Phillips 66
Santa Maria Refinery
2555 Willow Road
Arroyo Grande, CA 93420

January 27, 2014

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

Subject: Transmittal of Phillips 66 Comments on
Phillips 66 Company Rail Spur Extension Project
Public Draft Environmental Impact Report and
Vertical Coastal Access Project Assessment
SCH# 2013071028

Dear Mr. Wilson:

Thank you for the opportunity to comment on the above matter. You and your staff are to be commended on what amounts to an excellent Draft EIR.

Phillips 66 Company has a few comments regarding the document, which are reflected in the attachment to this letter.

Please do not hesitate to contact me if you have any questions regarding our comments.

Sincerely,

Jerry D. Stumbo
Santa Maria Refinery
Site Manager

JDS:sm

Attachment

L-14-007
EEF170

Phillips 66 Company Rail Spur Extension Project
Public Draft Environmental Impact Report and
Vertical Coastal Access Project Assessment
SCH# 2013071028

Phillips 66 Comment Summary Table

#	Page Number	Paragraph, Table or Figure	Subject of Comment (Specific Item or Language)	Comment/Explanation of Issue	Recommended Action
1	General	Throughout	Federal Preemption	Please see attached letter with additional details. All information in the letter is incorporated herein as a comment.	Please see attached letter addressing, among other things, the following issues: • Impacts from mainline rail operations should not be subject to CEQA conclusions regarding significant impacts. However, because the information has already been provided in the DEIR, we do not see any benefit to deleting it from the FEIR. • All mitigation measures (e.g., AQ-2 and AQ-3) and alternatives (i.e., Reduced Rail Deliveries alternative) targeting impacts associated with mainline rail operations should be revised such that they only address the onsite project components.

P66-1

Phillips 66 Comment Summary Table

2	ES-3, 1-4, 4.12-21, Throughout	Multiple Locations	Bakken field	In numerous locations, the DEIR states or suggests that "The most likely [crude oil] sources would be the Bakken field in North Dakota or Canada." This statement is incorrect and should be deleted throughout the document. The SMR processes heavy sour crude as described in Section 4.7.1.2 and is not equipped to process more than nominal volumes of light sweet crude such as that from the Bakken oilfield.	Delete statements suggesting that the Bakken oilfield is the most likely source of crude oil and clarify that the SMR processes heavy crude oil not light crude. Clarify that the EIR preparer selected the Bakken field only based on its distance from the SMR to facilitate a reasonable representative assessment of project elements for study. Clarify that the statements in the DEIR asserting that the Bakken oilfield is the most likely source is incorrect.	P66-2
3	ES-5 & 8	ES-5 – Section B 2nd paragraph on the page ES-8 – Noise and Vibration	Unloading Time Consistency	On ES-5, the DEIR specifies ten hours and on ES-8 it specifies10-12 hours.	Suggest making all references 10-12 hours.	P66-3
4	ES-6 and Section 4.3 (Air Quality and Greenhouse Gases	Throughout	Off-site emissions reductions	In numerous locations, the DEIR specifies that mitigation will include off-site emission reduction programs. The anticipated emission reduction programs for mitigation are for onsite reductions of emissions at SMR.	The DEIR should be changed globally to delete the word "offsite" and specify the use of "SLOAPCD approved reductions" rather than "SLOAPCD approved offsite reductions."	P66-4

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5	ES-7, ES-10	Multiple Locations	Available spill containment or cleanup equipment	The DEIR states that "…there would likely be no oil spill containment or cleanup equipment available, and it would likely take some time for emergency response teams to mobilize adequate spill response equipment." We disagree that such a sweeping generalization is accurate in all instances because UPRR maintains a nationwide system of spill response infrastructure and personnel.	This speculative sentence should be deleted or substantiated.	P66-5
6	ES-8	Noise & Vibration – 2nd Paragraph	Editorial	"This includes the time need to position……" "…nighttime nose standards could be exceeded during train positioning operations when locomotive are operating east of the unloading racks. This is the area closest to residential….." Noise. Locomotives. Closest TO…	Replace need with needed. Edit as indicated	P66-6
7	ES-9	Transportation Water Resources	Editorial & Clarification Editorial	Editorial – "…potentially interfere with schedule trains…." Scheduled. Clarification – First the DEIR states that there is potentially some interference and then that there is no interference. "Implement…." Implementing. Or implementation of. Delete the comma in the same sentence.	Minor Edit Clarify Minor Edit	P66-7

