February 25, 2016

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Department of Planning and Building
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VIA EMAIL
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**RE: Comments on the Final Environmental Impact Report for the Phillips 66 Company Rail Spur Extension and Crude Unloading Project**

Dear Ms. Hostetter,

Communities for a Better Environment ("CBE"), the Sierra Club, the Center for Biological Diversity ("Center") and ForestEthics submit the following comment in support of the Department of Planning and Building Staff's recommendation to deny the Phillips 66 Company Rail Spur Extension and Crude Unloading Project ("Project"). This comment is supported by the several undersigned community, environment, labor and academic groups.

The Staff Findings for Denial are based on ample evidence formulated during environmental review of the Project. Furthermore, while the environmental review process of this tar sands crude by rail project has elicited substantial evidence highlighting several significant Project impacts, the Final Environmental Impact Report ("FEIR") still fails to adequately disclose several other significant environmental impacts, and in particular, diminishes the environmental benefits of the No Project Alternative.

As set forth below, as well as in our prior submittals and the accompanying attachments, the FEIR suffers from numerous deficiencies that render it inadequate under the California Environmental Quality Act ("CEQA")[1] and the CEQA Guidelines.[2] We respectfully request that the Commission reject this Project based on the numerous significant impacts identified in the FEIR, and also those significant impacts that the FEIR fails to disclose in violation of CEQA.

[1] Pub. Res. Code § § 21000 *et seq.*
[2] 14 Cal. Code Regs. § § 15000 *et seq.*

## I. STAFF FINDINGS FOR DENIAL OF THE PROJECT ARE ADEQUATELY SUPPORTED BY EVIDENCE IN THE RECORD

CEQA Guidelines section 15042 specifically provides authority for a public agency to "disapprove a project ... in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." The definition of "mitigation" includes "[a]voiding the impact altogether by not taking a certain action or parts of an action."[3] Moreover:

> "The EIR by itself does not control the way in which a project can be built or carried out. Rather, when an EIR shows that a project could cause substantial adverse changes in the environment, the governmental agency must respond to the information by … [various options including] [d]isapproving the project."[4]

There can be no doubt as to the authority, if not the duty, of the governmental agency to disapprove a project where an EIR shows there are significant, unmitigated adverse environmental effects.[5] Adding to that inherent duty, "fundamental, mandatory and specific" policies within a general plan may prevent or thwart the approval of projects that otherwise would be permissible under CEQA with the adoption of a statement of overriding considerations.[6]

The Staff Findings for Denial identify several significant and unavoidable impacts of the project that the FEIR admits. Those conflict with such fundamental, mandatory and specific state and local policies and include:

1. Significant impact on Environmentally Sensitive Habitat Areas, its species, and subsequent violation of Coastal Zone Land Use Ordinance Section 23.07.170;
2. Generation of local and statewide toxic air emissions that exceed the San Luis Obispo County Air Pollution Control District ("SLOAPCD") health risk thresholds, in violation of General Plan Strategic Growth Goal 1, Objective 2, Air Quality;
3. Increased risks of oil spills and additional rail traffic significantly impacting agricultural, biological, and water resources, in violation of the Coastal Zone Framework for Planning, Coastal Zone Land Use Element Strategic Growth Goal 1;
4. Significant impacts to agriculture in the event of an accident or spill, in violation of County Agriculture Policy 1;
5. Inconsistency with the Safety Element of the General Plan, Fire Safety Goal S-4;
6. Significant and unmitigated air quality impacts due to Project $NO_x$, ROG, and $PM_{10}$ emissions along the mainline rail route within the County, thwarting attainment of state PM and ozone standards, and in contradiction to the General Plan policy of the Conservation and Open Space Element;

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[3] CEQA Guidelines § 15370(a).
[4] CEQA Guidelines § 15002(h)(5).
[5] *Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal. App 4th 892, 906-907.
[6] *Families Unafriad to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal. App. 4th 1332, 1342.

7. Significant increases in crude oil rail traffic which could have potential for catastrophic impacts in the event of a derailment or explosion and would be in direct conflict with the General Plan as it relates to the health and safety of the citizens around the mainline within San Luis Obispo County, Implementation Strategy E 7.1.1;
8. Significant threats to public health and safety, in particular by *greatly* reducing the "buffer" between refinery and residential uses, in Violation of Title 23 of the County Code.

These are but a few of the several significant Project impacts that the FEIR identifies. The FEIR *still fails* to disclose several other significant and local impacts that remain unaddressed and unmitigated, in particular, daily operational impacts of refining a new and different feedstock at the San Francisco Refinery – impacts that are neither diminished nor eliminated by the decreased trains per week alternative. These impacts include significant climate disrupting pollution, increased local public health risks and hazards due to increased co-pollutant emissions and refinery-worker safety risks of refining a lower quality, more inherently hazardous oil feedstock. In line with CEQA Guidelines direction, these unidentified impacts both preclude formulation of an adequate statement of overriding considerations, and, bolster Staff Findings to deny this Project.

In addition, the CEQA Guidelines provide that a "responsible agency may refuse to approve a project in order to avoid direct or indirect environmental effects of that part of the project which the responsible agency would be called on to carry out or approve."[7] The Guidelines provide a specific example: an air quality management district.[8] The SLOAPCD has previously commented on the significant air quality impacts posed by approval of this Project.[9] In particular, the comment notes the SLOAPCD's concerns with the RDEIR's multiple references to "the potential preemption from imposing mitigation measures, conditions or regulation on UPRR train movements." The FEIR responds that those concerns are indeed valid; such emissions would create "air quality impacts relating to criteria pollutant emissions [that] are potentially significant and unavoidable."[10] Information in the FEIR's analysis of project air quality impacts also shows that toxic and co-pollutant emissions exceed the SLOAPCD thresholds of significance, and as illustrated in our prior comments and below, the "actual" reductions of emissions that the SLOAPCD requests are not feasible for this Project. Several other air districts have also expressed similar concerns regarding this Project's air quality impacts.

Agencies have full authority to deny development projects, especially those that pose such an entire host of unacceptable local, statewide and global environmental impacts. The Staff Findings for Denial identify some of those impacts, which is more than sufficient to warrant the Commission's denial of the Project.

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[7] CEQA Guidelines § 15042.
[8] *Id.*
[9] SLO County APCD Comment on the Recirculated Draft Environmental Impact Report for the Phillips 66 Rail Spur Project, November 24, 2014.
[10] FEIR Response to Comments SLOAPCD-20.

## II. ADDITIONAL ENVIRONMENTAL REVIEW SHOULD PROCEED UNDER A PROGRAM EIR.

The Phillips 66 Propane Recovery Project is currently in litigation in the California Superior Court, County of Contra Costa. CBE, a local community group, and a worker safety group each filed separate lawsuits against Contra Costa County for its improper certification of the EIR for that project. Each complaint highlighted that EIR's deficient and piecemealed review of that project in Rodeo, the Phillips 66 Santa Maria Throughput Increase Project, and this Project.

As stated in our prior comments, this Santa Maria facility, one end of the Phillips 66 San Francisco Refinery, lacks the equipment to finish petroleum product. The Rodeo facility, the other end of the San Francisco Refinery, in turn lacks "the additional deep conversion to feed its hydrocrackers sufficient [feedstock]."[11] That deep conversion capacity is at the Santa Maria end.[12] The Throughput Increase Project allows increased product to flow from this Santa Maria facility to the Rodeo facility via a direct pipeline, enabling their interdependent functions. As noted in our prior comments, a series of inextricably linked and either proposed or pending projects enable Phillips 66 to refine greater quantities of a new and different feedstock at its overall San Francisco Refinery. The FEIR's responses do not rebut our comments highlighting this inextricable connection. Consequently, should the County fail to adhere to its staff recommendation to deny the Project, it is still the appropriate lead agency to continue environmental review of Phillips 66's overall expansion of the San Francisco Refinery under a programmatic EIR. As noted, this would also yield a more accurate assessment of the significant and cumulative impacts and mitigation measures for all communities affected by the San Francisco Refinery's switch to refining tar sands.

## III. THE EIR'S PROJECT DESCRIPTION IS INADEQUATE.

### A. The Project Description Fails to Disclose an Industry Shift to a Different Quality Crude Feedstock

"An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity."[13] The FEIR still fails to admit the extent of the Santa Maria facility's shift to refining tar sands. This precludes any adequate assessment of potentially significant environmental impacts. Moreover, the failure to disclose the extent of the shift to refining tar sands and other lower quality oils is not cured by the reduced train alternative, which still does not address this underlying flaw in violation of CEQA.

The FEIR states that the "[air quality] impact assessment was based upon the worst case assumption that the crude being processed by the [Santa Maria facility] would be all tar sands."[14]

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[11] *See* Expert Report of Greg Karras on the Rodeo Propane Recovery Project Recirculated Draft EIR, December 5, 2014.
[12] *Id.*
[13] *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 730, quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 193.
[14] FEIR Response to CBE Cover Letter Comments CBE-06.

It attempts to substantiate that analysis with reference to FEIR Table 4.3.13 which shows that BTEX emissions are assumed to increase from 0.81 to 1.25% with the Project's shift in feedstock at Santa Maria or the overall San Francisco Refinery. Nevertheless, discussion of air quality impacts then focuses largely on other sources of emissions, such as rail line emissions as a result of the Project, *not* those operational emissions that would result from refining "all tar sands" in Santa Maria, and which would most impact local residents.

