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Date: 11/24/2014 02:09 PM
Subject: Letter (11/24/14): Phillips 66 Company Rail Spur Extension Project - SCH#2013071028
Sent by: "Meister, Anthonie" <Anthonie.Meister@alston.com>

Dear Mr. Wilson:

Attached is a letter of today's date from Jocelyn Thompson regarding the Phillips 66 Company Rail Spur Extension Project - SCH#2013071028.

Thank you.

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November 24, 2014

Via E-mail

Mr. Murry Wilson
San Luis Obispo County
Department of Planning and Building
976 Osos Street, Room 200
San Luis Obispo, CA 93408-2040

Re: Phillips 66 Company Rail Spur Extension Project
SCH#2013071028

Dear Mr. Wilson:

On behalf of Phillips 66 Company, I am submitting these supplemental comments regarding federal preemption of the regulation of railroads and railroad operations.

The Revised DEIR for the Phillips 66 Company Rail Spur Extension Project explains that UPRR will operate the unit and manifest trains to and from the SMR on UPRR property and on trains operated by UPRR employees. Executive Summary, p. ES-6, ¶ 1. The Revised DEIR further states "[t]he movements of those trains to and from the Project Site may be preempted from local and state environmental regulations by federal law under the Interstate Commerce Commission Termination Act of 1995 and the Commerce Clause of the United States Constitution." *Id.* Federal law indeed preempts state and local regulation of the railroads, and there is no doubt that the federal preemption extends to state and local environmental regulation such as the mitigation measures discussed in this comment. For a summary of federal preemption and how it affects this Project, see my letter commenting on the first DEIR for the Project dated January 17, 2014. A copy of that letter is attached hereto. AB-01

Subsequent to the January 17, 2014 letter, another California state appellate court answered any outstanding questions concerning the extent of federal preemption of California state and local environmental regulation of railroad activities. In *Friends of the Eel River v. North Coast Railroad Authority*, 230 Cal.App.4th 85 (Cal. Ct. App. 2014) ("*Friends of the Eel River*") the Court held that the Interstate Commerce Commission Termination Act ("ICCTA") "expressly preempts CEQA review of proposed railroad operations." *Id.* at p. 108. In that case, the public agency North Coast

Railroad Authority ("NCRA") had received state funds to repair and upgrade railroad tracks that are located on California's north coast and connected to the national railroad system. The NCRA entered a contract with a private railway company to operate on the rails and certified an EIR that analyzed the environmental impacts of resuming rail operations on part of the tracks. Two groups challenged the adequacy of the EIR, but the Court held federal law preempted the CEQA challenges.

Citing to *People v. Burlington Northern Santa Fe Railroad*, 209 Cal.App.4th 1513 (Cal. Ct. App. 2012), the *Friends of the Eel River* Court stressed, "the ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation." *Id.* at p. 105. One category of state and local action that is categorically preempted is "any form of permitting or preclearance that, by its nature, could be used to deny a railroad the opportunity to conduct operations or proceed with other activities the [Surface Transportation Board] has authorized." *Id.* The Court held CEQA review falls squarely within the category of required preclearance that could deny a railroad the opportunity to proceed with its operations or activities: An "EIR's disclosure of such effects could significantly delay or even halt a project in some circumstances, and in the context of railroad operations, CEQA is not simply a health and safety regulation imposing an incidental burden on interstate commerce." *Id.* at p. 107.

The *Friends of the Eel River* Court distinguished another recent California appellate case, *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (Cal. Ct. App. 2014) ("*Atherton*"). The *Friends of the Eel River* Court noted that the *Atherton* Court never actually decided whether the ICCTA preempted CEQA because the *Atherton* Court held the market participant doctrine served as an exception to preemption in that case. *Id.* at p. 108. The market participant doctrine concerns the special situation where the government is involved in business and commerce, and the doctrine is not relevant to a privately proposed project such as the Phillips 66 Rail Spur Project. Thus, on the issue of whether federal law preempts CEQA review of rail operations, *Friends of the Eel River* is the most recent and definitive word, and it unequivocally held that CEQA review of rail operations is preempted. AB-01

Subjecting the rail component of the Phillips 66 project to CEQA review and the related mitigation measures could deny UPRR the opportunity to conduct its operations or proceed with its rail activities that are already authorized by and subject to federal law. At worst, the mitigation measures discussed in this comment attempt to dictate the design, equipment and operations of a railroad company's activities on the mainline. At the least, the mitigation measures described in this comment impose a high price on the use of rail to transport goods in interstate commerce. These costs or "equivalent" measures were not envisioned by the federal government and are directly counter to Congress' objectives in adopting the ICCTA. The County has already analyzed the impacts from the mainline rail operations in the Revised Draft EIR. Without waiving any preemption arguments, Phillips 66 does not request that the County remove that

information from the Final EIR. However, the County may not rely on the EIR and CEQA to impose mitigation measures aimed at reducing impacts of mainline rail activity.

