



Community Development Department
MEMORANDUM

Date: February 10, 2016
To: Planning Commission
From: Amy Million, Principal Planner
Re: **City Council Public Hearings for Valero Crude by Rail Project**

The attached materials have been provided by the City Attorney's Office in regard to the Commission's questions on preemption.

- (1) Staff report for the Phillips 66 project; and
- (2) An excerpt from the responses to comments prepared by Kern County in connection with the Alon project.



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**COUNTY OF SAN LUIS OBISPO
DEPARTMENT OF PLANNING AND BUILDING
STAFF REPORT**

PLANNING COMMISSION

MEETING DATE	CONTACT/PHONE	APPLICANT	FILE NO.
February 4, 2016	Ryan Hostetter / Senior Planner (805) 788-2351 rhostetter@co.slo.ca.us	Phillips 66 Company	DRC2012-00095
SUBJECT			
<p>Hearing to consider a request by the Phillips 66 Company for a Development Plan/Coastal Development Permit to allow the modification of the existing rail spur currently on the southwest side of the Santa Maria Refinery in order to allow for the import/unloading of crude oil at the refinery via train. The rail spur project includes a 6,915-foot long rail spur, an unloading facility, onsite pipelines, replacement of coke rail loading tracks, the construction of five parallel tracks with the capacity to hold a 5,190-foot-long unit train consisting of 80 tank cars (60 feet each), two buffer cars (60 feet each), and three locomotives (90 feet each), and accessory improvements outlined in more detail below in the staff report as well as the Final Environmental Impact Report (FEIR). The site is in the South County Coastal Planning Area, in the Industrial Land Use Category, and is located at 2555 Willow Road, approximately 3 miles west of the Nipomo Urban Reserve Line and approximately 3,300 feet from the nearest residence. Also being considered is the Final EIR.</p>			
RECOMMENDED ACTION			
<p>Staff recommends the Planning Commission take the following action:</p> <ol style="list-style-type: none"> 1. Deny the application for the Development Plan/Coastal Development Permit; and 2. Adopt the Findings included in Exhibit C. 			
ENVIRONMENTAL DETERMINATION			
<p>The Environmental Coordinator, after completion of the initial study, found that there was evidence that the project may have a significant effect on the environment, and therefore a Final Environmental Impact Report (FEIR) was prepared (pursuant to Public Resources Code Section 21000 et seq., and CA Code of Regulations Section 15000 et seq.) for this project. The FEIR considers the following issues: Aesthetics and Visual Resources, Agricultural Resources, Air Quality and Greenhouse Gases, Biological Resources, Cultural and Historical Resources, Geological Resources, Hazards and Hazardous Materials, Land Use and Recreation, Noise and Vibration, Population and Housing, Public Services and Utilities, Transportation and Circulation and Water Resources. The FEIR also considers alternatives in addition to the "No Project" alternative. Notice of the FEIR was provided to the public and copies were made available for public review. The FEIR was also distributed to the Planning Commission under separate cover. While a FEIR has been prepared, per the Public Resources Code 21080(b)(5) and CEQA Guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. However, the FEIR has provided evidence and information to support this recommendation for denial, including an evaluation of the significant and unavoidable environmental impacts of the proposed project.</p>			
LAND USE CATEGORY	COMBINING DESIGNATION	ASSESSOR PARCEL NUMBER	SUPERVISOR DISTRICT(S)
Industrial	Coastal Appealable Zone, Flood Hazard Area, Local Coastal Plan Area	092-401-011, 092-401-013, 092-401-005, & 092-411-005	4
PLANNING AREA STANDARDS:			
South County Coastal Area Plan, Industrial Development			
EXISTING USES:			
Phillips 66 Company – Santa Maria Refinery			

<p>SURROUNDING LAND USE CATEGORIES AND USES:</p> <p><i>North:</i> Industrial and Agriculture/ mixture of industrial, large lot residential and open space</p> <p><i>East:</i> Agriculture, Industrial and Recreation / agriculture, open space and residential</p> <p><i>South:</i> Agriculture / agricultural uses</p> <p><i>West:</i> Open Space / open space, dunes, Oceano Dunes State Vehicle Recreational Area and Pacific Ocean</p>	
<p>OTHER AGENCY / ADVISORY GROUP & PUBLIC INVOLVEMENT:</p> <p>The project was referred to: County Public Works, County Environmental Health, County Agricultural Commissioner, Air Pollution Control District, County General Services, County Building Division, Cal Fire, Cambria Community Services District, Los Osos Community Services District, Avila Community Services District, Cayucos Fire, Cayucos Sanitary, Paso Robles Beach Water Association, Oceano Community Services District, San Miguelito Water Association, San Simeon Community Services District, Coast Union Joint School District, San Luis Coastal School District, Cal Trans, Regional Water Quality Control Board, U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, California Coastal Commission, California Department of Parks and Recreation, Cayucos Citizens Advisory Council, North Coast Advisory Council, Los Osos Community Advisory Council, South County Advisory Council and the Avila Valley Advisory Council, Pacific Gas and Electric, Santa Barbara County, City of San Luis Obispo, City of Santa Maria, Division of Oil and Gas, City of Grover Beach, and the City of Guadalupe.</p> <p>In addition, this project has received a vast amount of public input in the form of emails and letters in addition to those published in the Final EIR. This additional correspondence is posted on the Planning Department Website for review by the Public and Planning Commission as a part of the record for the project. The letters can be found here:</p> <p>http://www.slocounty.ca.gov/planning/environmental/EnvironmentalNotices/Phillips_66_Company_Rail_Spur_Extension_Project/Project_Comment_Letters__Post_EIR_Comment_Period_.htm</p>	
<p>TOPOGRAPHY:</p> <p>Nearly level to steeply sloping dunes.</p>	<p>VEGETATION:</p> <p>Dune vegetation and grasses.</p>
<p>PROPOSED SERVICES:</p> <p><i>Water supply:</i> Onsite well</p> <p><i>Sewage Disposal:</i> Individual septic system</p> <p><i>Fire Protection:</i> CAL FIRE</p>	<p>ACCEPTANCE DATE:</p> <p>July 12, 2013</p>

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I. STAFF RECOMMENDATION

Staff recommends the Planning Commission take the following actions:

1. Deny the application for Development Plan and Coastal Development Permit DRC2012-00095; and
2. Adopt the Findings included in Exhibit C.

The detailed basis for this recommendation can be found in Section V below under “Project Analysis.”

II. SUMMARY

A. Project Description:

The project (“Project”) includes modification of the existing rail spur by constructing five parallel tracks and an unloading rack area. The Project would involve unloading of up to five unit trains per week, or a combined total of five unit and manifest trains (manifest trains contain a mixture of goods within separate railcars and are also known as a mixed freight train), with an annual maximum number of trains of 250. Trains would arrive from different North American oilfields and/or crude oil loading points depending on market availability. In a unit train configuration, each train would consist of three locomotives, two buffer cars, and 80 railcars carrying approximately 27,300 gallons each, for a total of approximately 2,190,000 gallons (52,000 bbls) of crude oil. The Project would not affect the amount of material processed at the refinery. Throughput levels at the refinery are capped by previous permits issued by the County and by the San Luis Obispo County Air Pollution Control District. In addition, no crude oil or refined product would be transported out of the refinery by rail. The refined product would be shipped to the Rodeo Refinery in Contra Costa County via pipeline which is the refinery’s current operation.

B. Community Concerns Regarding Health, Safety and Other Issues:

Extensive community input has been submitted to the County with regards to the Project. Out of the approximately 24,500 comment letters received on the project (including comments on the Draft Environmental Impact Report, Recirculated Draft Environmental Impact Report and throughout the process) approximately 150 of these have been in support of the Project. A majority of the letters submitted with comments and opinions on the project have been submitted from persons outside of San Luis Obispo County. For the remainder of the letters and comments submitted by residents of San Luis Obispo County, a similar ratio of opposition versus support of the project was the case.

The general consensus among the comments received is that Project benefits do not outweigh the potential hazards it will bring to the public. These hazards mainly stem from rail accidents, oil spills, health hazards, and explosions/fires within communities along rail lines as a result of an increase of crude transport via rail. These hazards are also exacerbated because the County is not legally able, due to federal preemption, to require certain conditions of approval for Union Pacific along the main rail lines (e.g., require particular emergency response preparations, use of particular routes to avoid sensitive areas, or modifications to Union Pacific Railroad [UPRR] tracks or operations), therefore the County’s approval of the project would allow an increase in risk to the populations within the County along the mainline (as well as outside the County and throughout the state) without the ability to enforce any measures to mitigate off-site impacts to populations along the rail lines.

C. Recommendation for Denial:

Significant local, regional, and statewide concern has been expressed throughout the various phases of the Project including land use incompatibilities, toxic air emissions adjacent to the project site and adjacent to the UPRR mainline; risk of derailment, spill, and explosion in areas adjacent to the mainline; threat of impact to agricultural, biological, cultural, and water resources due to spill, fire, and explosion along the mainline; and, inadequate fire and emergency response services along UPRR mainline throughout the state in the event of a spill, fire or explosion. The Final Environmental Impact Report (FEIR) concluded that the Project, for components only on the project site, would result in two significant and unavoidable impacts (Class I impacts) stemming from diesel particulate matter emissions and toxic air emissions generated by increased locomotive activity at the Santa Maria Refinery site.

The FEIR also concluded that ten Class I impacts would result along the UPRR mainline, beyond the project site, including impacts to agricultural resources, air quality, biological resources, cultural resources, hazards, public services, and water resources.

The Planning and Building Department recommends denial of the Project because the project would be inconsistent with goals and policies outlined in the County's Local Coastal Program, Coastal Zone Land Use Ordinance (CZLUO), Coastal Plan Policies, and other sections of the County's General Plan. In addition, the Project would include 11 "Class I" environmental impacts, (two of which are on the project site) and there are insufficient economic, social, technological, or other benefits of the Project to override its significant unavoidable environmental impacts.

1. The Department of Planning and Building has found the Project to be inconsistent with several goals and policies of the following plans:
 - a. Coastal Zone Framework for Planning
 - b. County's Conservation and Open Space Element
 - c. Coastal Plan Policies
 - d. Safety Element
 - e. Coastal Zone Land Use Ordinance
 - f. South County Area Plan
2. The Project would be detrimental to the health, safety and welfare of the public and the residents of San Luis Obispo County due to the increase of hazardous accidents as a result of the Project.
3. The Project includes a significant and unavoidable environmental impact with regards to cancer risk (air quality) for the population near the proposed rail spur.
4. The Project includes a significant and unavoidable environmental impact with regards to diesel particulate matter (air quality) due to an exceedance of the SLOCAPCD CEQA threshold.
5. The Project would result in 10 significant and unavoidable environmental impacts (agricultural resources, four which are air quality, biological, cultural, hazards, public services, and water resources), with regards to the mainline rail operations within the County as a result of the Project.

6. The Project would result in 10 significant and unavoidable environmental impacts (agricultural resources, four which are air quality, biological, cultural, hazards, public services, and water resources), with regards to the mainline rail operations beyond San Luis Obispo County and throughout the State.
7. There is a lack of specific overriding economic, legal, social, technological, or other benefits of the Project that outweigh the significant effects on the environment, as would be required to approve the Project pursuant to Public Resources Code section 21081.

End of Summary

III. PROJECT DESCRIPTION

A. Project Description

Phillips 66 proposes to extend an existing rail spur which is currently used for shipment of coke (an oil refinement by-product) from the southwest side of the refinery extending east to add an unloading facility for crude oil trains, onsite pipelines, and replacement coke rail loading tracks (refer to Exhibit E). This project would allow up to five trains per week or 250 trains annually in order to deliver heavy crude for refinement at the Santa Maria Refinery. Additionally, an existing agricultural road would be improved as an unpaved eastern Emergency Vehicle Access route between the eastern end of the rail spur and State Route 1 (refer to Exhibit E-1). The tracks and unloading facilities would be designed to accommodate trains of approximately 80 tank cars and associated locomotives and buffer cars in unit trains or manifest train configurations. These trains would deliver crude oil to the facility for refining. The unloaded material would be transferred to the existing crude oil storage tanks via a new pipeline that would be constructed across the existing coke storage area and along an existing internal refinery road. The project construction would occur entirely within the existing Phillips 66 Santa Maria Refinery (SMR) boundary.

The project would also include work within the existing refinery connecting and upgrading existing infrastructure. This includes adding a new electricity cable to an existing pipeway and adding a new fire water pipeline to an existing pipe rack. The rails on the existing rail spur would also be replaced.

The new rail spur lines would extend from the terminus of the current spur. The unloading facility would be located at the end of the existing coke storage area and along an existing internal refinery road.

The construction areas are summarized below:

- 6,915 feet – Length of spur extension (including approximately 2,445 feet within the existing industrial coke plant area);
- 270 feet – Maximum width of construction area for rail extension;
- 2,325 feet – Length of the new pipeline route from the unloading facility to the internal refinery (an additional 2,800 feet would be constructed within the existing refinery connecting to the existing storage tanks and existing steam boilers); and
- 2,400 feet - Length of new steam pipelines from the unloading facility east between Tracks 1 and 2.

The maximum width of the temporary construction area for pipeline installation would be 25 feet. Acreage breakdowns (temporary + permanent) are summarized below:

- 41.6 acres – Rail Spur and Unloading Facility (25.3 acres permanent + 16.3 temporary),
- 3.8 acres – New Pipeline (1.8 acres permanent + 2 acres temporary), and
- 1.6 acres – Secondary Emergency Vehicle Access (1.6 acres permanent).

Collectively, the entire project, including temporary and permanent impacts, would affect approximately 47 acres. Of this area, 19.5 acres would occur within the existing refinery and coke area, and 27.5 acres would occur in undeveloped areas outside the refinery and coke facilities. A more detailed description of the Project can be found in section 2.0 of the Final EIR.

B. Project Location

The Project is located approximately 3 miles west of the community of Nipomo on the west side of State Route 1, immediately east of the Oceano Dunes State Vehicle Recreation Area (ODSVRA). The project site is located at 2555 Willow Road, Arroyo Grande (SR 1) (APN 091-141-062, 092-391-021, 034, 092-401-005, 011, 013, 092-411-002, 005). The project site is located within the Industrial Land Use Category.

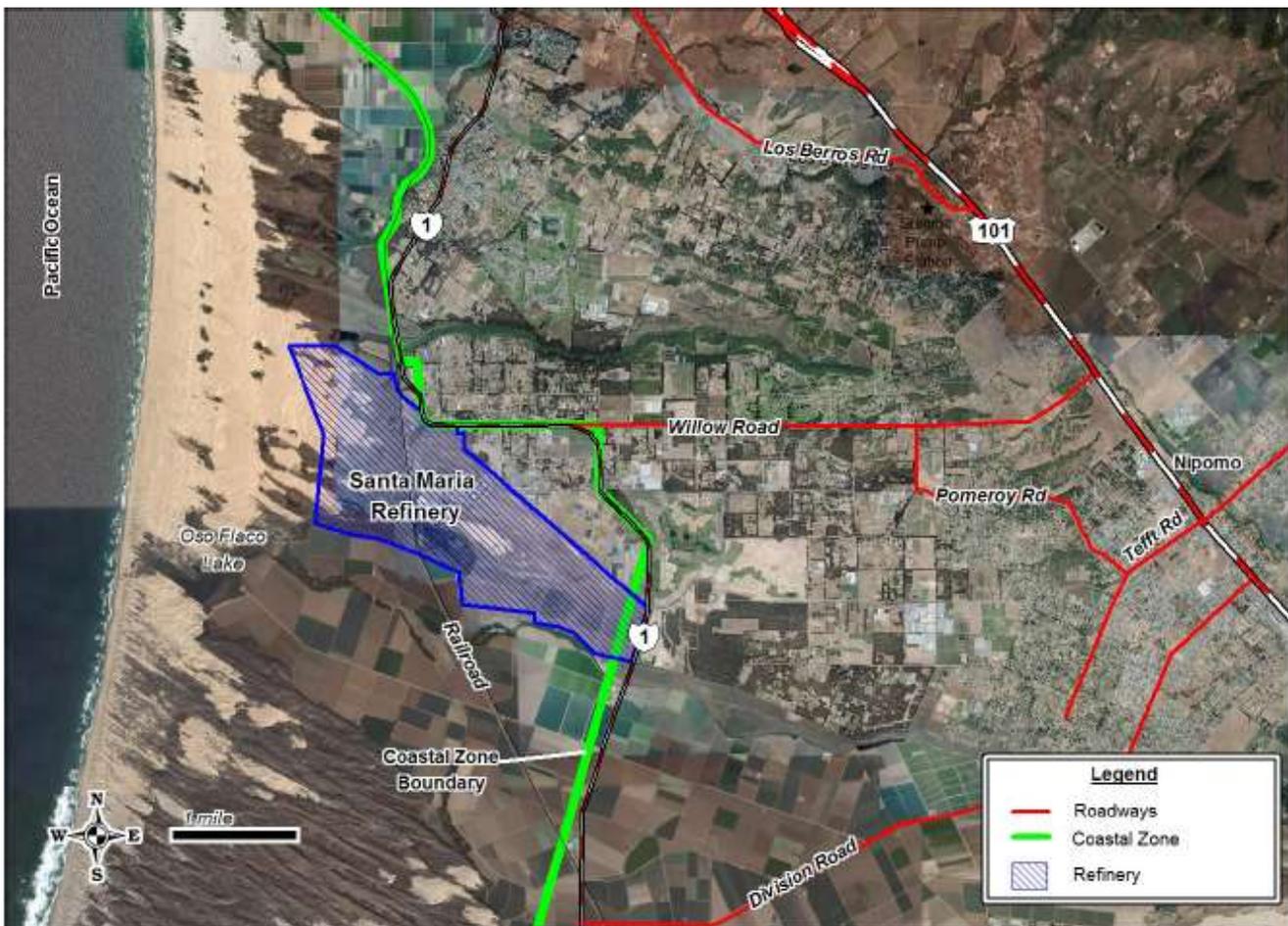


Figure 1 – Project Location Map

IV. APPLICATION HISTORY

An application for a Development Plan/Coastal Development Permit for the rail spur and crude oil delivery project (Project) was submitted to the Department of Planning and Building on April 30, 2013. The Project was accepted for processing in July of 2013. Upon preparation of the Initial Study, the County Planning Department determined that the Project would have the potential to result in significant and unavoidable impacts to the environment therefore an Environmental Impact Report (EIR) was required.

In July 2013, the County entered into a contract with Marine Research Specialists to prepare the EIR. A scoping meeting was held on July 29, 2013 to obtain public comments on the scope of the Draft EIR (DEIR). The DEIR was released for a 60-day public comment period in November 2013 and the public comment period closed on January 27, 2014. The Department held a public workshop during the public comment period (on December 12, 2013) and upon completion of the comment period received 201 comment letters, e-mails and comment cards (795 comments) on the DEIR.

Comments submitted on the DEIR included compelling arguments that, for purposes of full disclosure under CEQA, County decision makers need to be made aware of impacts of the Project beyond the project site along the mainline UPRR route, beyond the County of San Luis Obispo, and to the border of California. After lengthy discussions between the Applicant and the County, it was agreed in March 2014 that recirculation of the DEIR with an expanded geographic scope would make for a more legally defensible document.

Shortly before the release of the Recirculated Draft EIR (RDEIR), the County became aware of a comment letter dated October 2, 2014 from Attorney General Kamala D. Harris to the City of Benicia Community Development Department, on the proposed Valero Crude by Rail Project Draft EIR. This letter stated that impacts from the Valero crude by rail project listed in the City of Benicia's Draft EIR "Ignores reasonably foreseeable Project impacts by impermissibly limiting the scope of the affected environment analyzed to only the 69 mile stretch from Benicia to Roseville", reaffirming the County's decision to include evaluation of the mainline UPRR routes to the California border in the Project RDEIR.

Due to the extensive revisions to the original DEIR, a RDEIR was prepared and released for public review and specific written responses to DEIR comments were not prepared. The RDEIR was released for a 45-day public review comment period in October 2014 and the second public comment period closed on November 24, 2014. The Department held a public workshop during the public comment period (on November 5, 2014) and upon completion of the public comment period received 603 comment letters, e-mails and comment cards (2,206 comments). In addition, approximately 23,450 form letters were received during the RDEIR public review comment period. The Department reviewed all comments on the RDEIR and has provided responses to these comments which are contained in the Final EIR (FEIR) dated December 2015.

Based on Staff's review of the Project, including the information contained in the FEIR, Staff recommends that the Commission find that the Project is not consistent with the County General Plan. Applicable Development Plan findings cannot be made in support of the Project, and at the time of preparation of this Staff Report there are insufficient economic, social, technological, or other benefits of the Project to override its significant unavoidable environmental impacts.

V. PROJECT ANALYSIS

A. General Plan Consistency

Under State law, the County's decision makers must consider the Project's consistency with the County General Plan as a part of the decision making process. Staff recommends that the Project, as proposed, is inconsistent with the South County Coastal Area Plan, Coastal Plan Policies, Coastal Zone Framework for Planning, the Conservation and Open Space Element of the County General Plan, and the Environmentally Sensitive Habitat Area (ESHA) requirements of the CZLUO: all of which are part of the County's General Plan. The discussion below identifies these inconsistencies, environmental impacts, and the circumstances for which Staff is recommending denial of the Project. It is important to note that Staff's recommendation for denial of the Project does not preclude or set precedence for future projects or activities on the refinery property. This project was evaluated independently based on the currently proposed project characteristics. Future projects in this area will be evaluated based on proposed project characteristics at that time.

There are numerous policies that apply to the Project. While the Project is consistent with some of the County Policies and Ordinance requirements, there are many key policies and ordinance requirements with which this project is not in compliance. The policies and ordinance requirements with which the Project is not in compliance, and which staff is basing their recommendation, are summarized in the table below. A more detailed policy discussion is provided in Exhibits A and B for onsite and the mainline rail respectively.

The Project has been broken up into "onsite" versus "mainline" issues as they relate to the project discussion and evaluation here in the staff report. This has been done since different issues relate to the construction and operation of the rail spur on the Santa Maria Refinery property compared to the impacts related transportation of crude oil along the mainline rail routes.

Policy Compliance Summary	
Policy, Goal, or Requirement Section	Compliance
CZLUO Section 23.07.170, Environmentally Sensitive Habitats (ESHA)	Project not in compliance – Onsite
Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats	Project not in compliance – Onsite
Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats	Project not in compliance – Onsite & Mainline
Coastal Plan Policies: Environmentally Sensitive Habitat Area Policy 36, Protection of Dune Vegetation	Project not in compliance - Onsite
Framework for Planning: Land Use Goal 4, Land Use Compatibility	Project not in compliance – Onsite
Framework for Planning: Strategic Growth Goal 1 Objective 2 Air Quality	Project not in compliance – Onsite & Mainline
Framework for Planning: Sensitive Resource Area General Objective 1	Project not in compliance – Onsite
Conservation and Open Space Element: Air Quality Policy AQ 3.2 Attain Air Quality Standards	Project not in compliance – Onsite & Mainline
Conservation and Open Space Element: Air Quality Policy AQ 3.3 Avoid Air Pollution Increase	Project not in compliance – Onsite & Mainline

Policy Compliance Summary	
Policy, Goal, or Requirement Section	Compliance
Conservation and Open Space Element: Air Quality Policy AQ 3.4 Toxic Exposure	Project not in compliance – Onsite & Mainline
Conservation and Open Space Element: Air Quality Policy AQ 3.5 Equitable Decision Making	Project not in compliance – Onsite
Conservation and Open Space Element: Biological Resources Policy 1.2 Limit Development Impacts	Project not in compliance – Onsite
Conservation and Open Space Element: Non Renewable Energy Facility Siting Policy E 7.1	Project not in compliance – Onsite
South County Coastal Area Plan: Land Use Rural Area Industrial	Project not in compliance – Onsite
South County Coastal Area Plan: Industrial Air Pollution Standards	Project not in compliance – Onsite
Framework for Planning: Strategic Growth Goal 1 Preserve Resources	Project not in compliance – Mainline
Framework for Planning: Strategic Growth Goal 1 Objective 4 Agriculture	Project not in compliance – Mainline
Framework for Planning: Land Use Goal 2 Preserve Agriculture	Project not in compliance – Mainline
Coastal Plan Policies: Chapter 6 Environmentally Sensitive Habitats, Coastal Streams Policy 20	Project not in compliance – Mainline
Coastal Plan Policies: Chapter 7 Agriculture Policy 1	Project not in compliance – Mainline
Coastal Plan Policies: Chapter 12, Archaeology Policy 1, Protection of Archaeological Resources	Project not in compliance – Mainline
Conservation and Open Space Element: Air Quality Goal AQ 3, Implementation Strategy AQ 3.6.1, Identify Health Risks to Sensitive Receptors	Project not in compliance – Mainline
Conservation and Open Space Element: Biological Resources Policy BR 1.15 Restrict Disturbance in Sensitive Habitats, Nesting Birds	Project not in compliance – Mainline
Conservation and Open Space Element: Chapter 5 Energy Goal E7 Design Siting and Operation of Non Renewable Energy	Project not in compliance – Mainline
Conservation and Open Space Element: Chapter 4, Fire Safety Goal S-4, Reduce the threat to life, structures and the environment	Project not in compliance – Mainline
Conservation and Open Space Element: Chapter 4, Fire Safety Goal S-14, Reduce the threat to life structures and the environment	Project not in compliance – Mainline
Conservation and Open Space Element: Chapter 6, Other Safety Issues Goal S-6, Reduce the Potential for harm to individuals and damage to environment from hazards	Project not in compliance – Mainline

VI. DEVELOPMENT PLAN FINDINGS

In order to approve a Development Plan, the CZLUO (Title 23.02.034(C) (4)) requires that the following findings must be made. Each finding must be supported by substantial evidence in the record. Based on staff's review of the Project, the staff report concludes that these findings cannot be made.

