

February 3, 2016

**Via Electronic Mail**

San Luis Obispo County Planning Commission  
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***Phillips 66 Company Rail Spur Extension Project***

Dear Commissioners and Staff:

We write on behalf of the Mesa Refinery Watch Group in support of the Planning Commission staff recommendation to deny the proposed Phillips 66 Company Rail Spur Extension Project (“Project”). This letter supplements other written comments by Mesa Refinery Watch and focuses exclusively on the federal preemption issues raised by the Project proponents.

In various written submissions, Phillips 66 and Union Pacific have argued that the Interstate Commerce Commission Termination Act (“Termination Act”) preempts the County’s ability to fully comply with the disclosure and mitigation requirements of the California Environmental Quality Act (“CEQA”) and the permitting and consistency requirements of the certified Local Coastal Program and County zoning codes. In particular, the Project proponents assert that the refinery’s desire to install new rail spur features that would facilitate new product deliveries somehow constrains the County’s discretion to review, approve, condition, or deny the proposed Project simply by virtue of the fact that the Project would connect with an existing interstate rail line.

That argument reflects a fundamental misunderstanding of the federal law, which does not impede the County’s ability to fully exercise its land use authority over the existing facility and the proposed Project. As explained below, the Termination Act addresses congressional concern with the economic regulation of rail transportation and is intended to ensure a fair and efficient market for interstate rail carrier services. That is, the statute regulates the movement of people and property by common carriers to facilitate a viable competitive market for what historically has been a regulated monopoly. The Termination Act not does regulate non-carriers in any fashion and is not concerned with the business operations of customers, like Phillips 66, beyond the point of delivery.

To implement this objective, the statute (1) charges the Surface Transportation Board (“STB”) with certifying common carriers and new or expanded interstate rail lines and (2) provides exclusive federal jurisdiction over legal remedies related to common carrier rates, schedules, and discrimination disputes. In enacting the Termination Act and its predecessors, Congress was clear that it did not intend to preempt a state or local government’s exercise of traditional land use authority to protect the health, safety, and welfare of its residents. Here, the County must make a siting decision on a new rail spur project proposed by a private (non-carrier) oil refinery that seeks to connect to an existing interstate rail line. That decision – and the environmental review which must accompany it – falls squarely within these preserved traditional state land use powers and wholly outside the ambit of the Termination Act. Accordingly, the County has the legal authority to deny the proposed Project or to condition it in any way that does not directly target or control the movement of rail cars by a common carrier.

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**I. Courts Narrowly Construe Statutory Preemption Provisions and the Preemptive Effect of Federal Laws to Accommodate Traditional State and Local Police Powers.**

The courts recognize two forms of preemption: express and implied. Express preemption “occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law.”<sup>1</sup> The existence of an express preemption clause, however, “does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law remains.”<sup>2</sup> When determining whether a federal law preempts state or local law, courts must “identify the domain expressly pre-empted” by the statutory language.<sup>3</sup> Additionally, Congress’ “express definition of the pre-emptive reach of a statute ‘implies’ – *i.e.*, supports a reasonable inference – that Congress did not intend to pre-empt other matters.”<sup>4</sup> Hence, the inclusion of an express provision may “support[] an inference that [the] express pre-emption clause forecloses implied pre-emption.”<sup>5</sup>

Even when a statute lacks an express preemption provision, courts may find implied preemption where “compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes

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<sup>1</sup> *Carrillo v. ACF Indus.*, 20 Cal.4th 1158, 1162 (1990).

<sup>2</sup> *Altria Group Inc. v. Good*, 555 U.S. 70, 76 (2008); *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298, 308 (2015).

<sup>3</sup> *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

<sup>4</sup> *In re Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1092 (2008) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)).

<sup>5</sup> *Freightliner*, 514 U.S. at 288; see also *Viva! Int’l Voice For Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 945 (2007).

and objectives of Congress.”<sup>6</sup> As the California Supreme Court recently reiterated, such implied “obstacle” or “conflict” preemption “requires proof Congress had particular purposes and objectives in mind, a demonstration that leaving state law in place would compromise those objectives, and reason to discount the possibility the Congress that enacted the legislation was aware of the background tapestry of state law and content to let that law remain as it was.”<sup>7</sup> “Ultimately, ‘what constitutes a ‘sufficient obstacle [for a finding of implied preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.’”<sup>8</sup>

In assessing the existence and scope of any federal preemption, the County should be “guided by two cornerstones of [the Supreme Court’s] pre-emption jurisprudence.”<sup>9</sup> First, in all preemption cases, courts “start with the presumption that the states’ historic police powers shall not be superseded by federal law unless that is shown to be the clear and manifest purpose of Congress.”<sup>10</sup> This presumption applies to both the existence and scope of federal preemption.<sup>11</sup> The presumption against federal preemption exists because states are “independent sovereigns,” and courts “have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”<sup>12</sup> The party seeking to overcome the presumption against preemption thus bears “the burden of demonstrating a ‘clear and manifest’ congressional intent to preempt.”<sup>13</sup>

Second, preemption is fundamentally a question of congressional intent.<sup>14</sup> Thus, the existence and scope of preemption is defined not only by any preemption language in the clause itself, but also by the statutory structure and purpose.<sup>15</sup> Any potentially preemptive statutory language is bounded by “the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.”<sup>16</sup> Thus, in assessing the scope of the Termination Act’s preemptive effect, the County must look to not only the plain text, but also to the long and informative legislative history of Congress’ involvement with the regulation of railroad common carriers.

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<sup>6</sup> *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotations and citations omitted).

<sup>7</sup> *Herb Thyme*, 62 Cal. 4th at 312.

<sup>8</sup> *Herb Thyme*, 62 Cal. 4th at 312 (quoting *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 992 (2004), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

<sup>9</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

<sup>10</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>11</sup> *In re Farm Raised Salmon Cases*, 42 Cal.4th at 1088.