Below is more detail regarding the specific mitigation measures that are improper and violate federal preemption. The Final EIR should state unequivocally that these mitigation measures are preempted and therefore legally infeasible. Imposing regulatory burdens or costs on the Project tied to its use of rail transportation is directly counter to the ICCTA's purpose of lifting regulatory burdens from such transportation. To avoid repetition, this list refers to the mitigation measures as summarized in the Impact Summary Tables, starting on page IST-1. However, appropriate revisions should be made to all references to these mitigation measures throughout the Revised Draft EIR and Final EIR. AB-01

AR-5 (Revised DEIR, p. IST-1.) – This mitigation measure is aimed exclusively at potential impacts to adjacent agricultural uses along the UPRR mainline. It would require implementation of measures PS-4a through PS-4e and BIO-11. This mitigation measure is preempted for the reasons summarized below under those respective mitigation measures. AB-02

AQ-2a (Revised DEIR, p. IST-1.) – This mitigation measure addresses both emissions onsite at the refinery, and off-site emissions from UPRR locomotives using the mainline rail route. With respect to the latter, the condition would require Phillips 66 to contract with UPRR for the use of specific locomotive classes in delivering crude to the refinery, or to secure other emissions reductions to offset the ROG+NOx and DPM emissions from locomotives operating on the mainline within San Luis Obispo County. The County does not have the legal authority to impose either of these requirements.

The County cannot require the use of specific locomotives because locomotives are inherently part of an extensive interstate network, and dispatch of the equipment affects the wider rail system. Dedication of specific engines to the Phillips 66 project, or to the San Luis Obispo portion of the route, would impose serious burdens on interstate commerce. California has previously recognized the implications of restricting locomotive fleets in this manner. As far back as 1998, the California Air Resources Board acknowledged: AB-03

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

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

Memorandum of Mutual Understandings and Agreements, South Coast Locomotive Fleet Average Emissions Program, July 2, 1998, pp. 4-5.[1] The federal Environmental Protection Agency has reached similar conclusions:

> Class I railroads operate regionally. This is why railroad companies and the Federal Railroad Administration (FRA) have stressed the importance of unhindered rail access across all state boundaries. If states regulated locomotives differently, a railroad could conceivably be forced to change locomotives at state boundaries, and/or have state-specified locomotive fleets. Currently, facilities for such changes do not exist, and even if switching areas were available at state boundaries, it would be a costly and time consuming disruption of interstate commerce. Any disruption in the efficient interstate movement of trains throughout the U.S. would have an impact on the health and well-being of not only the rail industry but the entire U.S. economy as well.

AB-03

62 Fed.Reg. 6366, 6368 (Feb. 11, 1997).[2] The consequences of requiring a specific locomotive fleet within just San Luis Obispo County are even more extreme, and preempted for the same reasons.

The alternative requirement of securing equivalent emission reductions is also preempted. Air emissions offsets are a valuable asset, if already owned by a company, and can be costly to acquire if not. Here, the magnitude of that cost would be directly related to the number of additional train trips operated by UPRR on the mainline. Regardless whether

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[1] The 1998 Railroad Memorandum of Mutual Understandings reveals a second basis of federal preemption that precludes County imposition of proposed Mitigation Measure AQ-2a. Specifically, the federal Clean Air Act gives the federal Environmental Protection Agency exclusive authority to adopt emissions standards applicable to new locomotives and locomotive engines; states and local governments are prohibited from adopting or enforcing "any standard or other requirement relating to the control of emissions from ... new locomotives or new engines used in locomotives." 42 U.S.C. §§ 209, 213. To implement the statutory preemption provision, EPA adopted a regulation specifically declaring a state or local requirement to reduce a local locomotive fleet emissions average to be preempted as an impermissible "other requirement relating to the control of emissions". *See* 40 C.F.R. § 85.1603(c) as promulgated in 63 Fed.Reg. 18978 (April 16, 1998), and currently embodied in 40 C.F.R. § 1074.12. In the same vein, a mitigation measure intended to require dedication of Tier 1 and above locomotives to San Luis Obispo County is preempted by Section 209.

[2] The federal Environmental Protection Agency also explained how fragmented regulation of locomotives can cause modal shift (i.e., a shift from one mode of transportation such as rail to another such as trucks) that results in greater emissions per ton of freight transported. *Id.* See, for example, the analysis of the air quality impacts associated with the No Project Alternative in Section 5 of the Revised Draft EIR.

this cost is imposed on UPRR and passed through to Phillips 66 or imposed directly on Phillips 66, it is a burden on rail transportation that can influence decisions whether to transport by rail or the number of unit trains to receive at the refinery.

The two requirements in this mitigation measure would also interfere with interstate commerce by affecting the cost of rail transportation. As CARB also acknowledged in 1998: "Price is usually the significant determinant in a shipper's choice of modes or routes, with the result that railroad traffic levels and patterns are very sensitive to increases in costs. Overly stringent regulation can severely impact railroad traffic . . ." 1998 Railroad Memorandum of Mutual Understandings, *supra*, p. 5. AB-03

AQ-3 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential air quality impacts of operational activities of UPRR's locomotives traveling along the mainline rail route. It would require that Phillips 66 either contract with UPRR for the use of specific locomotive classes in delivering crude to the refinery, or secure equivalent emissions reductions to offset the emissions from locomotives operating on the mainline in every air district, presumably as far as the Canadian border. This mitigation measure is preempted for the same reasons summarized above under AQ-2a.