Required findings. The Review Authority shall not approve or conditionally approve a Development Plan unless it first finds that:

- a. *The proposed project or use is consistent with the Local Coastal Program and the Land Use Element of the General Plan; and*
- b. *The proposed project or use satisfies all applicable provisions of this Title; and*
- c. *The establishment and subsequent operation or conduct of the use will not, because of the circumstances and conditions applied in the particular case, be detrimental to the health, safety or welfare of the general public or persons residing or working in the neighborhood of the use, or be detrimental or injurious to property or improvements in the vicinity of the use; and*
- d. *That the proposed project or use will not be inconsistent with the character of the immediate neighborhood or contrary to its orderly development; and*
- e. *That the proposed use or project will not generate a volume of traffic beyond the safe capacity of all roads providing access to the project, either existing or to be improved with the project.*
- f. *The proposed use or land division (if located between the first public road and the sea or the shoreline of any body of water), is in conformity with the public access and recreation policies of Chapter 3 of the California Coastal Act.*
- g. *Any additional findings required by planning area standards (Part II of the Land Use Element), combining designation (Chapter 23.07), or special use (Chapter 23.08).*

Exhibit C includes a complete discussion of the findings based upon facts that have been presented at the time of staff report publication. The Development Plan findings overlap to a certain extent with the issue of General Plan consistency and impact issue areas addressed in the Final EIR, and thus some issues may be discussed several times under different headings. In addition, many of these include issues related to the construction and operation of the spur and unloading facilities within the Santa Maria Refinery property (i.e., onsite) as well as inconsistencies related to the transportation of crude oil via rail along the mainline rail routes. These issues are discussed separately as either onsite or mainline impacts and are additionally reflected as such in the Final Environmental Impact Report (FEIR) and General Plan analysis.

In summary, the required findings for issuance of the Development Plan and Coastal Development Permit cannot be met. The Project does not comply with the County's Local Coastal Program and Land Use Element of the General Plan. As shown under the Project Analysis Section V of this Staff Report and Exhibits A and B, the Project does not comply with numerous General Plan policies, programs, and ordinance requirements as they relate to environmentally sensitive habitats, air quality,

safety, hazards, energy development, water resources, riparian areas, cultural resources, and agricultural resources.

The Project would adversely impact the health, safety, and welfare of the public as a result of significant and unavoidable impacts related to air quality, cancer risk, accidental release, fire and potential explosions as a result of the construction and operation of the Project. Public concerns have been expressed regarding the safety of the unloading process on the project site, as well as along the rail lines through the County and through the State. Some of the concern related to mainline rail also has to do with the County likely being preempted from mitigating or conditioning impacts to areas beyond the project site (refer to Section VII below for further discussion on preemption).

VII. FEDERAL PREEMPTION

The federal government has historically, and heavily, regulated rail transportation in the U.S., beginning with the Interstate Commerce Act of 1887. In 1995, Congress enacted the Interstate Commerce Commission Termination Act (ICCTA), which replaced the Interstate Commerce Commission with the Surface Transportation Board. The ICCTA also included a broad statement of preemption of state and local regulation of rail transportation. In essence, this means that the federal government through the Surface Transportation Board has full authority over all rail transportation and therefore the County is unable to require local regulation within these areas:

As outlined in the ICCTA the jurisdiction of the [Surface Transportation] Board includes:

- (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.

This law preempts state and local regulation “that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws of general application having a more remote or incidental effect on rail transportation.” (*People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 1528.). A project falling under the Surface Transportation Board’s jurisdiction is not subject to CEQA or to local regulation, except for ministerial permits and generally applicable codes protecting the public health and safety such as electrical, plumbing, and fire codes.

The Applicant has asserted that the ICCTA preempts the County from subjecting the rail component of the proposed project to CEQA review and from mitigating any of the potential impacts identified from project-related mainline activities. UPRR has generally concurred, pointing to cases where courts have found that local conditions imposed on permits unreasonably burdened rail carriage and were therefore preempted. (See Exhibit J for correspondence from the Applicant and UPRR regarding federal preemption.)

Opponents of this and other recently proposed rail projects state the regulatory authority granted by the ICCTA is not limitless, does not preempt CEQA, that CEQA is an information statute which does not interfere with interstate commerce, and that CEQA requires that all significant impacts of a project be mitigated if reasonably feasible.

In the case of this Project, it is clear that for activities performed within the Santa Maria Refinery (SMR) site the County is not preempted by federal law since these activities would not occur on UPRR property and would not involve infrastructure or trains operated by UPRR. However, federal law would likely limit the ability of the County to regulate the type and design of locomotives since they are owned and operated by UPRR to transport goods throughout the nation and because regulation of the types of locomotives that could be used for this project would likely interfere with interstate commerce. The impacts of the activities that occur on the Project Site are described and evaluated in the FEIR, and the County as CEQA Lead Agency has the authority to impose mitigation measures or conditions of approval to reduce potential impacts within the boundaries of the SMR.

As lead agency, the County determined that it would analyze potential project-related impacts that may occur along UPRR's mainline in order to meet the information disclosure requirements of CEQA. While the FEIR describes these potential impacts of project-related train movements along the UPRR mainline throughout the state, the County Department of Planning and Building, based on input from legal counsel, understands the County as CEQA Lead Agency may be preempted from imposing mitigation measures disclosed in the FEIR on UPRR equipment and train movements statewide on the mainline. This information was included in the FEIR to ensure full disclosure of impacts and mitigations.

VIII. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

A. Geographic Scope of Analysis

The FEIR evaluates the environmental issues associated with the Project, both on the project site and beyond the boundaries of the project site onto the UPRR mainline throughout California and beyond. The operation of trains to and from the Santa Maria Refinery (SMR) would be performed by UPRR, on UPRR property, and on trains operated by UPRR employees.

Trains could enter California at five different locations. Depending upon the route taken by the train they could arrive at the project site from the north or the south. It is unknown what route UPRR would use to deliver the trains to the SMR. Coming from the north the routes merge at the UPRR Roseville Rail Yard. From the south the routes merge at the Colton Rail Yard. Given that the route the trains would travel to get to these two UPRR yards is speculative, the FEIR has evaluated in more detail the impacts of trains traveling from these two UPRR yards to the SMR.

Beyond the two UPRR Yards, trains could travel any number of routes. Crude oil delivered to California by UPRR would generally pass through either of these two rail yards in route to the SMR. Depending upon the source of the crude oil, crude oil trains could use any portion of the UPRR network between Roseville/Colton and the source location for the crude oil. The exact route that would be taken would depend upon a number of factors, that could include the source of the crude oil, weather conditions, train traffic conditions, etc. Since the routes past Roseville and Colton are somewhat speculative, the FEIR has discussed in a more qualitative nature the potential impacts of train traffic beyond these two rail yards.

Once the train arrives at the SMR, it would be operated by Phillips 66 personnel on property owned by Phillips 66. Therefore, activities performed within the SMR would not be preempted by federal law since they would not occur on UPRR property and would not be operated by UPRR employees. For the impacts of the activities that occur within the SMR, the County as CEQA Lead Agency, and other state and local responsible agencies have clear authority to impose mitigation measures. The following are discussions of the significant and unavoidable impacts associated with the Project at the SMR (refer to Section VII.B below) and on the mainline (refer to Section VII.C below).

B. Project Site – CEQA Discussion

The FEIR identifies several project site-specific impacts (versus railroad mainline impacts) that would result from implementation of the project (i.e., impacts that would result solely based on activities on the project site). Of these impacts, most can be reduced to a level of insignificance through the County's ability to require implementation of various mitigation measures (i.e., resulting in Class II impacts). Issue areas where impacts can be reduced to insignificant include aesthetics/visual resources, water resources, biological, cultural, geological, noise, public services, traffic, and air quality impacts.

However, there would remain two project site-specific significant and unavoidable adverse air quality impacts (i.e., Class I impact) for operational activities at the SMR.

- 1. Air Quality (AQ.2):** The Project would exceed the diesel particulate matter (DPM) emission threshold of 1.25 pounds per day at the Santa Maria Refinery. The onsite DPM emissions for the project would be about 8.15 lbs per day. The use of Tier 4 locomotives and reduced idling time for locomotives onsite as mitigation would reduce the DPM emissions to 0.72 lbs per day. However, since UPRR (and not the Project Applicant) would own the locomotives, and the locomotives are used for interstate commerce, the mitigation measure to use Tier 4 locomotives would likely be preempted by Federal law, and therefore may not be a feasible mitigation measure. Without the use of Tier 4 engines the DPM emissions would be 7.45 lbs per day (this includes the reduction in idling at the site). DPM is an air toxic and would contribute to the local PM₁₀ emissions, which already exceed the State PM₁₀ air quality standard. Therefore, even with all of the proposed mitigation the County could feasibly implement, the impact would remain significant and unavoidable (Class I).
- 2. Air Quality (AQ.4):** The Project would generate toxic air emissions in the vicinity of the Santa Maria Refinery that exceed San Luis Obispo County Air Pollution Control District (SLOCAPCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments (refer to FEIR, Section 4.3.4.2, Impact AQ.4). The SLOCAPCD cancer risk CEQA threshold is 10 in a million for toxic emissions.

In assessing health risk impacts, the state-approved Hotspots Analysis and Reporting Program (HARP) model was used for the FEIR. In late April of 2015 OEHHA issued the final Guidance Manual for Preparation of Health Risk Assessments, as well as an updated health risk assessment model (HARP2). Given that this is the most recent up to date HRA model approved by the State, San Luis Obispo County Planning decided that all of the HRA analysis in the FEIR should be updated to reflect the final HRA guidance and HRA model from OEHHA. The California Air Pollution Control Officers Association (CAPCOA) guidelines for Health Risk Assessments (which are the guidelines the SLOCAPCD uses) requires that the health risk assessment for a facility include all existing fixed and mobile sources plus the proposed Project.

HARP2 modeling for the Project, when taking into consideration the existing SMR, all existing trucking operations, and the proposed project, results in a maximum exposed individual resident (MEIR) cancer risk of 26.5 in a million. This includes emission sources at the project site as well as the mainline emissions near the SMR. Both of these sources affect the same receptors near the SMR. The SLOCAPCD cancer risk threshold is 10 in a million for toxic emissions. Note that the APCD considers all sources (both the project site sources and the mainline sources) in comparison to the thresholds when determining significance (see section C.4 below). The maximum exposed individual location is the residential area north of the SMR.

The use of Tier 4 locomotives and reduced idling time for locomotives onsite as mitigation would reduce the MEIR to 6.0 in a million at the same receptor. However, since UPRR (and not the Project Applicant) would own the locomotives, and the locomotives are used for interstate commerce, the mitigation measure requiring the use Tier 4 locomotives would likely be preempted by Federal law, and therefore may not be a feasible mitigation measure. Without the use of Tier 4 engines but with implementation of other mitigation measures, the MEIR would be 13.6 in a million at the same receptor (this includes the reduction in idling at the site, use of cleaner truck engines, and daytime unloading only). Therefore, even with all of the proposed mitigation measures the County could implement, the impact would remain significant and unavoidable (Class I).

C. Union Pacific Rail Road (UPRR) Mainline – CEQA discussion

The FEIR identifies ten impacts from operation on the mainline that are considered significant unavoidable (i.e., Class I impacts). The following is summary of the ten Class I impacts.

1. **Agricultural Resources (AR.5):** The Project would result in effects that impair adjacent agricultural resources and uses along the UPRR mainline in the event of a derailment and/or spill, including the generation of contaminated air emissions, soil and surface water contamination, and increased risk of fire, which have the potential to adversely affect adjacent agricultural areas. Implementation of mitigation measures have been recommended (i.e., measures that would reduce the likelihood of an oil spill and increase the ability of first response agencies to respond to a crude oil spill along the mainline); however, even with full implementation of these measures impacts to agricultural resources would be significant. In addition, Federal preemption would likely prevent local agency (County) regulation of rail lines and implementation of appropriate mitigation measures to protect and reduce impacts to agricultural resources along the mainline may not be feasible or enforceable. Therefore, oil spill impacts to agricultural resources along the UPRR mainline tracks would be significant and unavoidable (Class I).
2. **Air Quality (AQ.2):** Operational activities associated with the Project within San Luis Obispo County (SLOC) along the UPRR mainline would generate nitrogen oxide (NO_x), reactive organic gases (ROG), and diesel particulate matter (DPM) emissions that exceed SLOCAPCD thresholds. For the mainline rail emissions it is possible that contractually the Applicant could require the use of lower emission locomotives such as Tier 4 locomotives. However, since these are operated by UPRR on UPRR tracks, a requirement that the Applicant enter into this type of contractual provision is likely preempted by Federal law and therefore unenforceable. The County may also be preempted by Federal law from requiring emission reduction credits for mainline rail emissions. Due to the possible preemption by Federal law which could prevent the mitigation measures from being implemented (outside of the SMR facility boundary), emission reduction credits might not be achievable and impacts would remain significant and unavoidable (Class I).
3. **Air Quality (AQ.3):** Operational activities of trains along the mainline rail route outside of SLOC associated with the Project would generate NO_x and ROG emissions that exceed thresholds of 15 air districts other than SLOCAPCD. For three of these districts impacts cannot be mitigated to less than significant levels. Mitigation has been recommended that includes use of Tier 4 locomotives and the purchase of emission credits. For the mainline rail emissions it is possible that contractually the Applicant could require the use of lower emission locomotives such as Tier 4 locomotives. However, since these are operated by UPRR on UPRR tracks, a requirement that the

Applicant enter into this type of contractual provision would likely be preempted by Federal law and therefore unenforceable. The County may also be preempted by Federal law from requiring emission reduction credits for mainline rail emissions. Since it is unlikely that these mitigation measures will be implementable and it is uncertain if the other Air Districts could require emission reduction credits, the impacts associated with the mainline rail operation would remain significant and unavoidable (Class I).

4. **Air Quality (AQ. 5):** Operational activities of trains along the mainline rail route associated with the Project would generate toxic air emissions that exceed the San Luis Obispo County Air Pollution Control District (SLOCAPCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments (refer to FEIR, Section 4.3.4.2, Impact AQ.5). The SLOCAPCD cancer risk CEQA threshold is 10 in a million for toxic emissions. These activities include movement of the locomotives on the mainline (and in areas near the SMR which are also impacted by project site activities) due to the emissions of air toxics such as diesel particulate matter. Calculations in the FEIR show that this Project would exceed the cancer threshold of 10 in a million for areas where trains speeds are limited to 30 miles per hour or less. Mitigation has been recommended that includes use of Tier 4 locomotives and the purchase of emission credits. Since it is unlikely that these mitigation measures will be implementable due to Federal preemption, and it is uncertain if the other Air Districts could require emission reduction credits, the air toxic emission impacts associated with the mainline rail operation would remain significant and unavoidable (Class I).
5. **Air Quality (AQ.6):** Operational activities along the mainline rail routes would generate greenhouse gas (GHG) emissions that exceed SLOCAPCD thresholds. Emissions of GHG would result from locomotives operating along the mainline. Project-related GHG emissions within California would exceed the SLOCAPCD thresholds and therefore would be considered significant. Since the State does not have a GHG threshold, the FEIR used the SLOCAPCD threshold for determining the significance of GHG emissions for mainline operations. For the mainline rail GHG emissions it is possible that the Applicant could be required to obtain GHG emission reduction credits. However, the County may also be preempted by Federal law from requiring emission credits for mainline rail GHG emissions. Due to the possible preemption by Federal law which could prevent mitigation measures from being implemented (outside of the SMR facility boundary), emission reduction credits might not be achievable and impacts would remain significant and unavoidable (Class I).
6. **Biological Resources (BIO.11):** Transport of crude oil by rail, along the UPRR mainline, could result in a crude oil spill that significantly impacts sensitive plant and wildlife species, wetlands, creeks, rivers and waterways. Implementation of oil spill prevention plan and first response mitigation measures (i.e., BIO-11 and PS-4a through PS-4e in the FEIR) would serve to reduce the likelihood of an oil spill and enhance the ability of first response agencies to respond to a crude oil spill. The County may be preempted by federal law from implementing these measures as they require particular contractual provisions that might be determined to improperly impact interstate commerce. There are several state and federal laws and rules that are proposed to help minimize impacts from rail-related oil spills (e.g., SB 861 to be implemented by California Department of Fish and Wildlife/Office of Spill Prevention and Response (CDFW/OSPR) and United States Department of Transportation's (USDOT's) proposal for oil trains to have comprehensive Oil Spill Response Plans in place). Given the uncertain timing of these rules and that the County may be

preempted from implementing mitigation measures for the mainline rail oil spills, potential impacts to biological resources along the UPRR mainline tracks would be significant and unavoidable (Class I).

7. **Cultural Resources (CR.6):** Train traffic associated with the importation of crude oil to the project site could result in a derailment or a material spill, which could result in the disturbance and destruction of cultural resources along the mainline routes. Clean-up of an oil spill would likely require the use of bulldozers, front end loaders, and other construction equipment to remove any contaminated soil. Use of this type of construction equipment could impact both known and unknown cultural, historic, and paleontological resources. Implementing cultural resources emergency contingency and treatment plan mitigation measure CR.6 in the FEIR could reduce potential impacts; however, there is the potential that a derailment or a spill may destroy a significant cultural or historic resource, and remediation actions may not result in the recovery of significant resources. In the event this occurs, the residual effect could be significant and unavoidable (Class I).
8. **Hazards and Hazardous Materials (HM.2):** The potential for a crude oil unit train derailment would increase the risk to the public in the vicinity of the UPRR right-of-way. It is unknown what route UPRR would use to deliver the trains to the SMR. Coming from the north the routes merge at the UPRR Roseville Rail Yard and from the south the Colton Rail Yard. Modeled scenarios ranged from small releases from a tank car, to the complete loss of multiple tank cars. The worst case spill was assumed to be 180,000 gallons (about six tanker cars). An explosion of tank cars, simulated as a Boiling Liquid Expanding Vapor Explosion (BLEVE), was also evaluated. Implementing tank car design improvements, route analysis, positive train control (which is a system of functions for safety control such as GPS and other electronic safety features), and first responder mitigation measures would reduce the potential for a rail accident and loss of containment, and would also improve emergency response in the event of an accident. Even with this reduction in release probability, the hazards associated with the project risk along the UPRR right-of-way would still be significant in the event of a release of crude oil that resulted in a fire or explosion. The County may be preempted by federal law from implementing these measures, particularly those that would require particular contractual provisions that would improperly impact interstate commerce or conflict with the Interstate Commerce Commission Termination Act (ICCTA). Therefore, the risk to the public along the UPRR mainline tracks would be significant and unavoidable (Class I).
9. **Public Services (PS.4):** Operations of the crude oil train on the mainline UPRR tracks would increase demand for fire protection and emergency response services along the rail routes. As discussed above, the worst case spill from a unit train on the mainline tracks was assumed to be 180,000 gallons (about six tanker cars). An accident along the UPRR mainline tracks could result in an oil spill or fire, which would place demand on fire and emergency responders. Mitigation identified for this impact includes requiring the Applicant, as part of their contract with UPRR, to provide for advanced notice of shipments to the SMR, use of enhanced rail cars, annual funding for first responder training, and emergency notification in the event of an accident. It is not certain that implementation of the mitigation measures discussed above is feasible given that the County may be preempted by federal law. Therefore, oil spill impacts to fire protection and emergency response services along the UPRR mainline tracks would be significant and unavoidable (Class I).

10. **Water Resources (WR.3):** A rupture or leak from a rail car on the UPRR mainline track could substantially degrade surface water quality. While the exact route the trains would take to get to these two rail yards is speculative, all of the routes within and outside of California would traverse numerous creeks, washes, rivers, wetlands, and sloughs, which would increase the probability of a spill impacting water resource areas such as surface water bodies. Implementation of oil spill prevention plan and first response mitigation measures (i.e., BIO-11 and PS-4a through PS-4e in the FEIR) would serve to reduce the likelihood of an oil spill and the ability of first response agencies to respond to a crude oil spill. The County may be preempted by federal law from implementing these measures as they require particular contractual provisions that might be determined to improperly impact interstate commerce. There are several laws and rules that are proposed to help minimize impacts from rail-related oil spills (e.g., SB 861 to be implemented by CDFW/OSPR and USDOT proposal for oil trains to have comprehensive Oil Spill Response Plans in place). Given the uncertain timing of these rules and that the County may be preempted from implementing the identified mitigation measures, impacts to water resources along the mainline would be potentially significant and unavoidable (Class I).

IX. OTHER ISSUES / MAJOR ISSUES RECEIVED FROM PUBLIC COMMENTS

A. Neighboring Governmental Entities

In addition to the comments received during the public comment period for the EIR, the Department has continued to receive comments subsequent to the comment period from private individuals and others. Of note are the comments that have been received from state and local governmental officials, counties, cities, schools and fire protection districts expressing concern over the Project's use of the mainline to transfer crude oil through their communities and past their facilities (refer to Exhibit F for a list of post comment period agency and special district commenters). The comments generally request that County decision-makers do not approve the project; or, if they do consider Project approval to first conduct additional risk analysis, adopt the best available tank car standards and ensure that they are adhered to, and require that better crude by rail safety standards be implemented. The letters listed in Exhibit F as well as all others received, including those from private individuals, are included as a part of the record.

Because the Interstate Commerce Commission Termination Act (ICCTA) may preempt the County from imposing a number of conditions that would mitigate project-related impacts along UPRR's mainline, certain impacts would remain unmitigated. Some of those impacts, such as those to fire protection or first responder services, have the potential to negatively affect public health and safety and the health and safety of residents and workers outside of the County. Even though those impacts would occur outside of the County's jurisdiction, these are legitimate concerns to be considered by your Commission. As a political subdivision of the state, created for the purpose of "advancing the policy of the state at large," the County may appropriately consider the impacts its decisions may make on citizens of the state at large. As a result, the proposed findings included in Exhibit C hereto address some of these state-wide concerns.

B. Hazard Zone

An ongoing issue of state and national controversy and concern, for this Project as well as other proposed rail projects, relates to Impact HM.2 (Hazards and Hazardous Materials) in the FEIR and described above. This impact deals with the potential for a crude oil unit train derailment that would increase risk to the public in the form of fire, explosion, and exposure in the vicinity of the UPRR right-of-way. The issue of rail car safety has come to the forefront

over that last several years due to the number train derailment and explosion incidents that have occurred (refer to Exhibit I, which provides a list of the 24 crude by rail accidents over the past few years). A related, and commonly discussed, issue is the exposure of the general public to the “blast zone” (properly referred to as the hazard zone). The hazard zone is an area where people could be injured or killed during an explosion and is an area calculated as part of consequence modeling. For some emergency response activities the hazard zone is typically referred to as the area that should be evacuated, which is usually larger than the area where people could be injured or killed.

