaced most of the light and medium sweet crudes and a majority of the other crudes. We think this translates into advantages for US refining and good margins for the industry.

So we understand the risks that are inherent in our business; we are experienced at managing these risks. We have proven ourselves capable of managing complex mega-projects in our industry. For example, our Wood River Coker refinery expansion, we call it the CORE project -- $4 billion, on time, on budget, flawless start-up, well-executed project.

DCP is a very experienced project manager. Two big pipes: Sand Hills, Southern Hills. About $1 billion each. On time; on budget; well-executed project. CPChem, very capable project manager. The past 12 to 14 years, five mega-projects in the Middle East. As you think about that environment, very complex, very competitive environment; not unlike the environment we're going to face on the US Gulf Coast in the next five to seven years. Well-executed projects.

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Speaking about the dock itself, we have the -- this dock will have the capability to load eight VLGC carriers -- or cargoes of propane and butane each month. That's about 150,000 barrels a day.

We have the capability to expand that by an additional four cargoes to make that a much more significant asset, and we are currently in conceptual development to expand the concept now to include condensate splitting in the area and to include other NGL fractionators.

So we are laying the groundwork for a much larger and involved and more purposeful NGL business that's based on the asset footprint that we have at Sweeny. So we are excited about that, and it's a major step in our growth program for the Midstream business at Phillips 66.

I want to talk about our transportation business in some detail. We get quite a bit of questions about that, and I think this lays the groundwork for its size and scale and opportunity it has, particularly as it ties back to PSXP, our MLP.

So, when you talk about transportation, again, we are talking about crude oil logistics, we're talking about our rail assets, we're talking about Jones Act ships that we move to get crudes to our markets, and then, we're talking about increasing export capability.

Overall, this segment generated about $400 million of EBITDA in 2013. We project that would be about $500 million in 2014. You can see that we are ramping up the capital spending as we capture these opportunities, talking about doubling it to about $400 million of opportunity space there as we look at ways to continue to increase our connectivity, expand our pipeline system, and add services to our terminals to capture the opportunities that we see in the marketplace.

I got four maps here to talk about our main operating regions and talk about the assets that we have and the opportunity set that we have. A really critical area for us where we have a significant amount of transportation infrastructure is in the Midcon region, right in the heart of the [century]. We've got three Phillips 66 operating refineries in this region. It's a very significant part of our operation, and the pipeline system plays a very important role both in delivering crudes to the refineries, as well as moving products to markets, and we're a long way from some of the markets, so it's a critical piece getting value in this particular system.

The Gold pipeline we will talk about a bit later, but that was recently acquired by PSXP to show you how that begins to fit with our overall Midstream strategy.

I think the interesting thing about the Midcon for us, even though we've got 3,700 miles of pipeline here, is that it's coincident with what's happening in the oil and gas development in the area, and given our asset footprint, because of our history here, we've got a lot of right-of-way, a lot of pipelines that allow us to look at options to bring new crudes into our system, but also provide market access for other producers and opportunities to do that. So it's a very active area for development that we are currently working on many projects to expand our presence and the opportunity set there.

The second point I'd make is that in this system, we also include Explorer Pipeline, which runs from the Gulf Coast. It's a product pipeline that runs from the Gulf Coast to Chicago, and we recently increased our ownership interest in the last quarter by 6% to 19.5% in that pipeline system. It is one of the major product pipelines in the US.

The story and the transportation system in the Rockies is very similar to the Midcon. We've got a great asset base in terms of pipelines, but a relatively small refining presence with our 60,000-barrel a day Billings Refinery. But we deliver crudes, primarily Canadian crudes, into Billings via the Glacier Pipeline that we jointly owned with Plains.

And then we distribute the products east -- or excuse me, west and south out of Billings into markets in the upper Rockies, eastern Washington, and now increasingly -- increasing connection to the south to markets in Salt Lake, and even having access now with the UNEV Pipeline to Las Vegas.

So it's an area that is fairly small, but taken together, our transportation system, our refining business, and the marketing opportunities that we have in this area, this is one of our most profitable regions and it's one that we continue to find ways to invest and grow because it is a very valuable piece of our portfolio.

As I look at the west coast, we have a relatively small footprint in the west coast in terms of pipelines, about 600 miles of pipe. Most of that is really directed toward crude that we access in central California and then move to Los Angeles or Rodeo refineries or Santa Maria Refinery there.

We have about 100 miles of product pipe in that system, as well. We also have some very high-volume terminals. But I think the real story in the transportation section on the west coast, it's really about our rail connectivity, so we are currently in the process of completing a 30,000-barrel a day rail rack to unload crudes at our Ferndale, Washington, refinery and we're in the permitting process for a 20,000-barrel a day rack at Santa Maria, and we hope to see that one advance soon.

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We expect Ferndale to be operational later this year, and on top of that, we are continuing to find ways to do third-party unloading to increase crude supply to the west as well, and we just recently signed a deal with Plains in Bakersfield, California, to put Canadian crudes into that pipeline system for delivery to our refining system.

So we are continuing to find ways to get new crude sources, particularly inland crudes, into the west coast and improve its competitive position, but that is a key function and key driver and focus for us on the west coast in transportation.

The final region that I wanted to show in some detail is the Gulf Coast, and again, it's not a huge system in terms of our own pipelines, but it's a very active area, a number of large systems there that connect to that, and the dynamics of this region are changing rapidly. You've got a lot of new crude sources pushing in from the Permian, from Cushing, coming into the Gulf Coast, and there have been a number of bottlenecks now developed to getting that crude to the refining system on the Gulf Coast or to other parts of the refining system in the US.

And so, we've been very active, increasing our connections and our capability to get those crudes into our refining system and to provide access to docks and other ways to get the crude into the system. In fact, in this area, we do run MR tankers across from Corpus to our refining system in Louisiana and occasionally to Bayway to capture that, and I think you'll continue to see those solutions develop and you'll continue to see opportunities for new pipelines, particularly on the crude oil/natural gas liquids side, to keep those products moving to markets and the refining centers on the Gulf Coast.

So I have touched on this a little bit, but I don't think any discussion on transportation today in the US when you think about the crude side of our business would be complete without a discussion around rail and marine. And this map shows a more comprehensive view of how we are servicing the needs for our refineries and supplementing that from what's traditionally been either marine oceangoing supply or pipeline supply.

So, we have a very active program to move south Texas crudes along the Gulf Coast with two MR-class tankers. We have 14 barges that are currently in crude service. We have 42 others in different services, and we have the ability to flex that barge capacity between crude and other services, so we have an opportunity to continue increase our delivery with that.

We are also now going to be able to load crude out of our Freeport dock, where we used to receive it by barge out of south Texas, so it's freeing up some capacity and opportunities for that.

We have been very active in the rail space. To do this, we talked about the rail rack at Bayway that comes up later this year. We've got a 70,000-barrel a day rail rack that will be coming up this quarter at our Bayway refinery, so taken together, we've put 100,000 barrels a day of additional rail and loading capacity for us on the east and the west coast, and to supplement that, we are continuing to grow our third-party connections to bring even more crude into the system, and we talked about Bakersfield in terms of unloading in California. Though also on the sourcing side, we developed new agreements recently in the past several months at Hardisty, Alberta, which lets us access heavy Canadian crudes, Berthold, North Dakota, for Bakken, and then at Casper, Wyoming, we've also got capacity there, which would allow us to bring crudes into California or other parts of our refining system from there.

So we are continuing to progress that, and I think rail will continue to be a piece of the solution for us. So Greg mentioned our fleet started out at 2,000 new railcars we took delivery of in 2013. We will take -- we will put 1,200 more cars in service in 2014, and in terms of capacity, that means that the 2,000 cars that delivered about 100,000 barrels a day, the 3,200 cars will increase that capability to 160,000 barrels a day.

So on top of that, we've got additional third-party commitments that let us really flex that rail system, and we ultimately see rail probably being 5% to 10% of our crude supply in North America because the pipeline capacity just isn't there to make that happen.

So, I think before I leave and talk about DCP and the Midstream, I think this is a slide that we've been anxious to show everybody because it really says what's the impact of all the growth projects that we are talking about in our Midstream business.

So last year, in 2013, we had $0.5 billion of EBITDA in the Midstream business. And we're going to grow that to $1.5 billion in 2017 with the projects that we just talked about and the opportunities. Half of that comes from the Sweeny NGL hub; a quarter comes from operations that are currently embedded in refineries, such as storage, docks, and terminal assets; and another quarter will come through additional transportation growth in our pipeline and terminal system. These are all very solid projects, so we are talking about a tripling of our Midstream EBITDA, and I think that really speaks to the opportunity that we see to grow the Midstream business in both Phillips 66, but just as importantly to grow for Phillips 66 Partners, our MLP.

So we currently own 73% of PSXP as a limited partner and we own the 2% GP as well. We have talked about top quartile distribution growth for that. It's important to have that backlog of EBITDA and the project backlog to drive that.

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The real challenge for us is to continue to increase that connectivity to some of our light processing refineries on the east and the west coast, hence the comments around rail and the logistics solutions that we look for to do that. But overall, we think we're in great shape to take advantage of the changing crude supplies -- crude slate in North America through our system.

We talked in 2012 at the analyst meeting about a $500 million improvement in refining and refining net income on a constant margin basis. We're delivering on that. We continue to make that progress.

In this chart, you can see about half of that improvement will come from increased runs of advantaged crudes. About a quarter -- or the other half will come from yields improvements, as well as increased exports, and overall when you look at our asset base today, our five-year average on refining return has been about 11%. We see that growing by 4 percentage points to about 15%. So continuing to see stronger business in our base refining business and taking steps to really work that, and I'll talk in more detail about some of those.

The biggest piece of that, of course, is how do we get lower-priced, higher-value crudes in the front end of our refinery? It's the number one competitive advantage that we have, and we spend a lot of time between our commercial, refining, transportation groups to drive that.

We've talked a bit about our light oil capability or heavy oil capability. We talked about the rail system that will increase the connectivity and the supply of that. Those are all actions that we have taken, and the result has been that we've increased our utilization of advantaged crudes from 62% in 2012 to 74% in 2013, and so far this year, we have average 90% advantaged crude.

And part of that is the fact is how you define advantaged, and for simplicity, we define advantaged as crudes that land at our refineries at a discount to landed Brent. So, the big change for us in North America has been the relative discounting of LLS and ANS as these inland crudes have now made it to the places where refiners didn't have those options in the past and those crudes have begun to discount.