<sup>12</sup> *Medtronics*, 518 U.S. at 485.

<sup>13</sup> *Brown v. Mortensen*, 51 Cal.4th 1052,1065 (2001); also *Herb Thyme*, 62 Cal. 4th at 313; *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014).

<sup>14</sup> *Wyeth*, 555 U.S. at 565 (citing *Medtronics*, 518 U.S. at 485).

<sup>15</sup> *Wyeth*, 555 U.S. at 588; *Medtronics*, 518 U.S. at 486; *Herb Thyme*, 62 Cal. 4th at 312.

<sup>16</sup> *Medtronics*, 518 U.S. at 486.

## **II. The Relevant History of the Termination Act Demonstrates that Congress Sought to Preempt Only State Economic Regulation of Railroads, Not Traditional State and Local Land Use, Health, and Safety Laws.**

Although the federal government has been involved in the economic regulation of interstate railroads for more than one hundred years, Congress has never expressed any intent to usurp traditional state health, safety, and land use powers to protect local communities. The history of the Termination Act makes it unmistakably clear that Congress was concerned with the market viability and fairness of the interstate rail system, not the impacts of non-rail customer facilities on the health and safety of local communities, which has always remained a local land use responsibility. Indeed, when Congress first adopted an express preemption provision in 1980 to facilitate the deregulation of carrier rates and schedules, it made abundantly clear that the preemption language was intended to prevent states from re-regulating in the very same field, not to override traditional state police powers.

American railroads were originally state-chartered and regulated pursuant to historic state police powers.<sup>17</sup> Early state regulatory efforts included attempts, largely unsuccessful, to curb monopolistic behavior and corruption in the rapidly expanding rail industry.<sup>18</sup> In 1887, the federal government stepped into the field in a limited way with passage of the Interstate Commerce Act. That Act established the Interstate Commerce Commission (“ICC”) and provided this new entity with narrow authority to protect interstate shippers from the economic implications of a monopolized rail industry fraught with market manipulation. As the industry matured over the next century, different economic concerns animated congressional action, but those concerns were still always strictly about the regulation and financial viability of rail carriers.<sup>19</sup>

Worried that state-mandated overbuilding of railroad lines and improvements might bankrupt the interstate system, Congress cautiously expanded the ICC’s narrow interstate

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<sup>17</sup> Zachary Smith, *Tailor-Made: State Regulation at the Periphery of Federal Law*, 36 *Transp. L.J.* 335, 338 (2009) (citing James Ely, Jr., *Railroads and American Law* (2001); Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *Yale L.J.* 1017, 1034 n.90 (1988) (the rail system developed through “state initiative and almost exclusively under state control” and “before 1887 federal regulation was virtually nonexistent”).

<sup>18</sup> For a more thorough history of the federal government’s role in the regulation of the railroad industry, see also James W. Ely, Jr., “*The Railroad System Has Burst Through State Limits*”: *Railroads and Interstate Commerce, 1830-1920*, 55 *Ark. L. Rev.* 933 (2003) (“Ely”); Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure*, 95 *Marq. L. Rev.* 1151, 1152 (2012) (“Congress [in 1887] instituted regulation under the ICC largely to protect the public from the monopolistic abuses of the railroads. Between 1920 and 1975, however, the goal of the national transportation policy shifted to protection of the transportation industry from . . . unconstrained competition.”); Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *Transp. L.J.* 235, 254-65 (2003).

<sup>19</sup> Sen. Rep. No. 104-176, 1st Sess., at 2 (1995).

railroad jurisdiction with adoption of the Transportation Act in 1920. To curb the states' practice of imposing costly new infrastructure requirements on local rail operators – a practice that Congress believed might ultimately bankrupt the industry – Congress for the first time required that all interstate carriers obtain certificates of public convenience from the ICC before constructing new lines or line expansions.<sup>20</sup> As STB itself has noted, “Congress’ purpose in enacting the Transportation Act of 1920 [was] to encourage railroads to maintain and improve existing services, thereby strengthening their common carrier abilities, before spending capital constructing a new line or extending an existing one to serve new customers.”<sup>21</sup> The new federal certification requirement, however, explicitly exempted “the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state.”<sup>22</sup> Likewise, states retained their historic regulatory authority over intrastate rates and schedules, as well as their traditional police powers to protect public health and safety.

By the 1960s, with the rise of alternative transportation services like trucking, Congress came to believe that the ICC’s rate regulations were impeding the railroad industry’s ability to keep pace in an increasingly competitive world. As one commentator explains, the industry found itself “in the grip of a regulatory structure that threatened its economic survival.”<sup>23</sup> Following a series of railroad bankruptcies in the 1970s, Congress enacted the Staggers Rail Act of 1980.<sup>24</sup> The Staggers Act extensively reformed the ICC’s authority, “deregulat[ing] most railroad rates, legaliz[ing] railroad shipping contracts, simplify[ing] abandonments, and stimulat[ing] an explosion of service and marketing alternatives.”<sup>25</sup>

But even after this considerable overhaul, states retained a role in economic regulation, albeit with federal oversight. The Staggers Act allowed states to exercise “jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation” if they submitted “intrastate regulatory rate standards and procedures” to the ICC for review and certification.<sup>26</sup> To effectuate this provision, Congress for the first time expressly preempted state economic regulation of railroads (rates, schedules, classifications, etc.) unless the state obtained the required ICC certification:

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<sup>20</sup> Ely, at 974-75.

<sup>21</sup> *Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Mo.-Kan.-Tex. R.R. Between Jude and Ogden Junction, Tex.*, FD No. 33611, 3 S.T.B. 646, 1998 WL 525587, at \*3 (S.T.B. Aug. 19, 1998).

