ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW, Suite 1000
Washington, D.C. 20024

Timothy J. Strafford
Associate General Counsel

Phone: (202) 639-2506
Fax: (202) 639-2868
E-mail: tstrafford@aar.org

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: FD 36036, *Petition for Declaratory Order, Valero Refining Company - California*

Dear Ms. Brown:

By this letter, the Association of American Railroads ("AAR") hereby replies in support of the petition for declaratory order filed by Valero Refining Company – California ("Valero") in the above-captioned proceeding. The Surface Transportation Board ("STB" or "Board") should institute a proceeding pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 and eliminate any remaining uncertainty that states and localities are preempted by 49 U.S.C. § 10501(b) from using permitting authority to prevent the construction, expansion, or use of facilities necessary for rail transportation, even if those facilities are owned and operated by a non-rail carrier.

Congress has vested the Board with exclusive jurisdiction over transportation by rail carrier because of the vital national interest in the uniform nationwide regulation of railroads and that regulation's effect on interstate commerce. Federal regulation over the railroad industry has historically been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *accord, Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989). The ICC Termination Act ("ICCTA") broadened federal preemption to ensure that states and localities do not burden interstate commerce by creating a patchwork of overlapping and conflicting regulation.

Section 10501(b) expressly preempts state and local action to regulate railroads and has been repeatedly recognized by the courts as preempting state and local laws regulating transportation operations. *See, e.g.*, *City of Auburn v. U.S. Government,* 154 F.3d 1025, 1031 (9th Cir. 1998), *cert. denied,* 527 U.S. 1022 (1999) (describing language of § 10501(b)(2) as

"broad" and giving the Board "exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines"); *CSX Transp., Inc. v. Ga. Public Service Comm'n,* 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) ("[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority."). It is well settled that section 10501(b) preempts the application of state and local preclearance requirements as applied to railroad transportation. *See, e.g.*, *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, FD 35861 (STB served Dec. 12, 2014), pet. for review pending sub nom. *Kings Cty. v. STB*, No. 15-71780 (9th Cir. filed June 11, 2015); *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998); *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *Norfolk S. Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997).

The AAR and its members have a strong interest in the proper application of section 10501(b) to ensure the uniform regulation of the railroad industry in the United States and to prevent a patchwork of local and state regulation from impeding railroad operations. The instant petition presents important national transportation issues affecting rail facilities across the country. In *Boston and Maine Corp. and Springfield Terminal Railroad Co – Petition for Declaratory Order,* STB Finance Docket No. FD 35749, 2013 STB LEXIS 225, at *9 (July 19, 2013), reconsideration denied (STB served October 31, 2013), the Board rightly turned back a local government's attempt to make an end-run around ICCTA preemption by targeting a non-railroad actor. This case now presents the Board with the situation where state and local permitting requirements are being applied to rail-served customer facilities with the purpose of controlling – and often preventing – rail transportation. The Board should take this opportunity further to clarify the scope of section 10501(b) preemption regarding the construction, expansion, and operation of rail-customer facilities necessary for the transportation of commodities by rail where a state or municipality expressly reaches into areas of Board jurisdiction under the guise of its environmental review.

Sincerely,

Timothy J. Strafford
Counsel for the Association
of American Railroads

cc: Parties of Record