So a significant change there and one that we think will be enduring. They will certainly move around, but I think the increased supply and competition has changed that and made that a bigger part of what we do.

The other thing that we like to do with crude is we like to gather local crude, very consistent quality, high value at our refineries, so crude-on-crude substitution, even within light tight oil, is important to us, and we also like to make sure that we have the capability to have options in our waterborne refineries that have access to waterborne crudes that we can maintain the optionality on those as well. So, we'll continue to evolve that.

I would say that finally on advantaged crude, the real issue today is logistics. It's about how to get those crudes out of the central part of the US and put more of that into the east and the west coast, hence why we work on that so much in our organization.

Just a couple of comments on yields. We have talked about this in the past. We have an industry-leading distillate yield of 40% today. The industry average is 37%. We see that going to 41% through optimization of our operations.

We are continuing to look at ways to increase our clean product yield, so we see that increasing from 84% to 85%, and that's really driven off of two things -- increased recovery of LPGs where we burn those as fuel today in some refineries, and then increasing conversions on some of our lower-valued fractions in our key operating units, like FCCs or hydrocrackers, where we get to convert at a higher percentage those low-valued fractions into higher-valued fractions. Overall, a one-point change in clean product yield yields about $100 million in net income for the refining business.

The export story, Greg touched on this, but it's just a great story for us. We have increased our export capacity and our export shipments substantially over the last two years, and we did that without spending a lot of capital. It really came through a concerted organizational effort between commercial and refining to find ways to optimize dock space and remove constraints and meet product specs that met export specifications.

And we have now revised our estimates of what our capability for exports will be. We see that growing from just over 400,000 barrels a day at 2013 to over 550,000 barrels a day in 2016, and most of that change comes in the Gulf Coast. And at 550,000 barrels a day, 25% of our US output could be exported and 42% of our US coastal refining capacity could be exported, and we think that's critically important as the US continues to have high crude runs, relatively flat product demand, and this is an opportunity to take that length and supply markets, particularly in the Atlantic Basin, with increased product supply out of the US that's very competitive. So we feel there's strong market pull for this, as well as strong operating push behind that part of the export business.

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Exhibit B

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November 18, 2014

Via Email and U.S. Mail

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Re: Phillips 66 Rail Spur Extension Project – Public Comment Deadline Extension Request (SCH# 2013071028)

Dear Mr. Wilson:

On behalf of Safe Fuel and Energy Resources California ("SAFER California"), we respectfully request that the County extend the time to comment on the Phillips 66 Company Rail Spur Extension Project Recirculated Draft Environmental Impact Report and Vertical Coastal Access Project Assessment ("RDEIR"). This request is based on the complexity of the issues involved in the RDEIR and County's failure to make available all documents we have requested in a timely manner.

Our office requested all documents referenced in the RDEIR and other documents under the Public Records Act on October 24, 2014. We also followed up with a specific request for data needed for a complete and adequate review of the RDEIR. We did receive a response on October 29, 2014 with documents referenced in the RDEIR. However, as of the morning of Tuesday November 18, less than one week from the deadline, we still have not received all of the documents we requested. Thus, pursuant to CEQA Guidelines section 15105, we respectfully request an extension of time to comment on this highly technical document. Given the fact that the Project has drawn much public attention, a finding requiring the maximum amount of time available for public comment under CEQA Guidelines section 15105 is warranted.

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Extending the existing comment deadline would ensure that the public is afforded adequate time to review the RDEIR and all supporting documents. Courts have emphasized the importance of a sufficient period for public review.[1] Therefore, we request that the comment period for this Project be extended by 30 days until Wednesday December 24. As you know, the currently noticed deadline for submitting comments on the Project RDEIR is November 24, 2014. Therefore time is of the essence. ABJC-01

By this letter, we also request written notification of any and all public hearings related to the Project, including CEQA-related hearings. With such notification, please include the time, date and location of the public hearing along with the decision making body that will be presiding over the hearing. We make this request for notice under California Public Resources Code Section 21092(b)(1) and Government Code Section 65092. ABJC-02

As the public comment deadline is fast approaching, we would appreciate the County's prompt response to this request. Thank you for your attention to this matter and please contact me if you have any questions.

Sincerely,

Laura E. Horton

LEH:clv

[1] *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689.

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November 24, 2014

Via Overnight and Electronic Mail

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Re: Comments on the Recirculated Draft Environmental Impact Report for the Phillips 66 Company Rail Spur Extension Project and Vertical Coastal Access Project Assessment

Dear Mr. Wilson:

We are writing on behalf of Safe Fuel and Energy Resources California ("SAFER California"), Ian Ostrov and Gene Sewall to provide comments on the Recirculated Draft Environmental Impact Report ("RDEIR") for the Phillips 66 Company Rail Spur Extension Project ("Project") and Vertical Coastal Access Project Assessment ("VCA"). The RDEIR was prepared by the San Luis Obispo County Department of Planning and Building ("County") pursuant to the California Environmental Quality Act ("CEQA").[1] SAFER California provided comments on the original DEIR on January 27, 2014, identifying many fatal defects in the document. The County then revised and recirculated the document with new analysis. Although the RDEIR addresses several of the errors we identified, there are still many more errors remaining, as well as new ones. Thus, the RDEIR fails to meet the requirements of CEQA.

The Project proposes to modify an existing rail spur at its Santa Maria Refinery ("SMR") and to construct a new offloading facility to accommodate an average of between 35,478 and 38,237 barrels per day of crude oil to be shipped by

[1] Pub. Resources Code, §§ 21000 et seq.

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rail to the SMR for processing.[2] The offloading facility would be located at an existing coke storage area within the SMR. The Project includes unloading up to five trains per week, with an annual maximum number of trains expected to be approximately 250.[3] According to the RDEIR, the refinery feedstock (i.e. crude oil) would be sourced from oilfields throughout North America, including Canada.[4]

The Project is proposed within the Coastal Zone, approximately one mile from Highway 1 and approximately 3.5 miles west of the community of Nipomo in southern San Luis Obispo County.[5] According to the RDEIR, Project construction would occur within the SMR.[6] The SMR and the Phillips 66 Rodeo Refinery are linked by a 200-mile pipeline, and are collectively referred to in the RDEIR as the "San Francisco Refinery."[7] The Rodeo Refinery is located in Contra Costa County. In addition to being physically linked, the SMR and the Rodeo Refinery have integrated refining operations. The SMR processes heavy crude oil, and semi-refined liquid products are sent by pipeline from the SMR to the Rodeo Refinery for upgrading into finished petroleum products.[8]

Phillips 66 seeks authorization from San Luis Obispo County for an extension of the existing rail spur off the Union Pacific rail mainline, construction of an oil railcar unloading facility including a small parking area and restroom facilities, a pipeline, and an unpaved eastern Emergency Vehicle Access route between the eastern end of the rail spur and Highway 1, as well as work within the existing refinery connecting and upgrading existing infrastructure, including adding a new electricity cable to an existing pipeway and a new fire water pipeline to an existing pipe rack.[9] The Project requires numerous permits, including a Coastal Development Permit, from the County and authorizations from the San Luis Obispo County Air Pollution Control District ("APCD"), CAL FIRE, and State Water

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[2] Phillips 66 Company Rail Spur Extension Project Recirculated Draft Environmental Impact Report ("RDEIR"), p. ES-5; 2-23. The RDEIR anticipates 5 unit train deliveries per week. Each unit train can hold between 49,670 and 53,532 barrels of crude oil. Those calculations were then averaged over seven days.
[3] RDEIR, p. 2-22.
[4] *Id.*, at 1-4, 2-22.
[5] *Id.*, at ES-1.
[6] *Id.*, at 2-6.
[7] *Id.*, at 2-4.
[8] *Id.*, at 2-5, 2-31.
[9] *Id.*, at 2-5 – 2-19.

Resources Control Board.[10] The Project may also require Incidental Take Permits from the U.S. Fish and Wildlife Service ("FWS") and the California Department of Fish and Wildlife ("CDFW") for the federally endangered Nipomo Mesa lupine ("NML"), as well as approvals from the Central Coast Regional Water Control Board ("CCRWCB") and the California Public Utilities Commission ("CPUC").[11]

In the RDEIR, the County also conducts programmatic CEQA review of the VCA.[12] As a condition of approval of the Phillips 66 Throughput Increase Project, Phillips 66 is required to provide a vertical public right of coastal access at the SMR Site, in accordance with the County's Coastal Zone Land Use Ordinance. The bulk of these comments is focused on the Project, but also includes some additional comments on the VCA.

Based upon our review of the RDEIR, appendices, and other relevant records, we conclude that the RDEIR still fails to meet the requirements under CEQA. The Project description again unlawfully piecemeals environmental review, does not adequately address the crude switch, and completely fails to address decommissioning. In addition, the RDEIR fails to provide a sufficiently detailed environmental setting for air quality and fails to reduce the Project's potentially significant impacts on various resources. The RDEIR also fails to incorporate feasible mitigation into the Project to reduce the significant air quality impacts identified in the RDEIR, and several of the mitigation measures for air quality, biological resources, and water that *are* incorporated in the RDEIR are otherwise inadequate and must be revised. The Project is also inconsistent with coastal land use plans, laws, and policies. Furthermore, the programmatic analysis of the VCA is unsupported. These defects render the RDEIR inadequate as an informational document.

We prepared these comments with the assistance of air quality expert Petra Pless, Ph.D and biologist Scott Cashen. Dr. Pless's and Mr. Cashen's technical comments are attached hereto as **Attachment 1** and **Attachment 2**, respectively, and submitted in addition to the comments in this letter. Dr. Pless and Mr. Cashen's comments are fully incorporated herein. We also incorporate by reference comments on this Project submitted by Dr. Phyllis Fox. The County must address and respond to the comments of Dr. Pless and Mr. Cashen separately.

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[10] *Id.*, at 1-6.
[11] *Id.*
[12] *Id.*, at ES-18.

I. INTEREST OF COMMENTORS

SAFER California advocates for safe processes at California refineries to protect the health, safety, the standard of life and the economic interests of its members. For this reason, SAFER California has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California oil refineries. Failure to adequately address the environmental impacts of crude oil transport and refining processes poses a substantial threat to the environment, worker health, surrounding communities, and the local economy.

Refineries are uniquely dangerous and capable of generating significant fires and the emission of hazardous and toxic substances that adversely impact air quality, water quality, biological resources and public health and safety. These risks were recognized by the Legislature and Governor when enacting SB 54 (Hancock). Absent adequate disclosure and mitigation of hazardous materials and processes, refinery workers and surrounding communities may be subject to chronic health problems and the risk of bodily injury and death. Additionally, rail transport of crude oil has been involved in major explosions, causing vast economic damage, significant emissions of air contaminants and carcinogens and, in some cases, severe injuries and fatalities.

