BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 36036

VALERO REFINING COMPANY – CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA'S REPLY TO VALERO REFINING COMPANY – CALIFORNIA PETITION FOR DECLARATORY ORDER

Scott J. Lichtig
Elizabeth B. Rumsey
California Department of Justice
Office of the Attorney General
1300 I Street, Suite 125
P.O.Box 944255
Sacramento, CA 94244-2550
(916) 445-5077
Scott.Lichtig@doj.ca.gov

Counsel for the People of the State of California

Dated: July 8, 2016

California Attorney General Kamala Harris, in her independent capacity on behalf of the People of the State of California, respectfully submits the following reply to Valero Refining Company's ("Valero") Petition for Declaratory Order ("Petition"). Since Petitioner Valero is not a rail carrier subject to STB jurisdiction and the law is clear, Attorney General Harris recommends that the Surface Transportation Board ("STB") deny Valero's Petition outright and not initiate proceedings in this matter. Should the Board nonetheless open a proceeding into Valero's request, this Office requests that the Board set a procedural schedule to allow sufficient time for all interested parties to respond.

I. INTRODUCTION

By this Petition, Valero asks the STB for an order declaring that the City of Benicia ("City"), in exercising its discretionary authority to grant or deny Valero's application for a permit to construct a new crude-by-rail off-loading facility ("Project"), is preempted from considering certain of the Project's foreseeable environmental impacts. Valero concedes that ICCTA does not preempt the City's discretionary permitting authority over the proposed Project altogether. Rather, the oil company argues that ICCTA circumscribes the scope of impacts the City is authorized to consider and "preempts" it from denying the permit on the basis of rail impacts. Not so. Where, as here, a lead agency retains authority to take a discretionary action vis-à-vis a project, that authority is neither circumscribed nor preempted by ICCTA so long as the agency's action does not does not *prevent* or *unreasonably interfere* with railroad transportation. *People v. Burlington N. Santa Fe R.R.,* 209 Cal. App. 4th 1513, 1528 (2012). Since there is no evidence showing that the City's denial of the permit in this case prevents or unreasonably interferes with any railroad's STB-sanctioned operations, the City's actions are not preempted.

The STB already squarely addressed this issue in *SEA-3, Inc.*, where it correctly found that, unless a transloading facility were in some way controlled by the rail carrier, ICCTA did not preempt local actions with respect to that facility. *SEA-3, Inc. – Petition for Declaratory Order*, 2015 WL 1215490, at *4, STB FD No. 35835 (STB served Mar. 17, 2015) ("*SEA-3*"). Valero cannot meaningfully distinguish *SEA-3* from the facts at issue here, and the STB should therefore refrain from opening a proceeding for Valero's Petition, exactly as it did in response to SEA-3's Petition. *Id.* at *1; *Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation, Inc. – Petition for Declaratory Order*, 2006 WL 23229702, at *2, STB FD No. 34824 (STB served August 11, 2006) ("It will not be necessary for the Board to institute a declaratory order proceeding here, because it is clear that the Board does not have jurisdiction over rail/truck transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services. The broad Federal preemption of 49 U.S.C. 10501(b) does not apply to activities over which the Board does not have jurisdiction."); see also *Town of Milford, MA – Petition for Declaratory Order*, 2004 WL 1802301, at *1, STB FD No. 34444 (STB served August 12, 2004).

II. BACKGROUND

Valero seeks to make improvements to its existing oil refinery in Benicia, California, including the construction of off-loading facilities that will enable it to receive crude oil shipped via rail. Specifically, Valero proposes to construct a new service road, 4,000 feet of pipeline, tank-car unloading racks, and new private rail tracks at the refinery, and to replace and relocate a tank farm and underground infrastructure. If approved, the Project would draw two 50-car "unit trains" dedicated exclusively to crude oil cargo into Benicia each day. Those trains would be operated by Union Pacific Railroad ("Union Pacific"), subject to STB jurisdiction. The off-

loading facilities, however, would be located on property owned by Valero, and all aspects of the off-loading facility would be owned and operated by Valero. There is no dispute that Valero – a subsidiary of Valero Energy Corporation, which is an international manufacturer and marketer of petrochemical products – is not a rail carrier under federal law and is therefore not subject to regulation by the STB. Thus, since first proposing the Project in 2012, Valero has neither sought nor obtained any authorization from STB, as none is required.

