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DEC 8
SLO CO PLAN & BLDG DEPT

November 24, 2014

By Email:

Docket for Comments (by email to p66-railspur-comments@co.slo.ca.us)

By Certified Mail Return Receipt Requested (7013 3020 0001 1992 5049) and Email:

Mr. Murry Wilson
San Luis Obispo County Department of Planning and Building
976 Osos Street, Room 200
San Luis Obispo, CA 93408
mwilson@co.slo.ca.usg

Re: Union Pacific Comments regarding the Draft Environment Impact Report for the Phillips 66 Crude by Rail Project—Santa Maria.

Dear Mr. Wilson:

Union Pacific Railroad Company ("UP") appreciates this opportunity to comment regarding the Draft Environmental Impact Report ("DEIR") for the Phillips 66 Crude by Rail Project. This letter is intended to respond in particular to issues raised by Mr. Steven Cohn of the Sacramento Area Council of Governments. We ask that this letter be included in the public comments on the DEIR.

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

Safety is UP's top priority. The only effective way to ensure safety is through comprehensive federal regulation. A state-by-state, or town-by-town approach in which different rules apply to the beginning, middle, and end of a single rail journey would not be effective. Congress agrees. Federal regulations completely preempt the application of the California Environmental Quality Act ("CEQA"), and we encourage the Sacramento Area Council of Governments ("SACOG") to participate in the multiple ongoing federal rulemaking processes concerning various aspects of DOT's comprehensive regulatory regime governing safety procedures, equipment, and planning concerning crude-by-rail safety and related matters.

I. UNION PACIFIC IS WORKING CLOSELY WITH OTHER STAKEHOLDERS TO ENSURE THE SAFETY OF CRUDE TRANSPORTATION.

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

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

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

II. THE FEDERAL GOVERNMENT IS IMPOSING MORE STRINGENT REQUIREMENTS FOR SAFE TRANSPORTATION OF CRUDE OIL.

As federal rail authorities recently explained, DOT, through the FRA and PHMSA, "continue[s] to pursue a *comprehensive, all-of-the-above approach* in minimizing risk and ensuring the safe transport of crude oil by rail." Department of Transportation, *Federal Railroad Administration's Action Plan for Hazardous Materials Safety* at 1 (May 20, 2014), available at http://www.fra.dot.gov/eLib/details/L04721. These efforts include not only scores of regulations

governing the safe transportation of hazardous materials, including oil products, found in 49 C.F.R. Parts 171 to 180, but also a host of equipment and operating rules promulgated by FRA, as well as voluntary agreements and Emergency Orders issued over the past year in response to oil spills.

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

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- Equipping crude trains with either distributed power or two-way telemetry end-of-train devices. These technologies allow train crews to apply emergency brakes from both ends of the train in order to stop the train faster.
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III. A Uniform Federal Regulatory Program is Essential To Ensure The Safe Transportation Of Crude Oil.

As the complex regulatory program described above illustrates, clear and uniform federal regulation is needed to ensure that crude oil continues to be transported safely. With respect to rail transportation, federal law preempts most state and local regulation of rail activities. Uniform standards and rules for railroad operations allow the efficient movement of goods among the states. If each state or local community were allowed to impose its own regulations on railroad operations, rail transportation could grind to a halt, because train crews would need to apply different rules or perhaps use different equipment as they move from place to place.

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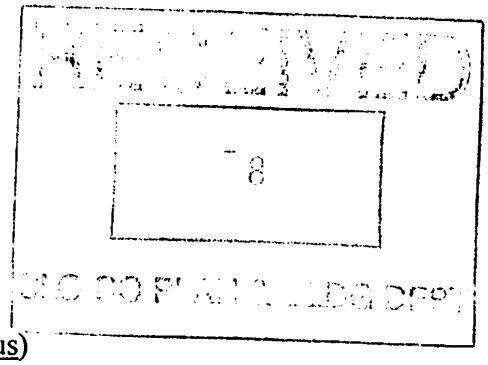

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As stated by the U.S. Senate:

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S. Rep. No. 104-176 at 6 (1995). As the House of Representatives further explained, federal regulation of railroads

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

H.R. Rep. No. 104-311 at 96 (1995). *See also* H.R. Rep. No. 104-422 at 167 (1995) (U.S. Congress describing preemption in order to ensure "uniform administration of the regulatory standards" that apply to railroads). *See also,* H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970) ("[S]uch a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government.") Congress has therefore established federal preemption under several statutes governing rail transportation.