Moreover, a bulk of the FEIR's response to our comments regarding the local impacts of refining a lower quality oil feedstock rests on the assumption that existing permit limits negate any need for further environmental review.[15] For instance, the FEIR states that "[t]he potential crude delivered by rail could have *slightly higher* sulfur content than the typical crude blend that is currently being run by the refinery … [but it] would be in the range [and] would not be expected to increase emissions from the sulfur plant, which has strict emission limits within the SLOCAPCD permit.[16] Absent any quantification of "slightly higher," such an assertion amounts to nothing more than an incorrect baseline determination based on maximum permitted conditions and violates CEQA.[17] "Maximum permitted" levels are "merely hypothetical conditions allowable under permits" and are not representative of current conditions for purposes of CEQA review.[18]

The reason for this Supreme Court holding is clear. Our prior comments have addressed the greater risk of corrosion from refining such higher sulfur content feedstocks; identified as a root cause of the August 2012 fire at the Chevron Richmond Refinery that sent 15,000 residents to local hospitals.[19] We highlight that the Court of Appeal has rejected an EIR for failing to study a *one percent* increase in sulfur in a refinery's crude supply, warranting a writ of mandamus.[20] A few years later, the Chemical Safety Board cited a *0.8 percent* increase in the amount of sulfur in Chevron's crude blend as a root cause of the August 2012 fire.[21] Notably, at the time of that incident, the sulfur content of Chevron's crude blend remained within the design range of the refinery's equipment.[22] What the FEIR claims as "slightly higher" or a "slight increase" in sulfur content cannot satisfy CEQA with such grave unchecked consequences. This limited response does not amount to substantial evidence to warrant any approval of this Project.[23] This error pervades the FEIR Project Description. It still neither discloses how this Project would affect the scope and degree of the company's use of tar sands in Santa Maria and Rodeo, nor evaluates the resulting impacts.

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[15] *See Id.*
[16] *Id. (emphasis added)*
[17] *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 106.
[18] *Id.*
[19] *See* Chemical Safety Board, Chevron Richmond Refinery Interim Investigation Report, April 2013, available at: http://www.csb.gov/assets/1/19/Chevron_Interim_Report_Final_2013-04-17.pdf.
[20] *Communities for a Better Environment et al. v. City of Richmond et al.* (2010) 184 Cal. App. 4th 70, 77.
[21] *See*, Chemical Safety Board, Chevron Richmond Refinery Interim Investigation Report, April 2013, available at: http://www.csb.gov/assets/1/19/Chevron_Interim_Report_Final_2013-04-17.pdf
[22] *Id.*
[23] *See Koster v. County of San Joaquin* (1996) 47 Cal. App. 4th 29, 32. A "statement of overriding considerations [must be] supported by substantial evidence."

The FEIR does, however, continue its prior drafts' evasive response to comments. For instance, our prior comments pointed to publicly available data showing that the Rodeo Propane Recovery Project "debottlenecks" the San Francisco Refinery's ability to process increasing amounts of lower quality crude oil feedstocks, and the increased throughput at the Santa Maria facility, enabled by this Project. The FEIR provides merely a vague response, again relying on unsupported assumptions that refining activities will remain "at or near their permitted capacities."[24] In particular, the FEIR still erroneously relies on data from 2011 and 2013 to evade the several comments that this Project, concurrent with enabling greater refining of tar sands at the Santa Maria facility, then delivers that semi-refined, but ultimately, different quality feedstock to Rodeo. The FEIR suggests that the 2011 and 2013 data show no changes to LPG recovery at Rodeo with or without this Project in Santa Maria. The FEIR still fails to acknowledge that those sets of data, as illustrated in our prior comments, are: first, merely inaccurate and unrepresentative estimates; and second, occurred during a period when the San Francisco Refinery was "testing" to see whether these interrelated infrastructure projects were even feasible.[25] The 2011 and 2013 data actually represent future conditions – what *post*-Project crude quality would look like - and cannot represent current conditions, nor support the FEIR's unsupported assertions regarding crude quality. Overall, the FEIR's "conclusory and evasive response to comments is pervasive," and improperly, "call[s] for blind faith in vague subjective characterizations."[26]

### B. The Project Is Piecemealed.

The FEIR includes several responses to expert comments regarding the piecemealed environmental review of this Project and other contemporaneous Phillips 66 projects.[27] Those responses do *not* provide substantial evidence to the contrary and do *not* amount to "changed circumstances" warranting any additional environmental review.[28] If anything, such "evasive response to comments" constitute "conflicting signals to decision makers and the public about the nature and the scope of the activity being proposed," rendering, "the Project description fundamentally inadequate and misleading."[29]

#### (i) The Prior Throughput Expansion is Dependent on this Project.

The FEIR's response to comments misses the mark: the Vertical Coastal Access Project is not a part of the overall project, but telling evidence that the Throughput Increase Project and this Project are interdependent. Although the FEIR states that Phillips 66 was required to develop the coastal accessway as a condition of approval of the Throughput Increase Project, and this Project came within the 10 year window to do so, the condition of approval does not remove the reality of the need to design the coastal accessway in conformance with public safety dangers and hazards presented by this Project. To do otherwise, and design an accessway subsequent to

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[24] FEIR Response to Comments, CBE-84-85.
[25] *See* Karras Report on the FEIR, February 23, 2016 ("Karras FEIR Report") at 15-17, referencing the Expert Report of Greg Karras on the Phillips 66 Company Propane Recovery Project Recirculated Final Environmental Impact Report, February 2, 2015, concurrently submitted with all attachments together with this comment.
[26] Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs. (2001) 91 Cal. App. 4th 1344, 1371.
[27] *See eg.* FEIR Response to Comments CBE-76, CBE-78, CBE-84/85, CBE-87-93.
[28] *See Native Sun/Lyon Communities*,15 Cal. App 4th 906-907.
[29] *See Communities for a Better Environment,* 184 Cal. App. 4th at 84.

completion of this Project, could prove practically impossible, and potentially result in a violation of the condition of approval. The Throughput Increase Project was predicated on the need to source new and different crude oil feedstocks into the San Francisco Refinery through the Santa Maria facility. Approval of that project contemplated and relies upon another project that would enable that new feedstock into Santa Maria in the future (and certainly within a 10 year window given dwindling traditional supplies) – this Project.

The purpose of the Throughput Increase Project remains to increase, "the volume of products leaving the Santa Maria facility for the Rodeo Refinery via pipeline."[30] As noted in our prior comments, economic feasibility and lack of traditional feedstock supply has driven the company to obtain crude by rail for its San Francisco Refinery. To refine that new feedstock, Phillips 66 had to seek contemporaneous permits for project components enabling tar sands delivery *and* increased flows of intermediate, semi-refined, oils from Santa Maria to profitably refine those new oils at the overall San Francisco Refinery. The FEIR's response to comments still does not provide any credible evidence to the contrary regarding these interdependent project components.

**(ii) The Phillips 66 Rodeo Refinery is Dependent on this Project.**

To recap the evidence: Phillips 66 told investors about its plans to switch to refining tar sands and fracked oils at the San Francisco Refinery. It then sought contemporaneous permits for project components enabling tar sands delivery, and increased flows of intermediate, semi-refined, oils from Santa Maria as well as tar sands and fracked Bakken oil over its expanded Rodeo wharf.[31] Phillips 66 then had to design a way to manage the excess propane and butane present in those new feedstocks that would "bottleneck" the Rodeo end – the Propane Recovery Project. Moreover, Phillips 66 actually designed the Propane Recovery Project based on measurements taken when it was importing non-baseline samples, or "test samples" of tar sands oils and Bakken lookalike oils from Russia.[32] These new oils would change the quality of the San Francisco Refinery's crude slate.

Evidently, plenty of "telling evidence" exists regarding the intimate connection between these projects at both ends of the San Francisco Refinery. The Rodeo end receives supplies of crude feedstock from the San Joaquin Valley Pipeline, but those traditional supplies are "declining with declining San Joaquin Basin production."[33] That decline has driven Phillips 66 to increase capacity at the Rodeo Marine Terminal with "more reliance … on crude imports from foreign sources."[34] Nevertheless, this increased Marine Terminal capacity still cannot meet Refinery production demands. Delivery of substantial amounts of semi-refined intermediate product from Santa Maria is the only other way that the Refinery can receive crude. The tar sands crudes that the Santa Maria Rail Spur Project EIR lists for import are "loaded with

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[30] *See* Fox Rodeo Report at 6, citing Throughput Increase Project DEIR at ES-4, 2-25. (This comment incorporates by reference the abbreviated citations to the expert reports of Dr. Phyllis Fox and Greg Karras, already included in the record.)
[31] *See* Rodeo Marine Terminal Initial Study, cited in Karras Rodeo Report 2.
[32] *See* Karras Rodeo Report 3.
[33] *See* Karras Rodeo Report 1.
[34] *Id.*

propanes and butanes."[35] The diluent required to transport tar sands by rail, into Santa Maria, is also rich in naphtha, a semi-refined product that is sent to Rodeo via pipeline and then into one of the feeds to the proposed Rodeo facility Propane Recovery Unit.[36] The Rail Spur project is further not precluded from importing other tar sands crudes or light crudes that are also rich in propane and butane for recovery at Rodeo. Although the FEIR maintains that no Bakken will come into the SMR via this proposed Project, those statements still call for blind faith until formally included in any land use permit, or even noted as a mitigation measure in the FEIR.

The FEIR again attempts to obfuscate this interdependent relationship by augmenting its prior incorrect claim regarding vapor pressure limits that prevent the transport of a portion of propane/butane-rich product from Santa Maria to Rodeo. As noted above, those responses to corroborating evidence from two refinery experts, are not persuasive and amount to nothing more than "evasive responses to comments" highlighting a defective project description.[37] Overall, the Rodeo Propane Recovery Project depends on projects at the Santa Maria facility and vice versa. These are connected actions that, therefore, must be analyzed concurrently with the direct and cumulative impacts of the proposed Project itself under a programmatic EIR assessment.

#### (iii) Both the Rail Spur Extension Project and the Propane Recovery Project Lack any Independent Utility.

We emphasize that the interdependence of the Santa Maria and Rodeo facilities do not alone evidence the piecemealed review of this Project. More specifically, the Rail Spur Extension Project cannot operate without the implementation of the Propane Recovery Project; otherwise refining at the San Francisco Refinery is bottlenecked.[38] Each project lacks any independent utility. The FEIR response to comments does not provide any substantial evidence to the contrary, in particular as noted above, erroneously relying on 2011 and 2013 data to claim that the Project has independent utility. The Project is piecemealed and the County should review the overall impacts, especially the cumulative impacts, of the overall project.

## IV. THE DEIR'S ANALYSIS OF AND MITIGATION FOR THE IMPACTS OF THE PROPOSED PROJECT ARE INADEQUATE.

As noted in our prior comments, failure to adequately disclose the full extent of the Project's shift in refining a new and different feedstock at the San Francisco Refinery, and each project component necessary to complete that switch, precludes any adequate assessment of Project impacts. The FEIR does not cure that fatal flaw, still suffers from an inadequate assessment of federal preemption of local impacts, and therefore, leaves several significant unmitigated, and unaddressed, impacts to: air quality, public and worker health and safety, water quality and supply, agriculture, biological resources and the local community in the Nipomo Mesa area.