For crude oil the hazard zone is typically driven by heat from a fire, or what is called thermal radiation. In recent crude by rail accidents rail cars have been punctured or valves/fittings have been damaged, oil spills and ignites, resulting in what is called a pool fire. A pool fire gives off a large amount of heat, which can injure or kill people who are too close to the fire. Depending upon the amount of oil spilled these pool fires can burn for a long period of time.

If a pool fire occurs underneath undamaged rail cars the cars can heat up and the tank can fail via what some people call a thermal tear. This can result in a boiling liquid expanding vapor explosion (BLEVE). A BLEVE can result in a fire ball, which burns very quickly and gives off large amounts of heat in a short period of time, which can injure or kill people who are too close to the fire. The extent of the fire and level of possible heat from the fire can be dependent upon a number of factors, one being the level of volatility of the crude oil. The volatility of crude oil is primarily driven by how much light end material is in the crude. Typically Bakken crude has more light ends than does Canadian Dil-bit crude.

Table 4.7.12 in the FEIR provides the estimated hazard zones for a mainline rail accident for the Canadian crudes evaluated in the FEIR. The maximum hazard zone was estimated to be about 1,690 feet. Canadian tar sands are not as “explosive” as Bakken crude oil. The FEIR does not include consequence modeling on Bakken crude as part of the proposed Project because the project would be prohibited from receiving Bakken as well as other light end crude and petroleum products with an API Gravity of 30° or greater. However, the FEIR did look at Bakken crude hazard zones as part of the cumulative analysis for other crude by rail projects. Consequence modeling of Bakken crude had a maximum hazard zone of about 2,340 feet. Hazard zones are specific to each type of crude based upon the composition of the crude and in particular the amount of light ends in the crude.

A 1.0 mile impact or “blast” zone was mentioned often in comment letters. The 0.5 mile U.S. Department of Transportation (USDOT) Evacuation Zone for Oil Train Derailments and 1.0 Mile USDOT Potential Impact Zone in case of Oil Train Fire numbers are derived from the 2012 Emergency Response Guidebook offered by the USDOT, and used throughout North America for initial response hazardous material releases. 0.5 mile is the recommended initial evacuation distance for a tank, rail car, or tank truck carrying a flammable liquid involved in a fire, while 1.0 mile is the recommended initial evacuation distance for a tank, rail car, or tank truck carrying a liquefied/flammable gas. The 2012 Emergency Response Guidebook offered by the USDOT also states that for large spills of flammable liquids without a fire the recommended evacuation zone is 1,000 feet. For large spills of flammable gasses without a fire the recommended evacuation zone is 0.5 mile.

C. Tank Car Regulations

As a result of the numerous crude oil tank car derailments that have occurred over the last two years in conjunction with the rapid increase in transport of crude oil by rail, the USDOT, in coordination with the Federal Railroad Administration, National Transportation and Safety Board, Pipeline Hazardous Materials and Safety Administration, American Association of Railroads, as well as numerous state and local regulatory agencies have been active in

making recommendations and passing new laws with the objective of increasing the level of safety for transporting crude by rail. The USDOT (May 1, 2015) issued their final rule covering enhanced tank car standards and operational controls for high-hazard flammable trains. The final rule defines certain trains transporting large volumes of flammable liquids as “high-hazard flammable trains” (HHFT) and regulates their operation in terms of speed restrictions, braking systems, and routing. The final rule also adopts safety improvements in tank car design standards, a sampling and classification program for unrefined petroleum-based products, and notification requirements. Exhibit G, Table G-1 provides a summary of the elements of the final rule and Table G-2 further summarizes the design specifications for tank cars allowed under the final rule. New tank cars built after October 1, 2015 would be required to meet the new DOT-117 standard. All existing Non-Jacketed CPC-1232 tank cars in Packing Group I service (i.e., tank cars proposed for use by the project Applicant) would have to meet the DOT-117R standard by April 1, 2020.

Use of DOT-117 tanker cars would reduce the probability of a release from a rail car by about 73.9% percent over the rail car design that is currently proposed by the Applicant. Use of the DOT-117R tanker cars would reduce the probability of a release from a rail car by about 65.9% percent over the rail car design that is currently proposed by the Applicant. Exhibit G, Figure G-1 shows the risk for the mainline rail transport between the SMR and state line assuming the use of either DOT-117 or DOT-117R tanker cars. The FEIR recommends a tank car design mitigation measure that is more stringent and safer than the May 1, 2015 final rule (the DOT-117/117R requirements) issued by the USDOT (refer to FEIR, Section 4.7, Table 4.7.6, Option 1; and, Mitigation Measure HM-2a). The Applicant has stated that the County is preempted from requiring implementation of this and other mitigation measures associated with the mainline portion of the Project. The primary difference between the FEIR recommended tank car design and the DOT-117 tank car design is that the FEIR recommended Option 1 tank cars would have top fittings that would be less likely to be compromised in a tank car roll over and would initially also have a more advanced and safer braking system (refer to Exhibit G, Table G-3).

X. ALTERNATIVE PROJECT / REDUCED PROJECT

The FEIR includes an alternatives section which describes multiple project alternatives such as a revised onsite rail spur configuration; shorter unit trains, hauling of crude by truck to a nearby pump station, and a reduced rail delivery project versus the proposed project of five trains per week. These alternatives are a requirement of CEQA in order to provide the public and decision makers an opportunity to review other potential project designs that could meet most of the project’s objectives and reduce or eliminate significant impacts on the environment.

Generally County Planning staff could recommend approval of a project alternative if it would lessen or avoid significant environmental impacts, and complied with the requirements set forth in the General Plan/CZLUO, including the findings regarding health, safety, welfare, and compatibility with surrounding uses. The Project however is unique in that all alternative designs of the rail spur project on the Santa Maria Refinery site do not comply with the County’s General Plan with regards to removal of environmentally sensitive habitat areas, and raise concerns in regards to health and safety, significant environmental impacts, and compatibility with surrounding uses at the project site and in communities along the mainline. Therefore, Planning staff is not recommending approval of an alternative version of the Project that modifies layout and design of the rail spur at the Santa Maria Refinery.

The FEIR evaluated a reduced delivery project alternative of three trains per week (versus five). Although this alternative reduces some impacts, significant environmental impacts would still result along with health and safety concerns which remain an issue.

The reduced delivery project alternative (three trains per week) would reduce the “Class I” significant toxic air emissions impact at the Santa Maria Refinery discussed above in Section VIII.B by lowering the cancer risk to below the San Luis Obispo County Air Pollution Control District threshold of 10 in a million. At three trains per week, or 150 trains per year, this alternative would result in a cancer risk of 9.5 in a million, which is below the 10 in a million threshold. Due to being below the SLOCAPCD threshold, this would no longer be considered a Class I significant impact. While no longer significant, health and safety risks, other significant environmental impacts, and other compatibility concerns remain a concern for affected communities and neighbors.

Air emissions of diesel particulate matter onsite (which are based on the peak day and would not change regardless of the number of trains used) would still be above the SLOCAPCD CEQA thresholds of 1.25 lbs per day even with partial mitigation, and would remain a Class I impact under the three train per week alternative. The diesel particulate matter emissions, which are an air toxic, would contribute to the localized PM₁₀ emissions, which already exceed the State PM₁₀ air quality standard. This onsite Class I impact would require the adoption of overriding considerations as discussed below in Section XI.

The reduced alternative of three trains per week would still require construction of the same facilities as the proposed Project with the same level of disturbance to environmentally sensitive habitat. Thus the three train per week alternative would still not comply with the environmentally sensitive habitat area requirements set forth in the General Plan, Local Coastal Program, and CZLUO.

While the reduced delivery alternative of three trains per week, would reduce the likelihood of a train accident and resultant oil spill along the mainline rail routes, the ten “Class I” mainline impacts would remain significant and unavoidable (Class I) resulting in the need for the adoption of overriding considerations as discussed below. Since the reduced delivery alternative would still result in the same Class I impacts for the mainline rail routes as the proposed Project, the areas of non-compliance with the General Plan and CZLUO identified for the proposed Project along the mainline rail route would remain the same for the reduced delivery alternative. Concerns regarding health and safety, compatibility with properties and neighbors of the project site, and with communities along the mainline remain considerable.

The table below has been included to show how the reduced delivery alternative of three trains per week would affect General Plan/CZLUO policy inconsistencies and Class I impacts onsite and along the mainline rail routes. Exhibit K provides a more detailed table on the comparison of Class I impacts and General Plan/CZLUO inconsistencies between the proposed Project (5 trains per week) and the reduced delivery alternative (3 trains per week).

Reduced Rail Delivery Comparison				
Project/Alternative	Onsite		Mainline Rail Routes	
	# Class I Impacts	# of General Plan/CZLUO Inconsistencies	# Class I Impacts	# of General Plan/CZLUO Inconsistencies
Proposed Project (5 trains per week)	2	15	10	17
Reduced Delivery Alternative (3 trains per week)	1	14	10	17

One of the Class I impacts (AQ.2) applies to both onsite and along the mainline rail route since it covers air emissions within San Luis Obispo County.
 See Exhibit K for a detailed breakdown of the Class I impacts and General Plan/CZLUO inconsistencies.

In summary, staff carefully considered, and the FEIR evaluated, a range of project alternatives including a reduced rail delivery alternative of three trains per week. While a reduced rail delivery project reduced the severity of the Class I impacts associated with the Project, including a reduction of the significant cancer risk onsite, other impacts related to air quality onsite, as well as numerous significant impacts along the mainline, and health and safety concerns would remain. A reduced project would reduce some compatibility issues with surrounding properties as well as communities along the mainline, but significant compatibility and General Plan policy inconsistencies would remain along with lingering health and safety concerns. Staff does not recommend approval of the reduced rail delivery alternative.

XI. OVERRIDING CONSIDERATIONS REQUIRED

In order to approve a project with significant and unavoidable impacts, the California Environmental Quality Act (CEQA) requires decision makers to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental impacts when determining whether to approve or deny the project. If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of the proposed project outweigh the unavoidable adverse environmental effects, the adverse effects may be considered acceptable.

Based on Staff's review of the proposed project and the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits presented at this time, Staff is recommending that the proposed project be denied. At this time, the benefits of the project do not appear to outweigh the significant environmental impacts identified in the FEIR.

XII. STAFF COMMENTS

A large volume of public and agency comments have been received from throughout the state of California during public review of the DEIR and the RDEIR as well as subsequent to the close of the RDEIR public comment period. Comments have been received both in support and in opposition to the Project (primarily the latter). As discussed above, the Project would result in significant and unavoidable impacts (Class I) which cannot be mitigated to a level of insignificance. The Project raises health and safety concerns and is inconsistent with provisions of the General Plan and with the findings required to approve a Development Plan and Coastal Development Permit. Through the public hearing process, your Commission may determine, based on public comment and other input from members of the public and / or the Applicant to either approve or deny the Project.

A. FEIR Certification

Staff is recommending denial of the project; therefore staff and County Counsel are also recommending that the Final EIR not be certified by the Planning Commission. If the Planning Commission denies the project, the FEIR should not be certified for the following reasons:

1. CEQA does not apply to projects rejected or disapproved by a public agency (Pub. Res. Code 21080);
2. Were the EIR to be certified, anyone wishing to challenge the adequacy of the EIR must file a lawsuit within 30 days after the Notice of Determination is filed;
3. Without an approved Development Plan/Coastal Development Permit, the applicant would be under no obligation to defend or indemnify the County for the time and money required to defend such a lawsuit. Nor would the applicant be required to reimburse the County for any attorney's fees that the County might have to pay to the litigants in the event the EIR is found to be inadequate for any reason; and,

4. Certification opens the County to potential liability even though no project is approved.

XIII. AGENCY REVIEW

There are numerous agencies which have submitted comments regarding the Project. Comments were submitted during the EIR process and many were submitted later for the Planning Commission's review as a part of the record for the deliberation process (a complete list of comment letters from agencies submitted after the close of the EIR comment period can be found in Exhibit F attached). In addition to the agencies listed on the first page of this staff report which received referrals when the project was initially submitted to the County Planning and Building Department, the following agencies have been involved in the project throughout the EIR process and their comments are listed in the Final EIR along with responses:

- Berkeley (City of);
- Davis (City of);
- Placer County Air Pollution Control District;
- Sacramento Area Council of Governments;
- Sacramento Metro Air Quality Management District;
- San Luis Obispo Council of Governments;
- Santa Barbara (County of);
- Santa Barbara County Air Pollution Control District;
- South Coast Air Quality Management District; and,
- Ventura County Air Pollution Control District.

XIV. LEGAL LOT STATUS

The one existing parcel is a portion of Lots C, F, G, M and N and all of Lots H, I, J, K, and L of the Standard Eucalyptus Tract filed in the office of the County Recorder of said County of San Luis Obispo on 11/1/1909 and recorded in Book 1, at Page 12 of maps thereof, and also Lots 1-6 inclusive and Lots 9 to 19 inclusive of the map entitled "Map of the Subdivisions of Lot "E" of the Standard Eucalyptus Tract" filed in the office of the County Recorder of said County of San Luis Obispo on 3/10/1910 and recorded in Book 1, at Page 17 of maps thereof. The parcel was legally created by deeds, Public Lot 80-88 and Parcel Map CO73-350, at a time when that was a legal method of creating parcels.

The Staff Report was prepared by the County of San Luis Obispo Department of Planning and Building with assistance from SWCA, Inc., and Marine Research Specialists.

EXHIBITS

- Exhibit A – Project Analysis, General Plan and Ordinance INCONSISTENCIES “Onsite”
- Exhibit B – Project Analysis, General Plan and Ordinance INCONSISTENCIES “Mainline”
- Exhibit C – Findings for Denial
- Exhibit D – California Coastal Commission Site Visit Letter
- Exhibit E – Project Graphics
- Exhibit F – Post Comment Period Agency & Special District Comments
- Exhibit G – USDPT Rail Car Specifications and Risk Levels
- Exhibit H – Agencies and Individuals Consulted During EIR
- Exhibit I – Crude by Rail Accident Table
- Exhibit J – Correspondence from the Applicant and UPRR Regarding Federal Preemption
- Exhibit K – Detailed Reduce Rail Delivery Comparisons

Exhibit A – Project Analysis, General Plan and Ordinance INCONSISTENCIES “Onsite”

A. Coastal Zone Land Use Ordinance

1. Section 23.07.170, Environmentally Sensitive Habitats (ESHA):

“Development standards for environmentally sensitive habitats: All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. This standard requires that any project which has the potential to cause significant adverse impacts to an ESHA be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.” Where avoidance is not possible the project must be the minimum necessary in order to avoid a takings of the property. Circumstances in which a development project would be allowable within an ESHA include resource dependent uses (i.e., coastal dependent), coastal access ways, incidental public utilities, and habitat enhancement.

The Project is located within dune habitat containing sensitive vegetative communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition (i.e., Silver dune lupine – mock heather scrub).

Per the Coastal Zone Land Use Ordinance (CZLUO) definition of Unmapped ESHA, the Department of Planning and Building is required to make a determination of the presence of Unmapped ESHA “at or before the time of application acceptance and shall be based on the best available information.” This specific language was included in the County’s CZLUO through consultation with the California Coastal Commission in the 1990’s in order to provide guidance for projects and project sites where ESHA mapping was not available or was outdated. Coastal Commission’s intent in including this ordinance language in the CZLUO is to require the Department to determine on a project-by-project basis, using the above referenced CDFW vegetation classification system, whether Unmapped ESHA is present and to do so at the earliest possible point in processing a coastal permit -- and to do so using the best information available.

It is often the case that there is limited, if any, information available to the Department to make a clear and concise determination of presence of Unmapped ESHA at the time of application acceptance because technical studies pertaining to ESHA have yet to be prepared or peer reviewed. Technical information required to make the ESHA determination is often generated or peer reviewed during the implementation of the CEQA process. The Department’s overriding requirement for processing permits in the coastal zone is to adhere to the Local Coastal Program (which includes the CZLUO) which is certified by the Coastal Commission and derived from the California Coastal Act. Therefore, the Department relies heavily on the collection of best available information during the CEQA process, which in the case of this Project involved preparation of an EIR, to make a final determination on presence or absence of Unmapped ESHA. If the Department relied solely on making a determination of Unmapped ESHA at the time of application acceptance, the Department would often find itself inconsistent with the Local Coastal Program because it would not include the best available data.

Shortly after the Applicant submitted their initial project application (April 2013), the Applicant agreed to preparation of an EIR (July 2013) and requested the Department

implement a facilitated EIR timeline that included preparation of the EIR and scheduling the Project for a Planning Commission hearing in fourteen months. The Department agreed to the facilitated schedule and immediately accepted the Applicant's application July of 2013 for purposes of processing the EIR. The Project application included botanical, archaeological, air quality, visual and other technical environmental studies prepared by the Applicant's consultants. The Department began preparation of the EIR in July 2013 with the understanding that the Applicant-submitted environmental studies would be peer reviewed by the EIR consultant and fully vetted during the Draft EIR public review process. It was not until review of public comments submitted on the Recirculated Draft EIR, the Department recognized the potential for the project site to contain Unmapped ESHA.

Based on the comments received on the Recirculated Draft EIR, the Applicant's consultants prepared updated vegetation classification and mapping and the Department's EIR consultant peer-reviewed this information. Based on the additional analysis that occurred during the CEQA process, and generation of better information than was available at the time of the Applicant's initial submittal in April 2013, the Department determined that Unmapped ESHA is in fact present throughout the area of proposed rail spur development (refer to Exhibit E, Figure E-3). Based on a site visit conducted May 27, 2015 by Coastal Commission staff scientists, the Commission corroborates the Department's determination of the presence of ESHA (Coastal Commission staff letter dated June 4, 2015 attached in Exhibit D).

The Project and associated infrastructure would extend within this habitat area and would impact approximately 20 acres of ESHA. Due to the extensive distribution of Unmapped ESHA there does not appear to be an alternative design or Project configuration that would avoid disturbance and removal of this habitat in order for the Project, or any project alternative, to proceed on the portion of the property outside the existing disturbed envelope of the refinery. The inability to avoid ESHA is in direct conflict with sub-section (e) of this standard (23.07.170 e) which states, "All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values."

In order to allow development within an ESHA very strict criteria are outlined in the ordinance and one of those would be a project that is "coastal dependent." The definition of coastal dependent includes, "any development or use that requires a permanent location on or adjacent to the ocean." Construction of the Refinery by Union Oil began in 1953 and the location for the Refinery was selected due to close proximity to Santa Maria Oil Fields (by 1957 there were 1,775 oil wells in operation in the Santa Maria Valley). Throughout its history, the primary operation of the refinery has remained the same, to receive locally produced heavy, sour crude oil and refine it into gas oil, sulfur, and coke. The citing of the Refinery was also due to being in close proximity to the rail line and major north-south highway corridors so as to transfer the sulfur and coke to manufacturers of supplies using those products.

Phillips 66 states the "Project clearly is "coastal dependent" because it must, by definition, occur adjacent to the ocean, where both the refinery and the mainline rail to which the proposed rail spur is to be extended are located" and that "the Project is inextricably tied to a facility that is itself coastal dependent, as evidenced by the fact that it operates under National Pollutant Discharge Elimination System ("NPDES") permit for outfall into the Pacific Ocean." The Refinery is not a use that needs to be located within the coastal zone and does not meet the definition of being coastal dependent. The Refinery could have been built a short distance to the north or the east, outside of the coastal zone, and a longer ocean outfall pipeline constructed. In and of itself, the outfall into the ocean meets

the definition of being coastal dependent; however, the refinery does not have to be adjacent to the sea for it to operate since the outfall pipeline could easily be extended beyond the coastal zone boundary. Also, the use of ocean disposal is just one option for a refinery such as SMR for disposing of or re-using treated wastewater, as such, the use of an ocean outfall at the SMR does not make the entire SMR a coastal dependent use.

The same would apply for the mainline rail where a spur could be built at a location outside of the coastal zone. Just because the mainline rail tracks are located in the coastal zone does not make the SMR coastal dependent. The Project (i.e., construction and operation of a rail spur and crude oil unloading facility), like other rail spur projects proposed or built around the state and country (e.g., in locations such as Bakersfield, California) does not need to be located adjacent to or near the ocean in order to be an economically or technologically feasible project.

Due to the fact the Project would impact ESHA and is not considered a coastal dependent use, the Project is considered in direct conflict with this section of the Coastal Zone Land Use Ordinance.

B. Coastal Plan Policies

A portion of the County's adopted Local Coastal Program includes the Coastal Plan Policies which are in place to carry out the requirements of the California Coastal Act. These policies are required to be implemented in the County's General Plan and Ordinances. Projects must comply with all applicable Coastal Plan Policies in order to be approved. Following is a list of the pertinent Coastal Plan Policies for which this proposed project does not comply:

- 1. Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats:** This policy states that new development within or adjacent to locations of environmentally sensitive habitats (within 100 feet unless sites further removed would significantly disrupt the habitat) shall not significantly disrupt the resource. Within an existing resource, only those uses dependent on such resources shall be allowed within the area. Unmapped ESHA is present throughout the Project area and within 100 feet of other areas determined to be Unmapped ESHA, including portions of the project area where the rail spur and unloading facility would be constructed, the emergency vehicle access route, and the area where the pipelines would be constructed from the rail spur unloading facility to the existing storage tanks. The Project would impact 20 acres of Unmapped ESHA. The Refinery was built in 1955 to be in close proximity to local onshore oil sources (non-coastal dependent). In the mid-1980's, upon development of offshore oil, the Refinery began use of offshore crude as a major source. During this time, and to present day, the Refinery has used a combination of offshore crude as well as a variety of onshore sources (including Canadian Tar Sands crude which arrives by truck from the Central Valley and is delivered to the Santa Maria Pump Station). The Refinery is dependent upon a complex arrangement of roadways, rail lines, pump stations, and pipelines that are located, in some instances in the coastal zone, but primarily throughout North America. The Refinery does not rely on the ocean or marine resources and is therefore not coastal dependent. Because the Project would impact Unmapped ESHA and is not a coastal dependent use, it would be inconsistent with this policy.
- 2. Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats:** This policy states that designated plant and wildlife habitats are environmentally sensitive habitat areas and emphasis for protection should be placed on the entire ecological community. Only uses dependent on the resource shall be permitted within the identified sensitive habitat portion of the site. The Project would be located within

and would impact an approximate 20-acre area that contains Unmapped ESHA. In addition the Project is not a coastal dependent use as described above. Because the Project is not considered a coastal dependent use and would impact Unmapped ESHA, it is not consistent with this policy.

3. **Environmentally Sensitive Habitat Area Policy 36, Protection of Dune Vegetation:** Policy 36 states “disturbance or destruction of any dune vegetation shall be limited to those projects which are dependent upon such resources where no feasible alternatives exist and then shall be limited to the smallest area possible. Based on the location of proposed improvements associated with the Project, portions of the development would be located within and would impact approximately 20 acres of Unmapped ESHA. Development activities and uses within dune vegetation shall protect the dune resources and shall be limited to resource dependent, scientific, educational and passive recreational uses. Coastal dependent uses may be permitted if it can be shown that no alternative location is feasible, such development is sited and designed to minimize impacts to dune habitat and adverse environmental impacts are mitigated to the maximum extent feasible.” As described above, neither the Project nor the existing refinery are coastal dependent uses (i.e., relying on adjacency and being dependent on the ocean). The objective of the Project is to increase the Applicant’s ability to access more economically priced crude from a wider diversity of suppliers throughout various locations in North America. Because the Project and the existing refinery are not “coastal dependent” and would result in the removal of Unmapped ESHA, the Project does not comply with this policy.