AQ-4 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential toxic air contaminants emitted both onsite at the refinery and off-site by UPRR's locomotives travelling along the mainline rail route. It would require implementation of measures AQ-2a and AQ-2b. To the extent this mitigation measure applies Mitigation Measure AQ-2a to the off-site locomotive emissions, this mitigation measure is preempted for the reasons summarized above under AQ-2a.

AQ-5 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential toxic air contaminants emitted by UPRR's locomotives travelling along the mainline rail route by requiring implementation of Mitigation Measure AQ-3. This mitigation measure is preempted for the same reasons summarized above under AQ-3. AB-04

AQ-6 (Revised DEIR, pp. IST-2-3.) – This mitigation measure would require Phillips 66 to provide GHG emission reduction credits for GHG emissions from on-site operations as well as for GHG emissions from UPRR's locomotives travelling on the mainline routes, presumably to the Canadian border. This mitigation measure would impose substantial costs on Phillips 66 for UPRR's mainline rail activities. For the reasons summarized above regarding off-site emissions under AQ-2, this mitigation measure is preempted.

AQ-8 (Revised DEIR, p. IST-15.) – This mitigation measure is aimed at addressing cumulative emissions, and would require Phillips 66 to investigate methods to bring GHG emissions "at the refinery" to zero "for the entire project," including both onsite and off-site measures. The scope of this mitigation measure is not clear. To the extent it

would require mitigation for off-site criteria pollutants or GHGs emitted by UPRR's mainline rail activities, this mitigation measure is preempted for the reasons summarized above under AQ-2 and AQ-6. AB-04

BIO-11 (Revised DEIR, p. IST-3.) – This mitigation measure is aimed at addressing potential impacts associated with transportation along the UPRR mainline by requiring Applicant to enter into a contract with UPRR that contains specified conditions. The County does not have legal authority to require Phillips 66 to enter into a contract with UPRR, or to specify the conditions of a contract to move goods via rail in interstate commerce. This is an indirect way of regulating UPRR, and neither Phillips 66 nor the County has the authority to control UPRR's conduct on the mainline. Under the preemption principles described above, UPRR cannot be subject to such conditions imposed by local agencies.

Moreover, the Revised Draft EIR fails to identify any benefits that would result from Mitigation Measure BIO-11. The Revised DEIR discusses recently adopted SB 861 at pages 4.4-17 to -18 and pages 4.4-47 to -48, as well as other regulatory programs that require preparation and implementation of oil spill prevention and response programs. The mitigation measure would require Phillips 66 to require UPRR to obtain a letter from the California Department of Fish and Game stating that UPRR is in compliance with all aspects of SB 861. The law does not require the Department to provide such a letter, and neither UPRR or Phillips 66 has a means to compel it to do so. The provisions of SB 861 are independently enforceable, backed up with substantial penalty provisions, and the Revised DEIR has not articulated any additional environmental benefit associated with the requirement to obtain a letter from the Department. Likewise, the Revised DEIR has not articulated any environmental benefit associated with the requirement that Phillips 66 require UPRR to provide copies of its spill contingency plan to first responders in the State. SB 861 independently requires the preparation of such plans, and requires that they be submitted to the State's oil spill response administrator for review. Thus the benefits of the plan will be obtained without the impermissible, preempted mitigation measure.[3] AB-05

In addition, UPRR is already subject to and complies with many federal statutes and regulations aimed at reducing the hazards and potential impacts of UPRR's mainline activities. See, e.g., Revised DEIR at pages 4.4-46, 4.7-18 to -31, and 4.7-45 to -46.

CR-6 (Revised DEIR, p. IST-3.) – This mitigation measure is focused exclusively at the potential impacts to cultural resources from train traffic along the mainline rail routes. AB-06

[3] SB 861 itself acknowledges that some aspects of contingency planning may be preempted by federal law. See Gov't Code § 8670.29(e). If these provisions are preempted when adopted by the California Legislature, certainty they are preempted as well when required by a local jurisdiction.

Again, it would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including requiring UPRR to prepare an "Emergency Contingency and Treatment Plan for Cultural and Historic Resources along the rail routes." The County does not have legal authority to require a contract or specify the terms for movement of goods in interstate commerce along the mainline rail routes. This is an indirect way of regulating UPRR's activities, and such regulation is federally preempted. AB-06

HM-2a (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR's mainline. As a means of dictating which train cars can travel the mainline track, the mitigation measure would prohibit the unloading of any cars other than the so-called "Option 1" cars. For the reasons described above under AQ-2a, the County does not have the legal authority to require the use of specific rail cars. Therefore, this mitigation measure is preempted. As discussed in Phillips 66's comments of today's date, the mitigation measure also is infeasible, as the Option 1 cars are not currently available in quantities sufficient to supply the refinery.