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[35] *See* Fox Report on RDEIR.
[36] *Id.*
[37] *Communities for a Better Environment*, 184 Cal. App 4th at 84.
[38] *See* Karras Rodeo Report 2.

### A. The FEIR Incorrectly Concludes that Certain Mitigation Measures are Preempted.

The FEIR and Staff Report correctly identify that certain mitigation measures could lessen the impacts of the Project, but may be preempted by federal law, and therefore significant environmental and public health and safety impacts will remain. The Staff Report presents a correct and compelling case for denial of the application for the reasons discussed. However, the FEIR incorrectly asserts that certain other mitigation measures would be preempted. Mitigation measures regarding the notification and training of first responders, coordinated oil spill clean-up and incident response planning along the rail line would not be preempted, because these measures are not economic regulations and therefore do not fall under ICCTA. Moreover, even if these measures were preempted, they would likely fall under the local safety hazard exception to railroad safety preemption.

***Preemption Generally***

"Congress may expressly preempt state law through an explicit preemption clause, or courts may imply preemption under the field, conflict, or obstacle preemption doctrines." *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298, 308 (2015). Only express and conflict or obstacle preemption is at issue here. Where, as here, a statute contains an express preemption clause, the task of statutory construction must focus "on the plain wording of the clause, which necessarily contains the best evidence of Congress's pre-emptive intent."[39] In addition, the task "does not occur in a contextual vacuum."[40] Accordingly, consideration must be given to 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."[41] In all preemption cases, the Court should "start 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."[42] When determining whether a federal law does overcome the presumption against preemption, "[t]he purpose of Congress is the ultimate touchstone."[43] Once the preemptive scope of the federal law is determined, consideration must be given to whether the state law falls within the scope of the preemption.[44] Not every state law that touches upon the federally regulated subject matter is invalid. The preemption doctrine "does not and could not in our federal system withdraw from the States either the power to regulate where the activity regulated is a merely peripheral concern of [a federal law]."[45] In deciding whether federal law does withdraw the states' power to legislate, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."[46] The

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[39] *People ex rel. Harris v. Pac Anchor Transportation, Inc.*, 59 Cal.4th 772, 778 (2014).
[40] *Medtronic v. Lohr,* 518 U.S. 470, 485-86 (1996).
[41] *Olszewski v. Scripps Health*, 30 Cal.4th 798, 816 (2003) (*quoting Medtronic*, *supra*, 518 U.S. at 486.)
[42] *Brown v. Mortensen*, 51 Cal.4th 1052, 1059-60 (2011).
[43] *Medtronic*, *supra*, 518 U.S. at p. 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009).
[44] *Perez v. Campbell*, 402 U.S. 637, 644 (1971).
[45] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).
[46] *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224 (1993).

role of this presumption is to "provide[] assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts."[47]

The ICCTA (49 U.S.C. § 10101 *et seq.*) was enacted to abolish direct economic regulation of rail carriers, while ensuring sufficient continuing oversight to prevent market abuses. To this end, it established the Surface Transportation Board, and provided that:

> (b) the jurisdiction of the [Surface Transportation Board] over—
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> (1) transportation by rail carriers, and the remedies provided in this part with operating rules), practices, routes, services, and facilities of such carriers; and
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> (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,
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> 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.[48]

Congress never intended that ICCTA's jurisdiction over the regulation of rail transportation be limitless, however. ICCTA is concerned only with regulations confined to a particular, limited sphere. It does not regulate rail transportation generally. It does not even seek to comprehensively regulate all economic aspects of railroad transport. Rather, ICCTA and all of its statutory predecessors, have only ever been concerned with regulation regarding rates, schedules, fees and corporate structures. The statutory changes brought about by the ICCTA demonstrate a continued legislative focus upon the impact of direct economic regulation by the states, rather than any incidental impact arising from the exercise of traditionally local police powers, such as planning and environmental laws.[49] It is clear that the federal scheme, as set out in the ICCTA, was of limited scope. It was concerned not with preempting any and all state regulations that might have some conceivable, incidental economic effect on a rail carrier, but rather only with preempting regulation dealing directly with rates, schedules, fees and corporate structures. As the plain language of the ICCTA makes clear, only those aspects that deal with economic regulation — the rates; service; the construction, acquisition, and abandonment of rail lines, carrier mergers; and interchange of traffic among carriers — could be preempted.[50]

**(i) CEQA Is Not Preempted by the ICCTA**

The FEIR correctly concludes that the ICCTA does not categorically preempt the application of CEQA to this Project. On its face, section 10501(b) of the ICCTA does not expressly – or "categorically" – preempt CEQA. It states: "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."[51] CEQA does not regulate rail transportation or provide any remedy with respect to the "regulation" of rail

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[47] *Brown v. Mortensen*, 51 Cal.4th 1052, 1060 (2011) (citations and quotations omitted).
[48] 49 U.S.C. § 10501(b).
[49] H.R.REP. No. 104-311, 1st Sess., at 82 (1995).
[50] 49 U.S.C. § 10101 *et seq.*
[51] 49 U.S.C. § 10501(b) (emphasis added).

"transportation."[52] And it certainly does not implicate the economic regulation of rates, schedules, and classifications with which Congress was concerned when it drafted the preemption language in the Staggers Act. The preemption provision in the Staggers Act was recodified and remained substantially unchanged in the ICCTA.

"Congress narrowly tailored the [ICCTA] 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."[53] Accordingly,

> The [ICCTA] 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.[54]

CEQA is not a law regulating the economics and finances of the rail carriage industry. Rather, CEQA is a generally applicable background law for public projects, and it operates at the pre-project planning stage, not at the point where carriers provide rail transportation services to shippers at specific prices. The fact that environmental disclosure and mitigation may alter a proposed rail project which is not within STB's licensing authority, or make the Project more costly is irrelevant to the express preemption analysis. Accordingly, the FEIR is correct in its conclusion that this Project must still undergo the CEQA process.

Even if the County's ability to impose mitigation measures for significant environmental effects identified in the EIR was limited (which it is not), that does not abrogate the obligation under CEQA to disclose and analyze those effects. "That a particular mitigation measure may be infeasible or precluded . . . is not a justification for not performing environmental review; it does not excuse the agency from following the dictates of CEQA and realistically analyzing the project's effects."[55]

**(ii) Mitigation Measures on the Spur Are Not Preempted**

The FEIR correctly concludes that "all activities performed within the Rail Spur Project Site are not preempted by federal law since they would not occur on UPRR property and would not be operated by UPRR employees."[56] Moreover, the FEIR is correct in stating that the

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[52] "Transportation" is defined as "related to the movement of passengers or property, or both, by rail" and "services related to that movement." 49 U.S.C. § 10102(5), (9). Even if CEQA's environmental review and disclosure obligations are considered regulations, they are not related to rail movements. *See Dan's City Used Car, Inc. v. Pelkey*, 133 S. Ct. 1769, 1779 (2013) (state consumer and tort claims are not related to "movement" under a similar statute).

[53] *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

[54] *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) ("[T]he 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) (The "central focus" of the Staggers Act, the Act preceding ICCTA, was "economic regulation of railroads.").

[55] *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal.4th 310, 325 (2010).

[56] FEIR at ES-25, 4-2; *see also* Staff Report, *supra*, at 13.

County, as CEQA Lead Agency, has the authority to impose mitigation measures to reduce or mitigate potential impacts within the Rail Spur Project.

This conclusion is proper because the ICCTA implicates those activities that pertain to the rates, schedules, fees and corporate structures of rail carriers. Unlike UPRR, Phillips 66 is not a rail carrier. While the Surface Transportation Board ("STB") has jurisdiction over rail carriers and transloading facilities *operated by* rail carriers, it does not have jurisdiction over industrial or transloading facilities connected to a railroad, when they are not owned or operated by a railroad.[57] Because the spur is owned and operated by Phillips 66, it is outside the scope of the STB's jurisdiction. Therefore, no measures to mitigate the impacts of the spur are preempted.

**(iii) The ICCTA Does Not Preempt All Measures to Mitigate the Impacts of the Project**

The FEIR incorrectly concludes that several mitigation measures could be preempted by federal law when in fact they are not. Specifically, the FEIR concludes that mitigation measures to improve emergency response and oil spill clean-up along the mainline to reduce impacts to adjacent agricultural crops,[58] sensitive biological[59] and cultural resources,[60] and ground and surface water resources;[61] and mitigation measures imposed along the mainline tracks addressing emergency responder notification and training,[62] are likely preempted by federal law.
These mitigation measures would not be preempted. Although the ICCTA grants exclusive authority to the Surface Transportation Board ("STB") over many aspects of rail transport, the scope of that preemption authority is not limitless. As set out above, the ICCTA gives the STB economic regulatory oversight over the railroad industry.[63] Only those aspects that deal with economic regulation — the rates; service; the construction, acquisition, and abandonment of rail lines, carrier mergers; and interchange of traffic among carriers — might be preempted.[64]

Though it never states so expressly, the FEIR appears to consider preemption by the ICCTA in the context of implied conflict preemption. A measure is not preempted on this basis merely because it may have some impact upon the economic aspects of rail carrier operations. Implied "conflict pre-emption exists 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 and objectives of Congress.'"[65] The importance lies not in the effect of the mitigation measure in question, but "the target at which the state law aims in determining

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[57] *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72-73 (2d Cir. 2011); *Hi Tech Trans, LLC—Petition for Declaratory Order*, 2003 WL 21952136, at *3 (Aug. 14, 2003, S.T.B. No. 34192); *Town of Milford, MA—Petition for Declaratory Order*, 2004 WL 1802301, at *2 (Aug. 11, 2004, S.T.B. No. 34444).
[58] FEIR at ES-9 (agricultural resources).
[59] FEIR at ES-11 (biological resources).
[60] FEIR at ES-11-12 (cultural resources).
[61] FEIR at ES-15 (water resources).
[62] FEIR at ES-14 (public services and utilities emergency response along the mainline rail routes); *see also* corresponding chapters: 1, 4, 4.2, 4.3, 4.4, 4.5, 4.7, 4.8, 4.11, 4.13, and 5.
[63] 49 U.S.C. § 10501(b).
[64] *Id.*
[65] *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (internal quotations and citations omitted).

whether that law is pre-empted."[66] As set out above, CEQA's primary purpose is to protect the environment through informed decisionmaking and careful consideration of feasible approaches to reduce environmental damage. CEQA does not target rail transportation or stand as an obstacle to accomplishing Congress' intent to deregulate the rail industry and make the market more competitive. The fact that a CEQA mitigation measure may incidentally impact the operations of a rail carrier is insufficient to establish preemption by the ICCTA.