Poorly planned refinery projects also adversely impact the economic wellbeing of people who perform construction and maintenance work in the refinery and the surrounding communities. Plant shutdowns in the event of accidental release and infrastructure breakdown have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER California are also concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER California live, work, recreate and raise their families in San Luis Obispo County, including the towns of Arroyo Grande and Santa Maria. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. The members of

SAFER California's participating unions may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

These comments are also submitted on behalf of Mr. Ian Ostrov, who lives and works in the vicinity of the Project, and Mr. Gene Sewell who lives and works in Arroyo Grande, California.

II. THE PROJECT DESCRIPTION IS INADEQUATE

CEQA Guidelines section 15378 defines "project" to mean "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[13] "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term project does not mean each separate governmental approval."[14] Courts have explained that a complete description of a project has to address not only the immediate environmental consequences of going forward with the project, but also all "*reasonably foreseeable* consequence[s] of the initial project."[15] "If a[n] . . . EIR. . . does not adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project, informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law."[16] ABJC-03

The RDEIR fails to meet CEQA's requirements for an adequate project description, by omitting from the analysis the reasonably foreseeable consequences of the Project. In particular, the RDEIR still fails to identify and analyze the separately proposed but related Rodeo Refinery Propane Recovery Project and the SMR Throughput Increase Project as part of the Project. In addition, although the RDEIR acknowledges likely changes to existing SMR feedstock, it fails to identify the changes as part of the Project and analyze the related environmental impacts of those changes. Finally, the RDEIR fails to provide any assessment whatsoever of

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[13] 14 Cal.Code Regs, tit. 14, §15378 (hereinafter "CEQA Guidelines").
[14] CEQA Guidelines § 15378(c).
[15] *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376 (emphasis added); *see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-50.
[16] *Riverwatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.

the Project's future decommissioning phase and potential impacts thereof. These defects in the County's analysis constitute fatal errors. The County has failed to make *all* necessary changes to its environmental review of the Project, and must again revise the RDEIR to address the defects set forth in greater detail in the following paragraphs. ABJC-03 cont

A. The RDEIR Violates CEQA's Prohibition on Piecemeal Environmental Review

A public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. CEQA prohibits such a "piecemeal" approach and requires review of a project's impacts as a whole.[17] CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences."[18] Before approving a project, a lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project.[19] "The significance of an accurate project description is manifest where," as here, "environmental impacts may be disguised or minimized by filing numerous, serial applications."[20] ABJC-04

The California Supreme Court held that an environmental impact report ("EIR") must treat activities as part of the project where the activities at issue are "a reasonably foreseeable consequence of the initial project and the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."[21] Both elements are met here. The Project is inextricably linked to both the Throughput Increase and Propane Recovery projects, and will change the scope of each project's environmental effects.

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[17] CEQA Guidelines, § 15378(a); *Burbank- Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.
[18] *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.
[19] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school's occupancy of a new medical research facility).
[20] *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1346.
[21] *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396.

These separately proposed changes within the San Francisco Refinery must be analyzed as one Project in the revised DEIR.

The SMR Throughput Increase Project was proposed by Phillips 66 to increase the maximum limit of crude oil throughput at the SMR by 10 percent.[22] According to the Throughput Increase Project FEIR, the project would potentially increase the volumes of crude oil delivered to the SMR and increase the volume of products leaving the SMR by pipeline to the Rodeo Refinery, among other changes.[23] The County and the APCD jointly approved the Throughput Increase Project in 2013.

Phillips 66 proposed the Propane Recovery Project at the Rodeo Refinery in 2012.[24] The purpose of that project is to modify existing facilities at the Rodeo Refinery to enable the Rodeo Refinery to recover additional propane and butane from refinery fuel gas and other process streams and ship it by rail and truck for sale.[25] Contra Costa County released an Final Environmental Impact Report ("FEIR") for the project in November 2013 and then revised and recirculated a new DEIR in October 2014.[26]

ABJC-04 cont

As described by Dr. Petra Pless in her comments, information contained in the Project RDEIR makes clear that the throughput increase at the SMR could not be realized but for the crude oil that would be brought in by rail.[27] In particular, the RDEIR indicates that the SMR would be unable to continue operating at current throughput levels if the Rail Spur Project were not implemented.[28] According to the RDEIR, the bulk of the crude oil currently processed at the SMR is delivered via pipeline from offshore platforms in the Outer Continental Shelf of Santa Barbara.[29] The pipeline system is currently the only way that the SMR can receive crude oil.[30]

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[22] Phillips Santa Maria Refinery, Throughput Increase Project FEIR, Nov. 2012, at p. ES-1.
[23] *Id.*, at p. ES-4.
[24] *See* Phillips 66 Propane Recovery Project Recirculated Draft Environmental Impact Report (October 2014), p. 1-1, *available at* http://www.cccounty.us/DocumentCenter/View/33804.
[25] *Id.*
[26] *Id.*
[27] *See* Letter from Petra Pless, to Laura Horton re: Recirculated Draft Environmental Impact Report for the Phillips 66 Company Rail Spur Extension Project and Vertical Coastal Access Project Assessment (hereinafter, "Pless Comments"), p. 10 – 11, **Attachment 1.**
[28] *Id.*
[29] RDEIR, p. 2-31
[30] Pless Comments, p. 11.

While crude oil can also be trucked to the Santa Maria Pump Station and then placed into the pipeline, truck deliveries to the Santa Maria Pump Station are limited to a permitted maximum of 26,000 barrels per day,[31] far below the SMR's throughput limit of 48,950 barrels per day sought by the SMR Throughput Increase Project.[32] Thus, absent further permit revisions, any additional crude would have to be brought to the SMR by rail, demonstrating the entirely foreseeable need for this Project.

As further documented by Dr. Pless, crude oil production in California has been in substantial decline for decades.[33] For example, the RDEIR discloses that crude oil production in Santa Barbara County, both onshore and off-shore, has been in decline for a number of years.[34] Given the limitations on truck import to the Santa Maria Pump Station and the long-standing knowledge of a declining crude oil supply,[35] particularly from the off-shore sources in the Outer Continental Shelf, Dr. Pless concludes that it is highly unlikely that Phillips 66 would have sought an increase in throughput at the SMR without simultaneously contemplating additional ways to deliver crude oil to the facility.[36] In other words, a throughput increase cannot be implemented at the SMR unless Phillips 66 can import crude to offset declining local crude supplies. Dr. Pless's analysis makes clear that the Project is a reasonably foreseeable consequence of the Throughput Increase Project. ABJC-05

Furthermore, Dr. Pless demonstrates that the Propane Recovery Project cannot be implemented but for the Rail Spur Extension Project. The Rodeo project aims to recover additional propane and butane. In order for the Applicant to reach Propane Recovery Project goals, the Applicant must depend on the Throughput Increase Project and this Project. As explained by Dr. Pless,

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[31] *Id.*, RDEIR, p. 2-36.
[32] Pless Comments, p. 11; Throughput Increase Project FEIR, p. 2-24; RDEIR, p. 2-35.
[33] Pless Comments, p. 9.
[34] RDEIR, p. 2-36.
[35] *See, e. g.*, California Energy Commission, California Crude Oil Production and Imports, CEC-600-2006-006 (April 2006) Figure 2, p. 4, *available at* http://www.energy.ca.gov/2006publications/CEC-600-2006-006/CEC-600-2006-006.PDF; *see* California Energy Commission, Transportation Energy Forecasts and Analyses for the 2009 Integrated Energy Policy Report, CEC-600-2010-002-SF (May 2010) p. 6, *available at* http://www.energy.ca.gov/2010publications/CEC-600-2010-002/CEC-600-2010-002-SF.PDF.
[36] *See* Pless Comments.

> This increased quantity of semi-refined products would result in increased propane and butane recovery at the Rodeo Refinery, which Phillips 66 must have anticipated when it applied for a permit to modify processing and ancillary equipment within the refinery and change permit conditions to enable substantially increasing the recovery of propane and butane.. . .[37]

The Project will also will likely change the scope or nature of the environmental effects of the Throughput Increase Project and the Propane Recovery Project.[38] As described above and in the comments of Dr. Pless, cost-advantaged North American crude is chemically distinct from the crude that is currently processed at the SMR. A change in the chemical composition of the SMR crude would also alter the chemical composition and the environmental impacts of the semi-refined products that would be sent from the SMR to the Rodeo Refinery to be converted into sellable petroleum products.

ABJC-05 cont

The fact that the Throughput Increase Project has already been approved does not negate the requirement for preparing a revised DEIR which analyzes the whole of the Project. The requirement to evaluate the whole of a project applies even where one of the phases has already undergone prior environmental review. It was precisely such piecemealing that was rejected by the Second District in the *Natural Resources Defense Council v. City of Los Angeles* case.[39] In that case, the Port of Los Angeles analyzed Phase 2 of a three-phase project in a negative declaration. The Court held that an EIR was required to analyze the entire three-phase project as a whole, even though earlier CEQA review had been completed on Phase I of the project.[40] Similarly here, the County must prepare a revised DEIR to analyze the impacts of the Project, together with the Throughput Increase Project and the Propane Recovery Project, rather than analyzing each individual proposal as unrelated and distinct projects.

The RDEIR directly denies that it is piecemealing CEQA review with regard to the Throughput Increase Project, stating that "[t]he Rail Spur Project would not affect the amount (throughput volume) of material processed at the refinery."[41]

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[37] *Id.*, at 17.
[38] *Id.*
[39] *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 284.
[40] *Id.*
[41] *Id.*, at ES-23.

However, the RDEIR later states that "if and when local crude oil production (the current major source of oil for the SMR) declines, the Rail Spur Project, if approved, would allow the SMR to maintain operating up to its permitted throughput levels."[42] Thus, the County clearly anticipates the SMR relying on the Rail Spur Project in order to maintain the SMR's new throughput volume and operating level.

