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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

Re: Valero Refining Company Petition for Declaratory Order
STB Finance Docket No. 36036

Dear Ms. Brown,

We write on behalf of Association of Irritated Residents, Climate Solutions, Columbia Riverkeeper, Evergreen Islands, Friends of the Columbia Gorge, Friends of the Earth, Resources for Sustainable Communities, Friends of the San Juans, Spokane Riverkeeper, and Washington Environmental Council. We agree with the City of Benicia and intervenors Benicians for a Safe and Healthy Community, Center for Biological Diversity, Communities for a Better Environment, Natural Resources Defense Council, San Francisco Baykeeper, Sierra Club, Stand, and Safe Fuel and Energy Resources California that the Surface Transportation Board should deny Valero Refining Company's Petition for Declaratory Order because the City of Benicia Planning Commission's denial of a permit for Valero's proposed crude-by-rail offloading facility is not preempted by the Interstate Commerce Commission Termination Act.

We also write to urge the Surface Transportation Board not to weigh in on projects that are mentioned in Valero's Petition, but that are outside of the Board's jurisdiction. In its Petition, Valero attempts to bolster its cause by asserting that a Surface Transportation Board decision in its favor will impact other crude transportation projects. Among the projects Valero cites are the Alon Bakersfield Refinery Crude Flexibility Project, the Shell Oil Puget Sound Refinery Project, and the Tesoro-Savage Vancouver Energy Project—projects which we are actively opposing.[1] Valero has no standing to bring these projects into issue in its Petition, and the Surface Transportation Board should not venture into issues not properly before it. We write to explain that granting Valero's Petition will not "provide clarity" with regards to these projects because of factual differences between these projects and Valero's petition, and urge the Surface

[1] Although this letter does not address the Phillips 66 Rail Spur Extension or Buckeye Terminal projects referenced in Valero's letter, we do not mean to imply that Valero is correct that the Board's response to Valero's petition will have any impact on these projects.

Transportation Board not to address these projects in response to Valero's Petition, except to at most clarify that the Board does not have jurisdiction over these projects.

A. The Alon Bakersfield Crude Flexibility Project

The Alon Project is an effort to retool the currently shuttered Alon Refinery in Kern County, California and build rail unloading capacity. Valero's Petition implies that the only thing preventing the Alon Project from operating is a legal challenge over the County's authority to regulate rail operation, thereby implying that a Surface Transportation Board ruling in this Petition would provide some clarity to the Alon Project. *See* Valero's Petition at 3-4. This is not the case.

Although the Alon Project has all of the necessary permit approvals, and has survived legal challenge at the Superior Court level, the Project is not operational. Recent news reports and investor presentations indicate that Alon does not expect to move ahead with the Project in the near future because of low oil prices.[2] At least one report has also indicated that it may be most profitable for Alon to dismantle the refinery and sell it in pieces.[3] The delay in Project implementation is not due to the legal challenge or any manufactured confusion over Kern County's authority to permit refinery operations.

Nor, even if the legal challenge were the cause of the Project's delay (which it is not), would a ruling by the Surface Transportation Board impact that delay, because the central focus of the lawsuit challenging the Project has nothing to do with rail regulation. Association of Irritated Residents, Sierra Club, and Center for Biological Diversity challenged Kern County's Environmental Impact Report ("EIR"), prepared under the California Environmental Policy Act, alleging that the EIR was defective for a wide variety of reasons, most of which had to do with the EIR's failure to fully evaluate and mitigate the impacts of restarting a refinery in one of the most polluted airsheds in the country.[4] *See Association of Irritated Residents v. Kern County Board of Supervisors,* Kern County Superior Court case no. S-1500-CV-283166. The Superior Court denied the Petition challenging the Alon Project on April 1, 2016; the case is currently on Appeal to the Fifth District Court of Appeal. The lawsuit is simply not delaying the Alon Project.

