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April 14, 2016

Via U.S. and Electronic Mail

Amy Million
Community Development Department
City of Benicia
250 East L Street
Benicia, CA 94510

RE: **Valero Appeal of Planning Commission Denial of Use Permit for Valero Benicia
Crude-by-Rail Project**

Dear Ms. Million:

Attorney General Kamala D. Harris submits the following comments regarding Valero Refining Company's ("Valero") appeal of the Benicia Planning Commission's denial of a Use Permit for its Crude-by-Rail Project ("Project").¹ This Office previously submitted comments on the Project's draft Environmental Impact Report (EIR), urging the City to correct several deficiencies in its analysis of environmental impacts flowing from an increased demand in rail services to the Project facility, including public-safety risks specific to crude-by-rail operations.

In its appeal of the Planning Commission's decision to deny the Use Permit, Valero has asserted that the Interstate Commerce Commission Termination Act (ICCTA) prohibits the City from taking those same rail-related impacts and public-safety risks into account in determining whether to approve or deny the Project. We disagree. For the many reasons set forth below, ICCTA does not preempt or constrain the City's discretionary decision-making authority where, as here, the City is exercising that authority with respect to a project undertaken by an oil company that is not subject to the jurisdiction of the Surface Transportation Board (STB).

The Project proposes improvements to Valero's Benicia refinery that, if approved, will draw up to 100 tank-cars of crude oil per day, on interstate rail lines. With this and other projects like it, California is faced with a dramatic increase in the amount of fossil fuels transported by rail into the State for domestic processing and/or shipment abroad, including highly flammable crude oils from North Dakota and coal from Utah. As the Final EIR recognizes, these rail shipments will have significant and unavoidable impacts on California's

¹ The Attorney General submits these comments pursuant to her independent power and duty to protect the environment and natural resources of the State. See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 1415.

citizens and environment, including adverse impacts on air quality and the potential for an accident causing death or severe personal injury. Indeed, several crude-by-rail crashes have resulted in catastrophic consequences, including one derailment in downtown Lac-Mégantic, Canada, that killed 47 people.

As indicated in the Attorney General's previous letter, where, as here, a local agency is vested with discretionary authority to determine whether to approve a project within its jurisdiction,² California law requires the agency to analyze and disclose the full scope of the project's foreseeable environmental impacts. This requirement ensures that the agency is fully informed of the consequences of its action, and thus that any discretionary action is ultimately in the public interest. This legal duty is not circumscribed by ICCTA for this Project. In fact, for Benicia to turn a blind eye to the most serious of the Project's environmental impacts, merely because they flow from federally-regulated rail operations, would be contrary to both state and federal law.

Background

This Office submitted comments on the Draft EIR in 2014, in which we asserted, among other things, that the City had failed to properly analyze the Project's foreseeable impacts on public safety and the environment, including impacts both related and unrelated to rail transportation. The City subsequently revised the Draft EIR, correcting many of the noted deficiencies in its analysis of rail-related impacts.³ Pursuant to this revised analysis, the City found eleven significant and unavoidable impacts caused by the transport of crude oil to the refinery, including significant and unavoidable impacts to air quality, biological resources, and greenhouse gas emissions. The City also analyzed the risks to public health and safety presented by the transport of hazardous materials and found that they, too, presented a significant and unavoidable impact.

Due to these impacts, City Staff has concluded that the Project's benefits do not outweigh its significant and unavoidable environmental impacts. Nonetheless, City Staff also argues that federal preemption prohibits Benicia from considering the Project's rail-related impacts in determining whether to approve the Project. Specifically, City Staff has asserted that Benicia is "legally prohibited" from denying the Project based on the rail-related impacts disclosed in the Revised Draft EIR. Valero agrees with City Staff, asserting, "the City Council's hands are, in effect, tied by the law of federal preemption."

We disagree that the City is prohibited from considering the Project's eleven significant and unavoidable rail-related environmental impacts when exercising its local land use authority. Where, as here, an oil company proposes a project that is not subject to STB regulation and over

² Neither the City nor Valero assert that the Project is not subject to the City's discretionary permitting authority.

³ To the extent that the Final EIR has not addressed the deficiencies outlined in this Office's previous comment letter, we reiterate the objections to the adequacy of the City's analysis.

which a public agency retains discretionary permitting authority, it would be a prejudicial abuse of discretion for that agency not to consider all of the project's foreseeable impacts in exercising its authority.

Discussion

While ICCTA may preempt certain local permitting authority over activities constituting "transportation by rail carrier," ICCTA does not preempt the City's permitting authority over this Project: an oil company's proposal to construct a new service road, 4,000 feet of pipeline, tank-car unloading racks, and new private rail tracks at the refinery, and to replace and relocate tank farm and underground infrastructure.