The RDEIR further explains that because the land use applications for the Throughput Increase Project and this Project were submitted apart, "evaluation of these projects separately would not be considered 'piece-mealing' under CEQA."[43] However, as Dr. Pless notes, "Phillips 66 commissioned specific studies in preparation of the CEQA review process for the Rail Spur Project well before the Throughput Project EIR was certified in March of 2013."[44] The County does include the Throughput Increase Project in its cumulative impacts analysis,[45] along with other nearby projects. However, because the Throughput Project is intertwined with this Project, the RDEIR may not lawfully treat them as separate. The RDEIR does not at all address the Propane Recovery Project's relationship to this Project. ABJC-05 cont

The CEQA Guidelines clearly state that "[w]here an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project."[46] Furthermore, the Guidelines explain that cumulative analysis is only appropriate "[w]here one project is one of several similar projects of a public agency, but is not deemed a part of a larger undertaking or a larger project."[47] Here, the Project, along with the Throughput Increase Project and the Propane Recovery Project, are part of the same "larger undertaking" to make the entire San Francisco Refinery more modern and economically advantageous by bringing in more lower cost crudes and producing more marketable products from those crudes.[48]

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[42] *Id.*
[43] *Id.*
[44] Pless Comments, p. 7.
[45] RDEIR, p. 3-2.
[46] CEQA Guidelines § 15165.
[47] *Id.*
[48] *See* Phillips 66 Propane Recovery Project Recirculated Draft Environmental Impact Report (October 2014), p. ES-2, *available at* http://www.cccounty.us/DocumentCenter/View/33804.

B. The RDEIR Fails to Adequately Address the Change in Refinery Feedstock

In *Communities for a Better Environment v. City of Richmond* ("*CBE v. Richmond*"), the First District Court of Appeal held that an EIR for a refinery project must disclose whether the proposed equipment and facility changes would allow the refinery to process heavier crude where a change in feedstock is a reasonably foreseeable consequence of the proposed project.[49] There, petitioners argued that the EIR was inadequate because the project description failed to clearly and consistently state whether the project would facilitate the future processing of heavier crudes at the refinery, and to analyze the consequences of such a change.[50] In that case, the EIR acknowledged that the proposed project would allow the refinery to process a wider range of crude oils, including crude that contains a higher amount of sulfur and associated contaminants.[51]

However, the lead agency denied claims that the refinery would also be able to process heavier crudes than before.[52] Petitioners pointed to conflicting statements in the EIR and the project proponent's SEC filings, as well as the project proponent's rejection of a permit limitation precluding the alteration of the baseline crude slate mix, all of which suggested that the project would, contrary to the lead agency's claim, enable the refinery to process heavier crudes.[53] The court agreed with petitioner that a crude switch was reasonably foreseeable and invalidated the EIR "because the EIR's project description ... [was] inconsistent and obscure as to whether the Project enables the Refinery to process heavier crudes."[54]

ABJC-06

Here, the County acknowledges the potential for processing new crudes in the future, but claims that no analysis is required because those crudes will be close enough in chemical composition to existing crude. The RDEIR states that "Phillips 66 expects to continue to receive, blend and process a comparable range of crudes in the future, and will select future crude to be delivered by rail based upon a number

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[49] *See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89.
[50] *Id.*, at 83.
[51] *Id.*, at 76-77.
[52] *See id.*
[53] *Id.*, at 83-85.
[54] *Id.*, at 89.

of factors including availability, suitability, and economics."[55] However, as in the case of *CBE v. Richmond*, a change in feedstock is reasonably foreseeable from evidence in the record and that change must actually be analyzed in the environmental review document.

The RDEIR admits that it has already been processing diluted bitumen, or dilbit, crude (i.e. tar sands crude) from Canada for a year, and that "Canadian crude has made up 2-7% of the crude processed at the SMR."[56] It further identifies potential new tar sands crudes called Access Western Blend and Peace River Heavy from Canada and suggests they are comparable to current crude imports.[57] However, the new crudes have never been assessed under CEQA and the information provided in the RDEIR does not satisfy CEQA requirements to disclose all potential significant impacts. As explained by Dr. Pless, the description of the new crudes in the RDEIR "remains too vague and does not cover the spectrum of properties of crude oils that could be imported by the Rail Spur Project for processing at the SMR."[58] Potential safety concerns have been raised over pipeline shipments of tar sands crude, specifically, and according to the Environmental Protection Agency ("EPA"), tar sands crude oil spills may result in different impacts than spills of other crude oils.[59] Furthermore, spills of tar sands crude could cost almost twice as much to clean up as comparable spills of conventional crude oil.[60] In addition, Dr. Pless points out that although the RDEIR claims it will not be importing Bakken crude, the County has not ensured against the importation of other similar light sweet crude oil.[61] As Dr. Pless demonstrates in her comments, the likely change in chemical composition of new crudes triggers the requirement to review potentially significant impacts.[62]

ABJC-06 cont

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[55] RDEIR, p. 2-33.
[56] *Id.*, at 2-31.
[57] *Id.*, at 2-33; 4.3-45.
[58] Pless Comments, p. 19.
[59] *See* CRS Report R42611, Jonathan L. Ramseur, et. al, *Oil Sands and the Keystone XL Pipeline: Background and Selected Environmental Issues* (April 2014); *See* comments from EPA on the Department of State Keystone XL Pipeline draft Supplemental Environmental Impact Statement, submitted in a letter from Cynthia Giles to Jose Fernandez and Kerri-Ann Jones (April 22, 2013).
[60] CRS Report R42611, *supra*, at 46 (citing Dagmar Etkin, *Modeling Oil Spill Response and Damages Costs*, Proceedings of the 5th Biennial Freshwater Spills Symposium (2004)).
[61] *Id.*, at 20.
[62] *See* Pless Comments, p. 21.

Dr. Pless concludes that for the RDEIR to have an adequate description of the crude oils that would be permitted to be imported by the Rail Spur Project, it must include "limits for, at a minimum, API gravity, vapor pressure, and concentrations of BTEX (benzene, toluene, ethylene, xylene), nickel, vanadium, and sulfur in order to ensure that SMR operations would not result in impacts beyond those analyzed in the Revised Draft EIR."[63] Those impacts could include "the production of coke and sulfur, an increase in fugitive emissions when processing a lighter, more volatile crude oil, increasing the metal content of the produced coke, odors, associated health risks, risk of upset due to increased corrosion and so forth."[64]

Statements in the RDEIR and Phillips 66's public representations all suggest that Phillips 66 is undertaking the larger Project, including the Throughput Increase Project and the Propane Recovery Project, in order to access a greater range of competitively priced crudes than what is being suggested by the County. Thus, the County lacks substantial evidence to support its claim that the RDEIR need not analyze the anticipated change in crudes to be processed. ABJC-06 cont

1. Statements in the RDEIR

According to the RDEIR, the purpose of the Project is "to obtain a range of competitively priced crude oil" by providing the capability to source feedstock from North American sources that are served by rail.[65] The RDEIR further provides that feedstock deliveries "would be sourced from oilfields throughout North America based on availability, market economics, as well as other factors."[66] The potential new North American crudes referenced in the RDEIR include Canadian tar sands crudes. These crudes are also chemically distinct from the current feedstock, because North American crudes contain large quantities of volatile diluents and toxic chemicals and require more heat and energy to refine than the current feedstock. Furthermore, other potentially significant impacts, such as increased energy consumption, air emissions, toxic pollutant releases, flaring and catastrophic incident risks, also depend on the quality of crude processed at a facility. In addition, a heavier crude oil feedstock has also been identified as a contributing factor to potentially catastrophic incidents at refineries, and a root cause of the

[63] *Id.*
[64] *Id.*
[65] RDEIR, p. 2-1.
[66] *Id.*, at 1-4.

August 6, 2012 fire at the Chevron Richmond Refinery.[67] The RDEIR admits to changes in chemical content, stating "crude delivered by rail could have slightly higher sulfur content then the typical crude blend that is currently being run by the refinery."[68] However, the RDEIR then concludes, without further analysis, that the change in sulfur content would not cause increased emissions.[69]

The RDEIR's suggestion that the Project will only bring in feedstock that is "comparable to those historically processed at the facility"[70] is seemingly inconsistent with the RDEIR's assurance that any new feedstock would go through California Division of Occupational Safety and Health ("CalOSHA's") Management of Feedstock Change Process, which requires an assessment of "any potential adverse impacts to overall refinery operations, including environmental conditions and / or product quality."[71] The latter statement identifies a foreseeable scenario in which the anticipated change in feedstock would require review by CalOSHA. However, the County cannot lawfully justify its failure to analyze and mitigate a potentially significant impact by deferring to a completely separate, non-CEQA CalOSHA review.

ABJC-06 cont

Further evidence of a crude switch is the RDEIR's admission that the Project is necessary to offset the decline in locally sourced crudes currently processed at the SMR. The RDEIR states that "if and when local crude oil production (the current major source of oil for the SMR) declines, the Rail Spur Project, if approved would allow the SMR to maintain operating up to its permitted throughput levels."[72] The Santa Maria Refinery currently receives all crude oil by pipeline from various, primarily local sources, including the Outer Continental Shelf (60-85%), Price Canyon/Santa Maria Valley/San Joaquin Valley (5-20%), San Ardo (5-10%) and Canada (2-7%).[73] Most of these crudes are in decline, particularly offshore sources which are a major feedstock source for the SMR.[74] As explained by Dr. Pless, these local crudes are chemically distinct from the Canadian crudes that could be imported by rail to the SMR if and when the Project is approved.[75]

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[67] *See* Chemical Safety Board Interim Report on Chevron Fire, (April 19, 2013).
[68] RDEIR, p. 4.3-46 – 46.
[69] *Id.*, at 4.3-46.
[70] *Id.*, at 2-34.
[71] *Id.*
[72] *Id.*, at ES-23.
[73] *Id.*, at 2-31.
[74] *Id.*, at 2-36.
[75] *See* Pless Comments.