<sup>22</sup> *R.R. Comm’n of Cal. v. S. Pac. Co.*, 264 U.S. 331, 345 (1924) (quoting paragraph 22 of section 402 of the Transportation Act).

<sup>23</sup> Maureen E. Eldredge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. Colo. L. Rev. 549, 558 (2004).

<sup>24</sup> *Id.*

<sup>25</sup> H.R. Rep. No. 104-311, 1st Sess., at 91 (1995).

<sup>26</sup> Pub. L. 96-448, § 214(b), 94 Stat. 1895 (Oct. 14, 1980) (formerly 49 U.S.C. § 11501(b)).

The jurisdiction of the [ICC] and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.<sup>27</sup>

Critically, as the House Conference Report explained, this new provision preempted *only* state financial regulation of the industry:

The Conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. *Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practices. States may only regulate in these areas if they are certified under the procedures of this section.*

*The remedies available against rail carriers with respect to rail rates, classifications, rules, and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.*<sup>28</sup>

The Staggers Act “began the substantial economic deregulation of the surface transportation industry and the whittling away of the size and scope of the [ICC]”<sup>29</sup> and included the new express preemption language to ensure that state legislatures and state courts could not undo these efforts by re-regulating railroad economics on intrastate lines, absent federal concurrence. Congress completed this deregulation process in 1995 with the adoption of the Interstate Commerce Commission Termination Act. The Termination Act repealed many of the ICC’s historic economic regulatory functions, including tariff filing, rail fare regulation, financial assistance programs, and minimum rate regulation.<sup>30</sup> As Congress noted, the only federal regulatory authority retained in the Termination Act is the authority “necessary to maintain a ‘safety net’ or ‘backstop’ of remedies to address problems of railroad rates, access to facilities, and industry restructuring.”<sup>31</sup>

To complete this economic deregulation, the Termination Act did away with the ICC altogether and replaced it with the more narrowly-empowered Surface Transportation Board.<sup>32</sup> In contrast to the ICC’s original broad economic regulatory authority, STB’s role

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<sup>27</sup> Pub. L. 96-448, § 214(b), 94 Stat. 1895 (Oct. 14, 1980) (formerly 49 U.S.C. § 11501(d)).

<sup>28</sup> H.R. Rep. No. 96-1430, at 106 (1980) (emphasis added).

<sup>29</sup> H.R. Rep. No. 104-311, at 82.

<sup>30</sup> H.R. Rep. No. 104-311, at 82-83.

<sup>31</sup> H.R. Rep. No. 104-311, at 93.

<sup>32</sup> Pub. L. 104-88, 109 Stat. 803.

in overseeing rail carrier activity is tightly circumscribed. Today, STB has two functions. First, it retains its historic authority to prescribe reasonable rates, classifications, rules, and practices for common carriers connected to the interstate rail system and to adjudicate disputes over interstate and intrastate common carrier obligations.<sup>33</sup> Second, STB may grant or deny applications for “public convenience and necessity” certifications authorizing construction of line extensions or new lines, abandonment or acquisition of existing lines, or changes in operator status.<sup>34</sup> As one federal appellate court summarized, “[t]he Termination Act regulates, *inter alia*, rail carriers’ rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines. . . . Thus it regulates the economics and finances of the rail carriage industry – and provides a panoply of remedies when rail carriers break the rules.”<sup>35</sup>

In short, STB is a purely reactive body with limited economic regulatory jurisdiction; it has no affirmative authority to control or direct railroad planning (i.e., it merely reacts to license applications to ensure that the system is not overbuilt) and no licensing authority with respect to the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks by non-carrier facilities like the Phillips 66 refinery.<sup>36</sup> As discussed above, the preemptive effect of the Termination Act must be assessed in light of this statutory structure and legislative history.

### **III. The Preemption Provision of the Termination Act**

To prevent states from stepping back into the field of economic regulation and undermining Congress’ deregulation efforts, the Termination Act withdrew all state authority to regulate railroad rates, classifications, rules, and practices and amended the jurisdiction/preemption provision of the prior Staggers Act accordingly.<sup>37</sup> The operative language of section 10501(b) now reads:

The jurisdiction of the Board over –

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<sup>33</sup> 49 U.S.C. §§ 10701-10747 (rates) and 11101-11164 (operations).

<sup>34</sup> 49 U. S. C. §§ 10901-10910 (licensing).

<sup>35</sup> *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (noting that “the Act’s subject matter is limited to deregulation of the railroad industry”); see also *Illinois Commerce Comm’n v. Interstate Commerce Comm’n*, 879 F.2d 917, 925 (D.C. Cir. 1989) (Staggers Act’s “central focus” was “economic regulation of railroads”).

<sup>36</sup> 49 U.S.C. § 10906 (exemption).

<sup>37</sup> H.R. Rep. No. 104-31 I, at 82-83, 95-96 (“State certification: Requires that States may only regulate intrastate rail transportation if certified by the [ICC]. Replaced by direct preemption of State economic regulation of rail transportation”); Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 Ecology L.Q. 1147, 1161 (2007).