CEQA Background and Statutory Overview

The purpose of CEQA (Pub. Res. Code, § 21000 et seq.) is to ensure that, when a public entity takes a discretionary action such as approval of Valero's Use Permit, it considers the foreseeable environmental impacts before taking that action. (§§ 21000, 21001, subd. (d); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) Accordingly, a public agency with discretionary authority to approve a project must publicly disclose the project's potentially significant direct and indirect environmental impacts, and – if feasible – impose measures to mitigate or lessen those impacts.⁴ (§§ 21002, 21002.1.) This process yields a final assessment of the project's environmental impacts, and on the basis of that information, and all other available information regarding the costs and benefits of the project, the agency exercises its discretionary authority to issue a decision. A failure to include all of a project's potential environmental impacts in the CEQA analysis, or to disregard that information in making a decision like the one regarding Valero's Use Permit, not only would defeat the purpose of CEQA, but would be an abuse of discretion. (See *Kings Cnty. Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, *reh'g denied and opinion modified* (July 20, 1990) ["A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."]; *Assoc. of Irrigated Residents v. Cnty. of Madera* (2003) 107 Cal.App.4th 1383, 1391.) Importantly, CEQA does not dictate a particular project outcome: A lead agency may approve a project, even if that project will have significant environmental impacts. (Pub. Res. Code, § 21002.1(c); Guidelines, §§ 15043 and 15093.)

Scope of Preemption Under ICCTA

Because the Project applicant Valero is not a rail carrier and not acting pursuant to STB authorization, ICCTA simply has no application to Valero and its proposed refinery upgrades. ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers," and therefore

⁴ The fact that the agency may lack authority to impose a particular mitigation measure, as where that authority is preempted, does not relieve the agency of the obligation to analyze and consider that impact when deciding whether to approve a project. (*Ctr. for Bio. Diversity v. S. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal.4th 310, 325.)

preempts state or local regulation only if the activity at issue is performed by a rail carrier. (See 49 U.S.C. § 10501(b)(1); *New York & Atlantic Railway Co. v. Surface Transportation Board* (2nd Cir. 2011) 635 F.3d 66, 72). But Valero is not a “rail carrier” constructing a project subject to STB’s exclusive jurisdiction; it is an oil company engaged in a project entirely removed from STB’s regulation. (See 49 U.S.C. § 10102(5); *Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, NJ*, FD No. 34192 (S.T.B. served Aug. 14, 2003) 2003 WL 21952136 at *4.) Federal preemption does not apply because Valero’s Project involves constructing ancillary refinery infrastructure over which Union Pacific, the actual rail carrier, will maintain no ownership or operational control and over which the STB has no jurisdiction. (*Sea-3, Inc.-Petition for Declaratory Order*, FD No. 34192 (S.T.B. served March 17, 2015) 2015 WL 1215490 at *4. [“The Board’s jurisdiction extends to rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier, the rail carrier holds out its own service through a third party that acts as the rail carrier’s agent, or the rail carrier exerts control over the third party’s operations.”])

The scope of ICCTA’s preemption is broad, but not unlimited: Preemption applies only to state or local laws that may reasonably be said to have the effect of ‘manag[ing]’ or govern[ing]’ rail transportation,” while allowing continued application of state laws that have “a more remote or incidental effect on rail transportation.” (*Fla. E. Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331.) Courts have interpreted the plain language of ICCTA’s preemption provision to categorically preempt a state or local law if that law operates either (1) to deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, or (2) to regulate matters directly regulated by the STB, including the construction, operation, and abandonment of rail lines. (*People v. Burlington N. Santa Fe R.R.* (2012) 209 Cal.App.4th 1513, 1528.) State actions that do not fall into one of these categories may be preempted as applied only when they would have the effect of preventing or unreasonably interfering with railroad transportation. (*Ibid.*)

Both Valero and City Staff incorrectly argue that the City’s denial of Valero’s Use Permit will somehow impermissibly interfere with Union Pacific’s rail operations. However, applying ICCTA’s preemption analysis, the City’s denial of Valero’s Use Permit is not categorically preempted, because it would neither (1) deny Union Pacific the ability to conduct its operations or proceed with activities the STB has authorized; nor (2) regulate matters directly regulated by the STB. The City’s action with respect to Valero’s Project does not “regulate” Union Pacific or interfere with STB-authorized activities or STB-regulated operations.

Nor is the City’s action preempted “as applied” to Valero’s Project, because it does not have the impermissible “effect of preventing or unreasonably interfering with” Union Pacific’s railroad operations. (*Burlington, supra*, 209 Cal.App.4th at p. 1528.) While the City’s denial of Valero’s Use Permit may diminish any prospective economic advantage Union Pacific may have enjoyed if Valero’s Project were constructed, this is, at best, “a more remote or incidental effect on rail transportation.” (*Fla. E. Coast Ry. Co., supra*, 266 F.3d at p. 1331 see also *Cal. Div. of Labor Stnds. Enforcement v. Dillingham Constr. N.A.* (1997) 519 U.S. 316, 334 [no preemption where statute “alters the incentives, but does not dictate the choices” of the federally regulated entity].) Union Pacific has no vested right in the completion of Valero’s Project, and denial of

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Valero's Project would not prevent or unreasonably interfere with Union Pacific's rail operations.

Conclusion

Under federal law, the City retains its authority to take discretionary action to approve or deny Valero's Project. In exercising that authority, state law requires the City to analyze and disclose the Project's direct and indirect environmental impacts, and thus to be fully informed of the consequences of its action. The City has done that here, and its action has not interfered with federally regulated activities. Valero's assertion that the Planning Commission's action was illegal is without merit.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Stt" followed by a stylized flourish.

SCOTT J. LICHTIG
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General