HM-2b (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR's mainline. It would require an annual route analysis for rail transportation to the SMR. While this measure references 49 CFR 172.820, it does not simply duplicate the federal code. As written, it could require Phillips 66 to perform the analysis, when Phillips 66 has no access to the information necessary to the analysis. In addition, it would require selection of the route with the lowest level of safety and security risk, without regard to the other selection criteria contained in the federal regulations. This mitigation measure attempts to regulate UPRR's rail routes, which is expressly preempted by federal law as described above. UPRR's rail routes are a part of an extensive interstate network, and use of specific rail routes affects the wider rail system. Local regulation of routing within California would impose serious burdens on interstate commerce, and the County does not have the legal authority to require this mitigation measure. In addition to being preempted, the measure is infeasible, as Phillips 66 has no ability to direct the route for trains operated by UPRR. Finally, the Revised DEIR does not describe any environmental benefit associated with this impermissible condition beyond the benefits achieved from the federal regulatory program already in place, and the routing technology described at page 4.7-22 of the Revised DEIR. AB-07

HM-2c (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR's mainline tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including specification of track and equipment design. Specifically, the mitigation measure would require "Positive Train Control (PTC) be in place for all mainline rail routes in California that could be used for transporting crude oil to the

SMR." The County does not have legal authority to impose design and equipment specification on UPRR. Nor can the County regulate UPRR indirectly by imposing a contracting requirement on Phillips 66. This is an indirect way of regulating UPRR's activities, and the measure is federally preempted. Under the preemption principles described above, UPRR cannot be subject to railroad design and equipment conditions imposed by local agencies.

In addition, the Revised DEIR does not describe any environmental benefits that would result from the impermissible condition. UPRR is already subject to and complies with many federal statutes and regulations aimed at reducing the hazards and potential impacts of UPRR's activities. The Revised DEIR explains that Positive Train Control is already required by federal law, and that UPRR has already been installing it within California. See Revised DEIR at page 4.7-46. The Revised DEIR states that the mainline routes between Roseville and the refinery and Colton and the refinery have already been upgraded. AB-07

HM-2d (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR's mainline tracks. It would require implementation of measures PS-4a through PS4e. This mitigation measure is preempted for the reasons summarized below under measures PS-4a through PS4e.

PS-4a (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including a requirement that quarterly hazardous community flow information documents be provided to all first response agencies along the mainline rail routes within California. The County does not have legal authority to require a contract or specify the terms for movement of goods in interstate commerce along the mainline rail routes. Federal law specifies certain information that the railroads must collect and provide to first responders. AB 861 imposes further requirements in this regard. UPRR's rail routes are a part of an extensive interstate network. Local regulation would impose serious burdens on interstate commerce, and is preempted. AB-08

PS-4b (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at operations on the mainline UPRR tracks. As a means of dictating which rail cars can travel the mainline track, the mitigation measure would prohibit the unloading of any cars other than the so-called "Option 1" cars. For the reasons described above under AQ-2a, the County does not have the legal authority to require the use of specific rail cars. Therefore, this mitigation measure is preempted.

PS-4c (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract,

including requiring "annual funding for first response agencies along the mainline rail routes within California that could be used by the trains carrying crude oil to the Santa Maria Refinery to attend certified offsite training for emergency responders to railcar emergencies . . . ." This mitigation measure is preempted for the reasons summarized above under PS-4a. Moreover, both federal law and SB 861 establish training requirements. Existing law imposes fees on the railroads and the owner of the oil to fund the training. The Revised DEIR does not describe these existing (and for SB 861, newly amended) training programs and fees as in any way inadequate, and does not describe any environmental benefits of the mitigation measure that will not already be accomplished by the existing (and newly amended) regulatory programs.

PS-4d (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including requiring "annual emergency responses scenario/field based training . . . ." This mitigation measure is preempted for the reasons summarized above under PS-4a. AB-08

PS-4e (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including that "all first response agencies along the mainline rail routes within California that could be used by trains carrying crude oil traveling to the Santa Maria Refinery be provided with a contact number that can provide real-time information . . . ." This mitigation measure is preempted for the reasons summarized above in PS-4a.

WR-3 (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require implementation of mitigation measures BIO-11 and PS-4a through PS-4e. This mitigation measure is preempted for the reasons summarized above under those respective mitigation measures. AB-09

TR-4 (Revised DEIR, p. IST-40.) – This mitigation measure is aimed exclusively at potential impacts of operations associated with train movements on the mainline UPRR tracks. The measure would require Phillips 66 to work with UPRR to schedule train deliveries so as not to interfere with passenger trains traveling on the Coast Rail Route. The County does not have the legal authority to regulate UPRR's delivery schedules, as that condition may have a direct impact on UPRR's mainline rail traffic far beyond the borders of the County. For the reasons described above, any indirect or direct regulation by the County of UPRR's mainline rail traffic is expressly preempted by federal law. Impacts on UPRR's mainline rail traffic will also impose serious burdens on interstate commerce. And CEQA does not justify the imposition of this impermissible condition: The Revised DEIR indicates that there is no significant impact even without mitigation. AB-10