(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,<sup>38</sup>

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.*<sup>39</sup>

This new language consolidated the prior jurisdiction and preemption provisions of the Staggers Act into a single statutory section and extended STB's exclusive economic regulatory jurisdiction to rail carrier transportation activities on wholly intrastate lines that had previously been subject to federally-certified state regulation. Notably, however, the Termination Act did not expand the narrow scope of the preemption provision originally adopted in the Staggers Act – which, as explained above, related solely to “remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers.” Rather, as the House Conference Report for the Termination Act explains, section 10501(b) retains “the exclusivity of Federal remedies with respect to the regulation of rail transportation” previously adopted in the Staggers Act “while clarifying that the exclusivity is related to remedies with respect to rail regulation – not State and Federal law generally.”<sup>40</sup> “The Termination Act regulates, inter alia, rail carriers’ rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines. . . . Thus it regulates the economics and finances of the rail carriage industry – and provides a panoply of remedies when rail carriers break the rules.”<sup>41</sup>

The Termination Act thus preempts only those state law “remedies” that “collide with the scheme of economic regulation (and deregulation) of rail transportation” – that is, potential state claims related to common carrier rates, classifications, rules, and practices over which the STB exercises exclusive jurisdiction. The result is “the complete pre-

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<sup>38</sup> While Congress amended section 10501(b) to clarify that states can no longer exercise any economic regulation over intrastate rail lines, it also retained the prior exclusion from federal licensing and certification jurisdiction for “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 49 U.S.C. § 10906. This makes sense because spur and other industrial facility tracks are not rail carriers subject to the statute’s common carrier requirements. As a result, neither STB nor states can mandate that a non-carrier construct, abandon, or operate an industrial spur; the decision to do so is purely one of private management. But like all private facility development decisions, Phillips 66’s non-carrier industrial spur track project is fully subject to local and state health, safety, and environmental land use and permitting requirements.

<sup>39</sup> 49 U.S.C. § 10501(b) (emphasis added).

<sup>40</sup> H.R. Conf. Rep. No. 104-422, 1st Sess., at 167 (1995).

<sup>41</sup> *New York Susquehanna*, 500 F.3d at 252.

emption of State economic regulation of railroads” even as “States retain the police powers reserved by the Constitution.”<sup>42</sup> As one federal appellate court has summarized, the “changes brought about by the Termination Act reflect the focus of legislative attention on removing direct economic regulation by the States, as opposed to the incidental effects that inhere in the exercise of traditionally local police power such as zoning.”<sup>43</sup>

#### **IV. The County’s Exercise of Its Traditional Land Use Powers and Full Compliance with CEQA Are Not Preempted by Federal Law.**

Applying the two cornerstones of preemption jurisprudence – congressional intent and a presumption against preemption – leads inescapably to the conclusion that the Termination Act does not preempt the County from (1) conducting the required CEQA review of potential direct, indirect, and cumulative impacts associated with the proposed Project<sup>44</sup> and (2) employing the findings of that review in deciding whether and how to approve the Project. Below, we separately address the concepts of express and implied preemption as applied to the County’s actions here.

##### **A. The Termination Act’s Express Preemption Provision Does Not Apply to the County’s Land Use Decision Regarding the Project or to Environmental Disclosure and Mitigation Requirements Imposed by CEQA.**

The presumption against preemption applies “particularly” where “Congress has ‘legislated . . . in a field which the States have traditionally occupied.’”<sup>45</sup> As explained above, while the federal government has played a significant role in the economic regulation – and subsequent economic deregulation – of the rail industry, states and local governments unquestionably retain their sovereign police powers “to adopt a wide range of laws in order to protect the health, safety, and welfare of its own residents.”<sup>46</sup> Local land use permitting authority falls squarely within the scope of such preserved traditional

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<sup>42</sup> H.R. Conf. Rep. No. 104-422, at 167 ; H.R. No. 104-311, at 95-96.

<sup>43</sup> *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d t324, 1337 (11th Cir. 2001); see also *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (noting that “the Act’s subject matter is limited to deregulation of the railroad industry”); see also *Illinois Commerce Comm’n v. Interstate Commerce Comm’n*, 879 F.2d 917, 925 (D.C. Cir. 1989) (Staggers Act’s “central focus” was “economic regulation of railroads”).

<sup>44</sup> The Project proponents’ reliance on *Friends of Eel River v. North Coast Railroad Authority*, 230 Cal.App.4th 85 (2014), is misplaced. That case has been accepted for review by the California Supreme Court and briefing has been completed, see 339 P.3d 329 (Cal., Dec. 10, 2014). and thus, the appellate opinion has been superseded and is not citable. Rules 8. 1105(e)(1), 8.1115, Cal. Rules of Court.

<sup>45</sup> *Wyeth*, 555 U.S. at 565; see also *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1141 (9th Cir. 2015).

<sup>46</sup> *Pacific Merchant Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1162 (9th Cir. 2011).

powers,<sup>47</sup> as does environmental review under CEQA.<sup>48</sup> Accordingly, “[t]he applicable preemption provision must be read narrowly ‘in light of the presumption against preemption of state police power regulations.’”<sup>49</sup>

In particular, section 10501(b) establishes STB jurisdiction over “transportation by rail carriers” and provides exclusive “remedies . . . with respect to regulation of rail transportation.”<sup>50</sup> The Termination Act defines “rail carrier” as “a person providing common carrier rail transportation for compensation,”<sup>51</sup> and “transportation” as “the movement of passengers or property, or both, by rail” and “services related to that movement.”<sup>52</sup> The statute thus only regulates the conduct of common carriers who provide services that move passengers or property for compensation, and its preemptive effect is limited to that conduct. As courts have found, “Congress narrowly tailored the [Termination Act] preemption provision to displace only ‘regulation,’ i.e., those state laws that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.”<sup>53</sup> The County’s local permitting process for a new private (non-common carrier) rail spur project – and the CEQA compliance that necessarily accompanies that decision – does not fall within this narrow preemption language, for several reasons.

First, the County’s permitting process – and associated health, safety, and environmental review – does not regulate transportation. Denial of the permit, or the imposition of conditions on the Project, will undoubtedly affect the ability of Phillips 66 to accommodate oil trains on its facility, but will not govern or manage Union Pacific’s operations on the existing rail line and thus is not an action “with respect to” the regulation of rail transportation. The Supreme Court has recognized that general words like “related to” (or in the case of section 10501(b), “with respect to”) must be narrowly construed consistent with federal preemption jurisprudence because “as many a curbstone philosopher has observed, everything is related to everything else.”<sup>54</sup> In interpreting

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<sup>47</sup> E.g., *City of Riverside v. Inland Empire Patients Health and Welfare Ctr., Inc.*, 56 Cal. 4th 729, 742 (2013) (explaining that the California Supreme Court has “recognized that a city’s or county’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state” and that under article XI, section 7 of the California Constitution, “[l]and use regulation in California historically has been a function of local government under the grant of police power regulation”).