On the contrary, these mitigation measures are not preempted. None of the mitigation measures govern or manage the rates, schedules, fees and corporate structures of a rail carrier. They are therefore not expressly preempted by the ICCTA. Nor do the mitigation measures conflict with or pose an obstacle to the Congressional goals of centralizing the economic regulation of rail transportation.

*1. Emergency Response and Oil Spill Cleanup.*

The FEIR and Staff Report consider notification and training of first responders and coordinated oil spill clean-up and incident response planning as measures that are likely to be preempted.[67] However, these measures do not fall under ICCTA's purview of economic regulation and are therefore not expressly preempted. Moreover, neither in the Response to CBE's Comments,[68] nor in the FEIR,[69] is there a clear fact-based explanation as to how emergency response and oil spill cleanup conflict with or poses an obstacle to the Congressional goals of centralizing the *economic* regulation of the rail line. The FEIR is inadequate to the extent that it concludes that these measures are preempted, and therefore should not be certified. Should the Project be approved (which, for the reasons set out in these comments, it should not) these mitigation measures should be imposed, whether or not ICCTA preempts other aspects of the project.

*2. Safety Controls on the Mainline*

Mitigation measure HM-2c requires that the Applicant contract with UPRR such that all mainline rail routes in California will have a Positive Train Control in place. Positive Train Control is "used to prevent train to train collisions, over-speed derailments, switch misalignment, and unauthorized entry into work zones."[70] UPRR are implementing Positive Train Control across UPRR lines, as required by federal law.[71] The FEIR does not explain why it believes that this mitigation measure would be preempted by the ICCTA. Requiring Phillips, which is not a rail carrier, to contract with a rail carrier to use lines that have safety features required by federal law does not amount to a measure that governs or manages the rates, schedules, fees or corporate structure of a rail carrier, and therefore is unlikely to be preempted.

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[66] *Id.,* 1599.
[67] FEIR at ES-9, 11-12, 14-15; Staff Report, *supra*, at 4.
[68] CBE Responses, *supra*, at CBE-11-14.
[69] *See supra* text companying notes 26-30.
[70] FEIR at 4.7-47
[71] FEIR at 4.7-47.

3. *Prohibiting the Refinery from Accepting Crude Oil or Petroleum with an API Gravity of 30 Degrees or Greater.*

Proposed mitigation measure HM-2d would require that the refinery not accept or unload any crude oil or petroleum product with an API Gravity of 30 degrees or greater.[72] This would "reduce the potential for a potential rail accident and loss of containment, and would also improve emergency response in the event of an accident."[73]

The FEIR states that "the County may be preempted by federal law from implementing these measures as they require particular contractual provisions that might be determined to improperly impact interstate commerce or conflict with the Interstate Commerce Commission Termination Act (ICCTA), which preempts state and local laws with respect to rail transportation."[74] This mitigation measure would not affect the economic regulation of the mainline, and thus would not be preempted by ICCTA. The FEIR is inadequate to the extent that it concludes that this mitigation measure is preempted, and therefore should not be certified. The FEIR also contains insufficient information to determine whether the proposed mitigation measure might violate the dormant commerce clause. No information is provided about the API Gravity of crude oil or petroleum product from within California, nor is any information provided about the API Gravity of crude oil or petroleum product from interstate or overseas. In the absence of such information, the conclusion that this mitigation measure "may" violate the dormant commerce clause is unsupported. To the extent that the FEIR contains conclusions not supported by facts contained within the EIR, it is inadequate and should not be certified.

**(iv) "Essentially Local Safety Hazard" Exception to National Uniformity of Regulation for Railroad Safety**

Even if the emergency response mitigation measures, and the mitigation measure prohibiting unloading of crude oil with an API Gravity of 30 degrees or greater, are preempted (which they are not), because they are regulations to protect the safety of the public, they would likely fall under a federal law preemption exception. Federal law expressly provides that state and local entities may implement railroad safety regulations or measures if they are necessary to eliminate an "essentially local safety hazard."[75] There are three conditions to qualify under this exemption. States and local entities can implement railroad safety regulations or measures if (1) they are necessary to eliminate or reduce an "essentially local safety hazard," (2) are not incompatible with federal regulations, and (3) do not unduly burden interstate commerce.[76]

The Response to Comments states that it is "unclear whether mitigation measures [such as adequately preparing local emergency response and oil spill planning] fall under the 'essentially local safety hazard' exception to the ICCTA's preemption provision."[77] Further, the response, without support, states that courts have narrowly construed the types of local

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[72] FEIR at 4.7-88, 4.7-92.
[73] FEIR at 4.7-88.
[74] FEIR at 4.7-92.
[75] 49 U.S.C. § 20106(a)(2).
[76] *Id.*
[77] CBE Responses, *supra*, at CBE-13.

regulations that fall within this exception.[78] To the contrary, the case law generally demonstrates that in the context of local safety hazard preemption, the courts consider the scope of preemption very narrowly, leaving space for state regulation of safety hazards.

*1. Local Safety Hazard*

The expression "local safety hazard" is not defined in the statute providing this exception to preemption. However, the danger of fire along a railway right-of-way is precisely the kind of local safety hazard that may be regulated by state or municipal law or order.[79] In *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 79 Wn.2d 288 (Wash. 1971), the court agreed that the federal Boiler Inspection Act did not preempt the power of individual states to require spark plug arresters.[80] The spark plug arresters served a critical role in fire prevention.[81] The court noted: danger of fires along railroad rights-of-way is "an essentially local safety hazard" and the state could regulate this hazard absent a showing of undue burden upon interstate commerce.[82]

The FEIR recognizes the County's responsibility to mitigate the risks associated with damages from derailments, resulting fires, explosions and spills, local safety hazards wholly analogous to the risk of fire alongside a rail line.[83] The mitigation of air emissions is also needed to limit toxic air, fugitive dust, and greenhouse gas releases from tank cars.[84] Those emissions are as equally dangerous to the health and safety of the public and workers in the vicinity of the rail line, as the risk of an oil spill, fire and explosions. The mitigation measures aimed at reducing such emissions are properly characterized as measures addressed to a local safety hazard.

*2. Mitigation Measures are not Incompatible with Federal Regulations.*

49 U.S.C. § 20106(a) effectively provides that applicable federal regulations may preempt any state "law, rule, regulation, order, or standard relating to railroad safety."[85] This is a high standard. To prevail on the claim that the regulations have preemptive effect, "petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that *pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law*. The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses."[86]

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[78] *Id.*
[79] See, *State v. Chi.*, 79 Wn.2d 288, 293 (Wash. 1971).
[80] *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 79 Wn.2d 288 (Wash. 1971).
[81] *Id.* at 294.
[82] *Id.*
[83] FEIR at ES-14, 27; Staff Report, *supra*, at 5, 15 (agricultural resources), 17 (cultural resources, hazards and hazardous materials), 18-19 (hazard zone, tank car regulations).
[84] FEIR at ES-9-11; Staff Report, *supra*, at 14-17.
[85] *CSX Transp. v. Easterwood*, 113 S. Ct. 1732, 1736 (U.S. 1993).
[86] *Id.* at 1738 (*cited in Southern Pac. Transp. Co. v. Public Util. Comm'n*, 9 F.3d 807, 812 (9th Cir. Or. 1993).

To preempt the mitigation measures that would reduce a local safety hazard, the FEIR must identify federal regulations that it identifies as safety regulations. The FEIR does not do so. In failing to identify federal regulations with preemptive effect, the FEIR is inadequate because it does not require the mitigation measures that would protect local health and safety.

*3. CEQA does not Interfere with Interstate Commerce.*

The mitigation measures in question are made pursuant to the authority granted by CEQA. The Commerce Clause grants Congress power to "regulate Commerce … among the several States."[87] Although the Clause is framed as a positive grant of power to Congress, Congress' authority "necessarily embraces the right to control [] operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.[88] "[F]ederal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.[89] Thus while "[t]his affirmative grant of power does not explicitly control the several states, [] it has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[90] "[A] state law may discriminate against interstate commerce "either on its face or in practical effect."[91] CEQA's primary purpose is to protect the environment through informed decisionmaking and careful consideration of feasible approaches to reduce environmental damage. It is not a statute which, on its face, discriminates against interstate commerce.

A state law discriminates in practical effect when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[92] "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[93]

The FEIR does not provide any evidence that the mitigation measures it wrongly asserts to be preempted would impose a burden on interstate commerce. In the absence of any such evidence, it must be concluded that no such burden exists. In any event, even if those particular mitigation measures did impose a burden on interstate commerce, it is a burden far outweighed by the nature of the local interest involved.

In enacting CEQA, the California legislature exercised its proprietary power to self-govern, and its traditional police powers to protect the health and welfare of its citizens. It did so

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[87] U.S. Constitution, Art I, § 8, cl. 3.
[88] *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342, 351 (1914).
[89] *Id.* at p. 352; *Wisconsin Railroad Comm'n* v. *Chicago, B. & Q.R. Co.*, 257 U.S. 563, 588 (1922).
[90] *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1087 (2013), citations omitted.
[91] *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).
[92] *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960).
[93] *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

by setting out an ordered system to ensure that government agencies reflect upon the impacts of their actions and make fully informed decisions.[94]

The courts have long held that informed decision making and public participation are central to CEQA's fundamental purpose.[95] Informed decision making, moreover, is essential not only to environmental protection, but also to participatory democracy. "Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees."[96] The CEQA process thus "protects not only the environment but also informed self-government."[97] It is because the EIR is an educational tool for the public as well as the decisionmaker that "CEQA's investigatory and disclosure requirements must be carefully guarded."[98] As a tool to enhance participatory democracy and informed governance, CEQA's legitimate local purpose clearly outweighs any incidental burden (of which there is no evidence in the FEIR) which may be placed upon interstate commerce by mitigation measures implemented pursuant to CEQA.