2. Public Statements

Public statements by Phillips 66 also strongly suggest that the purpose of the Project is to allow Phillips 66 to change the feedstock at the SMR to "advantaged" North American crudes. Advantaged crudes are competitively priced because they are stranded, with no pipeline access, and must be delivered by rail. Advantaged crudes include tar sands and Bakken crudes, the latter of which the RDEIR states it will not be importing.[76] According to Phillips 66's website, the challenge for refineries like Phillips 66 is getting the advantaged crude oil to the refineries that are equipped to process it.[77] Phillips 66's Chief Executive Officer Greg Garland states that the company is "looking at pipe, rail, truck, barge and ship – just about any way . . . [it] can get advantaged crude to the front end of the refineries."[78]

According to Phillips 66, until new pipelines projects come online, the easiest and most cost efficient way to get advantaged crude to some of Phillips 66's refineries is by rail.[79] Jay Clemens, manager of Business Development for Phillips 66 and the leader of the advantaged crude strategy team states that the company's refineries are not currently setup to take delivery of large volumes of crude oil from trains, "so we're looking at building rail offloading facilities at several refineries."[80] According to Phillips 66, the next challenge is identifying strategies to get more advantaged crude oil to its California refineries.[81] Mr. Clemens states "California refineries are capable of running a wide range of crude oils which creates opportunities throughout North America to supply California if we can find a cost effective mode of transportation."[82]

ABJC-06 cont

Finally, a change in crude is reasonably foreseeable here because it is clearly in Phillips 66's financial interest. According to Phillips 66, "[t]he single biggest lever . . . [Phillips 66 has] to improve value in ... [its] refining business is through lowering . . . feedstock costs. A savings of $1 per barrel . . . is worth about $450

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[76] RDEIR, p. 1-4, 2-1.
[77] Phillips 66, *Phillips 66 Delivers Advantaged Crude Strategy*, *available at* http://www.phillips66.com/EN/newsroom/feature-stories/Pages/AdvantagedCrude.aspx (last accessed Nov. 17, 2014), attached as **Attachment 3**.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

million of net income . . ."[83] Advantaged crude oil sells at a discount relative to crude oils tied to the global benchmark, North Sea crude. Canadian tar sands crudes have been identified as the most competitively priced crudes to import into California by rail.[84]

The reasonably foreseeable crude switch from local heavy crudes to Canadian tar sands crudes is significant in that it will change the scope and nature of the Project's environmental impacts. The composition of crude slate determines a project's impacts on air quality, odors, public health and hazards and is relevant to processing, as well as transporting and unloading the crude. The chemical composition of crude also determines its corrosive qualities, increasing the chance of accidental release and catastrophic events. Cost advantaged crudes in particular have been linked with such events, as demonstrated by the August 2012 catastrophic fire at the Chevron Richmond Refinery. The County is required to disclose the full extent of any change in feedstock at the SMR that is a reasonably foreseeable result of the Project. The County is also required to analyze the environmental consequences of that change. ABJC-06 cont

C. The RDEIR Fails to Provide a Complete Description of Decommissioning Phase

A complete project description must also include details as to the "later phases of the project, and any secondary, support, or off-site features necessary for its implementation."[85] The requirements of CEQA cannot be avoided by chopping a large project into many small parts or by excluding reasonably foreseeable future activities that may become part of the project.[86] An EIR must supply enough information so that the decision makers and the public can fully understand the scope of the Project.[87] The County, as the lead agency, must fully analyze the whole of a project in a single environmental review document. ABJC-07

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[83] *Id.*
[84] *See* Valero, UBS Global Oil and Gas Conference (May 21-22, 2013) at p.10, *available at* http://www.valero.com/InvestorRelations/Pages/EventsPresentations.aspx.
[85] *Bozung v. Local Agency Formation Com.* (1975), 13 Cal.3d 263, 283-84.
[86] Pub. Resources Code § 21159.27 (prohibiting piecemealing); *see also, Rio Vista Farm Bureau Center v. County of Solano,* 5 Cal.App.4th 351, 370 (1992).
[87] *Dry Creek Citizens Coalition v. County of Tulare,* 70 Cal.App.4th 20, 26 (1999).

Exhibit C

VALERO

UBS Global Oil and Gas Conference

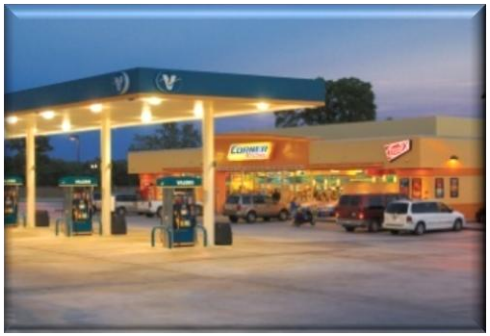
May 21-22, 2013

Safe Harbor Statement

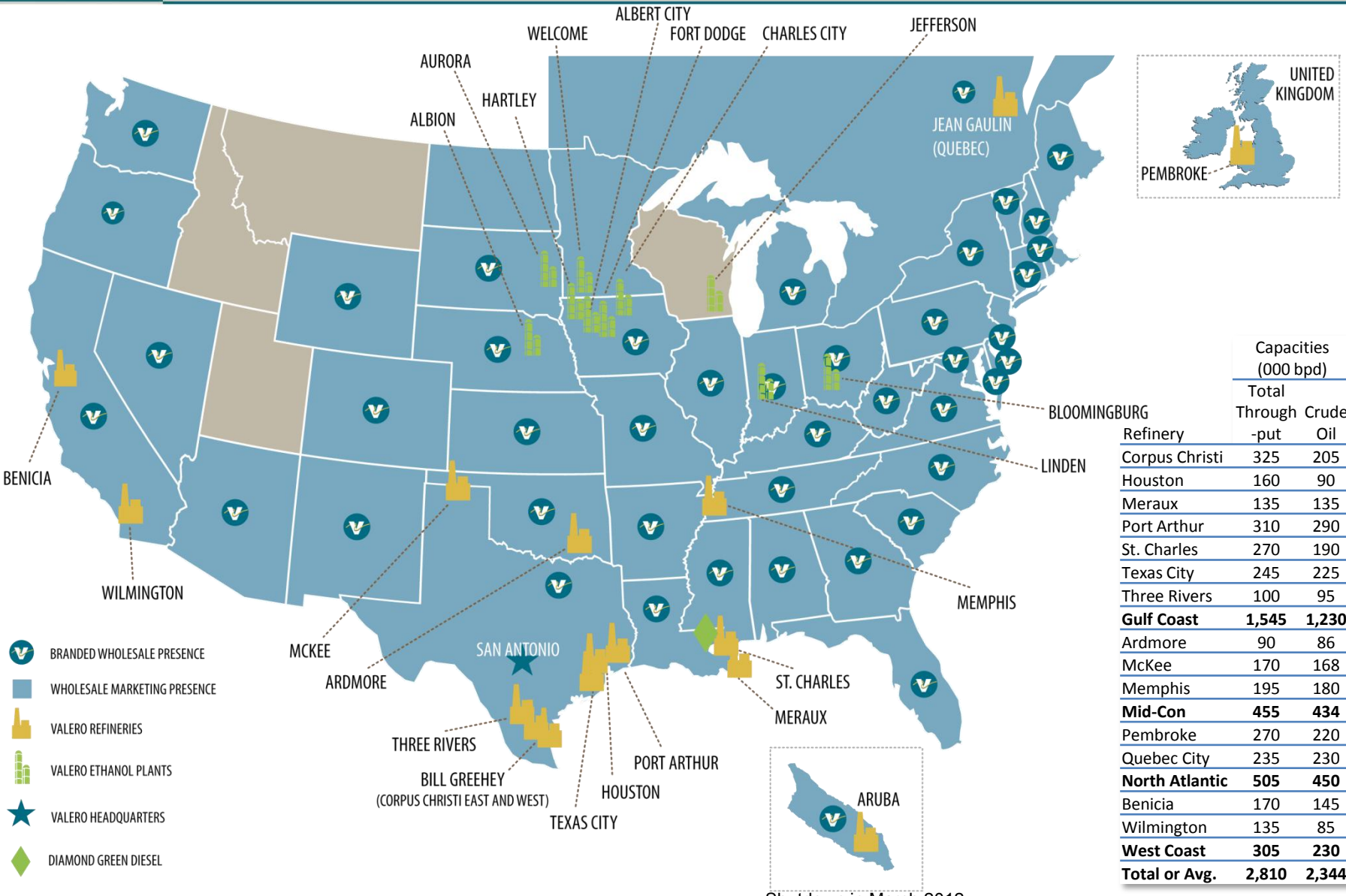
Statements contained in this presentation that state the Company's or management's expectations or predictions of the future are forward–looking statements intended to be covered by the safe harbor provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The words "believe," "expect," "should," "estimates," "intend," and other similar expressions identify forward–looking statements. It is important to note that **actual results could differ materially from those projected in such forward–looking statements. For more information concerning factors that could cause actual results to differ from those expressed or forecasted, see Valero's annual reports on Form 10-K and quarterly reports on Form 10-Q**, filed with the Securities and Exchange Commission, and available on Valero's website at www.valero.com.

Valero Energy Overview

- World's largest independent refiner
  - 16 refineries
  - 2.8 million barrels per day (BPD) of throughput capacity, with average capacity of 187,000 BPD, excluding Aruba
- More than 7,300 branded marketing sites
  - Nearly 1,900 sites belong to CST Brands, our former retail business that we spun off (80%) May 1, 2013
  - Brands include: Valero, Ultramar, Texaco, Shamrock, Diamond Shamrock, and Beacon
- One of the largest renewable fuels companies
  - 10 efficient corn ethanol plants with total of 1.1 billion gallons/year (72,000 BPD) of nameplate production capacity
    - All plants located in resource-advantaged U.S. corn belt
  - Diamond Green Diesel JV plant nearly complete
    - Renewable diesel from waste cooking oil and animal fat
    - Approximately 10,000 BPD capacity, 50% to Valero
- Approximately 10,500 employees



Valero's Geographically Diverse Operations



Refinery	Capacities (000 bpd) Total Through -put	Crude Oil	Nelson Index
Corpus Christi	325	205	20.6
Houston	160	90	15.1
Meraux	135	135	10.2
Port Arthur	310	290	12.7
St. Charles	270	190	15.2
Texas City	245	225	11.1
Three Rivers	100	95	12.4
Gulf Coast	**1,545**	**1,230**	**14.0**
Ardmore	90	86	12.0
McKee	170	168	9.5
Memphis	195	180	7.5
Mid-Con	**455**	**434**	**9.2**
Pembroke	270	220	11.8
Quebec City	235	230	7.7
North Atlantic	**505**	**450**	**9.7**
Benicia	170	145	15.0
Wilmington	135	85	15.8
West Coast	**305**	**230**	**15.3**
Total or Avg.	**2,810**	**2,344**	**12.4**

Shutdown in March 2012
235,000 bpd capacity, Nelson Index of 8

Valero's Strategy to Enhance Returns and Increase Long-term Shareholder Value

Exploit North American resource advantages and key market trends

- Increase MLP-able logistics assets
- Expand distillates hydrocracking capacity and leverage to natural gas
- Process more domestic light crude oil
- Grow products export capability
- Evaluate NGLs upgrading projects

Unlock potential value of existing assets

- Spun off retail assets into publicly traded CST Brands (NYSE: CST)
- Evaluate MLP for growing portfolio of logistics assets