C. Coastal Zone Framework for Planning

1. **Land Use Goal 4:** The Land Use Element land use categories identify areas that are to be compatible with each other and specific goals related to conflicts of uses and preservation of important areas. Land use goal no. 4 asks that “areas where agricultural, residential, commercial and industrial uses may be developed in harmonious patterns and with all the necessities for satisfactory living and working environments.” The proposed rail spur project would modify an existing industrial property to allow the construction of the spur within a buffer area between neighboring residential and agricultural land uses. Operation of the rail spur project could result in significant health risk impacts to the closest residences mainly due to diesel particulate matter from the locomotives and the trucks servicing the refinery. The project would also generate additional particulate matter emissions due to fugitive dust and diesel engines at the refinery in an area that already exceeds state PM₁₀ standards. Therefore, the project would be inconsistent with this policy by allowing an expansion of a use that is not compatible with neighboring residential or agricultural uses and would bring additional negative health impacts as a result.
2. **Strategic Growth Goal 1, Objective 2. Air Quality:** This air quality objective is put forth to maintain and protect a living environment that is safe, healthful and pleasant for all residents. The applicable goal associated with this objective seeks to ensure that development projects maintain, or exceed, the minimum state and federal ambient air quality standards. The Project would not comply with this objective and goal because it would generate toxic air emissions that exceed San Luis Obispo County APCD (SLOCAPCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments. The SLOCAPCD cancer risk CEQA threshold is 10 in a million for toxic emissions. The project would also exceed the SLOCAPCD diesel particulate matter emission CEQA threshold of 1.25 lbs per day without full mitigation. Refer to the FEIR, Air Quality, Section 4.3.4.2, Impacts AQ.2 and AQ.4, for additional information on these significant impacts.

3. **Combining Designations, SRA – Sensitive Resource Area, General Objectives: 1.** General objective 1 states that Environmentally Sensitive Habitats should be identified and protected by construction setbacks, use limitations, and other appropriate regulations. A portion of the Project area of disturbance is located within the existing refinery site in an area previously disturbed for storage and handling of coke; however, a large portion of the improvements associated with the Project would be located within identified sensitive vegetative communities, as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition, and as Unmapped ESHA (i.e., Silver dune lupine – mock heather scrub). Project construction would impact approximately 20 acres of this sensitive vegetative community and Unmapped ESHA. For this reason, the Project would not comply with this objective.

D. Conservation and Open Space Element of the General Plan

1. **Air Quality Policy AQ 3.2, Attain Air Quality Standards:** Policy AQ 3.2 states that the County will attain or exceed federal or state ambient air quality standards for measured criteria pollutants. San Luis Obispo County is in non-attainment for ozone standards as well as the state particulate matter standards. The rail spur project would generate NO_x and ROG emissions onsite that would lead to ozone increases. However, the NO_x and ROG emissions at the SMR can be offset using emission reduction credits. The Project would generate fugitive dust and DPM onsite that would contribute to PM₁₀ emissions within the County. It is unlikely that these fugitive dust and DPM emissions (i.e., PM₁₀ emissions) could be offset at the SMR due to a lack of available emission reductions. The addition of these PM₁₀ emissions would further exacerbate the ability for the County to attain the state particulate matter standards and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.
2. **Air Quality Policy AQ 3.3, Avoid Air Pollution Increases:** Policy AQ 3.3 states that the County will, “Avoid a net increase in criteria air pollutant emissions in planning areas certified as Level of Severity II or III for Air Quality by the County’s Resource Management System (RMS).” The Nipomo Mesa area is in a level of severity II for Ozone, a level of severity III for PM_{2.5}, and a level of severity III for PM₁₀. The “PM” or particulate matter includes hazardous materials in the air that gets into the lungs and causes a variety of health effects. The PM_{2.5} tends to be a greater health risk because the particles are smaller and can travel deeper into the lungs. Sources of particulate pollution include diesel exhaust, mineral extraction and production, combustion products from industry and motor vehicles, smoke, wind-blown dust and other sources (Source: County Resource Summary Report). The Project does not comply with this standard because it would add diesel exhaust from locomotives to an area which is currently in a level of severity of III. Even with implementation of mitigation measures the Project would exceed the threshold of cancer causing diesel particulate which is 10 in a million by creating a risk factor of approximately 13.6 in a million (for emissions occurring at the project site and along the mainline impacting the same receptors near the SMR). Without implementation of mitigation, the Project would create a risk factor of 26.5 in a million, both of which are exceeding the cancer risk threshold. In addition, without full mitigation, the project would also exceed the SLOCAPCD diesel particulate matter emission CEQA threshold of 1.25 lbs per day. It should be noted that the most effective mitigation measure may not be implementable due to likely federal preemption (i.e., requiring use of Tier 4 locomotives). Refer to the FEIR, Air Quality, Section 4.3.4.2, Impacts AQ.2 and AQ.4, for additional information on these significant impacts.
3. **Air Quality Policy AQ 3.4, Toxic Exposure:** Policy AQ 3.4 states that the County will, “Minimize public exposure to toxic air contaminants, ozone, particulate matter, sulfur

dioxide, carbon monoxide, nitrogen oxides, and lead.” This Project does not comply with this Policy of the General Plan because it allows for an increase in hazardous emissions as a result of the project. Calculations have shown that this Project would exceed the cancer threshold which is 10 in a million by resulting in a cancer risk of approximately 26.5 in a million (with no mitigation), or approximately 13.6 in a million (with mitigation, for emissions occurring at the project site and along the mainline impacting the same receptors near the SMR). This impact would exceed San Luis Obispo County Air Pollution Control District (APCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments (for more detailed analysis refer to Section VII.B above the FEIR, Air Quality, Section 4.3.4.2, Impact AQ.4).

4. **Air Quality Policy AQ 3.5, Equitable Decision Making:** Policy AQ 3.5 states that the County will, “Ensure that land use decisions are equitable and protect all residents from the adverse health effects of air pollution.” This policy is also consistent with the discussion above regarding air quality Policy AQ 3.3. The Project would bring locomotives (up to 5 trains per week, 10 round trips) to the site for unloading of heavy crude, and would depart the site empty. The additional diesel exhaust from these locomotives, upwind of many residences and sensitive receptors, would cause a significant impact to the air quality for these residences. In addition, a large onsite buffer between the residential neighborhoods and the facility would be reduced from over 7,600 feet to approximately 3,300 feet. This project application for a “Development Plan/Coastal Development Permit” is a discretionary land use permit with the discretion by the County to decide if this project complies with the General Plan including the health and safety of the County’s residents. The Project imposes health risks which would be inconsistent with the health and safety requirements of the General Plan with regard to air quality from the property (increase in cancer causing thresholds). This project would not ensure that all residents are protected from the adverse health effects of air pollution as this policy requires.
5. **Biological Resources Policy 1.2, Limit Development Impacts:** This policy calls for the regulation and minimization of proposed development in areas that contain essential habitat for special-status species, sensitive natural communities, wetlands, coastal and riparian habitats, and wildlife habitat and movement corridors as necessary to ensure the continued health and survival of these species and protection of sensitive areas. The Project would result in the extension of refinery infrastructure (i.e., rail spur, unloading facility, pipelines, and emergency vehicle access road) into a dune habitat system. Approximately 20 acres of various project features would be constructed within dune vegetation that is considered sensitive habitat as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition and is also considered Unmapped ESHA; therefore, the Project does not comply with this policy.
6. **Non-Renewable Energy Facility Siting Policy E 7.1:** Energy Goal 7 states that, “Design, Siting, and Operation of Non-renewable energy facilities will be environmentally appropriate.” In addition the related Policy E 7.1 for Non-Renewable Energy Facility Siting, “Energy fossil fuel, and related facilities will be sited, constructed, and operated in a manner to protect the public from potential hazards and significant environmental impacts.” The implementation Strategy related to Goal 7 and Policy 7.1 requires facility design, siting and operational standards: There are 30 of these outlined for energy projects and the pertinent policies for the rail spur project are listed here (numbers correspond to the numbers in the Conservation and Open Space Element Energy Policy E 7.1):
 - 3) Continue to maintain, operate, monitor, and repair the facility so that it does not constitute a public safety hazard or an environmental threat.

The Project does not comply with this component of the goal due to air toxic emissions from the operation of the Project that would exceed the acceptable levels determined by the SLOCAPCD, this based upon the health risk assessment described in Section VII B above and the FEIR, Air Quality, Section 4.3.4.2, Impact AQ.4, and the increase in PM₁₀ emissions (both fugitive dust and DPM), Air Quality, Section 4.3.4.2, Impact AQ.2. The Project, while located within and adjacent to an existing facility, would increase the intensity of rail activity and change the use of the site to allow for crude to be brought in via rail. The addition of up to five trains per week would increase toxic air emissions which would impact neighboring residences to the east and north of the project site.

- 4) Employ the best reasonably achievable techniques available to prohibit disruption of environmentally sensitive areas such as wetlands, animal or bird refuges, or habitat of species of special concern. Avoid impacts to habitat of rare, threatened, or endangered species.

The Project does not comply with this component of the policy because construction of the Project would impact about 20 acres of sensitive habitat as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition and an area of the project site considered Unmapped ESHA.

E. South County Coastal Area Plan

1. **Land Use, Rural Area Land Use, Industrial:** The Area Plan states that for the existing Santa Maria Refinery (SMR), the refinery occupies only a portion of the total area, and the large vacant areas around the refinery provide a desirable buffer from adjacent uses and an area where wind-carried pollutants can be deposited onsite, thereby not affecting neighboring properties. This is particularly important to the agricultural uses in the Santa Maria Valley. Any proposed modification or expansion of the refinery (e.g., the proposed rail spur project) should be subject to Development Plan approval covering the entire property to designate buildable and open space areas. The Area Plan continues by stating offshore oil and gas lease sales may generate the need for onshore partial oil and gas processing facilities and that expansion of industrial uses in the vacant portion of the Rail Spur Project Site may be appropriate in the future to accommodate offshore oil and gas lease sales. However, the Plan does not envision expansion for other purposes such as the Project. The rail spur component of the Project would extend an approximate 200-foot wide swath of development and industrial use approximately 0.8 mile to the east beyond the currently industrialized portion of SMR, toward existing residences and Highway 1. From the eastern terminus of the proposed rail spur, the buffer would be reduced to approximately 0.5 mile to the eastern boundary of the project site. This would reduce the buffer area between the Project and the residential area to the east and would therefore result in the Project being inconsistent with this policy.
2. **Industrial Air Pollution Standards:** This requirement of the South County Area Plan requires that “any expansion or modification of existing petroleum processing or transportation facilities or the construction of new facilities shall meet San Luis Obispo County Air Pollution District (APCD) standards.” The Project does not comply with this requirement as it exceeds the minimum threshold for cancer risk and the daily threshold associated with diesel particulate matter. The toxic air emissions added to the basin as a result of this project is not in compliance with these requirements (refer

to Section VII.B. above and the FEIR, Air Quality, Section 4.3.4.2, Impacts AQ.2 and AQ.4).



PLANNING COMMISSION

ORDER OF THE DAY

February 4, 2016

The San Luis Obispo County Planning Commission Welcomes Your Attendance for the Phillips 66 Rail Spur Hearing

Public Hearing to be Held in the Board of Supervisors Chambers

1055 Monterey St. San Luis Obispo RM D170

*Overflow seating with the hearing streaming next door in the Fremont Theater

9:00 AM ROLL CALL & FLAG SALUTE

1. PUBLIC COMMENT: For items *NOT* listed on today's agenda, 3 minutes per person.
2. PLANNING COMMISSION SECRETARY INTRODUCES AGENDA ITEM
3. CHAIRPERSON TO ANNOUNCE HEARING PROTOCOL AND INTRODUCTORY REMARKS
4. STAFF PRESENTATION – Approximately 30 minutes
5. APPLICANT PRESENTATION – Approximately 30 minutes

10:30 – 10:45 AM Morning Recess

6. COMMENT TIME RESERVED FOR ELECTED OFFICIALS AND AGENCY REPRESENTATIVES – 1.5 hours reserved for this time. Officials are granted 3 minutes each to speak, however if this time is not used completely, public comment will start immediately after. All speakers must obtain a speaker slip. Special speaker slips will be given to elected officials and agency representatives (i.e. Mayor, City Council Members, Board of Supervisors Members from other jurisdictions, Fire Chief) in order to speak during this time. Speaker slips will be available in the Fremont Theater which will be used as overflow seating. Please bring your business card and ID for pick up of this special speaker slip.

12:00 – 1:30 PM LUNCH

7. PUBLIC COMMENT - This could start before the lunch hour. This will likely take several days depending on how many people wish to speak. All speakers must obtain a speaker slip available in the Fremont Theater. Each speaker slip will have a number on it. If you don't have a seat in

the chambers, and if you are one of the first twenty speaker numbers please line up at one of the two podiums in the Board of Supervisors Hearing Chambers. The next twenty speakers are on deck and will come in after the first twenty are complete etc. It is likely that the Commission will be able to hear approximately 50- 60 speakers in the afternoon after lunch.

3:00 – 3:15 PM Afternoon Recess

8. PUBLIC COMMENT CONTINUED

5:00 PM Adjourn Meeting – Continue to February 5, 2016

The following items will occur on a future date after close of ALL public comment:

9. STAFF RESPONSE POST PUBLIC COMMENT
10. QUESTIONS FROM COMMISSION
11. OTHER AGENCIES AVAILABLE FOR COMMISSION QUESTIONS (e.g. Cal Fire, and APCD)
12. PLANNING COMMISSION DELIBERATIONS
13. PLANNING COMMISSION DECISION

*Information regarding any potential future hearing dates will be posted on the San Luis Obispo County Department of Planning and Building Website www.sloplanning.org.

Exhibit B – Project Analysis, General Plan and Ordinance INCONSISTENCIES “Mainline”

In addition to the standards, goals and policies listed above in Exhibit A for the onsite impacts, many were specific to impacts that the proposed project would bring to lands, citizens and habitats throughout the county along the mainline, off of the refinery property, as a result of the Project.

Following is a list and summary of those goals and policies for which the project is not in compliance along the mainline within the County in addition to those listed above on the project site:

A. Coastal Zone Framework for Planning

- 1. Coastal Zone Framework for Planning, Coastal Zone Land Use Element Strategic Growth Goal 1-Preserve Resources:** The Land Use Element states that the County will “preserve open space, scenic natural beauty and natural resources” and in addition “conserve energy” and “protect agricultural land and resources.” The project has the potential to result in an increased risk of oil spills and fires that could impact natural resources, scenic areas, and agricultural land along the mainline rail routes as a result of this project. An oil spill could result in significant impacts to agricultural, biological, and water resources in the event of a spill because of the additional rail traffic from this proposed project. Because the project is anticipated to increase the oil spill risk and it is possible that in the event of an oil spill impacts to the natural resources of the county could occur, the project would not be in compliance with this goal of the Land Use Element.
- 2. Strategic Growth Goal 1: Objective 4. Agriculture & Land Use Goal 2-Preserve Agriculture:** This objective states that agricultural land for the production of food, fiber and other agricultural commodities is to be protected. This includes the protection and support of the rural economy and locally based commercial agriculture. The proposed rail spur project has the potential to result in oil spills or fires that could impact agricultural land along the mainline rail routes within the County. An oil spill could result in significant impacts to agricultural commodities and soils. Because of the increase in risk and potential for a spill which would directly impact agricultural resources the project is not consistent with this land use policy.
- 3. Strategic Growth Goal 1, Objective 2. Air Quality:** This air quality objective is put forth to maintain and protect a living environment that is safe, healthful and pleasant for all residents. The applicable goal associated with this objective seeks to ensure that development projects maintain, or exceed, the minimum state and federal ambient air quality standards. The Project would not comply with this objective and goal because it would generate toxic air emissions that exceed San Luis Obispo County APCD (SLOCAPCD) health risk thresholds of 10 in a million for mainline rail operations in areas where train speeds would be less than 30 mph. The project would also exceed the SLOCAPCD NO_x, ROG, and diesel particulate matter emission CEQA thresholds without full mitigation, leaving potential exceedances of the state and/or federal ambient air quality standards unmitigated and making the Project inconsistent with this goal. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and DPM emissions. Refer to the FEIR, Air Quality, Section 4.3.4.2, Impacts AQ.2 and AQ.5, for additional information on these significant impacts.

B. Coastal Plan Policies

1. **Chapter 6: Environmentally Sensitive Habitats, Coastal Streams Policy 20:** Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological systems and ecological functions of coastal streams shall be “protected and preserved”. The proposed rail spur project has the potential to result in oil spills and fires that could impact coastal streams and riparian areas along the mainline rail routes. An oil spill could result in significant impacts to coastal streams and riparian vegetation which is also discussed in section 4.4 (Biological Resources) of the FEIR. The trains would use the existing union pacific Coastal Line which is an existing transportation corridor that is currently used to transport crude oil and other hazardous materials through the County. This project however would allow for an increase of rail traffic which would increase the probability of a potential spill which could severely impact the County’s riparian areas. Because of this, the project is not consistent with this Coastal Policy.
2. **Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats:** This policy states that designated plant and wildlife habitats are environmentally sensitive habitat areas and emphasis for protection should be placed on the entire ecological community. The proposed Project has the potential to result in oil spills and resultant fires that could impact terrestrial habitats along the mainline rail routes. Depending upon the location of an oil spill, it could result in significant impacts to terrestrial habitats. Given the potential significant impacts that could occur to terrestrial habitats in the case of an oil spill, rail transport of crude oil along the mainline is not consistent with this policy.
3. **Chapter 7: Agriculture Policy 1:** Policy 1 states that prime agricultural land shall be maintained and protected for agricultural uses. Similar to the strategic growth goals listed above related to agriculture, the Coastal Plan Policies also outlines requirements for protection of agricultural lands which would potentially be impacted severely as a result of an accident or spill of oil on agricultural resources or soils. This is also discussed in detail under section 4.2 Agricultural Resources in the FEIR. In summary however, there is a probability of an accident or spill as a result of this proposed project which includes an increase in oil traffic via rail throughout the County. In the event of a spill or fire there would be significant impacts to agricultural resources as a result of this project therefore the project is not in compliance with this policy.
4. **Chapter 12: Archaeology, Policy 1: Protection of Archaeological Resources:** This General Plan policy states that the County shall provide for the protection of both known and potential archaeological resources. All available measures shall be explored at the time of a development proposal to avoid development on important archaeological sites. While development is not proposed on or near an archaeological site, impacts to archaeological resources would occur as a result of a spill along the mainline and impacts to these resources could not be avoided if a spill were to occur within an area where resources are located.

C. Conservation and Open Space Element

1. **Air Quality Policy AQ 3.2, Attain Air Quality Standards:** Policy AQ 3.2 states that the County will attain or exceed federal or state ambient air quality standards for measured criteria pollutants. San Luis Obispo County is in non-attainment for ozone standards as well as the state particulate matter standards. The rail spur project would be generating NO_x and ROG emissions along the mainline rail route that would lead to ozone increases and would generate DPM along the mainline rail routes that would contribute to PM₁₀ emissions within the County. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and DPM emissions.

The addition of these NO_x, ROG, and PM₁₀ emissions would further exacerbate the ability for the County to attain the state particulate matter and ozone standards and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.

2. **Air Quality Policy AQ 3.3, Avoid Air Pollution Increases:** Policy AQ 3.3 states that the County will, “Avoid a net increase in criteria air pollutant emissions in planning areas certified as Level of Severity II or III for Air Quality by the County’s Resource Management System (RMS).” The Nipomo Mesa area is in a level of severity II for Ozone, a level of severity III for PM_{2.5}, and a level of severity III for PM₁₀. Operation of the locomotives along the mainline rail routes would result in increase in NO_x and ROG emissions that would lead to ozone increases. The locomotives would also generate DPM emissions along the mainline rail routes, which would increase PM₁₀ emissions in the County. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and DPM emissions. The addition of these NO_x, ROG, and PM₁₀ emissions would result in air pollution increase in the County and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.
3. **Air Quality Policy AQ 3.4, Toxic Exposure:** Policy AQ 3.4 states that the County will, “Minimize public exposure to toxic air contaminants, ozone, particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides, and lead.” The Project does not comply with this Policy of the General Plan because it allows for an increase in hazardous emissions as a result the locomotives operating on the mainline rail routes in the County. Calculations in the FEIR show that the Project would exceed the cancer threshold of 10 in a million for areas where trains speeds are limited to 30 miles per hour or less and thus impacting people in the county along the routes which will see the additional rail traffic as a result of this proposed project. Therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.
4. **Air Quality Goal AQ 3: Implementation Strategy AQ 3.6.1, Identify Health Risks to Sensitive Receptors:** This implementation strategy of the General Plan states that health risks are to be mitigated consistent with Air Pollution Control District standards. This is generally applicable to projects for which construction would occur near a freeway or rail line and mitigation would be required to reduce the air quality hazards to “sensitive receptors” or citizens which are sensitive to these pollutants. However, this project would increase the amount of toxic emissions as an increase in rail traffic would occur as a result of the proposed project. Toxic emissions from the locomotives operating on the mainline rail routes would exceed the cancer risk thresholds for areas where speeds are limited to 30 miles per hour or less and thus impacting people in the county along the routes which will see the additional rail traffic as a result of this proposed project.
5. **Biological Resources, Policy BR 1.15: Restrict Disturbance in Sensitive Habitats during Nesting Seasons:** This General Plan policy states that projects are to avoid impacts to sensitive riparian corridors, wetlands and coastal areas in order to protect bird-nesting activities. In addition to the impacts discussed above related to Coastal Streams in Coastal Plan Policies, impacts as a result of a spill along the mainline would negatively impact nesting birds which is in conflict with this General Plan policy. This project would increase the risk of a spill or fire which would remove and damage nesting habitats.
6. **Chapter 5 Energy, Goal E 7: Design, siting, and operation of non-renewable energy facilities:** Implementation Strategy E 7.1.1 states that new facilities will not be located in a manner which will impact the health and safety of human populations with special attention to disabled and elderly populations as they require additional resources for evacuation in

the event of an emergency. The risk analysis for the mainline rail routes found that significant hazards would exist to the public in the vicinity of the mail line rail routes in the event of a derailment and release of crude oil that could lead to a fire or explosion. This proposed project would increase crude oil rail traffic which could have potential for catastrophic impacts in the event of a derailment or explosion and would be in direct conflict with this General Plan policy as it relates to the health and safety of the citizens around the mainline within San Luis Obispo County.

7. **Chapter 4: Fire Safety Goal S-4 & S-14: Reduce the threat to life, structures and the environment caused by fire.** There is the potential for fire and explosions along the mainline rail routes due to a train derailment, which could impact life, structures and the environment depending on the location of the accident. While this could be mitigated through the implementation of conditions or mitigation measures, the Applicant has stated that the County is preempted from implementing these measures along the mainline, indicating that there are significant impacts to the safety of the populations near the rail lines within the County and that the project is not consistent with both of these policies of the General Plan.
8. **Chapter 6: Other Safety Issues Goal S-6: Reduce the potential for harm to individuals and damage to the environment from hazards.** Implementation measure Program S-68 states that commercial projects which use, store, or transport hazardous materials are to ensure necessary measures are taken to protect public health and safety. The County is likely preempted from being able to mitigate or require conditions upon the project which would ensure the safety for citizens along the main rail lines, as argued by the Applicant. The project is not in compliance with this policy because the County would not be able to ensure the safety of the residents of the County as a result of the additional probability of a derailment, spill, fire or explosion because of the proposed project.

Exhibit C – Findings for Denial

A. Environmental Determination

1. The Environmental Coordinator, after completion of the initial study, found that there is evidence that the project may have a significant effect on the environment, and therefore a Final Environmental Impact Report (FEIR) was prepared (pursuant to Public Resources Code Section 21000 et seq., and CA Code of Regulations Section 15000 et seq.) for this project. The FEIR considers the following issues: Aesthetics and Visual Resources, Agricultural Resources, Air Quality and Greenhouse Gases, Biological Resources, Cultural and Historical Resources, Geological Resources, Hazards and Hazardous Materials, Land Use and Recreation, Noise and Vibration, Population and Housing, Public Services and Utilities, Transportation and Circulation and Water Resources. The FEIR also considers alternatives in addition to the “No Project” alternative.
2. While a FEIR has been prepared, per the Public Resources Code 21080(b)(5) and CEQA Guidelines, CEQA does not apply to projects which a public agency rejects or disapproves. However, the FEIR has provided evidence and information to support this recommendation for denial, including an evaluation of the significant and unavoidable environmental impacts of the proposed project.
3. There are insufficient specific, overriding economic, legal, social, technological, or other benefits of the project that outweigh the significant effects on the environment, as would be required to approve the project pursuant to Public Resources Code section 21081. Additionally, due to federal preemption, implementation of mitigation measures to lessen the Class I impacts on the Mainline within San Luis Obispo County and the state are infeasible, as argued by the Applicant.