The FEIR erroneously concludes, while offering little justification, that mitigation measures addressing the risk of derailment, spill, explosion and fire; as well as measures addressing the risk of air emissions, are unlikely to survive preemption. It reaches this conclusion despite failing to identify the federal laws that preempt these measures. In fact, emergency responder and oil spill cleanup mitigation measures, being measures to reduce a local safety hazard, are not preempted by reason of 49 U.S.C. § 20106(a)(2).

#### (v) The Project Should Nonetheless Be Rejected Because Important Mitigation Measures are Preempted

The Staff Report and FEIR state that certain mitigation measures along the mainline rail route (e.g., using particular routes to avoid sensitive areas, or modifying UPRR's tracks or operations) would likely be preempted, resulting in unmitigable, unavoidable significant

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[94] *See, e.g.*, Pub. Res. Code § 21000(g) (stating legislative intent that public agencies shall "regulate" activities affecting the environment "so that major consideration is given to preventing environmental damage"); § 21001(g) (requiring public agencies "to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment"); § 21002 ("the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects"); § 21002.1(a), (b).) It is not a tool for the oppression or delay of social, economic recreational development. 14 Cal. Code Regs., § 15003(j).

[95] *See, e.g.*, *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990) (purpose of EIR "is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made"); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal.3d, 376, 394 (1998) ("A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project . . ."); *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (1974) ("an EIR serves to guide an agency in deciding whether to approve or disapprove a proposed project").

[96] *Laurel Heights Improvement Assn., supra*, 47 Cal.3d at 392.

[97] *Id*.

[98] *Assoc. of Irritated Residents v. County of Madera*, 107 Cal.App.4th 1383, 1392 (2003).

impacts..[99] We agree with this analysis. Consequently, the Staff Report was correct in suggesting that the project be denied.

*1. Air Quality and Greenhouse Gas Emission Mitigation Measures*

The FEIR identifies five significant and unavoidable air quality impacts, which as a result must be addressed in a "statement of overriding consideration" if the project is approved in accordance with Sections 15091 and 15093 of the State CEQA Guidelines.[100] The County asserts that these measures are unmitigable because they are likely preempted.

a. Impact AQ.2.

The first impact is identified as AQ.2 and its accompanying mitigation measures are AQ-2a and AQ-2b.[101] This impact is a result of operational activities associated with the Rail Spur Project *within* the County, both on the project site and on the mainline. The activities would generate criteria pollutant emissions that exceed the County's Air Pollution Control District's thresholds.

In response to this impact, the FEIR provides two possible mitigation measures, which are summarized. AQ-2a requires the Applicant to provide a mitigation, monitoring, and reporting plan. Additionally, locomotive emissions must be mitigated through contracting arrangements that require the use of Tier 4 locomotives or locomotives with equivalent emission levels. Using Tier 4 locomotives would provide considerable benefits by reducing: $NO_x$, ROG,[102] and diesel particulate matter ("DPM").[103] Reduced diesel particulate emissions would also lessen the Project's cancer risk.[104] The FEIR asserts that this first mitigation measure may be preempted if it requires use of Tier 4 locomotives on the mainline track. The FEIR does not consider ownership of the locomotives. If they are owned by Phillips, then, because Phillips is not a rail carrier for the purpose of the ICCTA, no question of preemption arises.

Accordingly, to the extent that the FEIR concludes that a mitigation measure requiring use of Tier 4 locomotives may be preempted, it is deficient and should not be certified. However, even if a mitigation measure is imposed requiring use of Tier 4 locomotives, the hazards along the mainline associated with the Project would still be potentially significant.[105] These potentially significant, unmitigable impacts, justify refusing to approve the Project.
Even if the locomotives are owned by UPRR, a mitigation measure prohibiting Phillips 66 from allowing other than Tier 4 locomotives at the refinery would not be. Such a mitigation measure properly seeks to mitigate impacts at the Project site. It is not a measure that seeks to govern or manage the rates, schedules, fees and corporate structures of a rail carrier. The mere fact that it might have some incidental impact on the kind of tanker cars running is insufficient to amount to the kind of regulation that is preempted by ICCTA.

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[99] Staff Report, *supra*, at 4; FEIR at ES-6-7.
[100] FEIR at IST-1-3
[101] FEIR at 4.3-50-52
[102] FEIR at ES-9.
[103] FEIR at ES-9.
[104] FEIR at ES-10.
[105] FEIR at 4.7-90, 92.

b. Impact AQ.3

The second impact is identified as AQ.3 and its accompanying mitigation measure is AQ-3.[106] The impact is a result of operational activities of trains along the mainline rail route *outside* of the County associated with the Rail Spur Project. The activities would generate criteria pollutants that exceed thresholds.

c. Impact AQ.4.

The third impact is AQ.4.[107] It pertains to operational activities at the refinery associated with the Rail Spur Project that would generate toxic emission that exceed the County's Air District thresholds.

d. Impact AQ.5.

The fourth impact relates to operational activities of trains along the mainline rail route associated with the Rail Spur Project which would generate toxic emissions that exceed thresholds.[108]

*2. Tank Car Safety*

The use of safer rail tanker cars may mitigate some of the risk posed by transporting feedstock for the refinery by rail. However, the County may be preempted by the ICCTA from requiring mitigation on the UPRR mainline tracks, and may not be able to require the use of the safer tank car design for cars owned and operated by UPRR.

The significant and unavoidable impact associated with this is identified as HM.2, which relates to the potential for a crude oil unit train's derailment.[109] Such an event would increase the risk to the public in the vicinity of the UPRR right-of-way.

There are five mitigation measures that seek to address this impact. The first is HM-2a, which states that only rail cars designed to FRA, July 23, 2014 Proposed Rulemaking Option 1: PHMSA and FRA Designed Tank Car standards will be allowed to unload crude oil at the Refinery.[110] This type of tank car is the safest design according to the Department of Transportation's proposed rulemaking for high-hazard flammable trains. According to the FEIR, this tank car design would reduce the probability of an oil spill by about 74%.[111] Although the FEIR does not specifically explain why the County may be preempted in implementing this

[106] FEIR at 4.3-55-59.
[107] FEIR at 4.3-64-68.
[108] FEIR at 4.3-73-75.
[109] FEIR at 4.7-44; 4.7-88.
[110] FEIR at 4.7-88. Although the FEIR refers to the "proposed rulemaking," this rule has been finalized. *See* 49 C.F.R. Parts 171, 172, 173, 174 and 179.
[111] FEIR at ES-12, 4.7-21-25.

measure, it may be preempted by the final rule, which adopted tank car design standards less stringent than Proposed Rulemaking Option 1.[112]

Mitigation measure HM-2b states that the rail transportation route with the lowest level of safety and security risk will be used to transport the crude oil to the Refinery. The FEIR does not provide a clear reason for why this measure may be preempted. To the extent it would require management of the schedule and services of a rail carrier the mitigation measure may be preempted by ICCTA.

Mitigation measures PS-4a through PS-4e[113] are included in the public services and utilities section of the FEIR and pertain to the operations of the crude oil train on the mainline UPRR tracks. The PS-4a through PS-4e measures would mitigate the increased demand for fire protection and emergency response services along the rail routes. As discussed above in Section 4.1 (emergency response), and below in Section 6 (local safety hazard), measures pertaining to emergency response will not be preempted because they do not regulate in an area of jurisdiction exclusive to the STB. However, insofar as the mitigation measures require UPRR to use specific tank car designs or special routes (as opposed to placing that obligation on Phillips), then the ICCTA may preempt those measures.

Irrespective of the mitigation measures imposed in regards to the hazards associated with HM.2 (release of crude oil that resulted in a fire or explosion), the impacts will remain Class I.[114] Thus, the Planning Commission should follow the Staff Report's recommendation to deny the Project application.

### B. The FEIR Fails to Adequately Analyze and Mitigate the Project's Air Quality Impacts

#### (i) The FEIR Uses an Inappropriate Baseline Environmental Setting, Rendering its Air Quality Analysis Unreliable.

As more fully highlighted above, the FEIR still suffers from an inaccurate and unstable baseline from which to measure and compare pre and post-Project crude quality. The FEIR's response to comments reveals a baseline determination based on maximum permitted conditions and violates CEQA.[115] "Maximum permitted" levels are "merely hypothetical conditions allowable under permits" and are not representative of current conditions.[116]

The FEIR offers an illogical response to this Supreme Court precedent. The FEIR manipulates this prior Supreme Court decision claiming that it provides "the use of permitted levels for the baseline was not in compliance with CEQA *unless* the permitted levels had already undergone previous CEQA review."[117] What the FEIR's response actually refers to, however,

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[112] *Id.*
[113] FEIR at 4.11-28-29.
[114] FEIR at 4.7-92.
[115] *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310.
[116] *Id.*
[117] FEIR Response to Comments CBE-18.

are those classes of projects that are merely modifications of previously analyzed projects.[118] This Project, "in contrast, cannot be characterized as merely the modification of a previously analyzed project to operate refinery [equipment] without significant expansion of use."[119] As documented in our prior comments, the Project will drastically shift and lock in the San Francisco Refinery to refining a majority new and different crude oil feedstock. Certainly, the Bay Area Air Quality Management District is currently considering adoption of regulations regarding the use of a lower quality oil feedstock at refineries. That consideration has included acknowledgment of the need for adequate application of New Source Review to changing refinery feedstock. Critically, those discussions are based on the understanding that use of a lower quality feedstock does *not* amount to a mere minor modification of prior approved permits, but a more major change/expansion of refinery processes requiring additional environmental review and mitigation.[120]

The FEIR ultimately lands on baseline determinations for several factors that, done correctly, could establish an adequate baseline for the purposes of CEQA review of pre and post-Project crude oil feedstock quality (for instance, BTEX, sulfur and vacuum resid properties). Nevertheless, by relying on its consistent approach of using hypothetical allowable conditions to determine these baseline calculations, instead, results "in "illusory" comparisons that "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts," [which is] a result at direct odds with CEQA's intent."[121]

**(ii) The FEIR Fails to Identify or Mitigate Additional Impacts of Emissions Resulting from the Project's Change in Crude Slate.**

As noted above, the FEIR's analysis of the use of a new and different crude slate is unnecessarily constricted to only mainline emissions; no focus on operational emissions has been added to the FEIR. The FEIR still fails to analyze the impact of refining increased quantities of a lower quality feedstock at Santa Maria, and subsequently, Rodeo. This forecloses a sufficient assessment of local and statewide toxic and climate pollution.