Reduced Rail Deliveries Alternative (Revised DEIR, p. ES-15, ¶ 2; p. 5-11, ¶ 4.) – In addition to the mitigation measures listed above, the Revised DEIR describes a project alternative to reduce rail deliveries that is also preempted. This alternative would limit train deliveries to the Santa Maria Refinery to a maximum of three unit trains per week (instead of the proposed deliveries five times per week) and an annual maximum of 150 trains. The Revised DEIR states, "if the County is preempted from applying mitigation to the UPRR mainline air emissions, then this alternative would serve to reduce the severity of the significant and unavoidable air quality impact." Revised DEIR, p. 5-15. Elsewhere the Revised DEIR states the "primary source of emissions of ROG+NOx and diesel particulate is the diesel powered train locomotives while operating on the refinery site and along the mainline." Revised Draft EIR, p. 4.3-46. Thus, this alternative is designed to restrict train traffic on the mainline in order to limit emissions from trains travelling on the mainline. This alternative cannot be advanced as a replacement for mitigation measures that are federally preempted because the alternative itself is preempted. Local governments do not have the authority to regulate or limit the volume of traffic on the mainline. Moreover, a local government cannot impose limitations on a local unloading facility in order to limit the mainline activity that is beyond its direct jurisdiction. *See Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150, 159 (4th Cir. 2010). AB-11

Please do not hesitate to contact me if you have questions or require any additional information related to preemption.

Very truly yours,

Ann Wann FOR

Jocelyn Thompson
ALSTON & BIRD LLP

JT:amm
Attachment

cc: Whitney McDonald (w/attachment)

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January 17, 2014

Via E-mail and U.S. mail

Whitney McDonald
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1055 Monterey Street
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Re: Phillips 66 Company Rail Spur Extension Project, SCH # 2013071028
Federal Preemption of State and Local Regulation of Railroads

Dear Whitney:

The objective of the Phillips 66 Rail Project is to facilitate delivery of crude oil to the Santa Maria Refinery via rail from various points of origin across North America. The Project includes extension of the existing rail spur in order to facilitate feedstock delivery by rail. The draft environmental impact report for the project quantifies the impacts of rail activity outside of the refinery site, but states that the train movements "may be preempted from local and state environmental regulations by federal law under the Interstate Commerce Commission Termination Act of 1995." In fact, there is no uncertainty regarding federal preemption of state and local regulation of the railroads, and there is no doubt that federal preemption extends to state and local environmental regulation. The Final EIR should be definitive on this point.

In light of federal preemption, CEQA and its significance thresholds should not be applied to impacts resulting from mainline rail activities, and those impacts may not be considered by state and local agencies in reaching their decisions to grant, deny or condition discretionary permits. As a corollary, the impacts from mainline rail operations may not be used in determining mitigation under CEQA, either for the mainline rail operations themselves, or for the remaining components of the project.

I. The Interstate Commerce Commission Termination Act Preempts State Regulation of Operations of Railroads.

The federal government has long exercised near-exclusive regulatory power over the railroads, beginning with the Interstate Commerce Act of 1887 (ch. 104, 24 Stat. 379). Nearly 100 years later, as that law continued to govern many railroad operations, the United States Supreme Court characterized it as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Congress has a sustained history of regulating the railroads to the exclusion of the states, and courts have repeatedly upheld Congress's power to do so.[1]

Federal preemption of regulation of the railroads was strengthened in 1995 with passage of the Interstate Commerce Commission Termination Act ("ICCTA"). The Act was intended to reenergize a moribund railroad industry and promote competition. The Interstate Commerce Commission was eliminated. In its place, the Surface Transportation Board was given exclusive authority to regulate the construction, operation and abandonment of railroads, together with a mandate to reduce regulatory barriers (49 U.S.C. § 10101) and apply exemptions whenever regulation is not necessary to carrying out Congress's stated policy objectives (49 U.S.C. § 10502(a)).

Section 15051(b) provides in relevant part:

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

[1] *See, generally*, more than 100 years of cases summarized in *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998).

(Emphasis added.)

Federal preemption of the regulation of railroads is exceedingly broad. Indeed, as noted by one court, "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transportation, Inc. v. Georgia Public Service Commission,* 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Congress made a number of changes to federal law to eliminate a state regulatory role over railroad operations. The ICCTA removed prior statements of regulatory cooperation between federal and state governments, and removed sections providing for joint federal and state regulatory bodies. *Id.* at 1583-84. The ICCTA also removed state jurisdiction over wholly intrastate railroad tracks, because even intrastate operations ultimately affect the flow of interstate commerce. *Id.* and at 1585. Accordingly, courts have repeatedly found that there are no regulatory gaps for states to fill. In other words, states may not regulate railroad operations even in the absence of federal regulation:

> By preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulation and reviving the railroad industry.

Id. at 1583.[2]

II. The ICCTA Preempts State and Local Environmental Pre-clearances such as Environmental Review Under the California Environmental Quality Act.

Federal preemption under the ICCTA is not limited to economic regulation. Preemption extends as well to state and local laws establishing pre-construction review or requiring environmental pre-clearances.