<sup>48</sup> Cal. Pub. Res. Code § 21000 (“The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.”).

<sup>49</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (2008) (quotations omitted).

<sup>50</sup> 49 U.S.C. § 10501(b) (emphasis added).

<sup>51</sup> 49 U.S.C. § 10102(5).

<sup>52</sup> 49 U.S.C. § 10102(9).

<sup>53</sup> *New York Susquehanna*, 500 F.3d at 252.

<sup>54</sup> *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 (1997).

similar preemption language in the Federal Aviation Administration Authorization Act (“FAAAA”), for instance, both the U.S. Supreme Court and the Ninth Circuit Court of Appeals have held that while state laws referencing carrier rates, routes, or services are generally preempted, Congress’ “use of the words ‘related to’ does not mean the sky is the limit”; state laws “that have ‘only a tenuous, remote, or peripheral’ connection to rates, routes, or services” are not preempted.<sup>55</sup> CEQA, the Coastal Act, and the San Luis Obispo County Code are precisely such peripherally connected laws.

Second, as explained above, spurs and other industrial facility tracks are not part of the interstate system and are not, therefore, subject to Termination Act jurisdiction. In particular, the spur tracks proposed here will not be operated by a “rail carrier” to provide transportation of people or property for compensation, but instead will be part of industrial manufacturing operations conducted by a non-rail carrier to serve that facility’s private profit objectives. Indeed, industrial spur tracks fall entirely outside STB’s licensing jurisdiction under 49 U.S.C. section 10906. Courts have correctly concluded that under these circumstances, section 10501(b) does not preempt the application of local zoning requirements to such industrial spur track projects.<sup>56</sup>

Third, the Termination Act deals exclusively with the economic regulation and associated licensing of rail transportation services and common carriers (and appropriate legal remedies for breaches thereof), not health, safety, and environmental concerns associated with rail activities. As such, Congress did not intend the Termination Act to displace traditional state functions unrelated to economic regulation. In fact, Congress viewed state retention of police powers as so obvious that in crafting the Termination Act, it removed any mention of state police powers from the preemption clause:

The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of *economic* regulation of the interstate rail transportation system. 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.<sup>57</sup>

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(reading such words broadly would mean that “for all practical purposes preemption would never run its course, for ‘[r]eally, universally, relations stop nowhere.’”).

<sup>55</sup> *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013); *Dilts*, 769 F.3d at 643 (quoting *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 264, 371 (2008)).

<sup>56</sup> *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 71-75 (2d Cir. 2011); *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3d Cir. 2004). The Project proponents’ reliance on certain railroad “transloading” facility cases is inapposite, as those rail carrier facilities are part of the common carrier network used to provide transportation services and clearly fall within STB’s licensing authority. See, e.g., *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 15 (4th Cir. 2010) (discussing common carrier’s transloading facility).

<sup>57</sup> H.R. Rep. No. 104-311, at 95-96 (emphasis added)

The public safety concerns at the heart of the County's permit analysis in this case are not matters of economic regulation within STB's jurisdiction. Indeed, an entirely different agency, the Federal Railroad Administration, is charged under the Federal Railroad Safety Act with responsibility for ensuring railroad safety.<sup>58</sup> The Federal Railroad Safety Act allows states to adopt more stringent safety requirements when necessary to reduce or eliminate local safety or security hazards, as long as such requirements are not incompatible with federal safety regulations or do not unduly burden interstate commerce.<sup>59</sup> Denial of a local non-common carrier project involving new rail spur capacity, or the imposition of environmental safety conditions in a local permit for such a project, do not implicate any preemption concerns under the Federal Railroad Safety Act.<sup>60</sup>

Similarly, the environmental review, disclosure and mitigation requirements of CEQA, California's bedrock environmental law, do not trigger preemption under the Termination Act (or the Federal Railroad Safety Act). CEQA is a necessary component of a local government's ability to fully appreciate and address the health, safety, and environmental implications of proposed new activities within its jurisdictions. The Environmental Impact Report ("EIR"), in particular, is a tool of public transparency and accountability that allows localities or public watchdogs to sound the alarm bell when proposed land use activities threaten to impose unmitigated harm on the community or are otherwise incompatible with local zoning.<sup>61</sup> As such, it "protects not only the environment but also informed self-government."<sup>62</sup>

Since the 1970s, California has mandated, as part of its inherent sovereign power, that all public agencies fully comply with CEQA prior to approving any project that may affect the physical environment and has provided for citizen participation in, and enforcement of, that mandate. Before trenching on this core sovereign function and interposing federal authority between the state and its subdivisions, Congress must make its

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<sup>58</sup> *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 107 (2d Cir. 2009) ("Several circuits that have examined the interplay between [the Termination Act] and [the Federal Railroad Safety Act] have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration ("FRA"), not the STB. We agree. Thus, FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law. See, e.g., *Boston & Me. Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 321 (D.C.Cir.2004); *Iowa, Chi. & E. R.R. Corp.*, 384 F.3d at 561; *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir.2001).").

<sup>59</sup> 49 U.S.C. § 20106(a).

<sup>60</sup> As discussed below, rail car requirements that conflict with federal rail car safety standards may be preempted by the Federal Railroad Safety Act or some other federal railroad law. But the Termination Act is concerned exclusively with common carrier services and railroad infrastructure.

<sup>61</sup> *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1998) ("The EIR serves as an "'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the point of ecological no return.").