B. Environmentally Sensitive Habitat

4. The proposed project is located within an Environmentally Sensitive Habitat area:

Following the circulation of the Public Draft EIR, additional biological survey efforts were conducted in 2015 by Arcadis and Leidos to ensure accuracy and consistency with vegetation type mapping with the National Vegetation Classification system, as described within A Manual of California Vegetation (Sawyer et al 2009).

Based on the best available information, it is determined that the Rail Spur Project area:

- a. Is currently occupied by plant species that are listed as Rank 1B status by the California Native Plant Society; and,
- b. Is currently occupied by sensitive communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition.

Due to these factors, the project site meets the definition of Unmapped ESHA in the County’s LCP (CZLUO Section 23.11). The area contains sensitive plant and animal species needing protection, including Rank 1B status plants, sensitive communities recognized by the CDFW, burrowing owls, and coast horn lizard. In addition, the Rail Spur Project area meets the definition of ESHA as defined in the guidelines set forth by the California Coastal Commission for defining ESHA (CCC 2013). As discussed further below in impact BIO.5, the Rail Spur Project would permanently impact a total of about 20 acres of ESHA, including the sensitive plant communities as classified by the California Department of Fish and Wildlife (CDFW)

under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition.

5. The Proposed Project does not meet the requirements of Coastal Zone Land Use Ordinance Section 23.07.170 b for Environmentally Sensitive Habitat Areas:
 - a. *There would be a significant negative impact on the identified sensitive habitat and the proposed uses would be inconsistent with the biological continuance of the habitat* because the proposed rail spur would remove approximately 20 acres of habitat area containing “rare” or “1B” species, and is not a project that is included within the list of projects noted in the ordinance as a “development project (which) would be allowable within an ESHA” such as a resource dependent use, habitat enhancement project, or coastal access way.
 - b. *The proposed uses would significantly disrupt the habitat* because development would remove approximately 20 acres of habitat area containing listed “rare” or “1B” species by the California Department of Fish and Wildlife and the California Native Plant Society. The Project is located within dune habitat containing sensitive vegetative communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition (i.e., Silver dune lupine – mock heather scrub). The Project and associated infrastructure would extend within this habitat area. Due to the extensive distribution of Unmapped ESHA, there does not appear to be an alternative design or Project configuration that would avoid disturbance and removal of this habitat in order for the Project, or any project alternative, to proceed on the portion of the property outside the existing disturbed envelope of the refinery. The inability to avoid ESHA is in direct conflict with sub-section (e) of 23.07.170 which states, “All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values.”

C. Development Plan Findings

The proposed project does not meet the requirements of 23.02.034.c.4 as follows:

- A. The proposed project or use is not consistent with the Local Coastal Program, the Land Use Element of the General Plan, and the General Plan. Following is a list of the items for which the project is not in compliance:**

Coastal Plan Policies:

6. Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats: This policy states that new development within or adjacent to locations of environmentally sensitive habitats (within 100 feet unless sites further removed would significantly disrupt the habitat) shall not significantly disrupt the resource. Within an existing resource, only those uses dependent on such resources shall be allowed within the area. Unmapped ESHA is present throughout the Project area and within 100 feet of other areas determined to be Unmapped ESHA, including portions of the project area where the rail spur and unloading facility would be constructed, the emergency vehicle access route, and the area where the pipelines would be constructed from the rail spur unloading facility to the existing storage tanks. The Project would impact 20 acres of Unmapped ESHA. The Refinery was built in 1955 to be in close proximity to local onshore oil sources (non-coastal dependent). In the mid-1980’s, upon development of offshore oil, the Refinery began use of offshore crude as a major source. During this time, and to present day, the Refinery has used a combination of offshore crude as well as a variety of onshore sources (including Canadian

Tar Sands crude which arrives by truck from the Central Valley and is delivered to the Santa Maria Pump Station). The Refinery is dependent upon a complex arrangement of roadways, rail lines, pump stations, and pipelines that are located, in some instances in the coastal zone, but primarily outside of the coastal zone. The Refinery does not rely on the ocean or marine resources and is therefore not coastal dependent. Because the Project would impact Unmapped ESHA and is not a coastal dependent use, it would be inconsistent with this policy.

7. **Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats:** This policy states that designated plant and wildlife habitats are environmentally sensitive habitat areas and emphasis for protection should be placed on the entire ecological community. Only uses dependent on the resource shall be permitted within the identified sensitive habitat portion of the site. The Project would be located within and would impact an approximate 20-acre area that contains Unmapped ESHA. In addition the Project is not a coastal dependent use as described above. Because the Project is not considered a coastal dependent use and would impact Unmapped ESHA, it is not consistent with this policy.

The proposed Project has the potential to result in oil spills and resultant fires that could impact terrestrial habitats along the mainline rail routes. Depending upon the location of an oil spill it could result in significant impacts to terrestrial habitats. Given the potential significant impacts that could occur to terrestrial habitats within the County in the case of an oil spill, rail transport of crude oil along the mainline it is not consistent with this policy.

8. **Environmentally Sensitive Habitat Area Policy 36, Protection of Dune Vegetation:** Policy 36 states “disturbance or destruction of any dune vegetation shall be limited to those projects which are dependent upon such resources where no feasible alternatives exist and then shall be limited to the smallest area possible. Development activities and uses within dune vegetation shall protect the dune resources and shall be limited to resource dependent, scientific, educational and passive recreational uses. Coastal dependent uses may be permitted if it can be shown that no alternative location is feasible, such development is sited and designed to minimize impacts to dune habitat and adverse environmental impacts are mitigated to the maximum extent feasible.” Based on the location of proposed improvements associated with the Project, portions of the development would be located within and would impact approximately 20 acres of Unmapped ESHA. As described above, neither the Project nor the existing refinery are coastal dependent uses (i.e., requiring a site on, or adjacent to, the sea to be able to function at all). The objective of the Project is to increase the Applicant’s ability to access more economically priced crude from a wider diversity of suppliers throughout various locations in North America. Because the Project and the existing refinery are not “coastal dependent” and would result in the removal of Unmapped ESHA, the Project does not comply with this policy.

Coastal Zone Framework for Planning:

9. **Land Use Goal 4:** The Land Use Element land use categories identify areas that are to be compatible with each other and specific goals related to conflicts of uses and preservation of important areas. Land use goal no. 4 provides that “areas where agricultural, residential, commercial and industrial uses may be developed in harmonious patterns and with all the necessities for satisfactory living and working environments.” The proposed rail spur project would modify an existing industrial property to allow the construction of the spur within a buffer area between neighboring residential and agricultural land uses. Operation of the rail spur project could result in significant health risk impacts to the closest residences mainly due to diesel particulate matter from the locomotives servicing the refinery. The project would also generate additional particulate matter emissions due to fugitive dust and diesel locomotive engines at the refinery in an area that already exceeds state PM₁₀ standards. Therefore, the

project would be inconsistent with this policy by allowing an expansion of a use that is not compatible with neighboring residential or agricultural uses and would result in additional negative health impacts.

10. **Strategic Growth Goal 1, Objective 2. Air Quality:** This air quality objective is put forth to maintain and protect a living environment that is safe, healthful and pleasant for all residents. The applicable goal associated with this objective seeks to ensure that development projects maintain, or exceed, the minimum state and federal ambient air quality standards. The Project would not comply with this objective and goal because it would generate toxic air emissions that exceed San Luis Obispo County APCD (SLOCAPCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments. The proposed Project would result in a maximum exposed individual resident (MEIR) cancer risk of 26.5 in a million. This includes emission sources at the project site as well as the mainline emissions near the SMR. The SLOCAPCD cancer risk threshold is 10 in a million for toxic emissions. The use of Tier 4 locomotives and reduced idling time for locomotives onsite as mitigation would reduce the MEIR to 6.0 in a million at the same receptor. However, since UPRR (and not the Project Applicant) would own the locomotives, and the locomotives are used for interstate commerce, the mitigation measure requiring the use Tier 4 locomotives would likely be preempted by Federal law, and therefore may not be a feasible mitigation measure. Without the use of Tier 4 engines but with implementation of other mitigation measures, the MEIR would be 13.6 in a million at the same receptor (this includes the reduction in idling at the site, use of cleaner truck engines, and daytime unloading only). In addition, without full mitigation, the project would also exceed the SLOCAPCD diesel particulate matter threshold of 1.25 lbs per day onsite.

The Project would also not comply with this objective and goal because it would generate toxic air emissions that exceed San Luis Obispo County APCD (SLOCAPCD) health risk thresholds of 10 in a million for mainline rail operations in areas where train speeds would be less than 30 mph. The project would also exceed the SLOCAPCD NO_x, ROG, and diesel particulate matter emission CEQA thresholds without full mitigation. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and DPM emissions, leaving potential exceedances of the state and/or federal ambient air quality standards unmitigated and making the Project inconsistent with this goal.

11. **Combining Designations, SRA – Sensitive Resource Area, General Objectives: 1.** General Objective 1 states that Environmentally Sensitive Habitats should be identified and protected by construction setbacks, use limitations, and other appropriate regulations. A portion of the Project area of disturbance is located within the existing refinery site in an area previously disturbed for storage and handling of coke; however, a large portion of the improvements associated with the Project would be located within identified sensitive vegetative communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition and Unmapped ESHA (i.e., Silver dune lupine – mock heather scrub). Project construction would impact approximately 20 acres of this sensitive vegetative community and Unmapped ESHA. For this reason, the Project would not comply with this objective.
12. **Coastal Zone Framework for Planning, Coastal Zone Land Use Element Strategic Growth Goal 1:** The Land Use Element states that the County will “preserve open space, scenic natural beauty and natural resources” and in addition “conserve energy” and “protect agricultural land and resources.” The project has the potential to result in an increased risk of oil spills and fires that could impact natural resources, scenic areas, and agricultural land along the mainline rail routes as a result of this project. An oil spill could result in significant impacts to agricultural, biological, and water resources in the event of a spill because of the

additional rail traffic from this proposed project. These impacts are discussed in applicable sections of Chapter 4.0 of the FEIR. Because the project is anticipated to increase the oil spill risk, the project would not be in compliance with this goal of the Land Use Element.

13. **Strategic Growth Goal 1: Objective 4. Agriculture & Land Use Goal 2:** This objective states that agricultural land for the production of food, fiber and other agricultural commodities is to be protected. This includes the protection and support of the rural economy and locally based commercial agriculture. The proposed rail spur project has the potential to result in oil spills or fires that could impact agricultural land along the mainline rail routes. An oil spill could result in significant impacts to agricultural commodities and soils within the County. Because of the increase in risk and potential for a spill which would directly impact agricultural resources the project is not consistent with this land use policy.
14. **Chapter 6: Environmentally Sensitive Habitats, Coastal Streams Policy 20:** Coastal streams and adjoining riparian vegetation are environmentally sensitive habitat areas and the natural hydrological systems and ecological functions of coastal streams shall be “protected and preserved”. The proposed rail spur project has the potential to result in oil spills and fires that could impact coastal streams and riparian areas along the mainline rail routes. An oil spill could result in significant impacts to coastal streams and riparian vegetation which is discussed in section 4.4 (Biological Resources) of the FEIR. This project would allow for an increase of rail traffic which would increase the probability of a potential spill which could severely impact the County’s riparian areas. Because of this, the project is not consistent with this Coastal Policy.
15. **Chapter 7: Agriculture Policy 1:** Policy 1 states that prime agricultural land shall be maintained and protected for agricultural uses. Similar to the strategic growth goals listed above related to agriculture, the Coastal Plan Policies also outlines requirements for protection of agricultural lands which would potentially be impacted severely as a result of an accident or spill of oil on agricultural resources or soils, which is discussed in section 4.2 Agricultural Resources in the FEIR. The proposed project would increase oil traffic via rail throughout the County and thereby increase the probability of an accident or spill. In the event of a spill or fire there could be significant impacts to agricultural resources as a result of this project. Therefore, the project is not in compliance with this policy.
16. **Chapter 12: Archaeology, Policy 1: Protection of Archaeological Resources:** This General Plan policy states that the County shall provide for the protection of both known and potential archaeological resources. All available measures shall be explored at the time of a development proposal to avoid development on important archaeological sites. While development is not proposed on or near an archaeological site, impacts to archaeological resources could occur as a result of an oil spill and associated clean up actions along the mainline rail routes. Impacts to archaeological resources could not be avoided if a spill were to occur within an area where these resources are located in proximity to the mainline rail within the County. Therefore, the project is not in compliance with this policy.

South County Coastal Area Plan:

17. **Land Use, Rural Area Land Use, Industrial:** The Area Plan states that for the existing Santa Maria Refinery (SMR), the refinery occupies only a portion of the total area, and the large vacant areas around the refinery provide a desirable buffer from adjacent uses and an area where wind-carried pollutants can be deposited onsite, thereby not affecting neighboring properties. This is particularly important to the agricultural uses in the vicinity of the project site. The Area Plan provides that any proposed modification or expansion of the refinery (e.g., the proposed rail spur project) should be subject to Development Plan approval covering the entire property to designate buildable and open space areas. The Area Plan continues by

stating offshore oil and gas lease sales may generate the need for onshore partial oil and gas processing facilities and that expansion of industrial uses in the vacant portion of the rail spur project site may be appropriate in the future to accommodate offshore oil and gas lease sales. However, the Plan does not envision expansion for other purposes such as the Project. The rail spur component of the Project would extend an approximate 200-foot wide swath of development and industrial use approximately 0.8 mile to the east beyond the currently industrialized portion of SMR, toward existing residences and Highway 1. From the eastern terminus of the proposed rail spur, the buffer would be reduced to approximately 0.5 mile to the eastern boundary of the project site. This would reduce the buffer area between the Project and the residential area to the east and would therefore result in the Project being inconsistent with this policy.

18. **Industrial Air Pollution Standards:** This requirement of the South County Area Plan requires that “any expansion or modification of existing petroleum processing or transportation facilities or the construction of new facilities shall meet San Luis Obispo County Air Pollution District (SLOCAPCD) standards.” The Project does not comply with this requirement as it exceeds the minimum threshold for cancer risk of 10 in a million. Without full mitigation, the project would also exceed the SLOCAPCD threshold for DPM of 1.25 lbs per day onsite and due to federal preemption, the County cannot impose measures (e.g. Tier 4 locomotives) to fully mitigate this impact. The toxic air emissions including the DPM added to the basin as a result of this project is not in compliance with this requirement.

Safety Element of the General Plan:

19. **Safety Element of the General Plan, Fire Safety Goal S-4:** “Reduce the threat to life, structures and the environment caused by fire.” There is the potential for fire and explosions along the mainline rail routes due to a train derailment, which could impact life, structures and the environment depending on the location of the accident. The County is likely preempted from implementing conditions or mitigation measures that could mitigate these impacts along the mainline rail route. There are significant impacts to the safety of the populations near the rail lines within the County and the project is not consistent with this policy of the General Plan.
20. **Safety Element of the General Plan, Fire Safety Policy S-14, Facilities, Equipment and Personnel:** “Ensure that adequate facilities, equipment and personnel are available to meet the demands of fire fighting in San Luis Obispo County based on the level of service set forth in the fire agency’s master plan.” It has come to the County’s attention through numerous letters from jurisdictions along the mainline that there are not adequate resources through their respective fire agencies to respond to a derailment, spill or explosion as a result of a rail accident. In addition, the County may be preempted from implementing conditions or mitigation measures that could mitigate these impacts along the mainline rail routes, therefore the County can’t ensure there will be adequate facilities, equipment and personnel available in the event of an accident. This is the case throughout the state as well as within San Luis Obispo County. Therefore, the project is not consistent with this policy of the General Plan.
21. **Safety Element of the General Plan, Hazardous Materials Policy S-26, Program S-68:** S-26 states: “Reduce the potential for exposure to humans and the environment by hazardous substances.” S-68 states “Review commercial projects which use, store, or transport hazardous materials to ensure necessary measures are taken to protect public health and safety.” Implementation measure Program S-68 states that commercial projects which use, store, or transport hazardous materials are to ensure necessary measures are taken to protect public health and safety. As the Applicant has stated, the County would not be able to mitigate or require conditions upon the project which would ensure the safety for citizens along the mainline rail routes, including the portions within the County, due to the County likely being preempted from requiring these types of measures. The project is not in compliance with this

policy because the County would not be able to ensure the safety of the residents of the County, or the state, as a result of the additional probability of a derailment, spill, fire or explosion because of the proposed project.

Conservation and Open Space Element of the General Plan:

- 22. Air Quality Policy AQ 3.2, Attain Air Quality Standards:** Policy AQ 3.2 states that the County will attain or exceed federal or state ambient air quality standards for measured criteria pollutants. San Luis Obispo County is in non-attainment for ozone standards as well as the state particulate matter standards. The Project would generate fugitive dust and DPM onsite that would contribute to PM₁₀ emissions within the County. It is unlikely that these fugitive dust and DPM emissions (i.e., PM₁₀ emissions) could be offset at the SMR due to a lack of available onsite emission reductions. The addition of these onsite PM₁₀ emissions would further exacerbate the ability for the County to attain the state particulate matter standards and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.

The rail spur project would be generating NO_x and ROG emissions along the mainline rail route that would lead to ozone increases and would generate DPM along the mainline rail routes that would contribute to PM₁₀ emissions within the County. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and DPM emissions. The addition of these NO_x, ROG, and PM₁₀ emissions would further exacerbate the ability for the County to attain the state particulate matter and ozone standards. The addition of these NO_x, ROG, and PM₁₀ emissions along the mainline rail route within the County would further exacerbate the ability for the County to attain the state particulate matter and ozone standards and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.

- 23. Air Quality Policy AQ 3.3, Avoid Air Pollution Increases:** Policy AQ 3.3 states that the County will, "Avoid a net increase in criteria air pollutant emissions in planning areas certified as Level of Severity II or III for Air Quality by the County's Resource Management System (RMS)." The Nipomo Mesa area is in a level of severity II for Ozone, a level of severity III for PM_{2.5}, and a level of severity III for PM₁₀. The "PM" or particulate matter includes hazardous materials in the air that gets into the lungs and causes a variety of health effects. The PM_{2.5} tends to be a greater health risk because the particles are smaller and can travel deeper into the lungs. Sources of particulate pollution include diesel exhaust, mineral extraction and production, combustion products from industry and motor vehicles, smoke, wind-blown dust and other sources (Source: County Resource Summary Report). The Project does not comply with this standard because it would add diesel exhaust from locomotives to an area which is currently in a level of severity of III. Even with implementation of mitigation measures the Project would exceed the threshold of cancer causing diesel particulate which is 10 in a million by creating a risk factor of about 13.6 in a million (for emissions occurring at the project site and along the mainline impacting the same receptors near the SMR). Without implementation of mitigation, the Project would create a risk factor of 26.5 in a million, both of which are exceeding the threshold. In addition, without full mitigation, the Project would exceed the 1.25 lbs per day threshold for DPM onsite. In addition, the most effective mitigation measure is likely not implementable due to federal preemption (i.e., requiring use of Tier 4 locomotives).

Operation of the locomotives along the mainline rail routes would result in increase in NO_x and ROG emissions that would lead to ozone increases. The locomotives would also generate diesel particulate matter emissions along the mainline rail routes, which would increase PM₁₀ emissions in the County. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and diesel particulate matter emissions. The addition of these NO_x, ROG, and PM₁₀ emissions would result in air pollution

increases in the County and therefore the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.

24. **Air Quality Policy AQ 3.4, Toxic Exposure:** Policy AQ 3.4 states that the County will, “Minimize public exposure to toxic air contaminants, ozone, particulate matter, sulfur dioxide, carbon monoxide, nitrogen oxides, and lead.” This Project does not comply with this Policy of the General Plan because it allows for an increase in hazardous emissions as a result of the project. Calculations in the FEIR have shown that this Project would exceed the cancer threshold, which is 10 in a million, by resulting in a cancer risk of about 26.5 in a million (with no mitigation), or about 13.6 in a million (with partial mitigation). This impact would exceed San Luis Obispo County Air Pollution Control District (APCD) health risk thresholds when factoring in the 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments.

The Project does not comply with this Policy of the General Plan because it allows for an increase in hazardous emissions as a result the locomotives operating on the mainline rail routes in the County. Calculations in the FEIR show that the Project would exceed the cancer threshold of 10 in a million for areas where trains speeds are limited to 30 miles per hour or less and thus impacting people in the county along the routes which will see the additional rail traffic as a result of this proposed project.

25. **Air Quality Policy AQ 3.5, Equitable Decision Making:** Policy AQ 3.5 states that the County will, “Ensure that land use decisions are equitable and protect all residents from the adverse health effects of air pollution.” This policy is also consistent with the discussion above regarding air quality Policy AQ 3.3. The Project would bring locomotives (up to 5 trains per week, 10 round trips) to the site for unloading of heavy crude, and would depart the site empty. The additional diesel exhaust from these locomotives, upwind of many residences and sensitive receptors, would cause a significant impact to the air quality for these residences. In addition, a large onsite buffer between the residential neighborhoods and the facility would be reduced from over 7,600 feet to approximately 3,300 feet. This project application for a “Development Plan/Coastal Development Permit” is a discretionary land use permit with the discretion by the County to decide if this project complies with the General Plan including the health and safety of the County’s residents. The Project imposes health risks which would be inconsistent with the health and safety requirements of the General Plan with regard to air quality from the property (increase in cancer causing thresholds). This project would not ensure that all residents are protected from the adverse health effects of air pollution as this policy requires.

26. **Air Quality Goal AQ 3: Implementation Strategy AQ 3.6.1, Identify Health Risks to Sensitive Receptors:** This implementation strategy of the General Plan states that health risks are to be mitigated consistent with Air Pollution Control District standards. This is generally applicable to projects for which construction would occur near a freeway or rail line and mitigation would be required to reduce the air quality hazards to “sensitive receptors” or citizens which are sensitive to these pollutants. However, this project would increase the amount of toxic emissions as an increase in rail traffic would occur as a result of the proposed project. Toxic emissions from the locomotives operating on the mainline rail routes would exceed the cancer risk thresholds for areas where speeds are limited to 30 miles per hour or less and thus impacting people in the county along the routes which will see the additional rail traffic as a result of this proposed project. Therefore, the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.

27. **Biological Resources Policy 1.2, Limit Development Impacts:** This policy calls for the regulation and minimization of proposed development in areas that contain essential habitat for special-status species, sensitive natural communities, wetlands, coastal and riparian

habitats, and wildlife habitat and movement corridors as necessary to ensure the continued health and survival of these species and protection of sensitive areas. The Project would result in the extension of refinery infrastructure (i.e., rail spur, unloading facility, pipelines, and emergency vehicle access road) into a dune habitat system. Approximately 20 acres of various project features would be constructed within dune vegetation that is considered sensitive habitat as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition and is also considered Unmapped ESHA; therefore, the Project does not comply with this policy.

28. **Biological Resources, Policy BR 1.15: Restrict Disturbance in Sensitive Habitats during Nesting Seasons:** This General Plan policy states that projects are to avoid impacts to sensitive riparian corridors, wetlands and coastal areas in order to protect bird-nesting activities. In addition to the impacts discussed above related to Coastal Streams in Coastal Plan Policies, impacts as a result of a spill along the mainline would negatively impact nesting birds which is in conflict with this General Plan policy. This project would increase the risk of a spill or fire which would remove and damage nesting habitats. Therefore, the project would not be in compliance with this General Plan policy of the Conservation and Open Space Element.
29. **Energy, Goal E 7: Design, siting, and operation of non-renewable energy facilities:** Implementation Strategy E 7.1.1 states that new facilities will not be located in a manner which will impact the health and safety of human populations with special attention to disabled and elderly populations as they require additional resources for evacuation in the event of an emergency. The risk analysis for the mainline rail routes found that significant hazards would exist to the public in the vicinity of the mainline rail routes in the event of a derailment and release of crude oil that could lead to a fire or explosion. This proposed project would increase crude oil rail traffic which could have potential for catastrophic impacts in the event of a derailment or explosion and would be in direct conflict with this General Plan policy as it relates to the health and safety of the citizens around the mainline within San Luis Obispo County.
30. **Non-Renewable Energy Facility Siting Policy E 7.1:** Energy Goal 7 states that, "Design, Siting, and Operation of Non-renewable energy facilities will be environmentally appropriate." In addition the related Policy E 7.1 for Non-Renewable Energy Facility Siting, "Energy fossil fuel, and related facilities will be sited, constructed, and operated in a manner to protect the public from potential hazards and significant environmental impacts." The implementation Strategy related to Goal 7 and Policy 7.1 requires facility design, siting and operational standards: There are 30 of these outlined for energy projects and the pertinent policies for the rail spur project are listed here (numbers correspond to the numbers in the Conservation and Open Space Element Energy Policy E 7.1):

- 3) Continue to maintain, operate, monitor, and repair the facility so that it does not constitute a public safety hazard or an environmental threat.