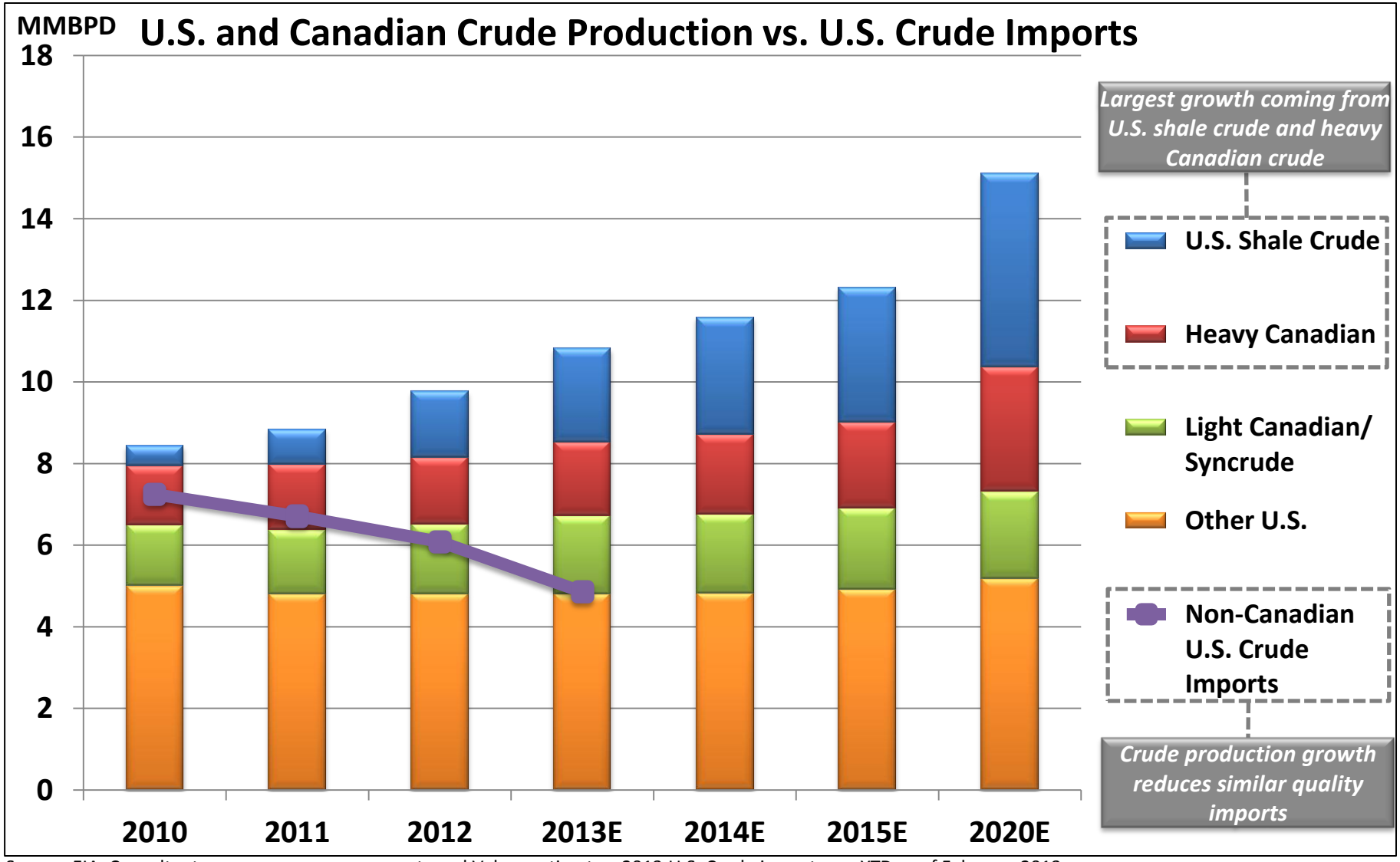
Return cash to shareholders

- Grow regular dividend at sustainable rate
- Concentrate value per share via stock buybacks

Key Market Trends

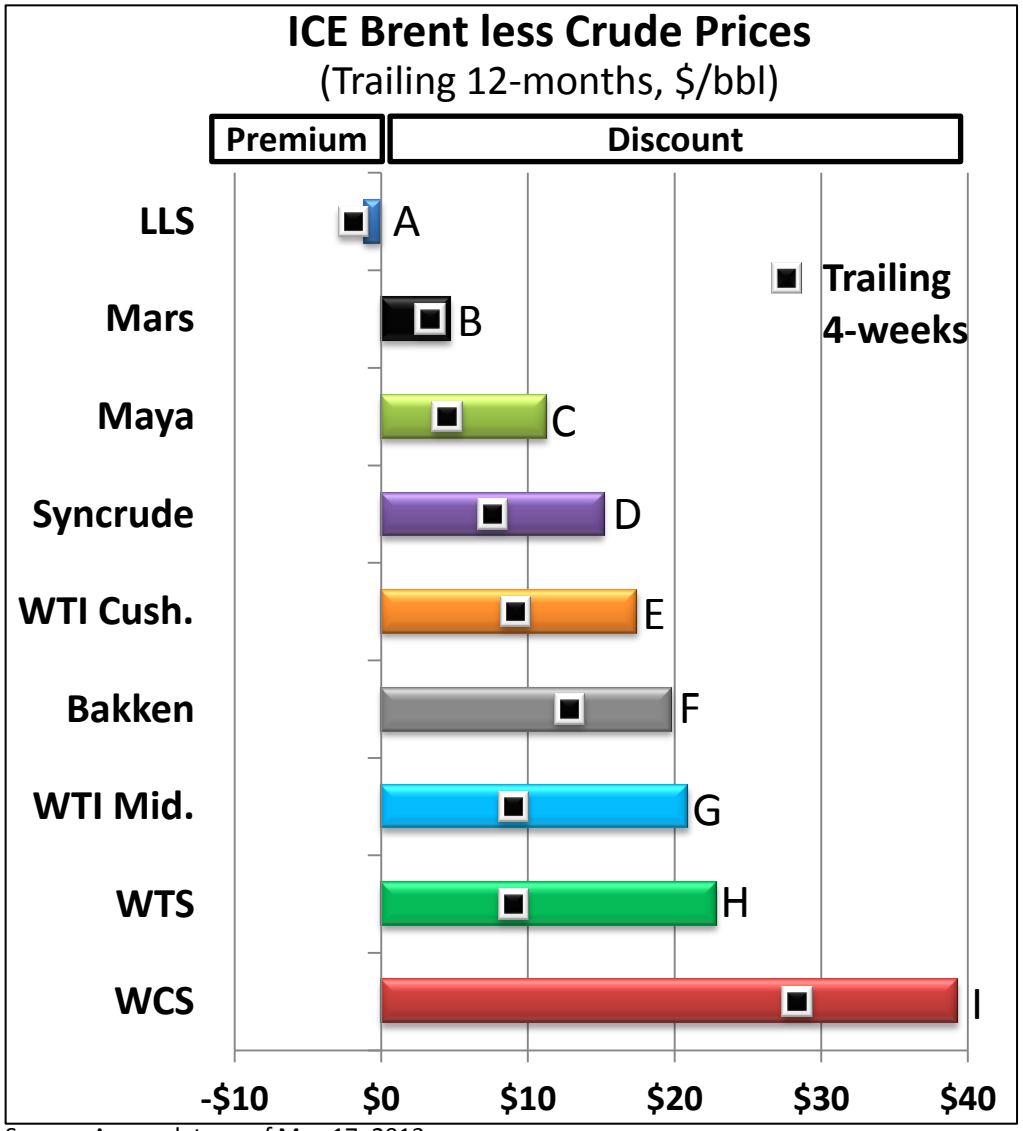
- Expect dramatic growth in U.S. shale oil and Canadian oil production to provide North American crude oil cost advantage
- Industry installing significant infrastructure to move crude oil to refining markets, mainly to U.S. Gulf Coast
- Lower-cost North American natural gas provides competitive advantage
- Global distillates demand growth yields higher margins
- U.S. Gulf Coast competitively advantaged to export into growing and undersupplied markets, taking market share from Western Europe and replacing shutdown and underperforming refining capacity in the Atlantic Basin

U.S. and Canadian Production Growth Provides Resource Advantage to North American Refiners

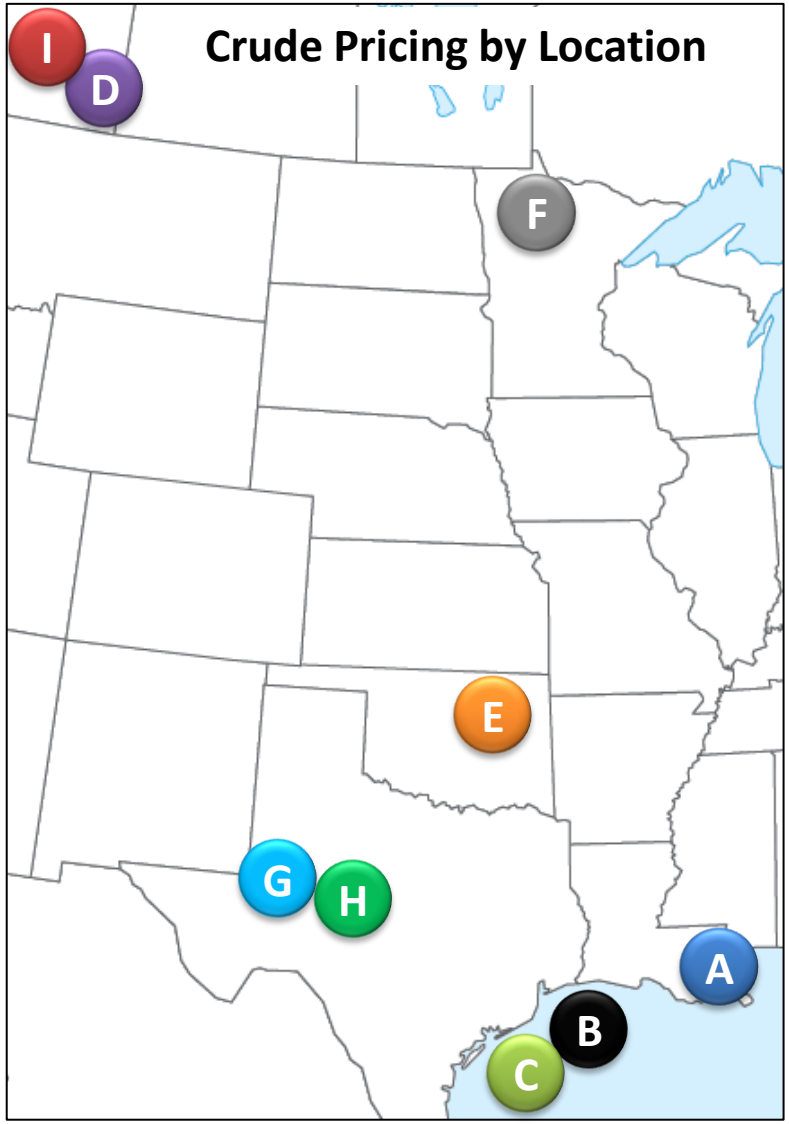


Source: EIA, Consultants, company announcements and Valero estimates; 2013 U.S. Crude imports are YTD as of February 2013