Before Valero can construct the proposed Project, Benicia Municipal Code section 17.104.010 requires that it obtain a "use permit" from the City. In making a determination to grant or deny a permit application, the Municipal Code directs the City to grant the permit only if it finds, among other things, that the proposed use will be consistent with the general plans, and that it will not be detrimental to the public health, safety, or welfare. *Id.* at §17.104.060. The City is implicitly authorized – and arguably required – to deny the permit if it finds otherwise.

Because the City's determination to grant or deny the permit is discretionary, the California Environmental Quality Act (CEQA) applies and requires the City to also analyze the Project's foreseeable environmental impacts.[1] Cal. Pub. Res. Code, §§ 21000, 21001(d); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 393 (1988).[2] The City's analysis, presented in an Environmental Impact Report (EIR), found that the Project will cause eleven significant and unavoidable impacts, including significant and unavoidable impacts to air quality, biological resources, and greenhouse gas emissions. The City also analyzed the risks to

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[1] Critically, Valero does not dispute that its Project is subject to Benicia's permitting authority and that CEQA applies to the City's discretionary action. Valero Refining Company - California – *Petition for Declaratory Order* (STB served October 31. 2013) STB FD No. 35749 at *16 ("Valero does not seek by this Petition an order declaring that the City of Benicia's permitting authority over the construction and operation of the unloading rack is itself subject to ICCTA preemption.")

[2] CEQA does not expand the City's permitting authority. Rather, it provides a framework for the City, exercising its *existing authority*, to consider whether the proposed project will negatively impact the public health, safety, and welfare. *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 129 Cal.App.4th 1356, 1376.

public health and safety presented by the transport of hazardous materials and found that it, too, presented a significant and unavoidable impact.

On the basis of those and other significant and unavoidable impacts, and after four days of public hearing, which included hundreds of public comments, Benicia's Planning Commission voted 6-0 to not certify the Project's EIR and to deny Valero's permit application. Specifically, as noted by Valero in its Petition, the Commission found that the "proposed location of the conditional use and the proposed conditions under which it would be maintained and operated would not be consistent with the General Plan as it would be detrimental to the public health, safety, or welfare ..." (Pet. at 11.)

In its Petition, Valero does not dispute that the City has discretionary permitting authority over the Project (Pet. at 16), or in other words, that ICCTA does not preempt the City's authority to *grant or deny* the requested permit. Rather, it asserts, that ICCTA circumscribes the City's exercise of this local authority by preempting the consideration of public safety and environmental impacts associated with federally-regulated rail operations. But ICCTA preemption is focused on the outcome of the City's action, not the process that led to that outcome. The sole question at issue here, then, is whether the City's denial of the permit has an impermissible effect on rail operations.

III. ARGUMENT

Whether a federal law preempts state or local authority in a particular circumstance is a question of Congressional intent, and one that must be addressed on a case by case basis. *Joint Pet'n for Declaratory Order – Boston & Maine Corp. & Town of Ayer, MA*, 2001 WL 458685, at *5 (S.T.B. April 30, 2001) ("whether a particular federal environmental statute, local land use

restriction, or other local regulation[3] is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce ...".) Here, where (1) neither the proposed project nor the project proponent are subject to STB jurisdiction, and (2) the City's action denying the permit application has no effect on STB-sanctioned rail operations, there is no indicia of Congressional intent to circumscribe or preempt the City's authority.

A. ICCTA Preempts Local Actions That Have the Effect of Managing or Governing Activities Undertaken by Rail Carriers

ICCTA grants the STB exclusive jurisdiction over "transportation by rail carriers" and the construction of rail tracks and facilities. 49 U.S.C. § 10501(b). Courts have interpreted the plain language of ICCTA's preemption provision to categorically preempt a state or local law if that law operates either (1) to deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, or (2) to regulate matters directly regulated by the STB, including the construction, operation, and abandonment of rail lines. *People v. Burlington N. Santa Fe R.R.,* 209 Cal. App. 4th 1513, 1528 (2012) ("*Burlington*"). State actions that do not fall into one of these categories may be preempted "as-applied" only when they would have the effect of preventing or unreasonably interfering with railroad transportation. *Id.* In short, preemption applies only to state laws that may reasonably be said to have the effect of 'manag[ing]' or govern[ing]' rail transportation," while allowing continued application of state laws that have "a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry. Co. v. City of West Palm Beach,* 266 F.3d 1324, 1331 (11th Cir. 2001) (internal citations omitted).