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8	1-5	Possible CDFW Permit	Correct Reference	The DEIR incorrectly points to Sections 1601 – 1607 of the CA Fish and Game Code. The reference should be to Sections 2050 et seq.	Edit reference	P66-8
9	2-11	Tail Track	Description	"…and move from the front and back of the rail cars." This is sort of confusing and not very descriptive.	Suggest wording to "and move from the front TO the back of the rail cars."	P66-9
10	2-12	Figure 2-6	Removed Drain Tank Pumps Air Eliminator	The diagram is inaccurate in that it reflects the Drain Tanks having pumps going to the oily water treatment system. The new plan is to vacuum truck it out and treat it; possibly through the oily water system with common liquid but if a spill occurs, the oil will be treated and used. Also there is only one (1) air eliminator for ease of operations.	Correct diagram	P66-10
11	2-14	2.3.4 Unloading System – 1st paragraph, last sentence 3rd Paragraph 4th Paragraph	Unloading Arm Air Eliminator Carbon Beds	"…unloading stations would consist of an unloading arm and…." We are no longer using unloading arms. They will be unloading hoses. There is now one (1) common air eliminator. Suggest rewording to say carbon beds. The reason is twofold. 1. Phillips may wish to install multiple beds in series to reduce the number of change outs. 2. Two different types of catalyst are required for the removal of VOCs and H2S. Thus, two trains in series.	Edits as described	P66-11

Phillips 66 Comment Summary Table

12	2-17	2.3.10	Drain Tank Transfer Pumps	Delete, "Two pumps would transfer……oily water system." The tanks will be emptied out with a vacuum truck and disposed of appropriately. In the event of a spill or fire, the same would apply. In other words, contact water would normally go to the refinery oily water system, but fire or oil would be treated differently and appropriately.	Edit as described	P66-12
13	2-21	2nd Paragraph	Number of train cars	The car specifications for unit trains are subject to continued safety and engineering improvements that could affect the length of the car. To allow flexibility to use the current and safest cars through the life of the project, the specifications should be changed to specify that unit trains will be 80 cars. An estimated total volume is acceptable, but the specificity regarding 73 or 80 cars should be deleted.	Revise sentence to state that unit trains will consist of 80 railcars carrying approximately 27,500 gallons each.	P66-13
14	2-22	2.5.1 #1.	Unloading Arm	For all sentences that state unloading arm, suggest changing to unloading spot or unloading hose.	Edit as described	P66-14
15	2-23	2.5.1 #2	Missing Word	"At each rack the first unloading would be…." Add "hose" after unloading. Change "unloading arm" to "unloading hose." "It is estimated…..20 cars (10 at each of the two racks)." Suggest adding at the end of the sentence, "…..two	Edit as described	P66-15

Phillips 66 Comment Summary Table

		2.5.1 #4	Missing Word	racks), including moving, switching, and decoupling." There is no mention of decoupling after the next ten tankers are lined up. In between the 7th and 8th sentence, suggest mentioning the decoupling before moving the empty cars to Track 5. ".....operations would connect to front of the empty....." Suggest "... operations would connect to THE front of the empty...."		P66-15
16	2-27	2.5.3	c/w	Complete With		P66-16
17	Aesthetics	Section 4.1	Throughout	It's not clear if the view simulations and the aesthetics analysis in general recognizes and accounts for the proposed grading, particularly toward the east end of the rail spur. As shown in Figure 4.1-11, the eastern end of the tracks will be located 10-20 feet below the surrounding grade. Much of the spur east of the existing coke facility will also be set below grade reducing visibility from the east.	Clarify discussions and update as appropriate	P66-17
18	4.1 - 21	Mitigation Measures AV-1a Fig. 4.1-11 Also on ES-6	*a. An earthen berm shall be constructed around the eastern perimeter of the rail spur. The berm shall be a minimum of 10 feet tall* *e. No disturbance shall occur*	Cannot meet both criteria set forth in measure. If an earthen berm is to be constructed at the east end of the project, additional area of disturbance would be required. 1.The berm height of 10 to 20 feet with side slopes of 2.5 to 1 per geotechnical slope stability	Consider changes	P66-18