Logistics Constraints Create Regional Crude Discounts in U.S. and Canada

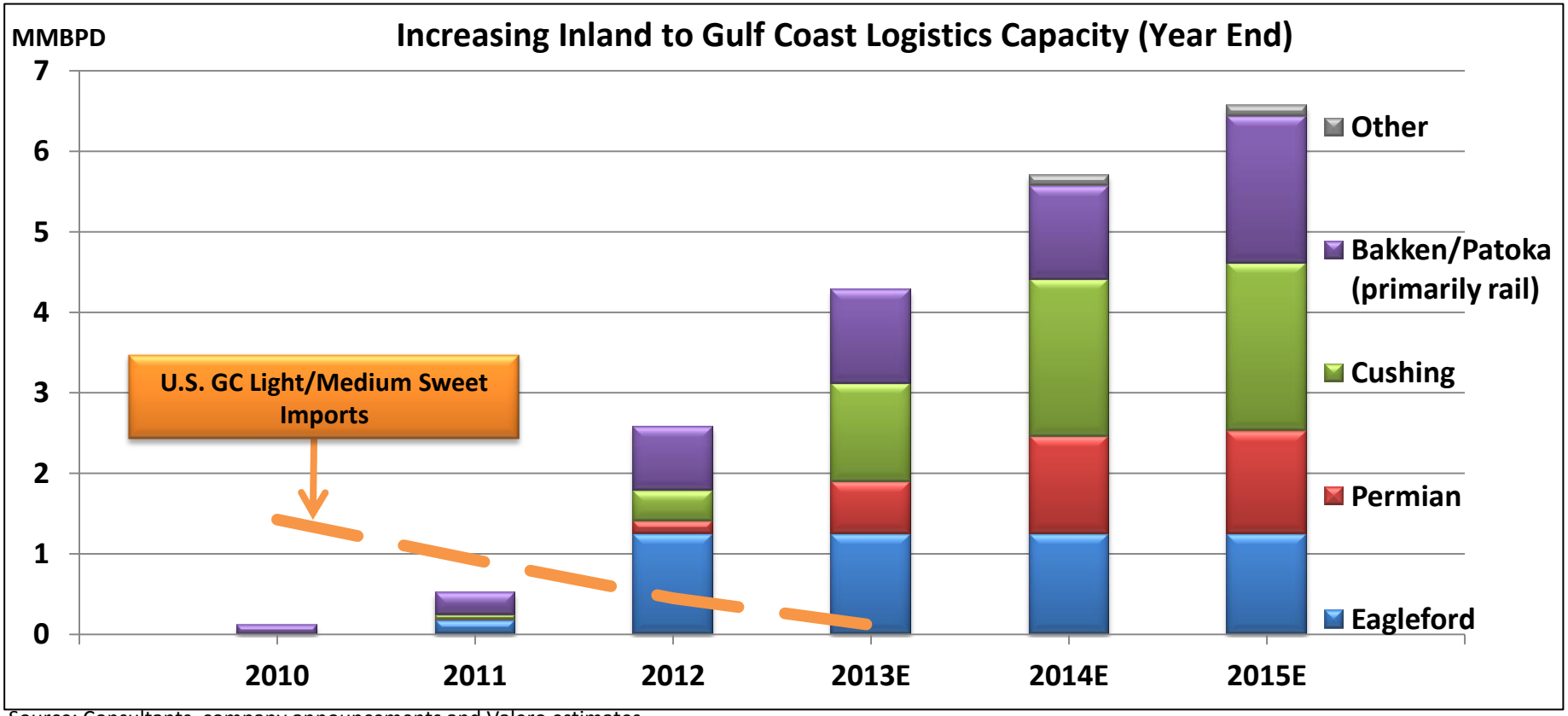


Source: Argus; data as of May 17, 2013



U.S. Gulf Coast: Main Destination for Most Cost-Efficient Crude Oil Logistics

- Rapid increase in pipeline capacities to move inland North American light and heavy crude oils to the Gulf Coast
- Light crudes have been pricing below LLS in western (Houston, Corpus) parts of Gulf Coast
- Expect rail to play a smaller part in Gulf Coast crude supply vs. East and West Coasts because of pipelines
- Expect Valero to benefit with over 50% of it's refining capacity on the Gulf Coast



Source: Consultants, company announcements and Valero estimates
Note: Import volumes include light and medium crudes between 28 and 50 API with less than 0.7% sulfur; 2013 data is year-to-date through February

Valero's Strategy to Supply Incremental Volumes of Cost-Advantaged Crude Oil

Gulf Coast Region

- Refineries mainly linked to cost-efficient pipelines
- Expect benefit as pipeline volumes increase
- St. Charles refinery: expect to rail 20 MBPD of Canadian heavy crude by end of 2013 using Valero-owned rail cars and unloading terminal
  - Also, growing barge deliveries from 20 to 30 MBPD