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[3] The City did not seek to impose measures to mitigate the identified rail-related impacts; whether any such measure would be preempted would similarly be a fact-specific inquiry.

B. ICCTA Does Not Preempt the City's Denial of Valero's Use Permit Because Such Action Has No Effect on Rail Operations

1. The City's Denial of Valero's Permit Would Not "Regulate" or Otherwise Impact the Railroad or its Operations.

The City's action here is not categorically preempted because it neither prevents a railroad from conducting operations or activities authorized by the STB, nor regulates matters directly subject to STB jurisdiction. For one, Valero, the project proponent, is an oil company, not a "rail carrier" either subject to or acting pursuant to STB authorization. *See* 49 U.S.C. § 10102(5); *Hi Tech Trans, LLC*, 2003 WL 21952136, at *4 (S.T.B. served Aug. 14, 2003) (non-carrier licensee operating transloading facility on railroad property not a "rail carrier" for purposes of STB jurisdiction). Furthermore, Valero's Project involves constructing ancillary refinery infrastructure, over which the rail carrier, Union Pacific, would maintain no ownership or operational control. Accordingly, the Project's construction and operation are beyond the regulatory scope of ICCTA. *Id.*; *SEA-3, Inc. – Petition for Declaratory Order*, 2015 WL 1215490, at *4, STB FD No. 35835 (STB served Mar. 17, 2015) ("*SEA-3*") ("[T]o be subject to the Board's jurisdiction and qualify for federal preemption under 49 U.S.C. § 10501(b), the activities at issue must be 'transportation' and must be performed by, or under the auspices of, a 'rail carrier.'"). In addition, since Union Pacific would have no operational control over the Project if built, the City's denial of the Project will have simply no impact on the railroad's ability to operate pursuant to its STB authorization. Union Pacific's operations will continue unimpeded exactly as they are today. The only entity whose operations will be impacted by the City's action are the owner and operator of the Project, non-rail carrier Valero. Despite protestations otherwise, Benicia's denial of Valero's permit would not create a "patchwork" or

"balkanization" of regulations imposed upon railroads, since the City's action would not require the railroad providing common carrier service to do *anything* differently.

This is true regardless of the basis for the City's decision to deny Valero's permit, and the entire premise of Valero's Petition – namely that ICCTA preempts the City from denying the Project for one reason but not another – is illogical. The proper focus of the preemption analysis in these circumstances is the *actual impact* of the City's action on rail transportation, not the City's *intent* in taking that action. Valero acknowledges that ICCTA does not preempt the City's discretionary permitting authority over the Project altogether, and once it has been established – as it has here – that the City is not preempted from denying the Project, there is no basis for arguing that denying the permit for one reason has any greater impact on the railroad than denying it for another.

2. The City's Denial of the Permit Would Not Prevent or Unreasonably Interfere With Railroad Operations

Nor is the City's action preempted "as-applied" to the Project, because it would not have the impermissible "effect of preventing or unreasonably interfering with" Union Pacific's railroad operations. *Burlington*, 209 Cal. App. 4th at 1528. The fact that denial of the permit may diminish any prospective economic advantage Union Pacific might have enjoyed if the Project were to have been constructed is, at best, "a more remote or incidental effect on rail transportation." *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331. Local regulation with such attenuated effects on rail operations falls outside the STB's jurisdiction. *Id.* In sum, the criteria necessary to establish preemption of the City's denial in this case are not satisfied, and again, the basis for the City's decision has no impact on the analysis.

The STB already squarely addressed this issue in *SEA-3*, where it correctly found that, unless a transloading facility were in some way controlled by the rail carrier, ICCTA did not

preempt local regulation of that facility. *SEA-3*, 2015 WL 1215490, at *4. In doing so, the STB rejected SEA-3's assertion that, where a local authority has discretionary permitting authority, ICCTA preempts it from considering "claims that are derived from, or depend on, allegations that [uprail communities] would be adversely affected as a result of increased rail transportation." *Id.* at *2.