A. Preemption under ICCTA.

1. *Statutory background.*

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

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

"Transportation" by rail carriers broadly includes:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. 49 U.S.C. § 10102(9) (emphasis added).

Further, ICCTA contains an express preemption clause: "the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law." 49 U.S.C. § 10501(b). "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Georgia Public Serv. Com'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (CSX). This provision continues the historic extensive federal regulation of railroads. *See, e.g., Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42, 46 (1st Cir. 2008); *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile* 450 U.S. 311, 318 (1981) ("The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes."); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (Courts have repeatedly recognized the propriety of "a broad reading of Congress' preemption intent, not a narrow one.").

2. *The cases uniformly support a broad application of federal preemption of railroad regulation.*

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

The prohibition against state and local regulation of railroad operations extends beyond purely economic issues; it embraces regulations adopted under the auspices of environmental laws. In *City of Auburn,* the Ninth Circuit affirmed the STB's ruling that local environmental review regulations could not be required for BNSF's proposal to reacquire and reactivate a rail line. *Id.* The court found that the State of Washington's environmental review statute–a statute that is similar to CEQA–could not be applied to a rail project. Similarly, the Second Circuit found that ICCTA preempted a state requirement for a railroad to obtain a pre-construction environmental permit for a transloading facility because it would give the local governmental body the ability to deny or delay the right to build the facility. *See Green Mountain Railroad Corporation v. State of Vermont*, 404 F.3d 638, 641-45 (2d Cir. 2005). In effect, the court found that if a permit allowed the state or local agency to exercise discretion over rail transportation, that permit requirement would be preempted.

Additional cases and STB decisions that have struck down state and local environmental and land use regulations include: *Grafton & Upton Railroad Company* 2014 WL 4658736, *3-5 (STB concluded that ICCTA preempts local regulation of liquefied petroleum gas transloading facility); *Boston and Maine Corp and Town of Ayer*, 2001 WL 458685, *5-7 (STB found that state and local permitting, environmental review, and a noisome trade ordinance were preempted when applied to an automobile unloading facility); *Borough of Riverdale,* 1999 WL 715272 (STB found that local zoning concerning a railroad's construction and operation of a transloading facility was preempted); *Norfolk Southern Railway Company v. City of Austell,*

1997 WL 1113647, *6 (N.D.Ga. 1997) ("ICCTA expresses Congress's unambiguous and clear intent to preempt [city's] authority to regulate and govern the construction, development, and operation of the plaintiff's intermodal facility"); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D. Minn. 1998) ("The Court concludes that the City's demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by [ICCTA]."); *Association of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (local regulations limiting permissible amount of emissions from idling trains and imposing reporting requirements on rail yards were preempted by ICCTA because they "may reasonably be said to have the effect of managing or governing rail transportation"); *Village of Ridgefield Park v. New York, Susquehanna & W. Ry.*, 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted); *Burlington Northern and Santa Fe Ry. v. City of Houston*, 171 S.W.3d 240, 248-49 (Tex. App. 2005) (interpretations of state condemnation law that would prevent condemnation of city land required for construction of rail line preempted); *Flynn v. Burlington Northern and Santa Fe Ry.*, 98 F.Supp. 2d 1186, 1189-90 (E.D. Wa. 2000) (court found that the STB's exclusive jurisdiction over construction and operation of railroad fueling facilities preempts local environmental permitting requirements, even if the STB does not actually regulate such construction or operations).

In short, state and local regulation that seeks to "manage or govern rail transportation" is preempted by ICCTA. *Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010).

3. *The mitigation measures proposed by SACOG do not fall within the exception for exercise of state police powers.*

SACOG argues that the mitigation measures it proposes fall within an exception for state exercise of police power, citing *Assn. of American Railroads v. SCAQMD* (9th Cir. 2010) 622 F.3d 1094, 1097-98; *Green Mtn. Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643.) Neither case supports SACOG's arguments, however.