This question was considered by the Ninth Circuit Court of Appeals in *City of Auburn v. United States*, 154 F.3d 1025 (1998). The case involved a proposal from Burlington Northern and Santa Fe Railway (BNSF) to reacquire a segment of rail line, make repairs and improvements (including replacement of track sidings and snow sheds, tunnel improvements, and communication towers), and reinstitute service. BNSF initially submitted applications to the local authorities, but during the permit review process the

[2] In addition to the express statements of intent in ICCTA itself, the court found additional support in the legislative history, citing S. Rep. No. 176, 104th Cong., 1st Sess. 14 (1995), "explaining that ICC Termination Act 'should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill'." *Id.* at 1581.

railroad contended that local environmental review was precluded by federal regulation. The Surface Transportation Board and the Ninth Circuit agreed that the ICCTA preempted local environmental review of the reopening of the railroad.

The City of Auburn had argued that the ICCTA preempted only economic regulation by the states, and did not preempt application of state and local *environmental* laws. The Ninth Circuit rejected this argument:

> In fact, there is nothing in the case law that supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress preemption intent, not a narrow one.
>
> *****
>
> Auburn attempts to distinguish its permitting requirements as environmental rather than economic regulation, claiming this is a 'traditional state police power' that Congress did not intend to preempt. It correctly points out that courts have declined to preempt state environmental regulation in some other contexts . . . . However, the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.

Id. at 1031, 1032. In addition to the broad language of express preemption, the Ninth Circuit noted the difficulty in distinguishing between economic and environmental regulation

> [G]iven the broad language of § 10501(b)(2) . . . the distinction between 'economic' and 'environmental' regulation begins to blur. For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

Id.

CEQA in particular has been found to be preempted by the ICCTA. For example, in *DesertXpress Enterprises, LLC*, STB Finance Docket No. 34914, the Surface Transportation Board considered the company's request for a declaratory order that its proposed project to construct a 200-mile high speed passenger rail line between Southern California and Las Vegas was not subject to state and local permitting laws in Nevada or California, including CEQA. The Board confirmed that the project qualified for Board

jurisdiction in that it involved transportation by a rail carrier. As such, "State permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Action, will be preempted." Decision on Petition for Declaratory Order, June 25, 2007, at 5.

Even the information disclosure aspect of CEQA may be preempted by ICCTA. *See, e.g., Ass'n of American Railroads v. South Coast Air Quality Management District,* 622 F.3d 1094, 1096 (9th Cir. 2010) holding that a South Coast Air Quality Management District rule requiring railroads to report emissions from idling trains was preempted by the ICCTA.

Although Congress intended states to retain traditional "police power reserved by the Constitution",[3] this has proven to be a very small exception to the ICCTA's preemptive effect. States and local governments may apply regulations designed to protect public health and safety where such regulations "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain Railroad Corp. v. State of Vermont,* 404 F.3d 638, 643 (2nd Cir. 2005). Environmental pre-clearances do not meet this test where "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." *Id.* By definition, CEQA does not meet this test because CEQA attaches only where an agency faces a discretionary decision to approve or disapprove a project. 14 C.C.R. §§ 15002(i)(2), 15357, 15378. Therefore, application of CEQA to railroads and rail operations is preempted by the ICCTA, and cannot be saved by the retention of traditional police power.

III. ICCTA Preemption Applies to Continued and Expanded Use of Existing Rail Lines.

ICCTA preempted more than the regulation of new lines and abandonment of existing lines. Section 10501 gives the Surface Transportation Board exclusive authority over "transportation by rail carriers" as well as the "operation" of tracks and facilities. Accordingly, state and local laws that would burden the use of existing rail lines also are preempted.

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[3] H.R. Rep. No. 104-311, 104th Cong., 1st Sess., at 95-96 (1995) *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08.

Preemption applies even where a state or local government regulation is not directed expressly at the mainline rail transportation of cargo, but at local facilities used to move the cargo from the railroad to the next step in the chain of commerce. For example, in *Norfolk Southern Railway Company v. City of Alexandria,* 608 F.3d 150 (4th Cir. 2010), the railroad began operating an ethanol transloading facility to transfer bulk shipments of ethanol from railcars onto surface tanker trucks for local distribution and delivery. No new rail lines were required as part of the project. The city objected to the increase in ethanol movement, and adopted a new ordinance regulating transportation of bulk materials, including ethanol, within the city. The city also unilaterally issued a permit to Norfolk that purported to limit the materials that could be hauled, the routes, times of day, etc. The city attempted to avoid preemption by focusing the ordinance and permit on the trucks that would distribute the cargo, rather than on the trains or the transloading operation.

Even so, the ordinance and permit were preempted because they "directly impact Norfolk Southern's ability to move goods shipped by rail." As explained by Norfolk's trainmaster, a limit on the number of trucks leaving the facility directly affects the number of railcars that can be unloaded, which in turn could affect the movement of trains in Norfolk's yard and throughout its rail system. Thus, the court concluded that the conditions restricting ethanol distribution by truck "necessarily regulate the transloading operations". 608 F.3d. 150, 159. In addition, the court found the ordinance and permit imposed an unreasonable burden on rail transportation because "the City has the power to halt or significantly diminish the transloading operations by declining to issue haul permits or by increasing the restrictions specified therein."