Valero makes a futile effort to distinguish *SEA-3*, but that case is directly on point, and fatal to Valero's argument: In *SEA-3*, the STB addressed whether a local regulation governing the proposed expansion of a liquefied petroleum gas (LPG) off-loading facility was preempted by ICCTA. *SEA-3*, 2015 WL 1215490, at *2. The project proponent, SEA-3, Inc., was a "non-carrier" (*id.* at *1) and the proposed facility was not otherwise within the scope of STB's jurisdiction, because the rail carrier, Pan Am, would exert no control over the facility's operations. *Id.* at *4. The regulation at issue essentially required the local permitting authority to determine, prior to issuing a discretionary permit, whether the facility would promote public health, safety and welfare. *Id.* at *2. The STB found that, because the transloading facility would be wholly owned and operated by SEA-3 (and not "under the auspices" of Pan Am), and because the regulation at issue did not "prevent[] the rail carrier from conducting its operations," (*id.* at *5), or "interfere unduly with Pan Am's common carrier operations" (*id.* at *6), the regulation was not preempted.

The same is true here. Valero identifies no fact in this matter that distinguishes it from *SEA-3*. While it correctly states that both *SEA-3* and the *Winchester* holding, discussed below, "stand[] for the proposition that states and local authorities with authority to regulate shipper facilities cannot use that authority to regulate 'transportation by rail carriers'" (Pet. at 19), the Petition utterly fails to show *how* the City's denial of Valero's permit to construct an off-loading

facility constitutes "regulation" of or otherwise has an impermissible effect on Union Pacific's operations in this case. For reasons discussed above, it does not. And again, the basis for the City's decision is irrelevant to the analysis: Whether the City decided to deny the permit on the basis of rail impacts or for other public health and safety reasons does not change the effect of that action on rail operations.

C. Valero Does Not Have an ICCTA-Protected "Right" To Construct a Facility That Would Enable It To Demand and Receive Rail Service

In its Petition, Valero relies heavily on *Boston & Maine Corp. and Springfield Terminal RR Co. – Petition for Declaratory Order*, 2013 WL 3788140, STB FD No. 35749 (STB served July 19, 2013) ("*Winchester*") for the proposition that Valero, as a "shipper," has an ICCTA-protected right to demand and receive Union Pacific's crude-by-rail services. Valero's argument misses the mark: ICCTA's concern is not a non-carrier shipper's "right" to demand and receive rail services so much as a railroad's "right" to conduct STB-authorized shipping services, as well as its obligation to provide those services upon reasonable request. 49 U.S.C. § 11101.[4] Valero, on the contrary, argues that ICCTA preempts regulation of *any* entity, whether it provides rail service or not, that proposes to build a facility to receive rail service. The STB should reject Valero's attempt to dramatically expand the scope of ICCTA preemption to swallow up local permitting authority of construction projects proposed by non-rail carriers over which STB does <u>not</u> have jurisdiction.

In *Winchester*, a rail carrier, Pan Am, operated trains over two rail tracks to deliver goods to a warehouse owned and operated by non-carrier Tighe. (One of the tracks was held by Pan

[4] *Winchester* cites section 11101 for the proposition that "[t]he Interstate Commerce Act provides any person the right to ask for common carrier rail service and carriers the obligation to provide such service upon reasonable request." *Winchester*, 2013 WL 3788140 at *3. But section 11101 speaks more precisely of a *rail carrier's* rights and obligations, including that it "shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a).

Am pursuant to a lease, the other was owned by Tighe.) The question before the STB was whether a regulation imposed by the local authority that would have had the effect of preventing Pan Am from continuing to provide rail services to the warehouse was preempted. Although Valero attempts to frame the issue as Tighe's right to demand and receive rail service, what was really at issue was the right of the rail carrier to *continue* to provide STB-authorized rail services to those facilities. (Valero concedes as much in its Petition, stating that the local regulation at issue "ordered *cessation* of rail service" (Pet. at 17, emphasis added).) Here, in contrast, at issue is not Union Pacific's right to "continue" to provide rail service to an existing facility, but Valero's "right" – as a non-rail carrier indisputably subject to local permitting authority – *to construct a facility* that would enable it to receive rail shipments. *See SEA-3*, 2015 WL 1215490, at *5 (distinguishing local enforcement of a zoning ordinance as applied to a non-carrier facility from regulation of a railroad that might provide service to that facility). This is a material distinction: It is not an existing rail service by a rail carrier that is being regulated, it is the construction of a new facility by a non-carrier not subject to STB authorization.