<sup>62</sup> *Id.*

intention to do so “unmistakably clear” in the federal statute.<sup>63</sup> There is not a shred of evidence in the long legislative history of the Termination Act that Congress intended to strip state and local governments of their historic ability to protect community health and safety when determining whether to approve a new land use activity that just happens to involve a rail spur. CEQA was in place when Congress enacted the Staggers Act in 1980 and when it amended the law through the Termination Act of 1995. Yet Congress did not express any purpose, let alone a clear or manifest one, to supersede the application of CEQA for projects that incidentally touch upon railroads operated by a common carrier. To the contrary, Congress plainly indicated that the Termination Act applies only to the economic regulation of rail transportation and does not preempt traditional local zoning functions.

**B. The County’s Permitting and Environmental Review Process Does Not Conflict with or Stand as an Obstacle to the Accomplishment of the Termination Act’s Full Purposes and Objectives.**

The argument that the Termination Act impliedly preempts either CEQA or the County’s land use and development permitting process is equally unavailing. The question for preemption purposes is *not* whether CEQA review or local permitting “interfere” with the ability of Phillips 66 to expand its refinery to obtain rail services or the ability of Union Pacific to sell rail services to Phillips 66 (or otherwise operate its existing line).<sup>64</sup> The only relevant question for implied conflict/obstacle preemption is whether the relevant state or local law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>65</sup> In answering this question, courts begin “from the starting point of a presumption that displacement of state regulation in areas of traditional concern was not intended absent clear and manifest evidence of a contrary congressional intent.”<sup>66</sup> And courts must be particularly cautious where, as here, the activity at issue “is quintessentially a matter of longstanding local concern.”<sup>67</sup>

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<sup>63</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140-41 (2004) (“federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its power”); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

<sup>64</sup> It is worth noting that the standard often cited by STB and some courts that the state law must not “interfere with” or “unduly burden” interstate commerce is not the legally correct test. That standard applies to dormant Commerce Clause challenges – a wholly different doctrinal area of the law that does not apply here – and perhaps to the Federal Railroad Safety Act’s state law savings clause test. It does *not*, however, apply to preemption analysis, which is governed solely by the question of whether the state law conflicts with or poses an obstacle to achieving Congress’ purposes.

<sup>65</sup> *Oneok*, 135 S. Ct. at 1595.

<sup>66</sup> *Herb Thyme*, 62 Cal. 4th at 315.

<sup>67</sup> *Herb Thyme*, 62 Cal. 4th at 313.

In assessing conflict/obstacle preemption, the U.S. Supreme Court has emphasized “the importance of considering the target at which the state law aims in determining whether that law is [impliedly] pre-empted.”<sup>68</sup> For instance, in *Dan’s City*, the Court examined the express preemption language of the Federal Aviation Administration Authorization Act, which provides that “States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”<sup>69</sup> The Court found that a state law concerning disposal of towed vehicles was not preempted by this provision because that state law did not target “Congress’ driving concern” in the FAAAA – namely, “a State’s direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide.”<sup>70</sup> In particular, the state consumer protection and tort laws at issue in *Dan’s City* did not “constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market” – the behavior that Congress targeted in the preemption provision.<sup>71</sup> Rather, these laws applied to stored vehicles *after* towing or transportation services ended, taking them out of the FAAAA’s regulatory orbit.<sup>72</sup> Similarly here, the County’s pre-project environmental review and permitting process apply *before* any rail spur tracks or facilities are constructed or could conceivably become part of the Union Pacific network of lines (or in any other way subject to STB regulation).

The California Supreme Court has adopted the same approach to obstacle preemption. Interpreting the same FAAAA preemption language “with respect to the transportation of property,” the Court in *Pac Anchor* held that even though California’s wage and insurance laws of general applicability – like CEQA and the Coastal Act, here – may have an indirect effect on a carrier’s prices or services, “that effect is ‘too tenuous, remote, [and] peripheral’” to trigger preemption.<sup>73</sup> The Court also held, in the alternative, that state wage and insurance laws with remote effects on carriers do not threaten Congress’ deregulatory purpose in the FAAAA because “nothing in the congressional record establishes that Congress intended to preempt states’ ability to tax motor carriers, to

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<sup>68</sup> *Oneok.*, 135 S. Ct. at 1599; see also *People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal. 4th 772, 78-86 (2014).

<sup>69</sup> 49 U.S.C. § 14501.

<sup>70</sup> *Dan’s City*, 133 S. Ct. at 1780.

<sup>71</sup> *Id.*

<sup>72</sup> *Dan’s City*, 133 S. Ct. at 1779.

<sup>73</sup> *Pac Anchor*, 59 Cal. 4th at 786; see also *Oneok*, 135 S. Ct. at 1601 (even though state antitrust claims for false price reporting, wash trades, and anticompetitive collusive behavior “might well raise pipelines’ operating costs, and thus the costs of wholesale natural gas transportation,” they were not preempted by federal authority to issue rules and regulations concerning the prevention of “any manipulative or deceptive device or contrivance” for interstate natural gas sales).

enforce labor and wage standards, or to exempt motor carriers from generally applicable insurance laws.”<sup>74</sup>

The Coastal Act permitting requirements and the County’s Local Coastal Program and Zoning Code impose standards of general applicability that do not target rail carriers or rail transportation. They are intended to protect public health, community safety, and environment resources from potential impacts associated with new land use projects, regardless of whether those projects connect to the interstate rail system. Likewise, CEQA is a law of general applicability<sup>75</sup> that targets informed decision-making by public officials and public accountability to ensure that agency approval decisions are both environmentally sound and transparent. Here, while denial or conditional approval of a coastal development permit – or citizen enforcement of CEQA – may affect the Rail Spur Extension Project or compel Phillips 66 to implement certain mitigation measures, such outcomes do not frustrate Congress’ purpose in the Termination Act – to foster a viable interstate rail industry by ensuring that states do not re-regulate common carrier rates or services or impose expensive infrastructure building mandates on rail carriers. Any remedies available under CEQA or the Coastal Act are far removed from the carrier discrimination and licensing remedies available in, and preempted by, the Termination Act.<sup>76</sup>

Indeed, STB’s own regulations – which apply to the agency’s certification of new or expanded railroad projects where (unlike here) STB does have licensing jurisdiction – clearly demonstrate why CEQA review and Coastal Act permitting requirements are not impliedly preempted. Those STB regulations provide for review under the National Environmental Policy, the Energy Policy and Conservation Act, the National Historic Preservation Act, the Coastal Zone Management Act, and the Endangered Species Act in

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<sup>74</sup> *Pac Anchor*, 59 Cal. 4th at 786.