In the *AAR* decision, the Ninth Circuit held that state requirements that railroads maintain certain records were preempted under ICCTA. While the court recognized that "laws having a more remote or incidental effect on rail transportation" might be allowed, the agency's recordkeeping rules were preempted because they would "apply exclusively and directly to railroad activity." As set forth more fully below, the mitigation measures proposed by SACOG would go well beyond the recordkeeping requirements struck down by the Ninth Circuit and are therefore clearly preempted.

Nor does the Second Circuit's decision in *Green Mountain* support the kind of intrusive remedies proposed by SACOG. In that decision, the court described the kind of traditional and routine exercises of police power that are not preempted under ICCTA:

> It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.

Green Mountain R.R. Corp v. Vermont at 644. The court then offered illustrations, of "[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption." *Id.*

These circumstances fail *all* the elements described in *Green Mountain*. SACOG urges the County of San Luis Obispo to exercise *its discretion to adopt* various mitigations measures—action which *Green Mountain* explicitly describes as being preempted. The proposed mitigation measures are easily distinguished from the types of potentially permissible exercises of state police power, such as the requirements of electrical codes, plumbing and fire codes etc. The vaguely described limitations on storage of crude oil tank cars, analysis of the potential rail alignments and imposing of specific requirements for railroad inspection equipment and protocols all involve *direct, discriminatory regulation* of railroad operations based on the *exercise of discretion* by a state or local agency and are *neither "settled" nor "defined."* These requirements go well beyond routine and non-discriminatory exercise of police power described in *Green Mountain* and therefore fall squarely within the scope of ICCTA preemption.

4. *States cannot circumvent federal preemption of railroad regulations by regulating customer access to rail transportation.*

In the alternative, SACOG claims that the attempt to regulate interstate rail operations can be justified by directing the unlawful regulations at our customers rather than at Union Pacific. This argument is also incorrect.

States cannot circumvent the broad prohibition against local regulation of the interstate rail network simply by directing the regulations at the railroad's customers. Indirect attempts to manage or govern railroad transportation are also preempted by ICCTA. In *Boston & Maine Corp. and Springfield Terminal R.R. Co.*, 2013 WL 3788140, *3, the STB found that ICCTA preemption "prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad's ability to conduct rail operations," even when a railroad is not being directly regulated. In that case, the local regulation was directed at a customer and the private tracks on the customer's property. The STB held that a town cannot deprive a shipper of its "federal right to receive common carrier rail service over the track." *Id.* at *4. When there is a conflict between local regulations and the rights of the shipper and carrier "to request and provide, respectively, common carrier rail service," the "conflict must be resolved in favor of federal law." *Id.* The STB cautioned that it would not allow "impermissible regulation of the

interstate freight rail network under the guise of local regulations directed at the shippers who would use the network." *Id.*

The Fourth Circuit reached a similar conclusion in *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010). In *City of Alexandria,* the city issued a permit for a transloading facility that placed several conditions on the truck deliveries to the site. *Id.* at 155, n.3. Even though the permit was targeted at the truck traffic and not the railroad, the Court found that the action "necessarily regulate[s] the transloading operations of Norfolk Southern" and "directly impact[s] Norfolk Southern's ability to move goods shipped by rail." *Id.* at 159.

The *Springfield Terminal* and *City of Alexandria* decisions are analogous to several court of appeals decisions interpreting Section 306 of the Railroad Revitalization and Regulatory Reform (4-R) Act, 49 U.S.C. § 11503. Section 306 forbids states and localities from imposing any tax that discriminates against a rail carrier. Courts have found that this provision applies not only to taxes levied directly on railroads, but also to taxes on non-rail carriers such as a company providing standardized railroad flat cars to railroads. *See Trailer Train Co. v. State Board of Equalization of the State of North Dakota*, 710 F.3d 468 (8th Cir. 1983). As Judge Posner on the Seventh Circuit has explained:

> Who conducts the activity that is taxed is irrelevant. The tax will increase the cost of the activity, to the railroad's detriment. The statute applies to taxes on rail transportation property and to other taxes if they discriminate against rail carriers; it thus is not limited to cases in which the railroad is the taxpayer.

Burlington Northern R.R. Co. v. City of Superior, Wisconsin, 932 F.2d 1185, 1186 (7th Cir. 1991).