Clearly, restrictions on unloading operations are preempted where they have the effect of imposing burdens on interstate rail transportation.

IV. California Recognizes That Federal Law Preempts Its Regulation of Railroad Operation.

The State of California has long accepted that federal law preempts its authority to apply its environmental regulations to rail carriers and rail operations.

For example, in 1998, when the California Air Resources Board sought to reduce emissions from locomotive engines, it negotiated with the railroads for voluntary reductions rather than applying California law. *See*, Memorandum of Mutual Understandings and Agreements, South Coast Locomotive Fleet Average Emissions Program, July 2, 1998. In 2005, the Air Resources Board again negotiated for voluntary actions to reduce emissions from activities at rail yards within the state. *See*, ARB/Railroad Statewide Agreement, Particulate Emissions Reduction Program at

California Rail Yards, June 2005. The 2005 agreement summarizes federal preemption as follows:

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

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

Recently, the California Attorney General has asserted that the Interstate Commerce Commission Termination Act preempts application of the California Environmental Quality Act to the California High Speed Rail train system. As the Attorney General explained:

> Courts and the STB [Surface Transportation Board] uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate.

Supplemental Letter Brief filed August 9, 2013, in the matter of *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, No. C070877, at p. 3. After an extensive review of statutory and case authority, the Attorney General concluded:

> Railroads under the jurisdiction of the STB are therefore not subject to remedies imposing state or local environmental pre-clearance requirements because such regulation represents, "per se unreasonable interference with interstate commerce".

Id. at 12. Although the High Speed Rail Authority case concerns the proposed construction of a new rail line, ICCTA preemption is not limited to that context. As the

Attorney General noted, ICCTA preemption applies to railroad operations as well as to new construction:

> There are two types of facially preempted state regulation:
>
> (1) any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to **conduct some part of its operations** or to proceed with activities that the Board has authorized, and
>
> (2) state or local regulation of matters directly regulated by the Board such as construction, **operation**, and abandonment **of rail lines**; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.

Id. at pp. 9-10 (emphasis added; citations omitted). Accordingly, CEQA is preempted regardless whether the project is construction of a new rail line or increased traffic on a line already in operation.[4]

V. ICCTA Implications for the Phillips 66 Rail Project.

Unlike the situations in *DesertXpress* and *Norfolk Southern Railway v. City of Alexandria*, Phillips 66 accepts state and local regulation of construction and operation within the refinery site based on the specific facts of this project. Even so, the environmental review and permitting of the project must be conducted in a manner that does not infringe on federal preemption of the regulation of railroad operations. Federal preemption affects the review and permitting in three important ways. First, the impacts from mainline rail operations should not be subject to CEQA conclusions regarding significant impacts. Likewise, the impacts of operations on the mainline may not be considered in deciding whether to approve or disapprove the proposed project. Finally, project approval may not be conditioned on implementation of mitigation measures or alternatives aimed at reducing impacts of mainline operations, or that would otherwise burden such transportation.

The first point is moot. The Draft EIR has already quantified impacts from additional trains on the mainline track based on operation of the locomotives over a several thousand mile journey from one possible point of origin to the refinery. Further, the Draft EIR concludes that the project will have significant adverse environmental

[4] Even where not facially preempted, state and local regulation is preempted where the facts demonstrate that the particular action would have the effect of preventing or unreasonably interfering with railroad transportation. *See DesertXpress*, *supra*, STB Decision at p. 3, n.4.

consequences if these impacts are not mitigated. It is impossible to un-ring the bell; therefore—without waiving any preemption arguments—Phillips 66 does not request that the information be removed from the Final EIR. However, the County must carefully avoid impermissible uses of this information.

Mitigation measures aimed at reducing impacts of mainline rail activity are impermissible burdens on transportation by rail carriers engaged in interstate commerce. It would not be appropriate for the County to define the mitigation obligation of the project based on the impacts from operation of the railroad on the mainline tracks. In particular, proposed mitigation measures AQ-2a and AQ-3 would violate ICCTA preemption. These measures would require Phillips 66 to either contract with Union Pacific for the use of specific locomotive classes in delivering crude to the refinery, or provide off-site emissions reductions to offset the emissions from locomotives operating on the mainline within San Luis Obispo County. The County does not have the legal authority to impose either of these alternative requirements.