<sup>75</sup> Cal. Pub. Res. Code § 21080(a) (CEQA applies to all “discretionary projects to be carried out or approved by public agencies”).

<sup>76</sup> Project proponents reliance on *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025 (9th Cir. 1998), is misplaced for several reasons. First, that case involved local review of operations on an existing line acquired by a new rail carrier, where STB unquestionably had licensing jurisdiction over both the acquisition and the line operations. It is thus entirely distinguishable on its facts. Second, *City of Auburn*, decided shortly after the Termination Act was adopted, incorrectly dismissed or failed to examine the legislative history to determine Congress’ statutory objectives and the purpose of the preemption language, contrary to controlling U.S. Supreme Court precedent. See *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015). Additionally, the court in *City of Auburn* crafted its own “preclearance” test, apparently from whole cloth; such language does not exist anywhere in the Termination Act, its legislative history, or preemption jurisprudence. Although STB has since seized upon that “preclearance” test (and some court opinions have adopted the language), many subsequent, more detailed and careful judicial decisions in the evolving body of Termination Act case law have acknowledged that the statutory preemption provision is much narrower than *City of Auburn* presumed. At this point, therefore, it is questionable whether *City of Auburn* is good law.

connection with all proceedings and projects within STB's jurisdiction.<sup>77</sup> CEQA and the Coastal Act are essentially state statutory counterparts to these federal laws. If section 10501(b) of the Termination Act preempts such state laws, it also necessarily preempts the analogous federal laws because section 10501(b) does not distinguish between state and federal laws; it preempts all "remedies provided under Federal and State law." The requirement for NEPA and Coastal Zone Management Act review might delay – or for projects with unacceptable health, safety, or environmental impacts, entirely defer – a rail-related proposed construction project. But nobody would rationally argue that STB's own environmental review requirements under the Termination Act are preempted by the Termination Act. The illogic of such an argument illustrates why generally applicable state law requirements under CEQA and the Coastal Act that do not target the regulation of railroad economics are similarly not preempted, even if they result in conditions upon, or denial of, a proposed project.

Any other reading of the Termination Act would create a gaping hole in the state's environmental health and safety network. STB is not a national railroad planning agency with plenary jurisdiction over the development of the interstate rail system. Rather, it is a narrowly-chartered entity responsible for resolving common carrier disputes and ensuring, through its reactive certificate application and licensing process, that new railroad infrastructure is not "inconsistent with the public convenience and necessity."<sup>78</sup> Because STB has no jurisdiction over the Rail Spur Expansion Project, there will be no federal review of project impacts under NEPA or under any other federal law, there will be no consideration of appropriate project mitigation under federal law, and there will be no federal decision point to determine if the Project's impacts and zoning incompatibilities warrant denial. A conclusion that the Coastal Act and CEQA are preempted by the Termination Act would seriously disrupt California's carefully balanced coastal land use system and subject the state's vulnerable 1,100-mile coastline to unmitigated new railroad development hazards.<sup>79</sup> Congress certainly did not intend the narrowly prescribed economic deregulatory provisions of the Termination Act to affect such a startling result.

**V. The Only Permit Conditions that Are Arguably Preempted by Federal Law Are Those that Would Directly Affect Movement of Rail Cars Along the Existing Union Pacific Line.**

**A. In General, All Direct, Indirect and Cumulative Impacts of the Project Must Be Evaluated in the EIR and Mitigated if Feasible, Including Onsite Impacts and Upstream Impacts Along the Union Pacific Line.**

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<sup>77</sup> 49 C.F.R. § 1105.1 et seq. ("Procedures for Implementation of Environmental Law"); 49 C.F.R. § 1100.2 (explaining that rules apply to STB proceedings).

<sup>78</sup> 49 U.S.C. § 10901(c) (noting that certificate may require "compliance with conditions . . . the Board finds necessary in the public interest").

<sup>79</sup> *United States v. State of Cal.*, 639 F. Supp. 199, 205 (E.D. Cal. 1986) ("California has a fundamental interest in enforcing its Environmental Quality Act.").

In preparing the Project EIR, the County properly and wisely rejected arguments that CEQA review is limited to on-site impacts. The CEQA Guidelines require that “[a]ll phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation.”<sup>80</sup> The Guidelines further state, “[d]irect and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects.”<sup>81</sup> “Indirect or secondary effects,” as defined by the Guidelines, are those “which are caused by the project and are *later in time* or *farther removed in distance*, but are still reasonably foreseeable. Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.”<sup>82</sup>

Moreover, CEQA requires that an EIR identify mitigation measures intended to reduce or avoid a project’s significant effects.<sup>83</sup> A public agency approving a project “shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”<sup>84</sup> For the reasons discussed at length above, CEQA mitigation measures to protect public health, safety, and the environment generally may be incorporated into any coastal development permit issued by the County because they do not frustrate Congress’ objective in the Termination Act to deregulate railroad rates and schedules and promote competitive market efficiency.