Phillips 66 Comment Summary Table

			outside of the identified area of disturbance shown on the site-grading plan.	requirements, would require 90 to 100 feet east of the existing project fence boundary. 2.The berm shape shown on figure 4.1-11 is a horseshoe. The limits extend past that of the existing disturbance envelope as noted in 1 above and in the north south direction too. 3. In order to provide the berm to the heights requested, the area of disturbance would need to extend eastward another 100 feet to allow for space to construct the berm and the width would exceed the 250 current allotment. 4. If berm is constructed, it would need to be outside the limits of the fenced perimeter for security reasons. Placing the fence to encompass the limits of the proposed berm would create a dead zone for security views on the back side of the berm. 5. Perimeter fence has lighting for security reasons. If berm was inside the fence line, lights would illuminate the back side of the berm and make it visible from highway 1.		P66-18
19	4.3-22	1st Paragraph	Throughout	Throughput	Minor Edit	P66-19

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20	4.3-40	Section 4.3.4.1		Discussion of construction emissions indicates that with the implementation of construction equipment controls for DPM, DPM levels would be below thresholds. However, Table 4.3.12 shows that the quarterly project DPM emissions (0.15 tons) exceed the Tier 1 threshold of 0.13 tons.	This should be discussed in the residual impact section.	P66-20
21	4.3-42	Paragraph After List 3rd List – 1st Point	Loading Arms "Train travel would be from the Refinery…."	Suggest making "loading arms" read more generic and specify that they are not loading but they are unloading. Suggest "unloading piping" but maybe make an explanation earlier in the document that the piping includes an arm or hose and associated piping upstream of the pumps. Since this is an unloading facility, it would be more accurate to describe the travel as from the oilfield to the refinery.	Minor Edits	P66-21
22	4.4-17	BIO-1	Nipomo Mesa Lupine	Nipomo Mesa lupine was not observed in the project area during focused surveys for the project during the appropriate season when the known populations onsite were blooming. While additional pre-construction surveys of the project area may be conducted, it is not feasible to require that the project wait for a "normal rainfall season." That qualifier should be deleted.	Modify Measure	P66-22

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23	4.4-26	BIO-6b	Oak Impacts	This measure should be modified to recognize that no impacts to oak trees are anticipated. The preparation and County review and approval of the described Oak Tree Replacement, Monitoring, and Conservation Plan should only be required if impacts to oak trees are proposed.	Modify Measure	P66-23
24	4.7-57 4.7-57/58	1st Paragraph, 3rd Sentence 5th Paragraph & Last Paragraph	Drain Pumps Thermal Radiation Injury Levels	"Two pumps would……water system." This is no longer true. In the event of a spill, the tanks will be emptied out with vacuum trucks and the waste properly treated. The oily water system most likely couldn't handle that amount of oil and/or fire water foam. 800 meters or 500 meters? Also, the rest of the document uses standard units. Change for consistency.	Minor Edits	P66-24
25	Noise & Vibration	Section 4.9	Throughout	It's not clear if the noise and vibration modeling and the analysis in general recognizes and accounts for the proposed grading, particularly toward the east end of the rail spur. As shown in Figure 4.1-11, the eastern end of the tracks will be located 10-20 feet below the surrounding grade. Much of the spur east of the existing coke facility will also be set below grade attenuating noise and vibration.	Consider changes	P66-25
26	4.11-18	1st Paragraph	Wrong Word	"…during the unloading operations ARE the refinery…" At.	Minor Edit	P66-26

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27	4.13-12	2nd to Last Paragraph	Drain Tanks	"…to two parallel 30,000 gallon rectangular…." Three (3) 20,000 gallon tanks. Capacity of 60,000 gallons is still the same. Delete the mention of the pumps as the pumps are no longer to be installed.	Minor Edits	P66-27
28	5-3	2nd Paragraph	Title	"….Santa Maia Pump Station…." Maria.	Minor Edit	P66-28
29	9-12	9.3.3 2nd paragraph and related assumption on 9-13 2nd paragraph, Table 9-5, and throughout Chapter 9.	Private Crossing	The DEIR states that it is uncertain whether or not docent led hikes would require a change in the classification of the railroad crossing from private to public. We disagree. Any docent-led hikes would be coordinated, managed, and led by the County or their designee and not by Phillips 66, and would provide public access requiring a change in the classification of the railroad crossing and grade-separation.	Clarify that docent-led hikes will require a change in the classification of the railroad crossing and grade-separation.	P66-29

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January 17, 2014

Via E-mail and U.S. mail

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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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