The Project does not comply with this component of the goal due to air toxic emissions from the operation of the Project that would exceed the acceptable levels determined by the SLOCAPCD for both cancer risk and diesel particulate matter. The Project, while located within and adjacent to an existing facility, would increase the intensity of rail activity and change the use of the site to allow for crude to be brought in via rail. The addition of up to five trains per week would increase toxic air emissions which would impact neighboring residences to the east and north of the project site.

- 4) Employ the best reasonably achievable techniques available to prohibit disruption of environmentally sensitive areas such as wetlands, animal or bird refuges,

or habitat of species of special concern. Avoid impacts to habitat of rare, threatened, or endangered species.

The Project does not comply with this component of the policy because construction of the Project would impact about 20 acres of sensitive habitat as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition and an area of the project site considered Unmapped ESHA.

B. The proposed project does not satisfy all applicable provisions of Title 23 of the County Code because:

31. **Section 23.07.170 of the Coastal Zone Land Use Ordinance Environmentally Sensitive Habitats:** The Project is located within dune habitat containing sensitive vegetative communities as classified by the California Department of Fish and Wildlife (CDFW) under the National Vegetation Classification system described in A Manual of California Vegetation, Second Edition (i.e., Silver dune lupine – mock heather scrub). The Project will extend within this habitat area, and there are no alternatives around disturbance or removal of this habitat area in order for the project, or project alternative, to proceed. This is in direct conflict with this standard which states, “All development and land divisions within or adjacent to an Environmentally Sensitive Habitat Area shall be designed and located in a manner which avoids any significant disruption or degradation of habitat values. This standard requires that any project which has the potential to cause significant adverse impacts to an ESHA be redesigned or relocated so as to avoid the impact, or reduce the impact to a less than significant level where complete avoidance is not possible.” The extension of the rail spur adjacent to the Santa Maria Refinery is located within a dune habitat area which also acts as a spatial buffer between the refinery and the residences to the east.

C. The establishment and subsequent operation or conduct of the use will, because of the circumstances and conditions applied in the particular case, be detrimental to the health, safety or welfare of the general public or persons residing or working in the neighborhood of the use, and will be detrimental or injurious to property or improvements in the vicinity of the use because:

32. The Rail Spur Project would modify and expand the existing industrial uses and activities at the Santa Maria Refinery (SMR) by delivering crude oil to the refinery by rail. The onsite activities associated with the rail spur project would result in cancer risk from air toxics and increased DPM that would both exceed Air Pollution Control District CEQA thresholds. These significant air quality impacts would directly impact neighboring residences, employees, and populations in the vicinity of the Santa Maria Refinery. The Project would generate toxic air emissions that exceed San Luis Obispo County APCD (SLOCAPCD) health risk thresholds when factoring in the most recent 2012 California Office of Environmental Health Hazard Assessment (OEHHA) childhood exposure and breathing rate adjustments. The SLOCAPCD cancer risk CEQA threshold is 10 in a million for toxic emissions and with this proposed project (with partial mitigation) there would be a risk of 13.6 in a million, which exceeds these thresholds. Onsite operation of the locomotives would exceed the SLOCAPCD CEQA threshold of 1.25 lbs per day of diesel particulate matter even with partial mitigation. These are both considered a significant and unavoidable environmental impact.

Operation of the locomotives along the mainline rail routes would result in increase in NO_x and ROG emissions that would lead to ozone increases both in the County and in other parts of the State. Operational activities of trains along the mainline rail route outside of San Luis Obispo County associated with the Project would generate criteria pollutant emissions that exceed thresholds of 15 air districts other than SLOCAPCD. For three of these districts

impacts cannot be mitigated to less than significant levels. Mitigation has been recommended that includes use of Tier 4 locomotives and the purchase of emission credits. For the mainline rail emissions it is possible that contractually the Applicant could require the use of lower emission locomotives such as Tier 4 locomotives. However, since these are operated by UPRR on UPRR tracks, a requirement that the Applicant enter into this type of contractual provision would likely be preempted by Federal law and therefore unenforceable. The County may also be preempted by Federal law from requiring emission reduction credits for mainline rail emissions. Since these mitigation measures may not be implementable and it is uncertain if the other Air Districts could require emission reduction credits, the impacts associated with the mainline rail operation would remain significant.

The locomotives would also generate diesel particulate matter emissions along the mainline rail routes, which would increase PM₁₀ emissions in the County. Due to Federal preemption, the County may not be able to require emissions reduction credits for the mainline rail NO_x, ROG, and diesel particulate matter emissions. The addition of these NO_x, ROG, and PM₁₀ emissions would result in significant and unavoidable air quality impacts.

This proposed project would increase rail traffic by importing heavy crude via rail into the Santa Maria Refinery. A risk assessment was conducted for the mainline rail routes to the Santa Maria Refinery. The risk along the mainline rail routes that were evaluated was found to be significant in the event of a rail accident that occurred near populated areas. The EIR identified mitigation measures to reduce the potential for release of crude oil in the event of an accident. However, the County may be preempted by Federal law from applying these mitigations to the project. Furthermore it has been communicated to the County through numerous letters from outside jurisdictions that many of the jurisdictions do not have the necessary personnel, equipment or training in order to provide appropriate emergency response to an oil train derailment or explosion within their areas. This proposed project will create a significantly hazardous and potentially dangerous situation within many areas along the mainline not only in San Luis Obispo County, but to other jurisdictions along the main rail lines and therefore, the project is inconsistent with this policy.

D. The proposed project or use will be inconsistent with the character of the immediate neighborhood or contrary to its orderly development because:

33. The proposed rail spur project will expand the existing industrial uses of the Santa Maria Refinery onto a currently vacant portion of the refinery property which acts as a buffer between the residential areas to the east and the refinery operations. The South County Coastal Area Plan specifically identifies the undeveloped areas of the project site as providing a desirable buffer from the heavy industrial activities and more sensitive adjacent land uses. The rail spur extension would extend a total of approximately 1.3 miles (6,915 feet), including approximately 0.5 mile (2,445 feet) within the exiting industrial coke area. This would result in an extension of industrial uses approximately 0.85 mile into the undeveloped area in the eastern portions of the project site. The buffer between residential and recreational uses east of State Route 1 would be reduced from approximately 1.4 miles to 0.6 mile. The rail spur extension would similarly reduce existing buffers between the industrial structures and agricultural crops located northeast and southeast of the project site.

This important buffer is what allows these incompatible land uses (refinery and residential) to coexist as neighbors, however this project will greatly reduce this buffer. The rail spur will be incompatible with the residential and agricultural resources that surround the spur and will bring additional toxic air contaminants and PM₁₀ closer to the residential and agricultural land uses. Therefore, the proposed extension of the industrial activities by allowing the railroad spur would be incompatible with surrounding uses and would therefore not comply with the character of the immediate neighborhood and will be contrary to its orderly development.

E. Coastal Access:

34. Coastal access was addressed in a previously approved permit (Throughput DRC2008-00146), which included a condition of approval requiring Phillips 66 to construct coastal access improvements associated with the vertical public access within “□ 10 years of the effective date of this permit (including any required Coastal Development Permit to authorize such construction) or at the time of any subsequent use permit approved at the project site, whichever occurs first.” Because the proposed rail spur project (DRC2012-00095) is recommended for denial, the previous condition of approval from the Throughput project will remain in place and effective. Phillips 66 will be required to uphold the previous coastal access condition of approval from DRC2008-00146 as adopted. Denial of the proposed rail spur project will not impact Coastal Access.

Exhibit D – California Coastal Commission Site Visit Letter

STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY

EDMUND G. BROWN, JR., GOVERNOR

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



June 4, 2015

Ryan Hostetter
San Luis Obispo County
Department of Planning and Building
976 Osos St., Room 200
San Luis Obispo, Ca 93408-2040

Re: **Revised Draft Environmental Impact Report (EIR) for the Phillips 66 Santa Maria Refinery Rail Spur Extension Project**

Dear Ms. Hostetter:

Thank you for your help facilitating Coastal Commission staff's site visit to the Phillips 66 Santa Maria Refinery last week and for arranging to have San Luis Obispo County's environmental consultants participate. We found the visit to be very productive and informative and in particular, the Commission's two staff biologists, Dr. Jonna Engel and Dr. Laurie Koteen, found the field evaluation and open discussion of the site's vegetation communities to be particularly valuable. Much of that evaluation and discussion was focused on the characterization and classification of vegetation within the project's proposed footprint and the recommendations included in Commission staff's November 24, 2014, comment letter on the Revised Draft EIR. As you recall, these recommendations included suggestions that (1) the classification of dune vegetation within the proposed project site be corrected to reflect the California Department of Fish and Wildlife vegetation classification guidelines and (2) the corresponding analysis of project impacts to sensitive biological resources be amended to reflect the recognized rarity and imperiled status of dune vegetation within the proposed project footprint.

Based on the discussion during the recent site visit, it is our understanding that these recommendations have been followed and that the Final EIR for the project will reflect that a substantial area of sensitive dune scrub vegetation is present within the proposed project footprint and that this habitat is to be considered an environmentally sensitive habitat area based on its rarity and susceptibility to disturbance or degradation. Commission staff supports this change and believes it was corroborated by our field evaluation of the site. We look forward to reviewing the supporting analysis, vegetation mapping, and technical materials that are also to be included in the EIR's biological resources section on this topic and to continuing to work closely with you and your colleagues moving forward.

If you have any questions, please feel free to call me (415) 904-5502.

Sincerely,

A handwritten signature in black ink, appearing to read "Cass Teufel". The signature is written in a cursive, flowing style.

CASSIDY TEUFEL
Senior Environmental Scientist
Energy, Ocean Resources and Federal Consistency Division

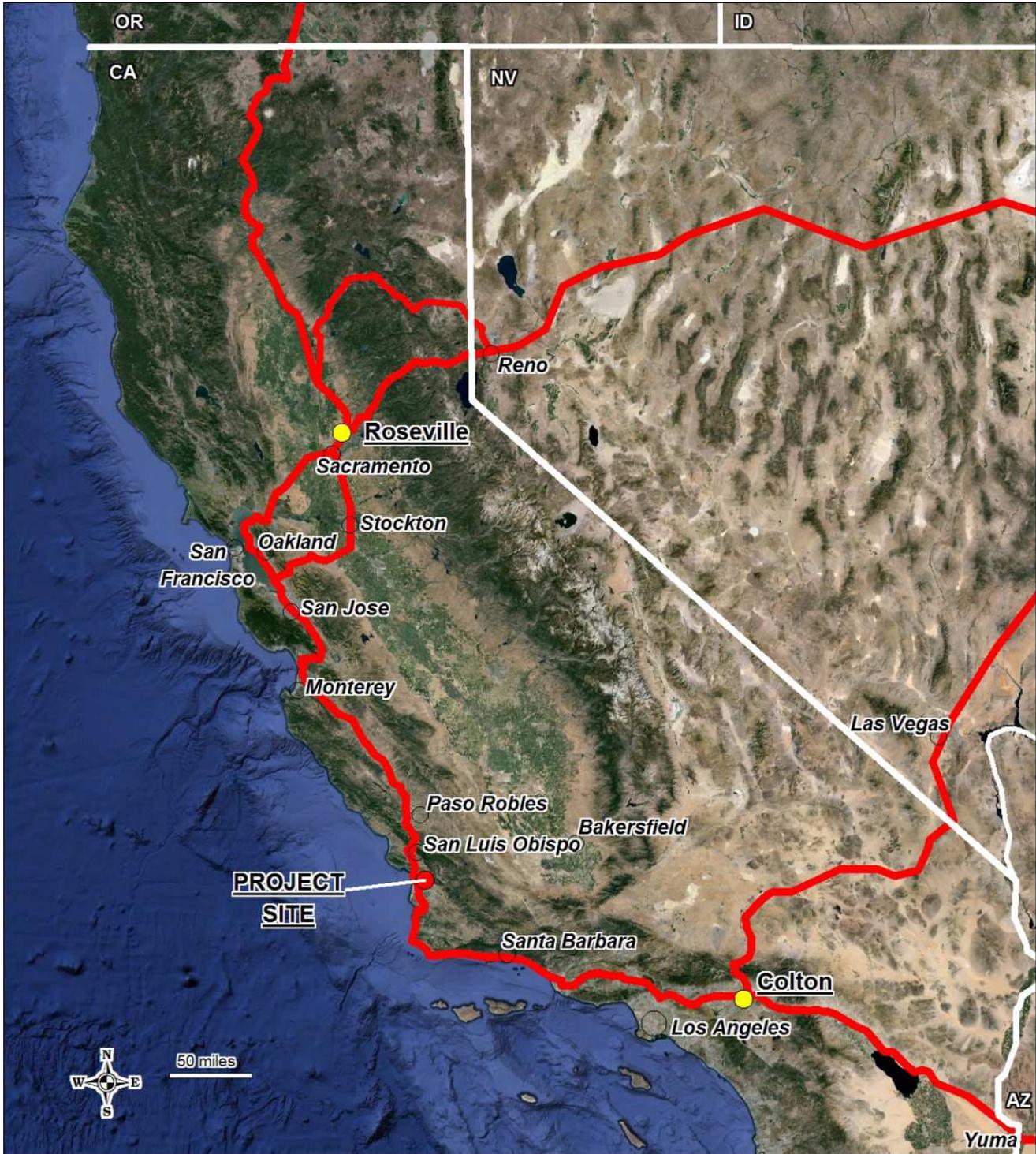
Exhibit E – Project Graphics

Figure E-1 Location of Proposed Rail Spur Project



Notes: Yellow line the boundary of the SMR property.
While the UPRR tracks pass through the refinery property, Phillips 66 does not own the railroad right-of-way. This property is owned by UPRR.
Source: Arcadis 2013.

Figure E-2 Mainline Rail UPRR Routes to the Santa Maria Refinery



Source: Adapted by MRS from UPRR maps.

Figure E-3 Environmentally Sensitive Habitat Area Map

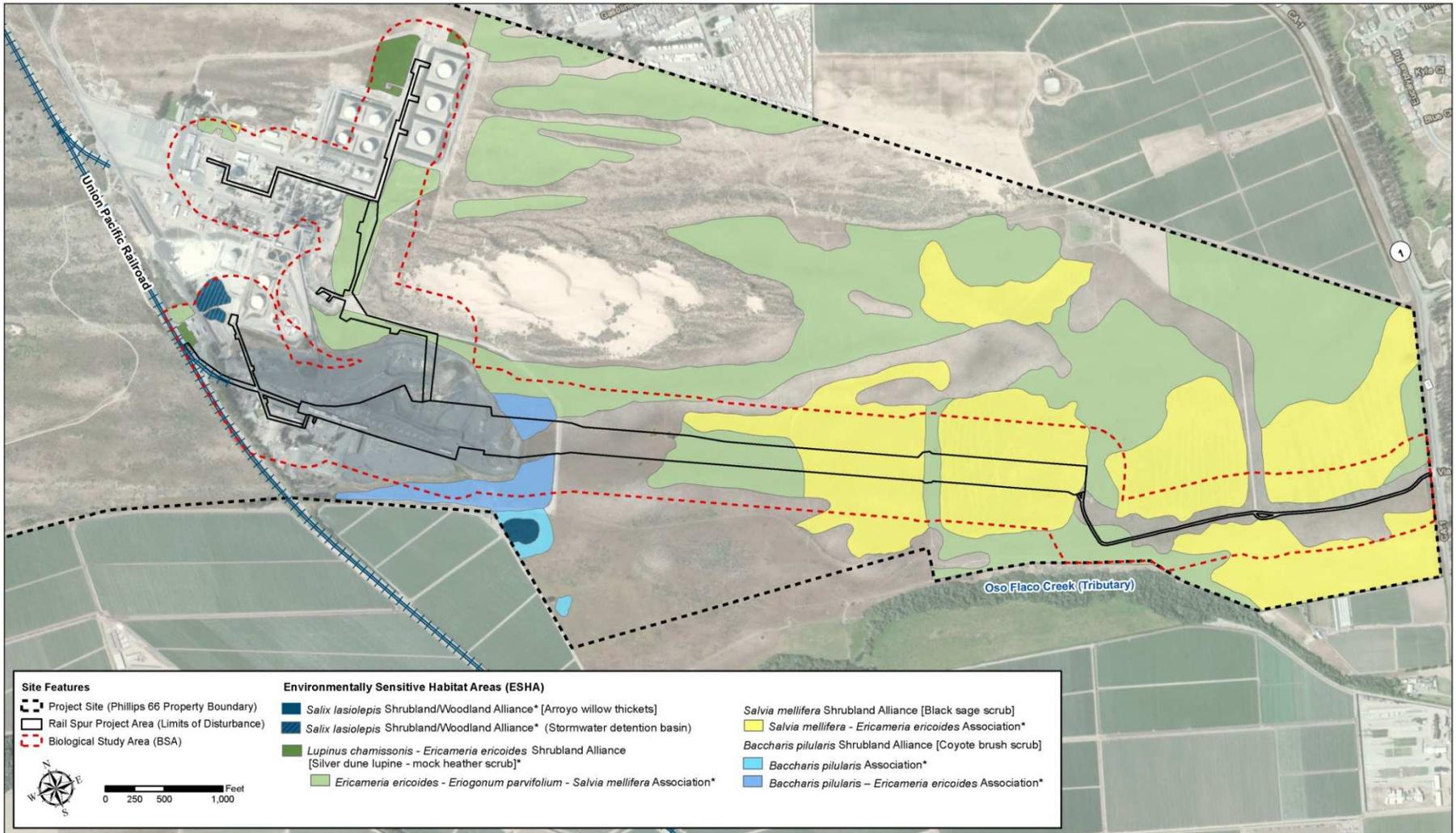
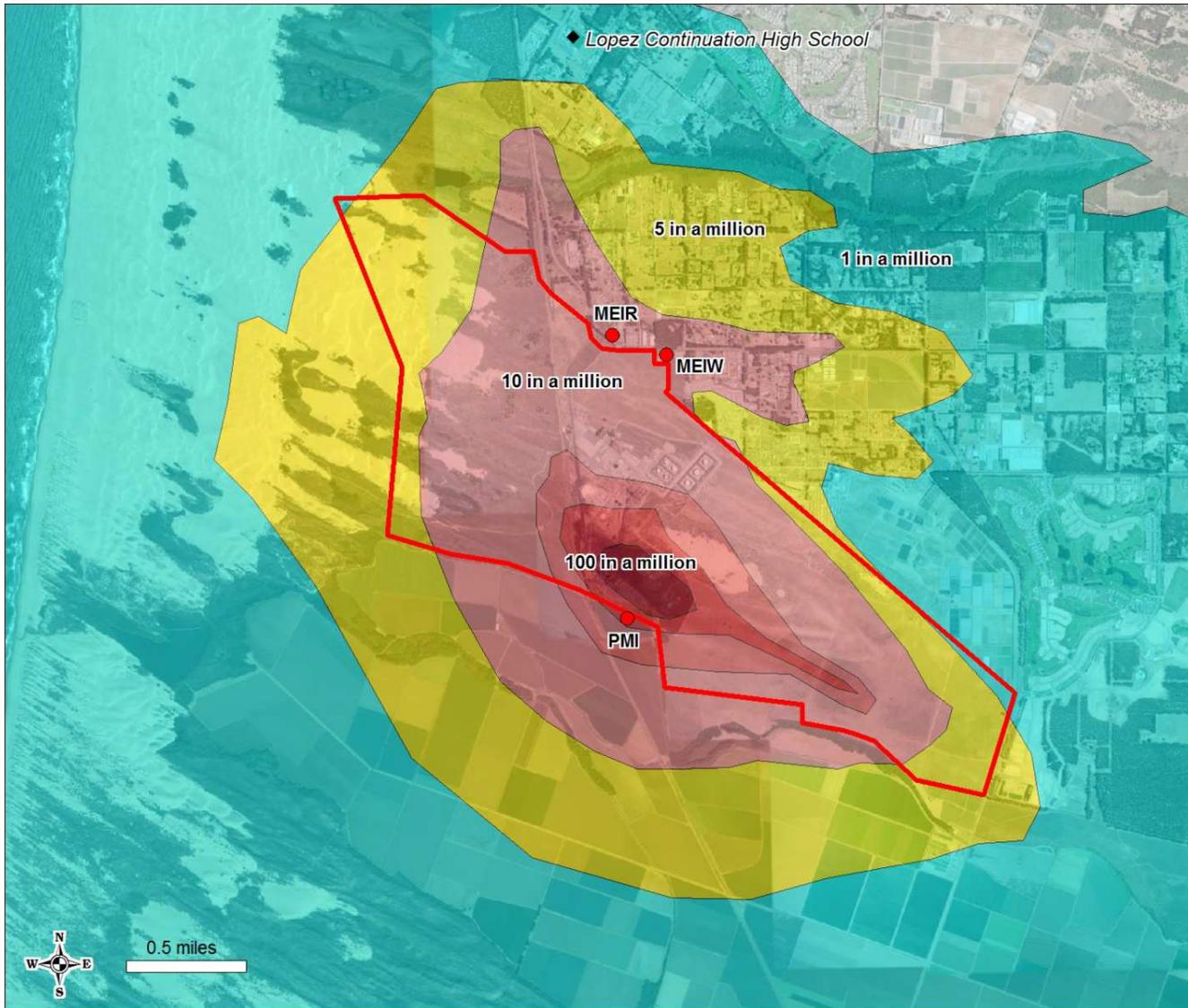


Figure E-4 Rail Spur Project Cancer Health Risk with Mainline – Partially Mitigated (without Tier 4 Locomotives)



PMI-Point of Maximum Impact
Based upon OEHHA adjusted factors.

Figure E-5 Union Pacific Rail Lines in California



Exhibit F – Post Comment Period Agency & Special District Comments

Jurisdiction	From
California State Legislature	Senator Hannah-Beth Jackson
California State Senate	Senator Fran Pavley
California State Senate	Senator William W. Monning
California State University Sacramento	President, Robert S. Nelson
County of Monterey Board of Supervisors	Chair, Simon Salinas
County of Monterey, North County Fire Protection District	Fire Chief, Chris Orman
County of Monterey, Assoc. of Monterey Bay Area Governments	President, Jerry Muenzer
County of Santa Barbara Board of Supervisors	Supervisor, First District, Salud Carbajal
County of Santa Clara Board of Supervisors	President, Board, Dave Cortese
County of Santa Cruz Board of Supervisors	Chairman, Greg Caput
County of Ventura Board of Supervisors	Chair, Kathy I. Long
City of Berkeley	Council Member, Linda Maio
City of Camarillo	Mayor, Bill Little
City of Carpinteria	Mayor, Gregg Carty (on behalf of City Council)
City of Davis	Mayor, Joseph F. Krovoza
City of Fremont	Mayor, Bill Harrison
City of Goleta	Mayor, Paula Perotte
City of Grover Beach	Mayor, John Shoals
City of Los Angeles	Mayor, Eric Garcetti
City of Moorpark	Mayor, Janice Parvin
City of Oxnard	Mayor, Tim Flynn, (on behalf of City Council)
City of Paso Robles	Mayor, Steve Martin
City of San Jose	Interim City Manager, Norberto Deunas
City of San Leandro	Mayor, Pauline Russo Cutter
City of San Luis Obispo	Mayor, Jan Marx (on behalf of City Council)
City of Santa Barbara	Mayor, Helene Schneider
City of Simi Valley	Mayor, Robert Huber
City of Ventura	Mayor, Cheryl Heitmann
Carpinteria-Summerland Fire Protection District	Board President, Christopher Johnson
North County Fire Protection District	Fire Chief, Chris W. Orman
Santa Clara County Fire Chief's Association	President, Eric Nickel
Central Coast Nurse Practitioners	Vice President, Tom Comar
Alameda County Public Health Department	County Health Officer, Muntu Davis, MD, MPH
Alameda County Water District	General Manager, Robert Shaver
Goleta Water District	President, Lauren Hanson
Montecito Association	President, Cindy Feinberg

Jurisdiction	From
East Side High School District, Silicon Valley	Board of Trustees
Fremont Unified School District	District
Hayward Unified School District	Board President, John Taylor
Albany Unified School District	President, Ron Rosenbaum
Lucia Mar Unified Teachers Association	President, Donna Kandel
National Education Association	President, Lily Eskelsen Garcia
Oakland Unified School District	President, Board of Education, James Harris
Peralta Community College District	Chancellor, Jewel C. Laguerre, Ph.D.
Peralta Federation of Teachers	President, Matthew Goldstein
Pleasant Valley School District	Superintendent, RaeAnne Michael
Sacramento City School District	District
San Jose Unified School District	Superintendent, Vincent C. Matthews, Ed.D.
San Leandro Teachers' Association	President, Jonathan Sherr
San Leandro Unified School District	Superintendent, Mike McLaughlin
San Lorenzo Education Association	President, Donna Pinkney
San Lorenzo High School	Teacher and Students, Alan Fishman
Ventura Unified School District	Board of Education
California Teachers Association	President, Dean E. Vogel
Goleta Union School District	Superintendent, William Banning
Peralta Federation of Teachers	President, Matthew Goldstein
San Jose Unified School District	President, Sandra Engel
San Lorenzo Education Association	President, Donna Pinkney
San Luis Coastal Unified School District	Superintendent, Eric Prater, Ed.D.