For example, permit conditions directed at materials handling limitations on the refinery property, even if those conditions affect what material may be received or stored at the site, are not preempted by federal law. The County has the authority to control the categories and quantities of hazardous materials handled at the Project site, as confirmed by the Pipeline and Hazardous Materials Safety Administration’s recent rulemaking statement that “Federal hazardous material transportation law does not preempt California [or county] requirements on [] the unloading of hazardous materials from rail tank cars by a consignee . . . following delivery of the hazardous materials to their destination and departure of the carrier from the consignee’s premises . . . .”<sup>85</sup> The Termination Act does not convey on a private non-carrier facility the right to construct a rail spur in order to receive future railroad services; it merely regulates common carrier behavior. In short, the Termination Act is simply legally irrelevant to the local permitting process for the Project.

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<sup>80</sup> Cal. Code Regs. tit. 14, § 15126

<sup>81</sup> Cal. Code Regs. tit. 14, § 15126.2

<sup>82</sup> Cal. Code Regs. tit. 14, § 15358(a)(2) (emphasis added).

<sup>83</sup> *Laurel Heights*, 47 Cal. 3d at 400; Cal. Pub. Res. Code § 21002.1(a) (purpose of EIR is “to indicate the manner in which those significant effects can be mitigated or avoided”); § 21100(b)(3) (EIR must include “[m]itigation measures proposed to minimize significant effects on the environment”).

<sup>84</sup> Cal. Pub. Res. Code § 21002(b).

<sup>85</sup> 80 Fed. Reg. 70874, 70878 (Nov. 16, 2015).

**B. The County Retains Its Fully Discretion to Deny the Coastal Development Permit for Incompatibility with the Local Zoning Code, for the Infeasibility of Identified Necessary Mitigation Measures or for Any Other Reason Consistent with Its Obligation to Protect Public Health, Safety, and the Environment.**

While most of the mitigation measures identified in the EIR may be implemented under the County's traditional land use authority without triggering federal preemption concerns, it also is true that permit conditions attempting to regulate the safety or movement of people or property on the existing Union Pacific line *may* be preempted by the Termination Act or the Federal Railroad Safety Act. Although such conditions do not directly implicate the economic regulation concerns that animated Congress in adopting the Termination Act, courts could nevertheless find that they frustrate Congress' objective of promoting a viable interstate system or that they conflict with applicable federal safety regulations. In the event of litigation, a court would be required to scrutinize each permit condition against the Supreme Court principles articulated above to determine the preemptive effect of the Termination Act, the Federal Railroad Safety Act, or some other federal statute. Because at least some the proposed mitigation measures seem reasonably likely to fail the preemption test, we do not discuss them in detail here. Rather, we briefly address a single category of mitigation measures that, if included as conditions in a coastal development permit, would be the most likely to trigger preemption.

In particular, permit conditions mandating a certain type of tanker car to minimize explosion risks or a certain type of locomotive to reduce air emissions may substantially affect how Union Pacific manages and schedules interstate shipments along the line. While Union Pacific could choose to contract with Phillips 66 for specialized services, such a private agreement may still be subject to STB approval (and likely rejection).<sup>86</sup> In any event, Union Pacific has categorically rejected any possibility of executing such a private agreement to ensure that the refinery's permit conditions are satisfied, arguing that doing so would unreasonably interfere with its schedules and interstate operations.<sup>87</sup>

It thus appears that some of the mitigation measures which the EIR and the County concluded are necessary to address the Project's significant adverse environmental impacts are legally infeasible, and the EIR offers no supporting reason for the County to make a Statement of Overriding Considerations, as CEQA requires. Under these circumstances, the County may act pursuant to its traditional land use authority by simply denying the permit application for the proposed Project as inconsistent with the Coastal Act and the

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<sup>86</sup> See, e.g., *Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 346 (D.C. Cir. 2013) (upholding STB's rejection of license application where buyer of 800-foot stretch of private railroad line sought to limit categories of toxic material to be handled).

<sup>87</sup> Letter from Melissa Hagan, Union Pacific to Murry Wilson, SLO Co. Department of Planning and Building, at 11 (Nov. 24, 2014).

Local Coastal Plan and as incompatible with the County's zoning standards. Doing so will not in any way affect interstate rail operations or regulate Union Pacific's operations. The railroad is free to continue operating just as it does today; it is not entitled by the Termination Act to obtain new business from private shippers. Nor is the non-carrier facility owner entitled to construct a rail spur project on its property that has significant community impacts which cannot be mitigated.

Even if Phillips 66 and Union Pacific contractually agree to accept conditions that may mitigate some of the significant environmental impacts identified in the EIR, however, Planning Staff has concluded that the Project is inconsistent with the Local Coastal Program and incompatible with the County Zoning Code. These findings alone are legally sufficient to support denial of the Project (or the imposition of restrictive permit conditions). To understand why this is so, imagine a slightly different proposed project designed to increase refinery optionality and profit by constructing new tanker truck receiving facilities, rather than a rail spur. The County would have discretion to conduct full CEQA review and determine whether the proposed truck receiving facility is consistent with the Local Coastal Program. It could impose appropriate conditions on the project or deny approval altogether based on health and safety concerns or zoning incompatibility. That traditional land use discretion does not suddenly disappear, or become constrained, merely because the receiving facility will connect to the rail system rather than the highway system. In short, the spur tracks being proposed as part of a private industrial project do not implicate the common carrier concerns or preemption language of the Termination Act, and the County is free to exercise its traditional zoning authority to deny the permit application.

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In conclusion, Mesa Refinery Watch Group agrees with Staff's recommendation to deny the proposed Phillips 66 Company Rail Spur Extension Project as incompatible with the Local Coastal Program and the County Code. As the foregoing analysis explains, the County may properly consider all impacts caused by the Project and deny the permit based on the significant adverse health, safety, and environmental impacts identified in the EIR, without risking a finding of federal preemption.

Sincerely yours,

/s/

Claudia M. Antonacci  
Rylee A. Kercher  
Deborah A. Sivas