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[2] *See, e.g.,* Reuters, *Alon Defers California Rail Project, Refinery Restart* (February 25, 2016), *available at* http://www.reuters.com/article/us-alon-crude-rail-idUSKCN0VY2CH.

[3] *See* John Cox, Bakersfield Californian, *Analysts: Refinery May Have to be Sold in Pieces* (March 23, 2016), *available at* http://www.bakersfield.com/news/2016/03/22/rosedale-refinery-may-have-to-be-sold-in-pieces-industry-observers.html.

[4] The legal claims in the Superior Court case included that the EIR was defective because it (1) relied on the incorrect baseline by which to measure project impacts; (2) failed to disclose that the project involved restarting the refinery; (3) underestimated the rail transport risks of the project by relying on a math error and by failing to fully disclose the rail transportation risks; (4) failed to disclose and analyze the emissions from the crude feedstocks that would be processed at the refinery; (5) failed to disclose flaring emissions; (6) understated greenhouse gas impacts; and (7) improperly conflated mitigation measures with significance analysis.

B. The Proposed Tesoro-Savage Terminal in Vancouver, Washington

The Tesoro-Savage Project is a new crude oil shipping terminal proposed at the Port of Vancouver, Washington. Located on the northern bank of the Columbia River, Tesoro-Savage would be the largest crude oil shipping terminal in North America, with an estimated average throughput of 360,000 barrels of crude per day. The proposal would build six large oil storage tanks, create a protective sub-basin to collect oil and rainwater, build associated buildings and a private rail loop with hook-ups for unloading oil tank cars simultaneously, perform significant dock work, and apply mitigation measures, including injecting concrete into the shoreline to protect against earthquakes and landslide damage.[5]

Because of its size and state-wide impacts, the Washington Energy Facility Site Evaluation Council ("EFSEC") is the permitting authority for all state aspects of the terminal. EFSEC acts as a one-stop, state and local permitting agency for large thermal energy facilities, oil refineries, and petroleum and natural gas pipelines. EFSEC's function is to consider and balance all costs and benefits of a proposed energy facility like Tesoro-Savage. Because EFSEC is the sole permitting body, review of permit applications necessarily involve a wide breadth of issues, ranging from the need for the project at a state-wide level, consistency with local land-use laws, environmental impacts, human health issues, air and water pollution, economic costs and benefits, labor concerns, impacts to city water supplies, impacts to a county jail, impacts to U.S. tribal nations, and compliance with other state laws. Federal laws and agencies, other than ICCTA, are directly implicated by EFSEC's review of the proposal. The Tesoro-Savage proposal will also require a separate federal Clean Water Act permit from the U.S. Army Corps of Engineers and will be reviewed under the federal Endangered Species Act in coordination with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. Sovereign tribal treaty rights will also be part of the review for this project.

In short, EFSEC's permitting review of Tesoro-Savage is not limited to rail impacts, nor is its consideration of rail issues hindering a final decision on the permit application. The preliminary issues list for the hearing before EFSEC lists 71 different issues to be decided. *See* Order Summarizing Issues and Setting Hearing Dates (Feb. 3, 2016).[6] While consideration of rail impacts is part of the EFSEC review, it is only one part of a much larger process. In its letter to the Board, Tesoro-Savage suggests that review by the STB would hasten the EFSEC permitting process, which is currently underway and moving toward a final recommendation. To the contrary, STB involvement in an ongoing process would confuse, rather than clarify, the proceedings, especially where the governing body has already recognized that there are limits to its authority imposed by federal preemption. *See* Order Denying Dispositive Motions (June 6, 2016).[7]

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[5] *See* Tesoro-Savage Revised Application (May 2016), *available at* http://www.efsec.wa.gov/Tesoro%20Savage/Application/Tesoro%20Savage%20Application%20Page.shtml.
[6] *Available at* http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/20160203TESORO%20Issue%20Consolidation%20Order%20-%20ES.pdf.
[7] *Available at* http://www.efsec.wa.gov/Tesoro%20Savage/Adjudication/Orders/TESORO%20-%20Order%20Denying%20Dispositive%20Motions%20-%20ES.pdf.