Therefore, the relevant question is to what degree railroad operations are being managed or governed by a state or local regulation. Attempts by a local authority that would place conditions on the delivery of crude oil—even if the regulations are directed at a railroad customer instead of the railroad itself—that "necessarily regulate" the operations of Union Pacific and "directly impact [UP's] ability to move goods shipped by rail" are preempted by ICCTA. *City of Alexandria*, 608 F.3d 159.

In the face of this precedent, SACOG nonetheless argues that "rail operations conducted by entities other than rail carriers are not preempted" and concludes that because the "proposed mitigation measures in the DEIR, and proposed [by SACOG], are directed to matters within the control of Phillips 66 and not the rail carrier, they are not preempted." SACOG letter at p. 8, citing *Town of Milford*—Petition for Declaratory Order (Aug. 11, 2004) STB 34444 [2004 WL 1802301]. While SACOG's position may or may not have merit as to activities conducted by Phillips 66 on Phillips 66's own property, none of the proposed mitigation measures relates to activities conducted or controlled by Phillips 66; indeed all of these proposed measures would

impose obligations on UP operations hundreds of miles from the Phillips 66 project. SACOG's own letter makes it clear that the measures it proposes are directed squarely at Union Pacific's operations on its tracks in Northern California and have little to do with Phillips 66's operations. SACOG letter at pp. 1-2.

Federal law does not permit local authorities to regulate interstate rail operations in this fashion, either directly by regulating Union Pacific or indirectly by regulating our customers. Such a patchwork of local regulations would "undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311 at 96 (1995).

B. **Preemption under the Federal Rail Safety Act.**

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

Under Section 20106(a)(2), these DOT regulations and orders preempt state and local regulations relating to the same subject matter. The text of § 20106 is unambiguous. It plainly states that the terms of § 20106 govern the preemptive force of all DOT regulations and orders related to rail safety. DOT has recognized that "[t]hrough [the Federal Railroad Administration] and [the Pipeline and Hazardous Materials Safety Administration], DOT comprehensively and intentionally regulates the subject matter of the transportation of hazardous materials by rail . . . . These regulations leave no room for State . . . standards established by any means . . . dealing with the subject matter covered by the DOT regulations." 74 Fed. Reg. 1790 (Jan. 13, 2009). *See also CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993) *superseded by statute on other grounds* (FRSA preemption lies "if the federal regulations substantially subsume the subject matter of the relevant state law.").

C. **Preemption under the Pipeline Safety Improvement Act.**

The Pipeline Safety Improvement Act, which created the PHMSA, includes an express preemption provision prohibiting any state or local agency from regulating "the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or

sold as qualified for use in transporting hazardous material in commerce." 49 U.S.C. §5125. Thus, any mitigation measure restricting or specifying the type of equipment to be used in transporting crude by rail is expressly preempted.

IV. UNION PACIFIC WILL NOT ENTER INTO AGREEMENTS RESTRICTING RAILROAD OPERATIONS.

Some commenters have suggested that the City might be able to do an "end-run" around federal preemption by requiring Phillips 66 to enter into agreements with UP restricting UP's operations. For all the same reasons that federal preemption is necessary to achieve a uniform system of regulation, UP will not enter into any such agreement. UP will not agree to any limitation on the volume of product it ships or the frequency, route or configuration of such shipments.

V. CONCLUSION.

SACOG urges the County of San Luis Obispo to exercise its discretion to adopt various mitigations measures—action which *Green Mountain* explicitly describes as being preempted. The proposed mitigation measures are easily distinguished from the types of potentially permissible police power regulation, such as electrical codes, plumbing and fire codes etc. The vaguely described limitations on storage of crude oil tank cars, analysis of the potential rail alignments and imposing of specific requirements for railroad inspection equipment and protocols all involve direct, discriminatory regulation of railroad operations based on the exercise of discretion by a state or local agency and are neither "settled" nor "defined." SACOG's letter also makes it clear that the measures it proposes are directed squarely at Union Pacific's operations on its tracks in Northern California. These requirements go well beyond routine and non-discriminatory exercise of police power and are preempted.

UP supports the federal regulatory efforts to ensure that crude transportation is carried out safely. We encourage SACOG to participate in the rulemaking process. Neither SACOG nor the County of San Luis Obispo can go it alone—federal law and common sense demand that a uniform national approach be adopted and applied to ensure safety.

Regards,

UNION PACIFIC RAILROAD COMPANY

Melissa Hagan

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