Valero's Petition also relies heavily on *Norfolk Southern Railway Company v. City of Alexandria* 608 F.3d 150 (4th Cir. 2010), for its preemption argument. In *City of Alexandria*, the STB found that the city's permitting requirement for trucks hauling ethanol from a railroad-owned-and-operated transloading facility was preempted as "indirect regulation of rail transportation." The operative distinction between that case and Valero's is that, in *City of Alexandria*, the permit requirement applied to trucks entering and exiting the *rail carrier's* existing unloading facility. *See SEA-3*, 2015 WL 1215490, at *5 (distinguishing *City of Alexandria* from regulation of SEA-3's LPG transloading facility on the basis that, in *City of Alexandria*, the transloading activities were "performed by the rail carrier or under its auspices").

On that basis, the Court found that the city's ordinance improperly granted it "unlimited control" over the rail carrier's facility and its STB-authorized transloading operations. Here, the City's denial of Valero's Use Permit will have no such similar impact on Union Pacific, because Union Pacific does not own and will have no control over the operations of the off-loading facility. The City's denial will not cause Union Pacific to change its rail operations, and it will not prevent the railroad from doing anything authorized by the STB. Denial of Valero's permit is therefore not preempted.

IV. CONCLUSION

The basis for the City's denial of Valero's use permit application is not relevant to the inquiry of whether such denial is preempted by ICCTA. Valero concedes that the City retains discretionary permitting authority over the Project and fails to show – as it must to establish preemption – that the City's denial of the permit has any effect on Union Pacific's operations. The STB should therefore not initiate proceedings in this matter and should reject Valero's Petition outright.

Dated: July 8, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

SCOTT J. LICHTIG
Deputy Attorney General
ELIZABETH B. RUMSEY
Deputy Attorney General
Attorneys for the People of the State of California

CERTIFICATE OF SERVICE

Case Name: Valero – Petition for Declaratory Order **No.** STB FD NO. 36036

I hereby certify that on July 8, 2016, I electronically filed the following documents with the Surface Transportation Board:

THE PEOPLE OF THE STATE OF CALIFORNIA'S REPLY TO VALERO REFINING COMPANY – CALIFORNIA PETITION FOR DECLARATORY ORDER

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that on July 8, 2016, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following participants:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 8, 2016, at Sacramento, California.

Scott J. Lichtig	*/s/ Scott J. Lichtig*
Declarant	Signature

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Service List
Valero – Petition for Declaratory Order
No. STB FD 36036

Raymond Atkins
1501 K Street Nw
Washington, DC 20005
Party of Record

Theodore K. Kalick
Canadian National Railway Company
601 Pennsylvania Ave., NW
Ste. 500 North Bldg.
Washington, DC 20004
Party of Record

Rachel Koss
Adams Broadwell Joseph & Cardozo
601 Gateway Blvd. Suite 1000
South San Francisco, CA 94080
Party of Record

Justin Marks
1666 K Street, Nw
Washington, DC 20006
Party of Record

James Brian McDonald
274 Pebble Beach Loop
Pittsburg, CA 94565
Party of Record

Jaclyn H. Prange
Natural Resources Defense Council
111 Sutter Street, 21St Floor
San Francisco, CA 94104
Party of Record

Kevin M. Sheys
Nossaman LLP
1666 K Street, N.W., Suite 500
Washington, DC 20006
Party of Record

Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Avenue, Nw, Suite 560
Washington, DC 20004

Steven G. Churchill
Churchwell White LLP
1414 K Street, 3rd Floor
Sacramento, CA 95814
Party of Record

Jay P. Derr
Van Ness Feldman
719 Second Avenue, Ste 1150
Seattle, WA 98104
Party of Record

Jocelyn Thompson
Alston & Bird
333 South Hope, 16th Floor
Los Angeles, CA 90071-1410
Party of Record