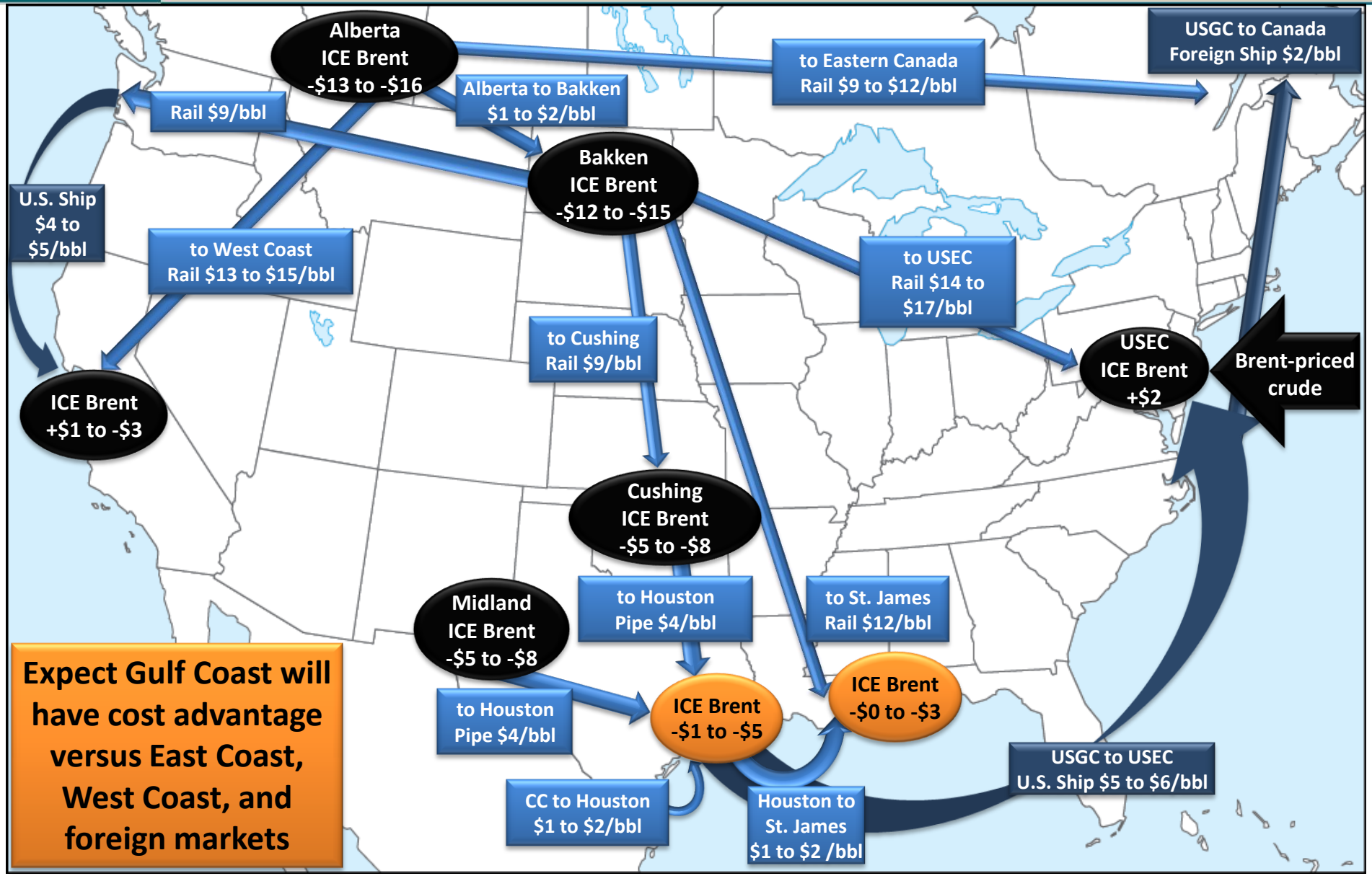
West Coast Region

- Benicia refinery: Plan to rail up to a range of 30 to 50 MBPD of crude in 4Q13

North Atlantic Region

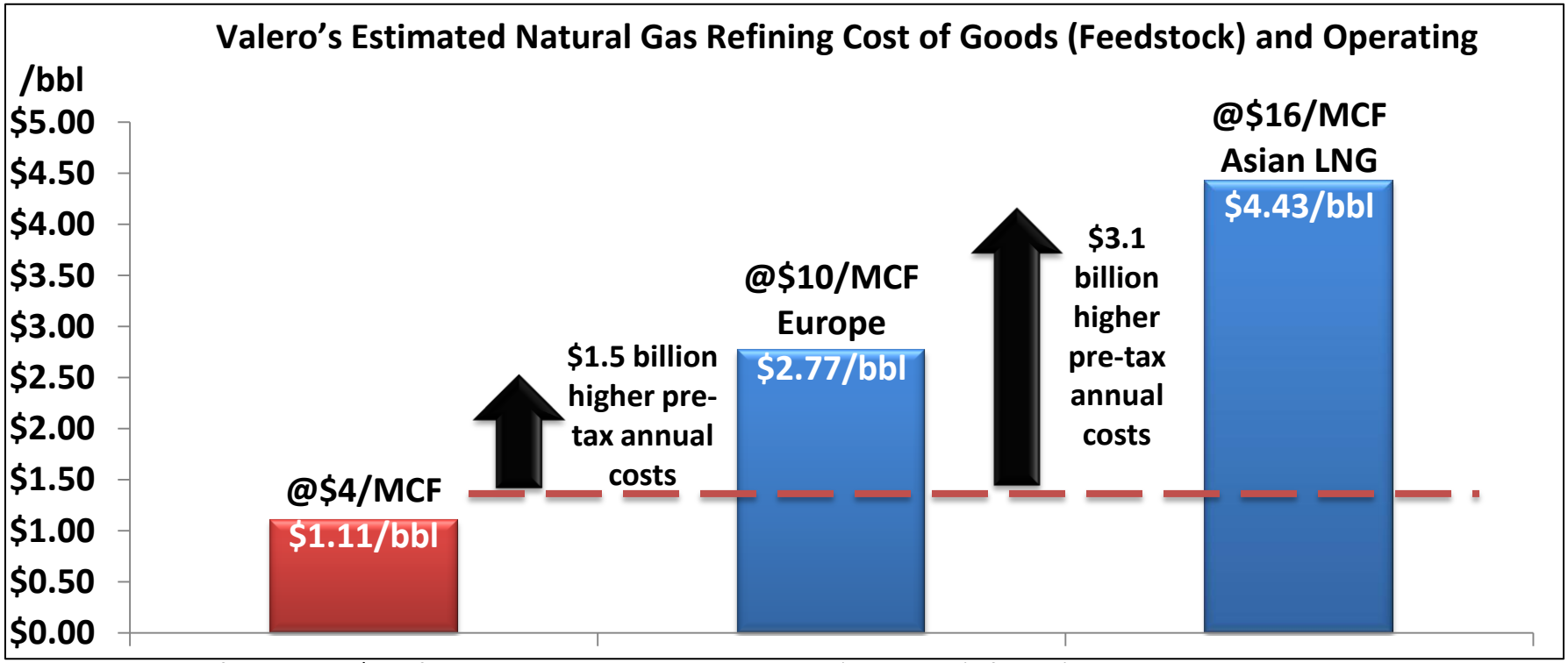
- Expect Quebec refinery to benefit and become supplied by U.S. and Canadian crude in three ways: rail, ship, pipeline
  - Rail up to 30 MBPD of light crude starting in 3Q13, increasing to 50 MBPD in 3Q14
  - Ship Eagle Ford crude from Texas via lower-cost foreign-flagged vessel in 2H13
  - Committed to receive substantial volume of light crude via Enbridge pipeline 9B and shuttled from Montreal by Valero-owned ships in 2H14

Valero's Estimate of Marginal Light Crude Oil Costs per Barrel in 12 to 24 Months



Lower-Cost Natural Gas Provides Structural Advantage to U.S. and Canadian Refiners

- **Expect U.S. natural gas prices will remain low and disconnected from global oil and LNG prices for foreseeable future**
- **Natural gas is a cost-advantaged feedstock, not just an operating expense advantage**
  - **Conversion to hydrogen provides desulfurization and volume expansion**
- **VLO refinery operations consume up to 700 MMCF/day of natural gas at full utilization, split roughly in half between operating expense and cost of goods sold**



Note: Per barrel cost of 700,000 MCF/day of natural gas consumption at 90% utilization (2,529 MBPD) of Valero's capacity

ATTACHMENT 22

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ADDITIONAL COMMENTS ON FINAL EIR

FEIR #	Text	Question or Issue
AV-3c	**Existing Facility and Operations Lighting Evaluation.** Prior to issuance of grading and construction permits, the applicant shall submit a comprehensive evaluation of the existing refinery facility and operations lighting to the Department of Planning and Building for review and approval showing the following: a. The Existing Facility and Operations Lighting Evaluation shall be prepared by a qualified engineer who is an active member of the Illuminating Engineering Society of North America (IESNA). b. The Existing Facility and Operations Lighting Evaluation shall assess the sources and levels of all existing lighting associated with the refinery operations, and shall determine if any lighting levels exceeds the minimum required by applicable County of San Luis Obispo, state and federal safety regulations. c. If lighting levels exceed the applicable regulations, the Existing Facility and Operations Lighting Evaluation shall make specific recommendations to reduce the lighting levels to the minimum required. The Existing Facility and Operations Lighting Evaluation shall also identify and make recommendations to eliminate visibility of all point source lighting as seen from public roadways. The project applicant shall implement all recommendations made by the Lighting Evaluation Report and required by the Department of Planning and Building.	The existing refinery is part of the baseline. There is no basis for the EIR requiring evaluation and mitigation of the lighting of the existing refinery. Note that this MM does NOT come up in the context of a cumulative impacts discussion.
AQ-1a	c. Applicant shall include the following, in addition to complying with state Off-Road Regulations, in order to reduce peak daily/quarter ROG+NOx emissions … 1) Use CARB Tier 4 certified diesel construction equipment off-road heavy-duty diesel engines…	There is limited availability of equipment with Tier 4 engines. Scheduling the required equipment will be even more difficult in light of c.2), which requires construction to be staggered to reduce peak day/ quarter emissions. Accordingly, this condition should require use of "Tier 3 or Tier 4, to the extent feasible".
AQ-1c	Prior to issuance of grading and construction permit, the Applicant shall ensure that portable equipment and engines 50 horsepower or greater, used during grading	It is not practical to have proof of PERP registration or SLO permit for all relevant equipment ***prior to issuance*** of all grading and

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	and construction activities must have a California portable equipment registration (issued by the ARB) or a SLOCAPCD permit. Proof of registration must be provided to the SLOCAPCD prior to the start of grading or construction or a permit secured from the SLOCAPCD prior to the start of grading or construction.	construction permits. Different equipment is on-site at different phases of construction, and this MM should require proof ***prior to bringing each piece of equipment onsite***.
AQ-1d	Prior to issuance of grading and construction permit, the Applicant shall ensure that all grading and construction equipment greater than 100 bhp be equipped with CARB Level 3 diesel particulate filters (DPF), or equivalent, to achieve an 85 percent reduction in diesel particulate emissions from an uncontrolled engine.	Same comment as above. Applicant will not have the necessary detail on all equipment prior to start of construction, but can provide the necessary documentation prior to each individual piece of equipment being brought on-site.
AQ-1f	Prior to issuance of applicable grading permit, the Applicant shall prepare a Dust Control Plan to be approved by the APCD and County Health and include requirements in the SLOCAPCD CEQA Handbook identified as fugitive dust mitigation measures and shall include a combination of the following, as approved by the SLOCAPCD and County Health … l. Apply water every 3 hours to disturbed areas within the construction site ***in order to achieve a 61 percent reduction in particulate emissions***. In addition, when drought conditions are present, fugitive dust control measures need to be modified by utilizing soil binders or other equivalent measures, to ***conserve water resources*** while still providing the necessary emission reductions	The way this condition is worded, the 61 percent reduction in PM is an enforceable performance standard, not just an assumption about the reduction expected from applying water every 3 hours. There is no way to demonstrate compliance with the 61% control, and that requirement should be deleted. The condition should just require watering every 3 hours. Impacts to water supply are evaluated in the Water Resources analysis in Chapter 4, with respect to cumulative impacts. It concludes that P66 does not contribute to cumulative impacts. So what is the basis for requiring soil binders instead of watering.
BIO-1	Prior to initiation of project activities, a floristic survey shall be conducted within the Rail Spur Project area in accordance with the California Department of Fish and Wildlife (CDFW) Protocol for surveying and Evaluating Impacts to Special Status Native Plant Populations and Natural Communities (2009) and the Guidelines for Conducting and Reporting Botanical Inventories for Federally listed, Proposed, and Candidate Species (USFWS 2000). The survey shall specifically focus on the presence/absence of Nipomo Mesa lupine and, if normal rainfall conditions	This condition requires a pre-construction survey during a blooming period of normal rainfall, and makes no provision for what happens in a year of less than *(or more than)* normal rainfall. The condition could indefinitely delay start of the project until a year of normal rainfall. The condition should include an alternative method of compliance

FEIR #	Text	Question or Issue
	are present during the survey, the findings would be only valid for a period of two years. ***The floristic survey shall be conducted during a blooming period with normal rainfall***. A 'normal' rainfall period is equivalent to the monthly or annual average of precipitation over a 30 year time period for the area. [etc.]	during periods of less than normal rainfall.
BIO-5f	During construction, the use of heavy equipment shall be restricted to within the identified work areas throughout the duration of construction activities and all construction personnel shall be advised of the importance of limiting ground disturbance and construction activities to within the identified work areas. A fulltime biological monitor shall monitor shall map any populations or individual sensitive species that may bloom within, or directly adjacent to, areas of ground disturbance. Should Nipomo Mesa lupine be identified at any time during construction, the species shall be completely avoided and the County shall be contacted immediately. If avoidance is not feasible, or the species was inadvertently impacted during construction before identification by the biological monitor, the County and the applicant shall coordinate directly with the California Department of Fish and Wildlife and United States Fish and Wildlife Service. At a minimum, the impacts to any sensitive plant species shall be mitigated though implementation of BIO-5a.	The second sentence requires a full-time biological monitor during construction. This should be limited to periods of ground-disturbing activities such as clearing and grading. The second sentence has a typo ("shall monitor shall map"). Likely this should be "shall monitor and map." The MM is internally inconsistent. The 3rd sentence mandates complete avoidance, but the 4th sentence says what to do if complete avoidance is not feasible. Editing fix: *"Should Nipomo Mesa lupine be identified at any time during construction, ~~the species shall be completely avoided and~~ the County shall be contacted immediately. The species shall be completely avoided if feasible, but if ~~If~~ avoidance is not feasible, or the species was inadvertently impacted during construction before identification by the biological monitor, the County and the applicant shall coordinate directly with the California Department of Fish and Wildlife and United States Fish and Wildlife Service."*
BIO-6b	d. The restored area shall be at a minimum equal in size to the area of oak habitat lost or disturbed.	This standard is vague, and confusing and unpredictable. BIO-6b a-c address replacement of individual plants, not restoration of habitat. It's not clear that habitat restoration is required, or the performance standards.

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