Exhibit G – USDOT Rail Car Specifications and Risk Levels

Table G-1 Final Regulatory Requirements for HHFT (USDOT May 1, 2015)

Proposed Requirement	Effected Entity
<p>Enhanced Standards for Both New and Existing Tank Cars Used in HHFTs</p> <ul style="list-style-type: none"> ▪ New tank cars constructed after October 1, 2015 are required to meet enhanced DOT Specification 117 design or performance criteria. ▪ Existing tank cars must be retrofitted in accordance with the DOT-prescribed retrofit design or performance standard. ▪ Retrofits must be completed based on a prescriptive retrofit schedule and a retrofit reporting requirement is triggered if initial milestone is not achieved. 	<p>Tank Car Manufacturers, Tank Car Owners, Shippers / Offerors and Rail Carriers</p>
<p>More Accurate Classification of Unrefined Petroleum-Based Products</p> <ul style="list-style-type: none"> ▪ Develop and carry out sampling and testing program for all unrefined petroleum-based products, such as crude oil, to address: <ol style="list-style-type: none"> (1) Frequency of sampling and testing that accounts for any appreciable variability of the material (2) Sampling prior to the initial offering of the material for transportation and when changes that may affect the properties of the material occur; (3) Sampling methods that ensures a representative sample of the entire mixture, as offered, is collected; (4) Testing methods that enable classification of the material under the HMR; (5) Quality control measures for sample frequencies; (6) Duplicate samples or equivalent measures for quality assurance; (7) Criteria for modifying the sampling and testing program; (8) Testing or other appropriate methods used to identify properties of the mixture relevant to packaging requirements ▪ Certify that program is in place, document the testing and sampling program outcomes, and make information available to DOT personnel upon request. 	<p>Offerors / Shippers of unrefined petroleum-based products</p>
<p>Rail routing - Risk Assessment</p> <ul style="list-style-type: none"> ▪ Perform a routing analysis that considers, at a minimum, 27 safety and security factors and select a route based on its findings. These planning requirements are prescribed in 49 CFR § 172.820. <p>Rail routing - Notification</p> <ul style="list-style-type: none"> ▪ Ensures that railroads notify State and/or regional fusion centers and State, local, and tribal officials who contact a railroad to discuss routing decisions are provided appropriate contact information for the railroad in order to request information related to the routing of hazardous materials through their jurisdictions. This replaces the proposed requirements to notify State Emergency Response Commissions (SERCs) or other appropriate state delegated entity about the operation of these trains through their States. <p>Reduced Operating Speeds</p> <ul style="list-style-type: none"> ▪ Restrict all HHFTs to 50-mph in all areas. ▪ Require HHFTs that contain any tank cars not meeting the enhanced tank car standards required by this rule operate at a 40-mph speed restriction in high-threat urban areas. 	<p>Rail Carriers</p>
<p>Enhanced Braking</p> <ul style="list-style-type: none"> ▪ Require HHFTs to have in place a functioning two-way end-of-train (EOT) device or a distributed power (DP) braking system. ▪ Require trains meeting the definition of a “high-hazard flammable unit train” (HHFUT) be operated with an electronically controlled pneumatic (ECP) braking system by January 1, 2021, when transporting one or more tank cars loaded with a Packing Group I flammable liquid. ▪ Require trains meeting the definition of a HHFUT be operated with an ECP braking system by May 1, 2023, when transporting one or more tank cars loaded with a Packing Group II or III flammable liquid. 	<p>Rail Carriers</p>

Source: USDOT, 2015a.

HHFT-High-Hazard Flammable Trains (A train comprised of 20 or more loaded tank cars of a Class 3 flammable liquid in a continuous block or 35 or more loaded tank cars of a Class 3 flammable liquid across the entire train.

HHFUT-High-Hazard Flammable Unit Train (a train comprised of 70 or more loaded tank cars containing Class 3 flammable liquids traveling at speeds greater than 30 mph.)

Table G-2 Final Safety Features by Tank Car Option (USDOT May 1, 2015)

Tank Car	Bottom Outlet Handle	GRL (lbs)	Head Shield Type	Pressure Relief Valve	Shell Thickness	Jacket	Tank Material	Top Fittings Protection	Thermal Protection System	Braking
DOT-117	Bottom outlet handle removed or designed to prevent unintended actuation during a train accident	286k	Full height, ½-inch thick head shield	Reclosing pressure relief device	9/16 inch Minimum	Minimum 11-gauge jacket constructed from A1011 steel or equivalent. The jacket must be weather-tight	TC-128 Grade B, normalized steel	Equipped per AAR Specifications Tank Cars, appendix E paragraph 10.2.1	Thermal protection system in accordance with §179.18	In trains with DP or EOT devices
DOT-117R for Unjacketed CPC-1232	Bottom outlet handle removed or designed to prevent unintended actuation during a train accident	286k	Full height, ½-inch thick head shield	Reclosing pressure relief device	7/16 inch Minimum	Minimum 11-gauge jacket constructed from A1011 steel or equivalent. The jacket must be weather-tight	TC-128 Grade B, normalized steel	Equipped per AAR Specifications Tank Cars, appendix E paragraph 10.2.1	Thermal protection system in accordance with §179.18	In trains with DP or EOT devices
CPC-1232	Bottom Outlets are Optional	263K	Optional; Bare Tanks half height; Jacket Tanks full height	Reclosing pressure relief valve	7/16 inch Minimum	Jackets are optional	TC-128 Grade B, normalized steel	Not required, but when Equipped per AAR Specifications Tank Cars, appendix E paragraph 10.2.1	Optional	Not required

Source: Adapted from USDOT 2015a.

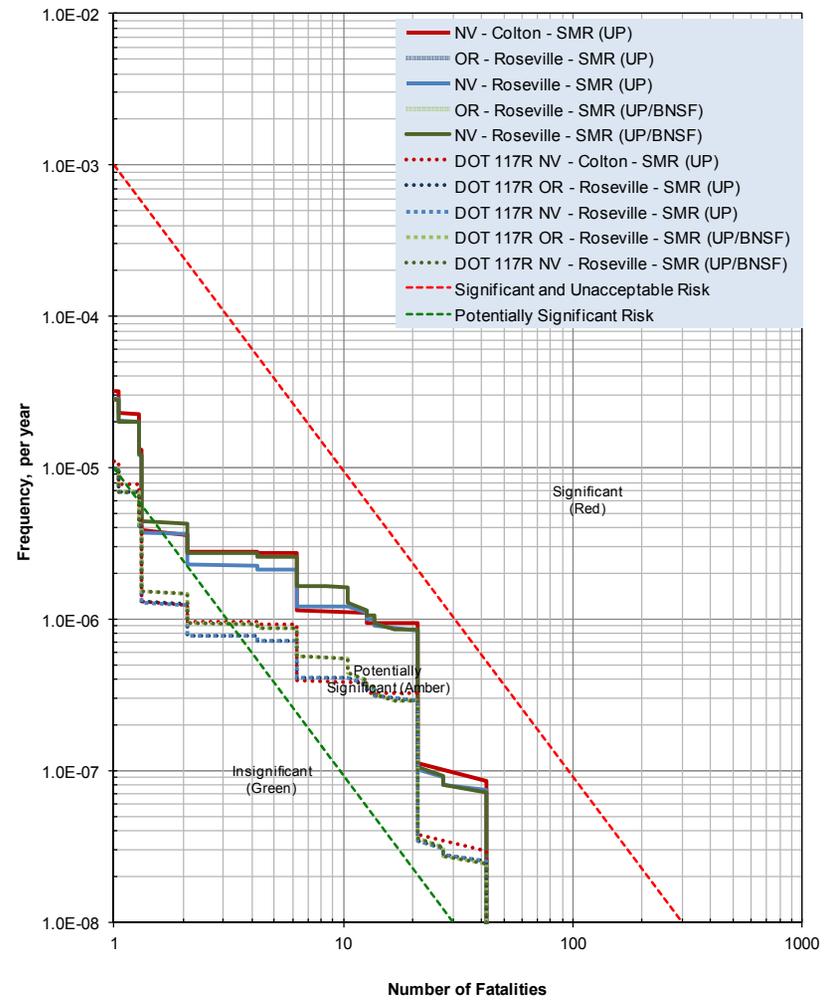
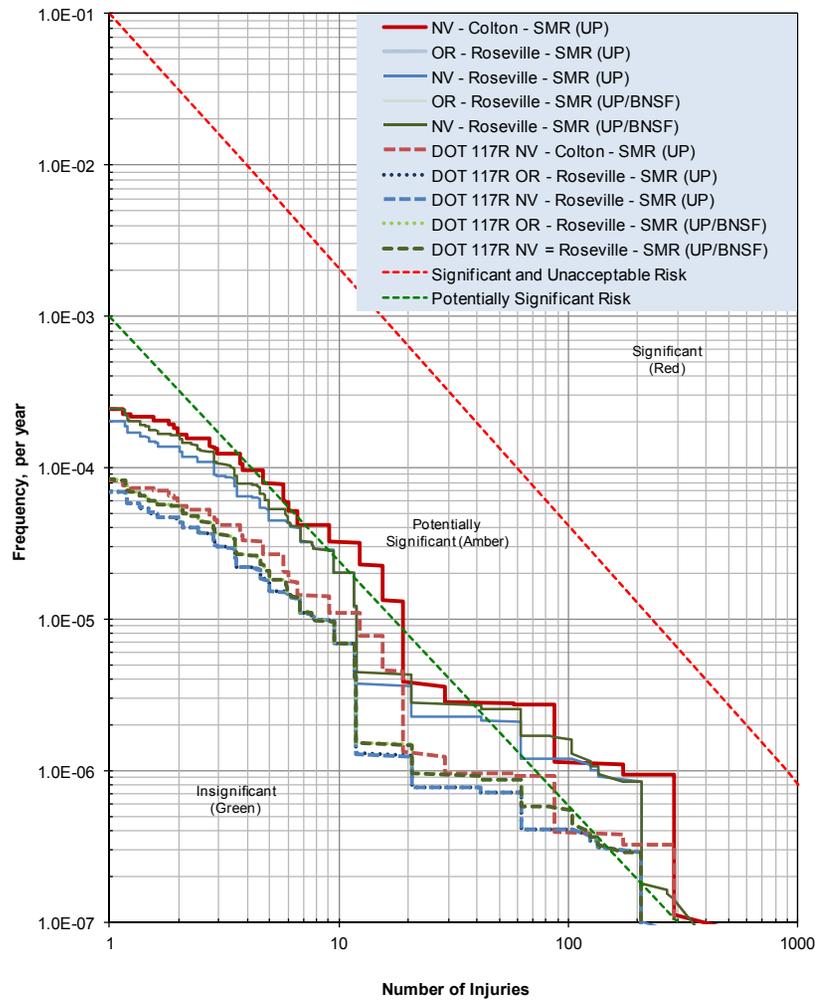
¹ This is referred to as a post October 1, 2011 tank car and is the tank car design proposed for use by Valero.

ECP-Electronically controlled pneumatic; DP-Distributed power; EOT-End of Train

HHFUTs transporting at least one car of Packing Group I flammable liquid to operate with ECP braking system by January 1, 2021. Requires all other HHFUTs to operate with ECP braking system by May 1, 2013 or operate at a maximum speed of 30 miles per hour.

Non-Jacketed CPC-1232 tank cars in Packing Group I (Applicant proposed tank cars) must meet DOT-117R standard by April 1, 2020.

Figure G-1 Risk Associated with Mainline Rail Crude Oil Unit Train Transportation Using DOT-117 or DOT-177R Tanker Cars – SMR to California State Line



Note: Some lines overlap and may not be visible.

Exhibit G

Table G-3 FEIR Mitigation Measure HM-2a and DOT Rule Comparison Table

Tank Car	Bottom Outlet Handle	GRL (lbs)	Head Shield Type	Pressure Relief Valve	Shell Thickness	Jacket	Tank Material	Top Fittings Protection	Thermal Protection System	Braking
FEIR MM, HM-2a: Option 1: PHMSA and FRA Designed Tank Car	Bottom outlet handle removed or designed to prevent unintended actuation during a train accident	286k	Full height, ½-inch thick head shield	Reclosing pressure relief device	9/16 inch Minimum	Minimum 11-gauge jacket constructed from A1011 steel or equivalent. The jacket must be weather-tight	TC-128 Grade B, normalized steel	TIH Top fittings protection system and nozzle capable of sustaining, without failure, a rollover accident at a speed of 9 mph	Thermal protection system in accordance with §179.18	ECP brakes
DOT-117	Bottom outlet handle removed or designed to prevent unintended actuation during a train accident	286k	Full height, ½-inch thick head shield	Reclosing pressure relief device	9/16 inch Minimum	Minimum 11-gauge jacket constructed from A1011 steel or equivalent. The jacket must be weather-tight	TC-128 Grade B, normalized steel	Equipped per AAR Specifications Tank Cars, appendix E paragraph 10.2.1	Thermal protection system in accordance with §179.18	In trains with DP or EOT devices
DOT-117R for Unjacketed CPC-1232	Bottom outlet handle removed or designed to prevent unintended actuation during a train accident	286k	Full Height 1/2 inch thick head shield	Reclosing pressure relief device	7/16 inch-Minimum	Minimum 11-gauge jacket constructed from A1011 steel or equivalent. The jacket must be weather-tight	TC-128 Grade B, normalized steel	Equipped per AAR Specifications Tank Cars, appendix E paragraph 10.2.1	Thermal protection system in accordance with §179.18	In trains with DP or EOT devices

Exhibit H – Agencies and Individuals Consulted During EIR

Name	Title	Agency/Company
Jonathan Hutchison		Amtrak
Jay Fountain		Amtrak
Leo Hoyt	Chief Office of Capital Projects, Operations and Marketing	Amtrak California
Brian Glenn	Cultural Resources Manager	Arcadis
Greg McGowan	Principal Ecologist	Arcadis U.S., Inc.
Brian Glenn, MA RPA	Cultural Resources Manager	Arcadis U.S., Inc.
Brian Chen	Senior Environmental Engineer	Arcadis U.S., Inc.
Laurie Donnelly	Battalion Chief/Fire Marshal	CAL FIRE San Luis Obispo County Fire Department
Matt Ritter	Professor of Biology	Cal Poly San Luis Obispo
Dave Hacker	Environmental Scientist	California Department of Fish and Wildlife
Melissa Boggs	Senior Environmental Scientist (Supervisor)	California Fish and Wildlife Office of Spill Prevention and Response
Tom Edell	Senior Environmental Planner	California Department of Transportation
John Chesnut	Botanist	California Native Plant Society
Dr. David Siegel	Chief, Air Community and Environmental Research Branch	California Office of Environmental Health Hazard Assessment (OEHHA)
Thomas Campbell	Deputy Chief, HazMat Fire and Rescue Division	California Office of Emergency Services
Felix Ko	Utilities Engineer	California Public Utilities Commission-Rail Transit and Crossing Branch
Roger Clugston	ROSB Manager	California Public Utilities Commission-Rail Transit and Crossing Branch
Adam Fukushima, PTP	Transportation Planning	Caltrans
William D. Bronte	Division Chief	Caltrans Division of Rail
Fred Collins	Spokesperson	Northern Chumash Tribal Council
Mona Olivas Tucker	Tribal Chair	Northern Chumash Tribe-yak tityu tityu
Peggy Odom	Member	Northern Chumash Tribe-yak tityu tityu
Johnny Odom	Member	Northern Chumash Tribe-yak tityu tityu
Lisa Dignan	Member	Northern Chumash Tribe-yak tityu tityu
Jim Anderson	Superintendent-Maintenance	Phillips 66
Marc Lea	Deputy Agricultural Commissioner	SLO Co. Dept. of Agriculture, Weights and Measures
Freddie Romero	Cultural Preservation Consultant	Santa Ynez Band of Chumash Indians
Tim McNulty	Senior County Counsel	SLO County
Whitney McDonald	Deputy County Counsel	SLO County
Melissa Guise	Air Quality Specialist	SLO County APCD

Name	Title	Agency/Company
Aeron Arlin Genet	Manager, Planning & Outreach Division	SLO County APCD
Murry Wilson	Environmental Resources Specialist	SLO County Planning and Building
Ellen Carroll	Environmental Coordinator	SLO County Planning and Building
Steven McMasters	Supervising Planner	SLO County Planning and Building
Peter Rogers	Administrative Director	SLOCOG
John D'Allesandro	Division Manager/ Process Services	SPEC Services, Inc.
Greg Lilliston	Project Manager	SPEC Services, Inc.
Alicia C. Perez	Associate State Archaeologist	State of California, Department of Parks and Recreation, Off-Highway Motor Vehicle Recreation Division
Bill Henry	Office Director	SWCA Environmental Consultants
Daniel Bohlman	Conservation Director	The Land Conservancy of San Luis Obispo County
Jerry Wilmoth	General Manager Network Infrastructure	Union Pacific Railroad
Melissa B. Hagan	Senior General Attorney-Environmental Law Department	Union Pacific Railroad
Scott D. Moore	Vice President-Public Affairs (West)	Union Pacific Railroad
Paul Marcinko	Regional Manager NID	Union Pacific Railroad

Exhibit I – Crude by Rail Accident Table

Incident Name	Date	Crude Type	Tank Car Type	BLEVE (Yes/No)	Location	No. of Tank Cars	Reason for Accident	No. of Cars Derailed	No. of Cars Exploded	Gallons Spilled
1. Parkers Prairie, MN (Canadian Pacific)	March 27, 2013	Bakken	DOT-111A100W1	No	Parkers Prairie, Minnesota	94	Emergency stop failure	14	0	30,000
2. White River (Canadian Pacific)	April 3, 2013	Petroleum crude	DOT-111A100W1, non-insulated	No	Calgary, Alberta	7	Broken wheel and emergency brake application	22	0	26,866
3. Jansen, Saskatchewan (Canadian Pacific Railway)	May 21, 2013	Western Canadian crude		No	Jansen, Saskatchewan	64	Under investigation	5	0	24,150
4. Lac-Mégantic (Montreal, Main & Atlantic)	July 5, 2013	Bakken	DOT-111A100W1	Yes	Quebec, Canada	72	Unmanned train, air brake system loss in pressure	63	63	1,500,000
Phillips 66 Rail Spur Permit Application Accepted for Processing – July 12, 2013										
5. Gainford, Alberta (Canadian National Railway)	Oct. 19, 2013	Bakken/ Liquefied petroleum gas		Yes	Alberta, Canada	134	Emergency stop failure	13	1	Not available
6. Smithboro, IL (CSX Transportation)	Oct. 21, 2013	Bakken	DOT-111A-100W1	No	Smithboro, IL		Valve failure	8	0	1
7. Aliceville, AL (Alabama & Gulf Coast Railway LLC [Genessee & Wyoming])	Nov. 8, 2013	Bakken	DOT-111A-100W1	Yes	Aliceville, AL	90	Still under investigation	30	14	630,000
8. Cheektowaga, NY (CSX Transportation)	Dec. 10, 2013	Bakken			Buffalo, NY		Under investigation	5	0	None

Incident Name	Date	Crude Type	Tank Car Type	BLEVE (Yes/No)	Location	No. of Tank Cars	Reason for Accident	No. of Cars Derailed	No. of Cars Exploded	Gallons Spilled
9. Casselton, ND (BNSF Railway Company)	Dec. 30, 2013	Bakken	DOT-111A-100W1	Yes	Casselton, ND	106	Grain train derailed/crude oil train struck	21	10	400,000
10. Plaster Rock, New Brunswick (Canadian National Railway)	Jan. 7, 2014	Canadian tar sands	DOT-111A (2/5 cars)/ CPC 1232 (3/5 cars)	Yes	New Brunswick, Canada	122	Broken wheel	19	5	Not available
11. Philadelphia, PA (CSX Transportation)	Jan. 20, 2014	Bakken		No	Schuylkill River, Philadelphia, PA	101	Failure to properly anchor crossties	7	0	None
12. Vandergrift, PA (Norfolk Southern Railway Co.)	Feb. 13, 2014	Canadian	DOT-111A-100W1	No	Vandergrift, PA	120	Possible winter weather	21	0	9,800
13. Selkirk Yard, Albany, NY (CSX Transportation)	April 30, 2014	Bakken	DOT-111		Albany, NY	110	Under investigation	13	0	None
14. Lynchburg, VA (CSX Transportation)	April 30, 2014	Bakken	DOT-111A-100W1	Yes	Lynchburg, VA	105	Emergency stop led to derailment	18	3	29,416
15. LaSalle, CO (Union Pacific Railroad Co.)	May 9, 2014	Bakken	DOT-111A-100W1	No	LaSalle, CO	100	Valve failure	6	0	7,932
16. Seattle, Washington (BNSF Railway)	July 24, 2014	Bakken	CPC-1232	No	Seattle, WA	100	Under investigation	3	0	0
17. Clair, Saskatchewan (CN Rail)	Oct. 7, 2014	Petroleum distillate	DOT-111	Yes	Wadena, Saskatchewan	100	Rail Failure	26	0	Not yet known
18. Timmins, Ontario (Canadian National Railway)	Feb. 14, 2015	Bakken	CPC-1232	Yes	Timmins, Ontario	100	Under investigation	29	7	Not yet known

Incident Name	Date	Crude Type	Tank Car Type	BLEVE (Yes/No)	Location	No. of Tank Cars	Reason for Accident	No. of Cars Derailed	No. of Cars Exploded	Gallons Spilled
19. Mt. Carbon, WV (CSX Transportation)	Feb. 16, 2015	Bakken	CPC-1232	Yes	Powellton Hollow, Fayette County, WV	109	Rail Failure	27	14	152,000
20. Galena, IL (BNSF Railway)	March 5, 2015	Bakken	CPC-1232	Yes	Galena, IL	105	Still under investigation	6	2	630,000
21. Gogama, Ontario	March 7, 2015	Canadian tar sands	CPC-1232	Yes	Ontario, Canada	103	Still under investigation	38	5	Not yet known
22. Wells County, Heimdahl, North Dakota	May 6, 2015	Bakken	CPC-1232	Yes	Heimdahl, North Dakota	109	Still under investigation	6	5-10	180,000
23. Culbertson, Montana (BNSF Railway)	July 16, 2015	Bakken	CPC-1232	No	Culbertson, Montana	106	Still under investigation	22	0	35,000
24. Watertown, Wisconsin (Canadian Pacific Railway)	November 8, 2015	Bakken	Upgraded DOT-111	No	Watertown, Wisconsin	110	Broken Rail	13	0	1,000

**Exhibit J – Correspondence from the Applicant and UPRR
Regarding Federal Preemption**

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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.