**(iii) The FEIR Fails to Adequately Analyze Significant Climate Change Implications of this Project.**

The FEIR recognizes that "[w]arming of the climate system is unequivocal."[122] The commenters welcome the addition of more recently published sources discussing the adverse impacts of climate change, including a reduction in water quality and supply from the Sierra snowpack; more extreme heat days; exacerbation of air quality problems; more large forest fires; more drought years; impacts on businesses, residences, and infrastructure due to sea level rise; and an increase in the incidences of infectious diseases, asthma, and other health-related

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[118] *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th at 326.
[119] *See id.*
[120] *See* Bay Area Air Quality Management District Refinery Strategy and accompanying proposed rulemaking, available at http://www.baaqmd.gov/rules-and-compliance/rule-development/rules-under-development
[121] *Id.* citing *Environmental Planning Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 250, 358.
[122] FEIR at 4.3-14

problems.[123] In the face of these severe, irreversible effects, the Project admits a climate change impact that is significant and unavoidable.[124] Nonetheless, the FEIR fails to provide a meaningful assessment of the degree of that impact, and underestimates the project's significant climate change impacts. For example, in calculating greenhouse gas emissions, the FEIR includes offsite impacts, but limits those impacts to sources such as "vehicle emissions and other associated transportation emissions."[125] The FEIR fails to provide a complete analysis of the lifecycle GHG impacts from extracting and burning the oil related to this project. The FEIR thus ignores the true climate change impacts of the entire tar sands project.

**(a) The FEIR Fails to Analyze All GHG Emissions from All Components of the Project**

As commenters have noted, the Project is piecemealed. With regard to climate change impacts, the FEIR fails to disclose all of the San Francisco Refinery's GHG emissions that the Project will enable, including at both the Santa Maria and Rodeo ends of the facility.

As acknowledged in the FEIR, the climate change impacts of refining are correlated to the quality of the feedstock refined.[126] In response to comments that a change in the crude oil feedstock will increase emissions of GHGs and co-pollutants, the FEIR states that "[t]he refining of the different crude slate associated with this project would not produce different GHG emissions at the SMR than the normal range of crude oils refined at the SMR."[127] Similarly, the FEIR states: "Phillips 66 expects to continue to receive, blend and process a comparable range of crudes in the future… The potential range of crudes that could be delivered by rail (see Table 4.3.13) have very similar properties in terms of sulfur and vacuum resid, which are the two key drivers in fuel use at the refinery (fuel use is the primary source of CO2 emissions)."[128] (Table 4.3.13 shows some of the crude oil properties that would be different under the future crude oil slate that could result from this project.[129]) As a result, the FEIR concludes that "CO2 emissions would not be expect [*sic*] to change."[130]

This cursory explanation fails to adequately analyze how the change in feedstock could impact GHG emissions. In making this assertion, the FEIR in part relies on the fact that "some Canadian crude oils are currently being processed at the SMR, transported by rail to Bakersfield, then by truck to the SMPS."[131] This response ignores the potential increase in GHG emissions that would result from a significant increase in the amount of Canadian tar sands refined at the San Francisco Refinery, as compared to refining the more traditional blend.

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[123] FEIR at 4.3-13
[124] FEIR at 4.3-79
[125] FEIR at 4.3-16
[126] FEIR at 4.3-76 ("Changes in crude oil quality can change the amount of GHG emissions at a refinery by increasing the energy consumption for processing each barrel of oil.")
[127] Response to CBE Cover Letter Comments, Response CBE-26
[128] FEIR at 4.3-78
[129] FEIR at 4.3-48
[130] FEIR at 4.3-78
[131] *Id.*

CEQA requires an EIR to consider both direct and indirect impacts of a proposed project. Indirect impacts are those that are "caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable."[132] As we pointed out in previous comments, an inextricable link exists between the Santa Maria and Rodeo ends of the SFR. If it foreseeable that the Rodeo facility will meet the demand of the Santa Maria facility's export by the pipeline that connects the facilities. As noted, the FEIR includes offsite impacts, but limits those impacts to sources such as "vehicle emissions and other associated transportation emissions."[133] Indirect emissions are limited to those such as "emissions from vehicles (both gasoline and diesel) delivering materials and equipment to the site and the use of electricity."[134] By limiting the study of GHG emissions in this manner, the FEIR fails to acknowledge the full scope of GHG emissions from the Project. Increased emissions from the Rodeo facility include, but are not limited to, GHG emissions from processing more tar sands. The assertion, in the response to comments, that "[o]ther changes in indirect emissions, such as a change in the GHG emissions at the Rodeo Refinery, are not anticipated" is inadequate.[135]

Furthermore, the assertion that "[t]he additional GHG emissions associated with mining the tar sands, such as steaming or excavation, would occur no matter the destination of the crude oil" is unsupported.[136] Similarly, the FEIR conclusorily states that "[e]xtraction GHG emissions would occur regardless of the status of this project," but does not provide any compelling basis for that assertion.[137] The picture is more complicated than the FEIR reveals, as crude-by-rail terminals can facilitate tar sands mining that would not otherwise occur (and thus result in increased GHG emissions from tar stands production).

**(b) The FEIR's Mitigation of Project GHG Emissions is Inadequate**

The FEIR's mitigation for the Project's increased GHG emissions is vague, speculative, and a potentially improper use of Emission Reduction Credits ("ERCs"). The FEIR would mitigate the Project's potentially massive increase in GHG emissions as follows:

> 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.[138]

An ERC is a credit granted to a facility that voluntarily reduces emissions beyond a certain required level of control. It then provides the authority to emit the regulated pollutant in

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[132] CEQA Guidelines, 14 Cal. Code Reg. § 15358(a)(2)
[133] FEIR 4.3-16
[134] *Id.*
[135] Response CBE-26
[136] Response CBE-26
[137] *Id.*
[138] FEIR at 4.3-78

an amount equal to that original reduction. One principle issue with ERCs is that the emission reductions may have occurred somewhere other than the project location. Although GHG emissions have global impacts, the argument that the location of the original reduction is irrelevant ignores the possibility that increased emissions at the project location – including emissions of harmful co-pollutants – could result in adverse impacts to receptors.

In addition, the FEIR fails to adequately quantify the amount of GHG reductions that could be achieved by ERCs, and fails to provide sufficient detail for the public and decisionmakers to determine whether this mitigation is feasible. In addition, the response to comments fails to adequately respond to comments on the RDEIR regarding Phillips 66's 2007 settlement with the Attorney General and its effects on the feasibility of using ERCs to mitigate GHG impacts of this project. And like the RDEIR, the FEIR fails to address the alternative forms of GHG mitigation recommended by SLOCAPCD, such as onsite renewable energy systems and energy efficiency.

#### (iv) The FEIR Inappropriately Relies on Emission Reduction Credits to Mitigate the Project's Significant Air Quality Impacts

The Project would result in significant increases in emissions of criteria air pollutants (CAPs). The FEIR would mitigate these impacts by requiring a mitigation, monitoring and reporting plan that "shall indicate that, on an annual basis, if the mainline rail emissions of ROG+NOx with the above mitigations [of reducing locomotive emissions through contracting arrangements] 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."[139] Similarly, the FEIR proposes to require "SLOCAPCD-approved onsite and/or offsite emission reductions in ROG+NOx emissions," or contribution to new or existing programs, for emissions within San Luis Obispo County that exceed the applicable thresholds.[140] As discussed above, the FEIR also proposes to mitigate GHG emissions using ERCs. (The FEIR states that SLOCAPCD does not have an emissions reduction program for DPM and that "there is insufficient DPM reductions that could occur at the existing SMR operations to offset the Rail Spur DPM emission."[141])

##### (a) The FEIR Provides Insufficient Information on its ERC Mitigation Measure

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[139] FEIR at 4.3-59 (Mitigation Measure AQ-3)

[140] FEIR at 4.3-50 (Mitigation Measure AQ-2a)

[141] FEIR at 4.3-54. The FEIR confusingly concludes that although "additional emissions of particulate matter from the project site might cause additional days of exceedance" of the PM standard, that due to meteorological conditions "rail spur operations are not anticipated to contribute to additional exceedances of the PM standard" (FEIR 4.3-53). It goes on to say that use of the rail spur could displace crude oil from other sources being used to supply SMR, some of which is delivered via truck through the SMPS. As a result, the FEIR finds that "DPM emissions, with this credit, would be reduced to below the thresholds with mitigation. However, these DPM emissions may still continue to be emitted within SLOC as the crude oil from these other sources may be transported to other refining locations" (FEIR at 4.3-54). The FEIR does not thoroughly explain the degree to which use of the rail spur would displace the use of trucks at the SMR, and the consequent change in DPM emissions.

For ROG + NOx and GHGs, the FEIR provides that Phillips 66 will be required to: "secure SLOCAPCD-approved onsite and/or offsite emission reductions in ROG + NOx emissions or contribute to new or existing programs" for emissions within the county;[142] "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 to not exceed the Air District thresholds for the life of the project";[143] "provide GHG emission reductions credits for all of the project GHG emissions" if GHG emissions exceed the thresholds.[144]

However, as noted in our previous comments on the RDEIR, very little information about the ERCs is provided. The FEIR adds the following information: "Information from the SLOCAPCD (SLOCAPCD 2014) indicate that about 190 tons annually (greater than 1,000 pounds per day) of ROG+NOx of reduction credits are available in SLOC, with the credits associated with the SMR calciner shutdown in 2007 (66 tons) limited in use to the SMR only."[145] This supplemental information is insufficient to address the concerns outlined in our previous comments regarding potential limitations associated with the use of ERCs (or, as explained above, regarding the 2007 settlement with the Attorney General). Furthermore, the FEIR does not commit to permanent retirement of ERCs. Without such a commitment, the mitigation achieved by ERCs would be illusory.

#### (b) Using Credits to Mitigate CAP Emissions Would Increase Emissions in San Luis Obispo County and Along the Main Line

Offsets rely on emission reductions that may have occurred many years in the past, in a different area than the new source of emissions. Such offsets would not counteract current emission increases associated with the Project, and would not protect receptors from adverse air quality impacts. The SLOAPCD has commented on this Project and expressed agreement with the need for actual local reductions of emissions. The County should not approve mitigation measures that would increase emissions of CAPs and GHGs above current levels.