The first alternative seeks to influence which railroad equipment operates within San Luis Obispo County. Locomotives are inherently part of an extensive interstate network, and dispatch of the equipment affects the wider rail system. Dedication of specific engines to the Phillips 66 project, or to the San Luis Obispo portion of the route, would impose serious burdens on interstate commerce. California has previously recognized the implications of restricting locomotive fleets in this manner. As far back as 1998, the California Air Resources Board acknowledged:

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

1998 Railroad Memorandum of Mutual Understandings, *supra*, pp. 4-5.[5] The federal Environmental Protection Agency has reached similar conclusions:

[5] The 1998 Railroad Memorandum of Mutual Understandings reveals a second basis of federal preemption that precludes County imposition of proposed Mitigation Measure AQ-2a. Specifically, the federal Clean Air Act gives the federal Environmental Protection Agency exclusive authority to adopt emissions standards applicable to new locomotives and locomotive engines; states and local governments are prohibited from adopting or enforcing "any standard or other requirement relating to the control of

> Class I railroads operate regionally. This is why railroad companies and the Federal Railroad Administration (FRA) have stressed the importance of unhindered rail access across all state boundaries. If states regulated locomotives differently, a railroad could conceivably be forced to change locomotives at state boundaries, and/or have state-specified locomotive fleets. Currently, facilities for such changes do not exist, and even if switching areas were available at state boundaries, it would be a costly and time consuming disruption of interstate commerce. Any disruption in the efficient interstate movement of trains throughout the U.S. would have an impact on the health and well-being of not only the rail industry but the entire U.S. economy as well.

62 Fed.Reg. 6366, 6368 (Feb. 11, 1997).[6]

The second alternative of off-site emission reductions also is preempted. Air emissions offsets are a valuable asset, if already owned by a company, and can be costly to acquire if not. Here, the magnitude of that cost would be directly related to the number of additional train trips operated by Union Pacific on the mainline. Regardless whether this cost is imposed on Union Pacific and passed through to Phillips 66 or imposed directly on Phillips 66, it is a burden on rail transportation that can influence decisions whether to transport by rail or the number of unit trains to receive at the refinery. The County is preempted from imposing this burden, directly or indirectly, just as the City of Alexandria was preempted from regulating local truck distribution of ethanol as a means of addressing concerns relating to rail transport and transloading.

Both options in AQ-2a and AQ-3 also would likely interfere with interstate commerce by affecting the cost of rail transportation. As CARB also acknowledged in 1998: "Price is usually the significant determinant in a shipper's choice of modes or routes, with the result that railroad traffic levels and patterns are very sensitive to increases in costs.

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emissions from ... new locomotives or new engines used in locomotives." 42 U.S.C. §§ 209, 213. To implement the statutory preemption provision, EPA adopted a regulation specifically declaring a state or local requirement to reduce a local locomotive fleet emissions average to be preempted as an impermissible "other requirement relating to the control of emissions". *See* 40 C.F.R. § 85.1603(c) as promulgated in 63 Fed.Reg. 18978 (April 16, 1998), and currently embodied in 40 C.F.R. § 1074.12. In the same vein, a mitigation measure intended to require dedication of Tier 1 and above locomotives to San Luis Obispo County is preempted by Section 209.

[6] The federal EPA also explained how fragmented regulation of locomotives can cause modal shift (i.e., a shift from one mode of transportation such as rail to another such as trucks) that results in greater emissions per ton of freight transported. *Id.*

Overly stringent regulation can severely impact railroad traffic . . ." 1998 Railroad Memorandum of Mutual Understandings, p. 5.

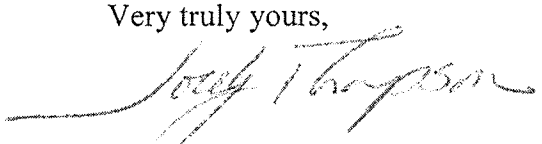
The Reduced Rail Deliveries alternative also is preempted. This alternative would limit train deliveries to the Santa Maria Refinery to a maximum of three per week (as opposed to five per week for the proposed project) and an annual maximum of 150. The Draft EIR states, "If the County is preempted from applying mitigation to the UPRR mainline air emissions, then this alternative would serve to reduce the severity of the significant and unavoidable air quality impacts." Draft EIR, page 5-14. As noted elsewhere in the Draft EIR, more than 99% of the ROG and NOx emissions attributed to the project come from operation of the locomotives on the mainline. Draft EIR, page 4.3-43. Thus, this alternative is designed to restrict train traffic on the mainline in order to limit emissions from trains travelling on the mainline. This alternative cannot be advanced as a replacement for mitigation measures that are federally preempted because the alternative itself is preempted. Local governments do not have the authority to regulate or limit the volume of traffic on the mainline. Moreover, as shown in the *City of Alexandria* case, it may not impose limitations on a local unloading facility in order to limit the mainline activity that is beyond its direct jurisdiction.

Finally, the County should not consider the impacts of operation of the mainline railroad in reaching a decision on the proposed project. The significant impacts attributed to the proposed project are in fact consequences of rail operations in interstate commerce. It would be improper for the County to deny permits for extension of the existing rail spur and associated equipment as a means of preventing an increase in traffic on the mainline.

As noted, the Draft EIR already has analyzed the impacts of mainline rail operations. Therefore, at this juncture, we suggest that the Final EIR must unequivocally state that these impacts are beyond the reach of CEQA, and that any mitigation measures or alternatives aimed at these impacts are preempted and therefore legally infeasible. Imposing regulatory burdens or costs on the project tied to its use of rail transportation is directly counter to the ICCTA's purpose of lifting regulatory burdens from such transportation.

Please do not hesitate to contact me if you have questions, or require any additional information related to preemption.

Very truly yours,



Jocelyn Thompson

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