C. The Shell Refinery East Gate Project in Anacortes, Washington

The Shell Oil Refinery in Anacortes, Washington proposes to build a crude-by-rail facility to increase its ability to bring different types of oil to the refinery. The project would move a million cubic yards of earth, harm or destroy 25 acres of wetlands, and threaten a designated Shoreline of Statewide Significance. The proposed facility could handle approximately 70,000 barrels of crude per day. Shell's "Crude by Rail East Gate Project" could also, under some circumstances, serve as a transit point for the export of crude oil via marine vessel, profoundly impacting the environment and economy of the Salish Sea. Community and environmental groups appealed Shell's state shorelines permit because none of these impacts and major public health and environmental risks received more than minimal review from Skagit County.

As Valero points out, the Skagit County Hearing Examiner agreed that an Environmental Impact Statement, pursuant to Washington's State Environmental Policy Act ("SEPA"), needed to be completed, due to the variety of impacts that were significant and yet unexamined. Valero fails to mention, however, that Shell appealed the Hearing Examiner decision to Washington Superior Court, where it argued that the Hearing Examiner did not have jurisdiction to order an environmental impact statement pursuant to SEPA. The Washington court dismissed the appeal as unripe. *Equilon Enterprises v. Resources for a Sustainable Community et al.,* No. 15-2-00368-5 (Skagit County Superior Ct. May 21, 2015). The environmental impact statement process is ongoing, and the list of issues addressed in the scoping report illustrates that the issues to be considered go far beyond rail impacts.[8] A draft environmental impact statement is expected to be released for public review in the fall of 2016.[9]

D. None of the Projects Are Proposed, Owned, or Operated by a Rail Carrier.

A ruling by the Surface Transportation Board in Valero's favor here would not have any impact on Alon, Tesoro-Savage, or Shell because the STB has no jurisdiction over these projects. None of them are owned or operated by a railroad. Instead, Alon is a refinery, Shell is a refinery, and Tesoro-Savage is a proposed oil shipping terminal. While the Surface Transportation Board has jurisdiction over rail carriers and transloading facilities *operated by* rail carriers, it does not have jurisdiction over industrial or transloading facilities connected to a railroad, when they are not owned or operated by a railroad. *See, e.g., SEA-3, INC—Petition for Declaratory Order* (Mar. 16, 2015, S.T.B. No. 35853); *New York & Atlantic Ry. Co. v. Surface Transp. Bd.* (2d Cir. 2011) 635 F.3d 66, 72-73; *Hi Tech Trans, LLC— Petition for Declaratory Order* (Aug. 14, 2003, S.T.B. No. 34192) 2003 WL 21952136, at *3; *Town of Milford, MA—Petition for Declaratory Order* (Aug. 11, 2004, S.T.B. No. 34444) 2004 WL 1802301, at *2. Thus, the Surface Transportation Board has no jurisdiction over any of these projects, and any opinion it issues with respect to Valero would not apply to them. We respectfully request that the Surface Transportation Board at most clarify that it does not have jurisdiction over these projects.

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[8] Shell Anacortes Rail Unloading Facility Scoping Report (Dec. 18, 2015), *available at* https://shellraileis.blob.core.windows.net/media/Default/Library/ShellCBR_ScopingReport_Final.pdf.

[9] *Available at* http://www.ecy.wa.gov/geographic/anacortes/shelloil.html.

In conclusion, we urge the Surface Transportation Board to deny Valero's Petition for Declaratory Order and find that the Valero's proposed crude-by-rail offloading facility is not preempted by the Interstate Commerce Commission Termination Act. We further urge the Board not to address other projects mentioned in Valero's Petition.

Sincerely,

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