### C. The FEIR Fails to Adequately Disclose, Analyze, and Mitigate Project-Related Hazards and Public Safety Risks.

The FEIR's response to our comments regarding Project public safety hazards rest in large part on its continued denial of the extent of the feedstock switch at the Santa Maria facility and the overall San Francisco Refinery.[146] As illustrated throughout this comment, the record includes insufficient evidence to come to that determination. Consequently, the FEIR does not adequately address the following significant Project impacts.

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[142] FEIR at 4.3-50 (Mitigation Measure AQ-2a)
[143] FEIR at 4.3-59 (Mitigation Measure AQ-3)
[144] FEIR at 4.3-78 (Mitigation Measure AQ-6)
[145] FEIR at 4.3-53.
[146] *See* FEIR Response to Comments CBE-30.

### (i) The FEIR Does Not Adequately Consider the Specific Impacts of Transporting Tar Sands Crude by Rail.

The FEIR identifies the Project impact to Water Resources (WR-3) as significant and unavoidable due to the risk of a crude oil spill along mainline rail routes and roads that could substantially degrade surface water and groundwater quality.[147] The FEIR then continues that such an impact could be mitigated to less than significant levels, requiring a statement of overriding considerations, with implementation of mitigation measures BIO-11 and PS-4a through PS-4e. None of these measures provides sufficient mitigation of the significant water quality impact and reliance upon them taints any statement of overriding considerations.

For instance, mitigation measure BIO-11 would require Phillips 66 to contract with UPRR to include an Oil Spill Contingency Plan.[148] The stated contents of that plan, however, largely depend upon courses of action that have "yet to be formulated" and have "not been subject to analysis and review within the EIR."[149] The EIR includes this plan, which "must be able to demonstrate that response resources are adequate for containment and recovery of 20% of the train's volume within 24 hours," but also contains evidence that it would prove impossible to contain and recover such a spill.[150] It is well established that CEQA is only concerned with *feasible* mitigation measures, and mere adherence to current regulations in the face of such impracticability thwart the statute's goals.

The measure's remaining provisions only provide notification to certain state environmental and emergency response agencies. This does little to cure what simply amounts to improper deferred mitigation under CEQA.[151]

### (ii) The FEIR Fails to Discuss the Public Safety Risks of Refining a Different or Lower Quality Crude Oil Feedstock.

As noted above, references to levels of certain pollutants that would remain "similar" to the status quo at the San Francisco Refinery does not comply with CEQA. This is particularly noteworthy for the increase in contamination from the use of a lower quality crude oil feedstock. The FEIR maintains that BTEX, vacuum resid, sulfur content, for example, will remain "similar" to what has traditionally been refined at the Santa Maria facility.

In regards to corrosion of refinery equipment from the use of a lower quality crude oil feedstock, the FEIR offers two responses that are both inadequate. First, it notes that Phillips 66 "follows generally accepted industry practices," which is well settled under CEQA to not constitute adequate mitigation of a significant impact. CEQA is concerned with *feasible*

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[147] FEIR at IST-52.
[148] FEIR at 4.4-56.
[149] *See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 670.
[150] FEIR at 4.4-56, 7-17; *see eg.* CBE et al. Comments on RDEIR, *citing* EPA's Response to the Enbridge Oil Spill, available at http://www3.epa.gov/region5/enbridgespill/
[151] *See eg. Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1605 [CEQA prohibits "postapproval mitigation measures adopted during the subsequent design review process."]

mitigation measures,[152] and the FEIR fails to demonstrate the practicality of this, and other mitigation measures it presents that merely rely on current set standards. Second, the FEIR claims that Phillips 66 has "approved capital projects planned between now and 2015 to further upgrade piping and equipment" to avoid the impact of piping corrosion and rupture at the Santa Maria Facility.[153] The FEIR does not identify what those projects are, when they will be completed, the exact locations of such replacements, whether they will target sulfur corrosion, acid corrosion, or both, or even whether they were incepted for the purpose of addressing increased corrosion from the use of a lower quality crude oil feedstock. Absent such disclosure, these mitigation measures have also not been properly vetted in the FEIR, amounting to further improper deferred mitigation of public safety hazards.

**(iii) The FEIR's Analysis of Risks at the Project Site and Refinery is Inaccurate and Misleading**

The FEIR states that the increased risks of oil spills, fires, and explosions at the refinery and on the Project Site are less than significant and do not require mitigation (*see* Impact HM.1). However, the disclosure and analysis of these risks is inaccurate and misleading in several key regards, thereby masking significant impacts that must be mitigated.

The FEIR fails to adequately disclose and analyze the risks of oil spills resulting from the new, above-ground 3,525-foot pipeline. The FEIR provides no evidence to support its estimate that a worst-case spill from the pipeline would be 90,800 gallons of crude,[154] and thus provides insufficient information to assess this risk. The FEIR also fails to provide an analysis showing that pipeline spills, including worst-case scenario spills, would be contained by the on-site containment equipment. The FEIR only states that "in the event of a release from the pipeline the oil would drain into the area around the pipeline and unloading racks."[155] The FEIR must provide an analysis and mitigation measures to ensure that spills occurring outside of unloading racks, including a worst-case scenario spill along any portion of the 3,525 foot pipeline, would be contained by the spill containment equipment and would not cause significant impacts to the surrounding environment, including sensitive habitats like the nearby Oso Flaco Creek tributary.

The FEIR also dismisses the possibility of oil spills from tank cars at the Project Site because oil trains would be moving slowly, lowering the likelihood that tank cars would be punctured.[156] However, the Federal Railroad Administration's Office of Safety Analysis accident data show that a large percentage of train accidents occur on yard track at slow speeds, including rates of 11.0, 11.2, and 11.9 yard accidents per yard switching miles during 2013-2015, respectively.[157] The FEIR fails to analyze the risks from on-site train accidents occurring between the mainline to the rail spur, including spills associated with low-speed derailments and valve leaks. Finally, the FEIR's response fails to address comments on the flaws in the risk

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[152] Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School Dist. (1994) 24 Cal. App. 4th 826, 840-843.
[153] FEIR Response to Comments CBE-33.
[154] FEIR at 4.7-43.
[155] *Id.*
[156] FEIR at 4.7-42.
[157] *See* Federal Railroad Administration's Office of Safety Analysis accident database at http://safetydata.fra.dot.gov/officeofsafety/default.aspx.

analysis for on-site crude rail car accidents resulting in pool fires and Boiling Liquid Expanding Vapor Explosions or "BLEVEs."

**(iv) The FEIR's Analysis of the Risks of Derailment and Oil Spills is Inaccurate and Misleading, Resulting in a Vast Underestimate of the Hazards from the Project's Oil Trains**

The FEIR's response fails to adequately address comments that the risk analysis for oil train derailments and oil spills is flawed and misleading. The FEIR evaluates the probability of derailments and oil spills in its Quantitative Risk Assessment (QRA),[158] but the QRA omits critical data and is based on unfounded assumptions, leading to a significant misrepresentations and underestimations of risks. Specifically, the QRA's estimate of oil spill risks from the Project relies on outdated freight train accident data from 2005-2009[159] and omits critical data from 2012-2015 on oil train derailments and associated oil spills, fires, explosions, and large-scale public evacuations. These oil train accidents are summarized by the SLO County Planning Commission,[160] reported in the Federal Railroad Administration's safety database[161] and the Pipeline and Hazardous Materials Safety Administration's Incidents Reports database,[162] and have been widely reported by the media because of the extreme safety hazards to the public and the environment. In omitting these data, the FEIR significantly underestimates the oil spill risks from the Project. The FEIR's response states that the outdated 2005-2009 dataset was used because it "contained additional information that allowed for the estimated effect of FRA Track Class, Traffic Density and Method of Operation (Signaled or Unsignaled) on derailment rate" but the FEIR fails to address why a similar analysis factoring in track class, traffic density, and method of operation was not conducted using the representative and relevant 2012-2015 data on oil train accidents.

Another key flaw is that the QRA uses data for *all freight train derailments* during 2005-2009, instead of looking at the more relevant data for *oil train derailments* through 2015. As demonstrated by the large number of recent catastrophic oil train accidents, the risk of derailments, oil spills, fires, and explosions from extremely heavy oil trains pulling 80 or more potentially explosive tank cars is higher than the average train, and thus it is not appropriate to generalize accident data from *all freight trains* to *oil trains* which carry a greater risk. As a result, the FEIR artificially underestimates the probability of oil train derailments. The FEIR attempts to dismiss this concern by asserting that "there is no reason to believe that crude oil trains derail at a rate different than other freight trains" and briefly references a preliminary analysis without providing this analysis for review. In sum, the FEIR fails to provide an analysis to show that crude oil derailment rates are the same as freight train derailment rates. The FEIR also fails to analyze the higher risks of oil spills, fires, explosions, and public evacuations that accompany oil train accidents and derailments.