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

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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.

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

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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.

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.

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+NO_x 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:

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

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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.

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

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.

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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.

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.

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

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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.

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

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.

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.

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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.

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.

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

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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.

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.

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,

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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.

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.

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.

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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).

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

Very truly yours,



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
San Luis Obispo Office of County Counsel
Room D320
1055 Monterey Street
San Luis Obispo, CA 93408

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.

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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).

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(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.

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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

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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.

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.

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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

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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

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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.

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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

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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.

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.*

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

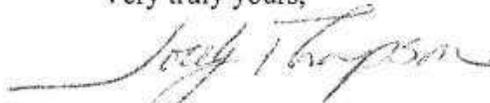
The Reduced Rail Deliveries alternative also is preempted. This alternative would limit train deliveries to the Santa Maria Refinery to a maximum of three per week (as opposed to five per week for the proposed project) and an annual maximum of 150. The Draft EIR states, "If the County is preempted from 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 4.3-4.3. 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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November 24, 2014

By Email:

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

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

Mr. Murry Wilson
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976 Osos Street, Room 200
San Luis Obispo, CA 93408
mwilson@co.slo.ca.us

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

Dear Mr. Wilson:

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

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

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

www.up.com



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

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

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

- UP uses lasers and ultrasound to identify rail imperfections.
- UP forecasts potential failures before they happen by tracking the acoustic vibration on wheels.
- UP performs a real-time analysis of every rail car moving on our system each time it passes a trackside sensor, equaling 20 million car evaluations per day.
- UP employees participate in rigorous safety training programs on a regular basis and are trained to identify and prevent potential derailments.

UP also reaches out to fire departments as well as other emergency responders along our lines to offer comprehensive training to hazmat first-responders in communities where we operate. UP annually trains approximately 2,500 local, state and federal first-responders on ways to minimize the impact of a derailment in their communities. UP has trained nearly 38,000 public responders and almost 7,500 private responders (shippers & contractors) since 2003. This includes classroom and hands-on training.

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

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

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

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

A. Voluntary Agreement.

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

- Increasing the frequency of track inspections using high-tech track geometry readers.
- Equipping crude trains with either distributed power or two-way telemetry end-of-train devices. These technologies allow train crews to apply emergency brakes from both ends of the train in order to stop the train faster.
- Using new rail traffic routing technology (the Rail Corridor Risk Management System ("RCRMS")) to aid in the determination of the safest and most secure rail routes for trains with 20 or more cars of crude oil.
- Lowering speeds to no more than 40 miles per hour in the 46 federally-designated high-threat-urban areas and no more than 50 miles per hour in other areas.
- Working with communities to address location-specific concerns that communities may have.
- Increasing trackside safety technology by installing additional wayside wheel bearing detectors if they are not already in place every 40 miles along tracks with trains carrying 20 or more crude oil cars, as other safety factors allow.
- Increasing emergency response training and tuition assistance.
- Enhancing emergency response capability planning.

These voluntary actions are already being implemented.

B. Emergency Orders.

In a February 25, 2014 Emergency Order, the DOT ordered certain changes in the way petroleum crude oil is classified and labeled during shipment, emphasizing that "with regard to emergency responders, sufficient knowledge about the hazards of the materials being transported [is needed] so that if an accident occurs, they can respond appropriately." February 25, 2014 Emergency Order at 13. And in its May 7, 2014 Emergency Order, the DOT ordered railroads transporting large quantities of crude oil to notify state authorities of the estimated number of trains traveling through each county of the State, provide certain emergency response information required by federal regulations (49 C.F.R. Part 172, subpart G) and identify the route over which the oil will be transported.

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C. Proposed Regulations.

On July 23, 2014, the PHMSA proposed enhanced tank car standards, a classification and testing program for crude oil and new operational requirements for trains transporting such crude that include braking controls and speed restrictions. PHMSA proposes the phase out of older DOT 111 tank cars for the shipment of flammable liquids, including most Bakken crude oil, unless the tank cars are retrofitted to comply with new tank car design standards. We encourage SACOG to participate in this rulemaking process.

The federal proposal includes:

- Better classification and characterization of mined gases and liquids
- Rail routing risk assessment
- Notification to State Emergency Response Commissions
- Reduced operating speeds
- Enhanced braking
- Enhanced standards for both new and existing tank cars

As the federal government's existing regulations, recent emergency orders, the voluntary agreements and the new regulatory proposals make abundantly clear, regulation of crude transportation is extremely detailed and complex. UP is actively participating in the efforts to finalize the new regulations and encourages SACOG to do the same, particularly with respect to its request that UP phase in new tank cars as early as possible. By jointly working to enhance safety we can ensure that the most effective regulations are adopted.

III. A UNIFORM FEDERAL REGULATORY PROGRAM IS ESSENTIAL TO ENSURE THE SAFE TRANSPORTATION OF CRUDE OIL.

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

As stated by the U.S. Senate:

Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

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

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

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

A. Preemption under ICCTA.

1. Statutory background.

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

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

“Transportation” by rail carriers broadly includes:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property. 49 U.S.C. § 10102(9) (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Preemption under the Federal Rail Safety Act.

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

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

C. Preemption under the Pipeline Safety Improvement Act.

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

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

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

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

V. CONCLUSION.

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

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

Regards,

UNION PACIFIC RAILROAD COMPANY



Melissa B. Hagan

cc: Mr. Steven Cohn (by Certified Mail Return Receipt Requested (7012 3050 0000 4438 3244) and email to scohn@cityofsacramento.org)

Exhibit K – Detailed Reduce Rail Delivery Comparisons

Item	5 Trains per Week (Proposed Project) ^a	3 Trains per Week Alternative ^b
CEQA Class I Impacts		
Onsite		
AQ.2-Operational Diesel Particulate Matter Emissions	Yes	Yes ^c
AQ.4- Air Toxic Emissions Cancer Risk	Yes	No
Mainline Rail		
AG.5-Oil Spill Impacts to Agricultural Resources	Yes	Yes ^d
AQ.2-Operational Criteria Pollutant Emissions in SLO County	Yes	Yes ^d
AQ.3-Operational Criteria Pollutant Emissions outside SLO County	Yes	Yes ^d
AQ.5-Operational Air Toxic Emissions Cancer Risk	Yes	Yes ^d
AQ.6-Operational GHG Emissions	Yes	Yes ^d
BIO.11- Oil Spill Impacts to Biological Resources	Yes	Yes ^d
CR.6- Oil Spill Impacts to Cultural Resources	Yes	Yes ^d
HM.2- Risk to Public due to Train Derailment	Yes	Yes ^d
PS.4- Demand for Fire Protection and Emergency Response Services	Yes	Yes ^d
WR.3- Oil Spill Impacts to Water Resources	Yes	Yes ^d
Onsite-General Plan/CZLUO Inconsistency		
CZLUO Section 23.07.170, Environmentally Sensitive Habitats (ESHA):	Inconsistent	Inconsistent
Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 1, Land Uses Within or Adjacent to Environmentally Sensitive Habitats	Inconsistent	Inconsistent
Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats	Inconsistent	Inconsistent
Coastal Plan Policies: Environmentally Sensitive Habitat Area Policy 36, Protection of Dune Vegetation	Inconsistent	Inconsistent
Framework for Planning: Land Use Goal 4, Land Use Compatibility	Inconsistent	Inconsistent
Framework for Planning: Strategic Growth Goal 1 Objective 2 Air Quality	Inconsistent	Inconsistent
Framework for Planning: Sensitive Resource Area General Objective 1	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.2 Attain Air Quality Standards	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.3 Avoid Air Pollution Increase	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.4 Toxic Exposure	Inconsistent	Consistent
Conservation and Open Space Element: Air Quality Policy AQ 3.5 Equitable Decision Making	Inconsistent	Inconsistent
Conservation and Open Space Element: Biological Resources Policy 1.2 Limit Development Impacts	Inconsistent	Inconsistent
Conservation and Open Space Element: Non Renewable Energy Facility Siting Policy E 7.1	Inconsistent	Inconsistent

Item	5 Trains per Week (Proposed Project) ^a	3 Trains per Week Alternative ^b
South County Coastal Area Plan: Land Use Rural Area Industrial	Inconsistent	Inconsistent
South County Coastal Area Plan: Industrial Air Pollution Standards	Inconsistent	Inconsistent
Mainline-General Plan/CZLUO Inconsistency		
Framework for Planning: Strategic Growth Goal 1 Preserve Resources	Inconsistent	Inconsistent
Framework for Planning: Strategic Growth Goal 4, Objective 4-Agriculture	Inconsistent	Inconsistent
Framework for Planning: Land Use Goal 2 Preserve Agriculture	Inconsistent	Inconsistent
Framework for Planning: Strategic Growth Goal 1 Objective 2 Air Quality	Inconsistent	Inconsistent
Coastal Plan Policies: Chapter 6 Environmentally Sensitive Habitats, Coastal Streams Policy 20	Inconsistent	Inconsistent
Coastal Plan Policies: Environmentally Sensitive Habitats, Sensitive Habitats, Policy 29, Protection of Terrestrial Habitats	Inconsistent	Inconsistent
Coastal Plan Policies: Chapter 7 Agriculture Policy 1	Inconsistent	Inconsistent
Coastal Plan Policies: Chapter 12, Archaeology Policy 1, Protection of Archaeological Resources	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.2 Attain Air Quality Standards	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.3 Avoid Air Pollution Increase	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Policy AQ 3.4 Toxic Exposure	Inconsistent	Inconsistent
Conservation and Open Space Element: Air Quality Goal AQ 3, Implementation Strategy AQ 3.6.1, Identify Health Risks to Sensitive Receptors	Inconsistent	Inconsistent
Conservation and Open Space Element: Biological Resources Policy BR 1.15 Restrict Disturbance in Sensitive Habitats, Nesting Birds	Inconsistent	Inconsistent
Conservation and Open Space Element: Chapter 5 Energy Goal E7 Design Siting and Operation of Non Renewable Energy	Inconsistent	Inconsistent
Conservation and Open Space Element: Chapter 4, Fire Safety Goal S-4, Reduce the threat to life, structures and the environment	Inconsistent	Inconsistent
Conservation and Open Space Element: Chapter 4, Fire Safety Goal S-14, Reduce the threat to life structures and the environment	Inconsistent	Inconsistent
Conservation and Open Space Element: Chapter 6, Other Safety Issues Goal S-6, Reduce the Potential for harm to individuals and damage to environment from hazards	Inconsistent	Inconsistent
<p>a. Proposed Project based upon analysis in the FEIR, Chapter 4.0 and Appendix G.</p> <p>b. Three train per week based upon analysis in Alternatives section of FEIR (Chapter 5.0).</p> <p>c. With the reduced deliveries the peak day diesel particulate matter emissions would remain the same as for the Proposed Project, which would exceed the SLOCAPCD CEQA threshold of 1.25 lbs per day. Therefore the impact would remain significant and unavoidable (Class I) for the reduced delivery case.</p> <p>d. The mainline Class I significant impacts would be reduced in severity or for oil spill risk reduced in terms of likelihood of occurrence but not avoided or reduced to a level of insignificance for the reduced delivery case.</p>		



meeting M RWG at Trilogy

Eric Meyer

to:

mrwcoord

01/25/2016 06:45 PM

Cc:

"rhedges@co.slo.ca.us"

Hide Details

From: Eric Meyer <frenchbicycles@gmail.com>

To: mrwcoord@gmail.com

Cc: "rhedges@co.slo.ca.us" <Rhedges@co.slo.ca.us>

Eunice,

Thanks for your invite to chat and discuss the Rail Terminal project. I have visited the trilogy site several times now. Once with the specific intent to ascertain the view shed, distances etc. involved. I have also visited the refinery site... and driven out onto the land where the terminal has been proposed to look and see the topographic changes proposed, lighting locations, distance to housing, etc.

I feel I have a good lay of the land and the issues at hand. I have been studying the information for months now.

I have also been to your meeting at the Clubhouse at Trilogy... and do read all

of your (and the rest of the public's) information, newsletters, updates, private letters etc.

Thank you for your offer to chat but I must respectfully decline.

The Staff report on this project came out this afternoon. You can view this at:

[http://agenda.slocounty.ca.gov/agenda/sanluisobispo/Proposal.html?
select=5611](http://agenda.slocounty.ca.gov/agenda/sanluisobispo/Proposal.html?select=5611)

Best

--

Eric Meyer
Planning Commissioner
District 3
County of San Luis Obispo, CA

frenchbicycles@gmail.com



Re: Fw: 2/4/16 PC -Fw: Request to Meet with Planning
Commissioners
Eunice King

to:

James Harrison

01/26/2016 07:53 AM

Cc:

"rhedges@co.slo.ca.us"

[Hide Details](#)

From: Eunice King <mrwcoord@gmail.com>

To: James Harrison <sbwlff@sbcglobal.net>

Cc: "rhedges@co.slo.ca.us" <rhedges@co.slo.ca.us>

History: This message has been replied to.

Good Morning Jim,

I was glad to meet you in person last evening. I spoke with Sam Saltoun and he would like to be a part of the meeting with you. Would you have availability on Friday this week or on Tuesday? We can be flexible with our calendars. We would want an hour to share information and go out to the vista site.

Let us know if either day works for you. Thank you.

Eunice

--

Eunice King

Mesa Refinery Watch Group Administrator

On Mon, Jan 25, 2016 at 5:18 PM, James Harrison <sbwlff@sbcglobal.net> wrote:

On Monday, January 25, 2016 5:17 PM, James Harrison <sbwlff@sbcglobal.net> wrote:

Hi
I received this today. When and where would you like to meet
Jim Harrison

On Monday, January 25, 2016 4:56 PM, "rhedges@co.slo.ca.us" <rhedges@co.slo.ca.us> wrote:

Commissioners,
please see below. Thank you!

Ramona Hedges, [\(805\) 781-5612](tel:(805)781-5612)
Records Management Supervisor
Custodian of Records
Planning Commission Secretary
rhedges@co.slo.ca.us
<http://www.sloplanning.org>
<http://www.facebook.com/SLOPlanning>
<http://twitter.com/SLOCoPlanning>



----- Forwarded by Ramona Hedges/Planning/COSLO on 01/25/2016 04:56 PM -----

From: Eunice King <mrwcoord@gmail.com>
To: rhedges@co.slo.ca.us
Date: 01/16/2016 09:16 AM
Subject: Request to Meet with Planning Commissioners

Good Morning Ramona,

I enjoyed meeting you by telephone yesterday and really appreciate all that you do to coordinate the Planning Commissioners meetings and calendars.

As you know, the Mesa Refinery Watch Group is a local volunteer group that formed to oppose the Phillips 66 railspur proposal that would bring oil trains to our area. We have researched the impacts of the project for more than two years and provide factual information to government officials, media and the general public.

We would like to meet with each Planning Commissioner in advance of the Public Hearings on February 4th and 5th. We suggest the meeting be at Trilogy in Nipomo so that we can walk to the location that looks out at the proposed building site. We are hopeful that the meetings could occur the week of January 25th but we will be flexible to meet at a date and time that works for the individual Commissioner's schedule.

Please let me know if you have any questions. Thank you for coordinating this request for meeting with each Commissioner.

Eunice

--

Eunice King

Mesa Refinery Watch Group Administrator



Fwd: Re: Phillips 66
Jim Irving
to:
rhedges
01/26/2016 10:42 AM
Hide Details
From: Jim Irving <pasorealtor@gmail.com>

To: rhedges@co.slo.ca.us

Ramona, here's an email thread I too had with the Mesa group.
Jim

----- Forwarded message -----
From: "Eunice King" <mrwcoord@gmail.com>
Date: Jan 25, 2016 10:18 PM
Subject: Re: Phillips 66
To: "Jim Irving" <pasorealtor@gmail.com>
Cc:

Thank you, Jim.

We really appreciate your diligence with the Phillips 66 proposal. We will certainly let you know if we have any special information to point out. We

look forward to seeing you at the Public Hearings on February 4th and 5th.

Eunice

On Mon, Jan 25, 2016 at 7:29 PM, Jim Irving <pasorealtor@gmail.com> wrote:

Eunice, our secretary forwarded your request. Happy to meet with you but unfortunately I am out of town all week. I have friends in Trilogy & am familiar with the site and view having been there just last week. I have been reading your groups posts for some time & believe I am familiar with your concerns. But if there is some unusual or special concern you'd like to point out perhaps I could meet with you after the first two hearing days.

Sincerely, jim Irving

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Eunice King

Mesa Refinery Watch Group Coordinator

- Notice of Preparation at PDF page 10
- Notice of Completion & Environmental Document Transmittal form at PDF page 16
- Initial Study/Notice of Preparation at PDF pages 21, 35, and 36
- Appendix B Air Quality and Greenhouse Gases Technical Report at PDF page 119
- Appendix D Cultural Resources Technical Report at PDF pages 642 and 643
- Appendix F Hazards and Hazardous Materials Technical Report at PDF page 874
- Appendix G Noise Technical Report at PDF page 908
- Appendix H Transportation and Traffic Technical Report at PDF pages 975 and 976

Also, the refinery's Precise Development Plan Condition of Approval No. 3 provides:

“This plan is for a refinery with the operational parameter of 70,000 barrels per day of input (crude). Increases to the input of crude above 70,000 barrels per day, calculated as an annual average will require a precise development plan modification and a review by the Kern County Planning Department Director as outlined in Condition (2).”

(Reference: Kern County Board of Supervisors Resolution No. 2008-531, In the matter of: Adoption of Precise Development Plan No. 1, Map No. 102-23 and Precise Development Plan No. 62, Map No. 102 (Big West of California, passed and adopted October 21, 2008.)

- N. The comment states that the DEIR must analyze potential environmental impacts of main line (offsite) rail operations, and that this analysis is not preempted by federal law.

The DEIR addresses the preemption of local regulation of mainline rail activities, including potential impacts regarding air quality and public safety requested by the comment. The DEIR notes that while the Lead Agency is preempted from imposing regulations or mitigation measures for off-site rail activities, other federal agencies are responsible for ensuring compliance with air quality and safety regulations, and are doing so. The DEIR also explains that the federal agencies responsible for regulating rail transport have continued to implement new and increased safety and air quality measures through regulations and negotiated agreements with railroads. The Lead Agency has considered the authority cited by the commenter. However, the cases cited, as well as the Lead Agency's own authorities, confirm the conclusions of the DEIR. Because the field of transport by rail is preempted by federal regulation, the Lead Agency cannot apply CEQA and its significance thresholds to impacts resulting from mainline rail activities.

The comment repeatedly states that CEQA review of mainline rail activities is not preempted by Interstate Commerce Commission Termination Act (ICCTA). The Lead Agency has considered both the case law cited in support of these statements, as well as other authorities. However, the Lead Agency does not find the authorities cited in the comment to be applicable to the CEQA review process for this project for the reasons outlined in the DEIR and further explained below.

Federal preemption of the regulation of transport by rail carriers, and operation of rail tracks or facilities, is broad and exclusive. Rail carriers are subject to federal environmental laws, but certain local rules and regulations imposed under state environmental laws are preempted.

Federal preemption of regulation of the railroads was strengthened in 1995 with passage of the ICCTA. As described in the DEIR, under the ICCTA, the Surface Transportation Board (STB) is given exclusive authority to regulate the construction, operation and abandonment of

new and existing rail lines. The state and local regulation of trains moving outside of the project vicinity is preempted by federal law under the ICCTA. (DEIR, page 4.12-18).

49 U.S.C. Section 15051(b) provides that “the jurisdiction of the [Surface Transportation] Board over ... transportation by rail carriers ... and ... operation” of tracks or facilities “is exclusive,” and that “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.”

Congress has 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. The ICCTA also removed state jurisdiction over wholly intrastate railroad tracks, because even intrastate operations ultimately affect the flow of interstate commerce. Accordingly, states may not regulate railroad operations even in the absence of federal regulation.

The commenter cites *Fla. E. Coast Railway Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331 for its statement that ICCTA allows “the continued application of laws having a more remote or incidental effect on rail transportation.” That case holds that a city’s application of local zoning and occupational license requirements for a business which leased rail yard property was not preempted. The City of Palm Beach sought to regulate a private company who leased the rail yard but was not, itself, a railway. The City was not seeking to impose its regulations on offsite rail activity conducted by the railways or to regulate them indirectly through regulation of the lessee’s activities. This is consistent with the Lead Agency’s approach to the project here. The Lead Agency is applying its zoning and other ordinances to the Alon Bakersfield Refinery, including the onsite rail activities of the Crude Flexibility Project. It is the application of County regulation to the offsite rail activity that is preempted by the ICCTA.

The Lead Agency also notes that a subsequent decision stated that “the Eleventh Circuit’s interpretation [in *E. Fla. Railway*] is not consistent with the interpretation of the Second Circuit in *Green Mountain [Railroad Corp. v. State of Vermont]*, 404 F.3d 638, 643 (2nd Cir. 2005)] . In *Green Mountain*, the Second Circuit noted that under ICCTA, “transportation’ is expansively defined. . . . Certainly, the plain language [of the statute] grants the [Surface] Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain.” (*Coastal Distrib., LLC v. Town of Babylon*, 2005 U.S. Dist. LEXIS 40795, 54 (E.D.N.Y. July 15, 2005).)

CEQA, specifically, 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.) Similarly, the 9th Circuit held that the South Coast Air Quality Management District rule requiring railroads to report emissions from idling trains was preempted by the ICCTA. (*Ass’n of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1096 (9th Cir. 2010).). The recent opinion addressing a challenge to the

environmental review of the California High Speed Train route selection does not contradict these authorities. (*Town of Atherton v. California High-Speed Rail Authority* (Cal. App. 3d Dist. July 24, 2014, C070877) ___ Cal.App.4th ___ [2014 WL 3665045].)

The Lead Agency acknowledges that, in enacting ICCTA, Congress intended states to retain traditional police powers reserved by the Constitution. However, case law has confirmed that the exception for state exercise of police powers does not extend to state permitting programs – and related environmental review – that are inherently discretionary. The Lead Agency 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*, (2nd Cir. 2005) 404 F.3d 638, 643.) 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 Cal. Code Regs. §§ 15002(i)(2), 15357, 15378.) Therefore, application of CEQA to railroads and rail operations is preempted by the ICCTA, and it would be inappropriate for the County to impose regulations or conditions, or apply CEQA significance thresholds, based on railroad activities that occur offsite.

The commenter cites to *Humboldt Baykeeper v. Union Pac. R.R. Co., et al*, 2010 U.S. Dist. LEXIS 52182, 2010 WL 2179900 (N.D. Cal., May 27, 2010) (“*Baykeeper*”) to support its statement that ICCTA’s preemptive scope is limited. The Lead Agency has considered this authority, and finds the authority consistent with the Lead Agency’s understanding that ICCTA’s preemptive scope is not limited by the requirements of CEQA, a *state* law. *Baykeeper* only addresses the question of whether ICCTA preempts a federal environmental law. The court, in determining that ICCTA does not generally preempt Clean Water Act requirements, noted that the STB has made clear that ICCTA is not intended to interfere with the role of state and local agencies in implementing “[f]ederal environmental statutes, such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” (*Baykeeper* at 8.) This holding is consistent with the Lead Agency’s understanding of the preemptive scope of ICCTA.

The DEIR describes federal environmental statutes that apply to the project, including the Clean Water Act (DEIR, page 4.7-14.), the Safe Drinking Water Act (DEIR, page 4.7-17) and the Clean Air Act (DEIR, page 4.1-4; pages 4.1-24 to 4.1-27). Some provisions of these acts and implementing regulations apply to offsite rail transport and operations activities. But ICCTA preempts the Lead Agency’s ability to impose its ordinances or mitigation measures based on rail activity that occurs offsite or outside of County boundaries. Nonetheless, the DEIR considers the authority of these other regulating agencies and the rules those agencies have established to ensure the safe and responsible operation of offsite rail activities.

For example, the DEIR, at pages 4.1-26 to 4.1-27, discusses the emissions standards adopted by the EPA that are applicable to new locomotives and new engines used in locomotives. Under the Final EPA National Locomotive Rule, locomotive engines are required to meet progressively more stringent emissions requirements over time. (Title 40 CFR part 92, with an update in 2008 at Title 40 CFR Part 1033.)