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[158] FEIR at 4.7-47 to 59, Appendix H.
[159] FEIR at 4.7-47 to 59, Appendix H.
[160] SLO Planning Commission, Exhibit I—Crude by Rail Accident Table, at http://agenda.slocounty.ca.gov/agenda/sanluisobispo/5611/RXhoaWJpdCBJLnBkZg==/12/n/56210.doc
[161] *See* http://safetydata.fra.dot.gov/officeofsafety/default.aspx
[162] *See* https://hazmatonline.phmsa.dot.gov/IncidentReportsSearch/IncrSearch.aspx

### (v) The FEIR's Worst Case Scenario Spill Analysis is Flawed

The FEIR's response fails to adequately address comments that the worst-case scenario spill analysis is flawed and omits recent data on oil train accidents. The FEIR assumes that the worst-case scenario spill to be 180,000 gallons of crude oil, which is the capacity of approximately six tank cars.[163] However, the Project would receive unit trains pulling 80 tank cars carrying up to 53,532 barrels of crude oil per train, equivalent to 2.24 million gallons.[164] Thus, the potential oil spill size from a Project oil train derailment could be an order of magnitude greater than represented by the FEIR's worst-case scenario. Indeed, FRA and PHMSA data on oil train accidents during 2013-2015 show that oil trains have routinely spilled much more than 180,000 gallons, ranging up to 1.5 million gallons spilled: 1.5 million gallons at Lac-Megantic, Montreal; 630,000 gallons at Aliceville, AL; 630,000 gallons at Galena, IL; 400,000 gallons at Casselton, ND; 362,000 gallons at Boomer, WV; and 260,000 gallons in Gogama, ON.[165] These data clearly show that the FEIR severely under-estimates the worst-case scenario spill from the Project. The FEIR's response to comments attempts to justify its use of a six tank-car spill as a worst-case scenario by stating that six tank cars was the "median number of cars derailed per FRA-reportable, freight-train derailment on Class I mainlines," based on 2005-2009 data for all freight trains. However, the FEIR provides no justification for why the median number of cars derailed—which represents the middle number in a data set—is the appropriate measure for a worst-case scenario estimate, nor why actual oil train accident data were ignored in the worst-case scenario analysis. Indeed, data on oil train accidents during 2013-2015 show that many more than 6 cars routinely derail, ranging up to 63 cars.[166]

## D. The FEIR Fails to Adequately Analyze the Project's Impacts on Local Agriculture and Water Quality and Supply.

The FEIR responds that mitigation measures identified would reduce significant environmental impacts to agriculture and water quality to less than significant levels. None of those measures listed, however, amount to adequate mitigation under CEQA.

The FEIR identifies significant impacts to adjacent agricultural uses.[167] It states that dust and contaminated air emissions, hazardous materials contamination, increased water demands, the spread of noxious weeds, and increased risk of fire or oil spills potentially and adversely affect on-site grazing activities and adjacent off-site agricultural uses.[168] The FEIR, however, identifies mitigation measures WR-1, WR-2, AQ-1f, and BIO-9 to work in conjunction with the design of the Project to avoid and mitigate these impacts to less than significant. It is unclear how these measures would reduce the significant agriculture and water quality impacts.

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[163] FEIR at 4.7-59.
[164] FEIR at ES-5.
[165] *See* SLO Planning Commission, Exhibit I—Crude by Rail Accident Table, at http://agenda.slocounty.ca.gov/agenda/sanluisobispo/5611/RXhoaWJpdCBJLnBkZg==/12/n/56210.doc
[166] *Id.*
[167] FEIR at 4.2-35 (AR.3).
[168] *Id.*

Measure WR-1 requires nothing more than compliance with existing regulations – the California Stormwater Quality Association Best Management Practice Handbook.[169] Moreover, it lists those Best Management Practices to *likely* include certain enumerated measures, but makes no firm commitment to do so.

Measure WR-2 requires an update to the procedures outlined in the Santa Maria Refinery Spill Prevention Control and Countermeasure Plan to include the activities described in this Project – also compliance with existing regulations.

Measure BIO-9 similarly enforces maintenance of the "*required* Dune Habitat Restoration Program,"[170] in order to prevent disturbance by invasive species, and targets construction, versus operational, activities.

Stripping away these mitigation measures, that merely restate current regulatory requirements, or worse, defer mitigation, the Project is left with nothing more than its design features to guarantee against operational impacts to local agriculture. The design of the project as the FEIR states, however, is premised on the assertion that the Santa Maria facility already "handle[s] heavy crude," and, "an increase in tar sand crude process would not have a significant change in the overall properties of the crude processed at the SMR." As illustrated in this and our prior comments, that conclusory statement is not supported by evidence in the record. For instance, a complete shift to tar sands at the Santa Maria facility would drastically increase water usage, and subsequent contamination, at the Santa Maria facility.[171]

The FEIR finally rests on future spill prevention plans to account for any significant local impact to agriculture. Those plans, however, as detailed in our prior comments and above lack sufficient detail to amount to sufficient mitigation under CEQA. The FEIR still fails to provide for any adequate discussion and mitigation of local impacts to agriculture.

### E. The Project is Inconsistent with State and Local Plans.

As highlighted above, the Staff Findings for Denial illustrate several conflicts with State and local plans. The FEIR's response to comments does little to remove such conflicts. Particularly noteworthy, the FEIR still makes vague and ambiguous references to other capital improvement projects that are asserted to remove any inconsistency with safety and hazard investigation plans. The FEIR even states that OSHA establishes rules and regulations covering worker protections at the San Francisco Refinery, but fails to incorporate a discussion of the company's significant history of violations.[172] This is yet another example of where the FEIR equates unchecked conformance to local regulations with sufficient environmental review, in violation of CEQA.

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[169] FEIR at 4.13-36.

[170] FEIR at 4.4-51.

[171] *See* Karras Rodeo Reports 1 and 2; Karras Santa Maria Reports 1 and 2.

[172] *See* CBE et al. Comments on the RDEIR detailing Phillips 66 San Francisco Refinery history of violations.

## V. THE FEIR FAILS TO ADEQUATELY ANALYZE THE PROJECT'S CUMULATIVE ENVIRONMENTAL IMPACTS.

The FEIR still fails to adequately consider the cumulative impacts of the Project, whether the cumulative environmental impacts of other nearby and inextricable refinery expansion projects, or the cumulative impact of even greater refining of tar sands, or other lower quality oil feedstocks not only locally, but also in the Bay Area, California, and globally.

### A. Other Phillips 66 Expansion Projects

The FEIR still fails to consider the cumulative and considerable impact of the Phillips 66 Propane Recovery Project, or the Rodeo facility, on this Project. The FEIR also still fails to consider how shipments of Bakken fracked oils to Phillips 66 in Ferndale Washington could implicate this Project, absent an explicit condition of approval or mitigation measure that prohibits the import of Bakken oils into the Santa Maria facility. The FEIR also fails to consider any cumulative impact of any of the projects we have outlined as piecemealed components of this Project, including the Throughput Increase Project.

The FEIR cites to *City of Long Beach*, to attempt to reduce the scope of its required cumulative impacts analysis, suggesting that, as certain Project impacts, *alone* and in isolation, have been determined to be significant and unavoidable, then "in many cases," it would also implicate an additional cumulatively significant impact.[173] The reference to *City of Long Beach* is misplaced, and does not remove CEQA's requirement to provide an accurate assessment of cumulative impacts in an environmental review document. This is particularly important in this case, given the possibility of the need to craft a statement of overriding considerations which must be based on adequate and complete, or, substantial evidence.[174]

### B. Environmental Justice Implications – A Tremendous Cumulative Impact on an Already Over-Burdened Community

Our prior comments highlighted the community characteristics of Nipomo, Guadalupe and Rodeo. Each community would face a tremendous increase in local and toxic pollution as a result of approval of this Project. Those comments illustrated the particular vulnerabilities of these communities, their existing and disproportionate pollution burdens, and how those would be exacerbated by the added impacts of refining increased quantities of tar sands and other lower quality oil feedstocks at the San Francisco Refinery. We requested the FEIR to include an adequate discussion of these communities and mitigation measures to prevent any further environmental injustice. The FEIR failed to provide any such response, simply restating instead that any further impact on these communities from the Project would prove "significant and unavoidable."[175]

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[173] *See eg.* FEIR Response to Comments CBE-62.

[174] *See supra*, *Families Unafriad to Uphold Rural El Dorado Count*y, 62 Cal. App. 4th at 1342.

[175] FEIR Response to Comments CBE-69 (although still not addressing the Rodeo community.)

## VI. THE FEIR FAILS TO ANALYZE A REASONABLE RANGE OF PROJECT ALTERNATIVES.

Our prior comments identified the FEIR's failure to identify a reasonable range of alternatives and also asked the question: should Phillips 66 be allowed to extend this refining operation for several decades by repurposing the Santa Maria facility to process tar sands oil that is imported by rail? As illustrated in the accompanying expert report, the FEIR's No Project Alternative still does not adequately answer that question.[176] The FEIR's analysis distorts the no project alternative by providing the "train to truck" scenario that is unsupported by objective data, not reasonably likely to occur, and also, ignores safer and lower cost options.

Moreover, CEQA includes a substantive mandate that public agencies not approve projects with significant environmental effects if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those effects.[177] Here, as the FEIR still overestimates the impacts of the No Project Alternative, it is still precluded from identifying a project that lessens or avoids several significant environmental impacts, or, the environmentally superior alternative. Whilst the FEIR's response to comments is correct that an EIR is not expected to identify every single possible alternative to a proposed project, and moreover, what would be reasonably expected to occur in the foreseeable future if the Project were not approved,[178] it is certainly unacceptable for an EIR to then distort the environmental benefits of the No Project Alternative. By failing to adequately describe the No Project Alternative, the FEIR suffers from a flawed analysis of project alternatives.

## VII. CONCLUSION

For the reasons stated above, the FEIR identifies several significant environmental impacts of the Project that warrant its denial. The FEIR still also fails to identify several other significant impacts and remains inadequate under CEQA. If the County rejects its Staff Recommendation, the County must still substantially revise and recirculate the FEIR in order to correct its numerous defects.

Notably, the FEIR still cannot provide a sufficient basis for the County to make a statement of overriding considerations. The document still fails to disclose several significant impacts of the Project. In order to approve the FEIR with these significant impacts unmitigated, the County must make a finding that the benefits of the project outweigh those impacts, and base that determination on substantial evidence.[179] As stated in our prior comments, "minimal new operational employment would be associated with" this Project."[180] Therefore, any socioeconomic analysis and balancing of environmental harms rests on the continued operation of the Santa Maria facility, or in other words, the feasibility of the No Project Alternative. As the analysis of the No Project Alternative itself is distorted and violates CEQA, the County is precluded from making any adequate balancing of interests until the FEIR is substantially

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[176] Karras FEIR Report at 6-12.
[177] *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal. 4th 105, 134.
[178] FEIR Response to Comments CBE-70, citing CEQA Guidelines § 15126.6(e)(2).
[179] CEQA Guidelines §§ 15092, 15093.
[180] FEIR at 6-2.

revised and recirculated for public comment.

For these, and the reasons listed above and detailed in the accompanying attachments, the County should concur with its Staff Findings and deny this Project. Alternatively, the County must reject this FEIR, revise its flawed analyses and recirculate it for public comment under the procedures for a programmatic level EIR.

Sincerely,

Roger Lin
*Communities for a Better Environment*

Shaye Wolf
*Center for Biological Diversity*

Ethan Buckner
*ForestEthics*

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