

Valero Crude by Rail Project
3400 East Second Street

Appeal Application No. 16PLN-00009

City Council
March 15, 2016

Appeal Hearing Outline:

1. City Staff presentation
2. Council questions to City Staff
3. Applicant's presentation
4. Council questions to applicant
5. Public comment is opened
6. Public comment is closed
7. Council deliberation and decision

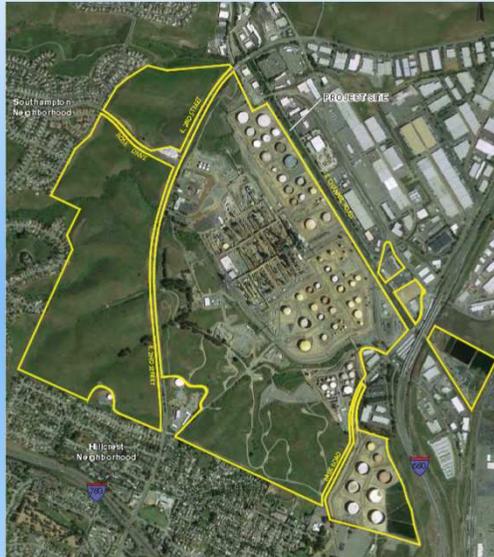
Tonight's Agenda:

1. City Staff presentation
2. Council questions to City Staff
3. Applicant's presentation
4. Council questions to applicant
5. City Council selection of future hearing date(s)

City Staff Presentation Outline:

- An overview of the proposed project by City Staff.
- An overview of the environmental impacts addressed in the EIR by the City's consultant, ESA.
- An overview of the project's legal issues and preemption by the City's Attorney
- An overview of the appeal
- Chair of Planning Commission

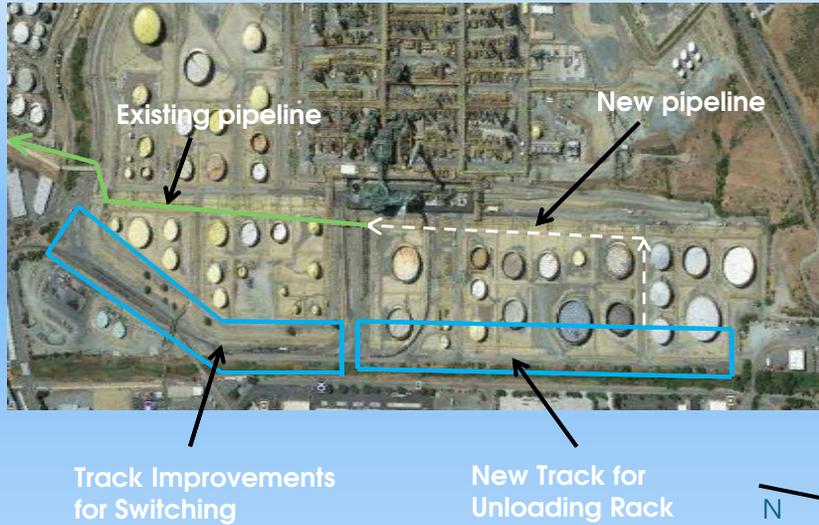
Valero Refinery



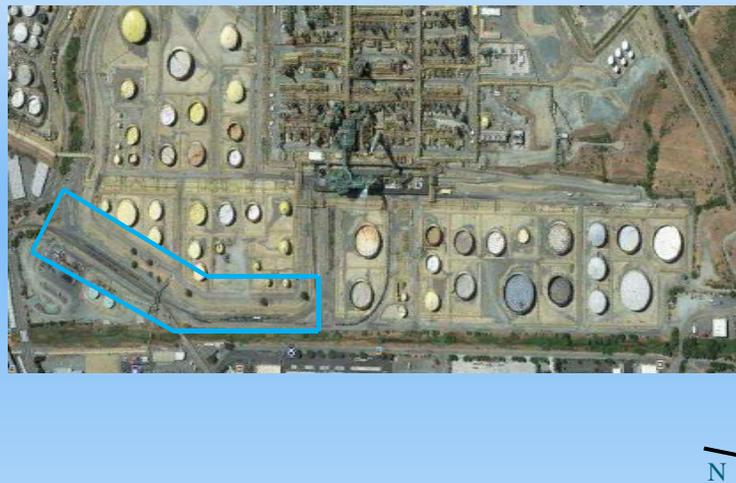
Project Description

- Up to 70,000 barrels per day of crude oil to be delivered by rail cars
- Construction of new track for switching activity and unloading rack
- 4,000 linear feet crude oil pipeline
- Replacement and relocation of tank farm dikes with a concrete berm
- Relocation of underground infrastructure
- New service road

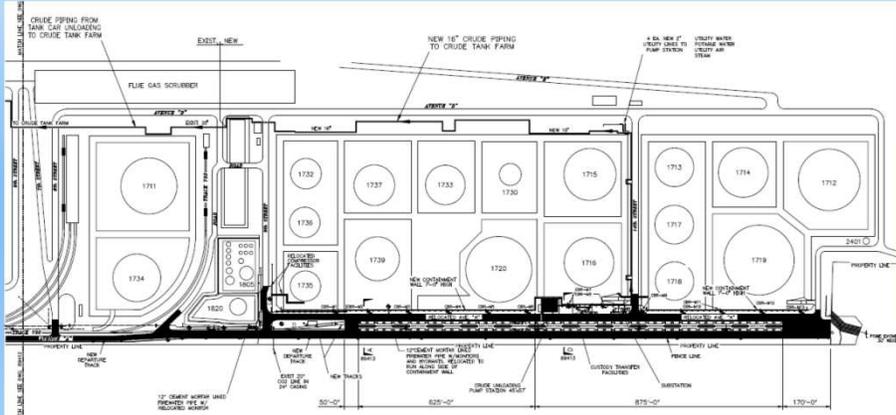
Project Overview



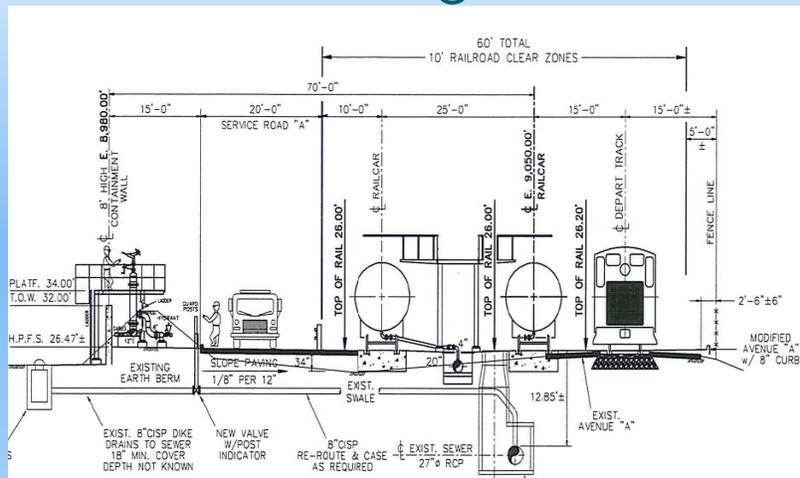
Proposed Track Improvements for Switching Activity



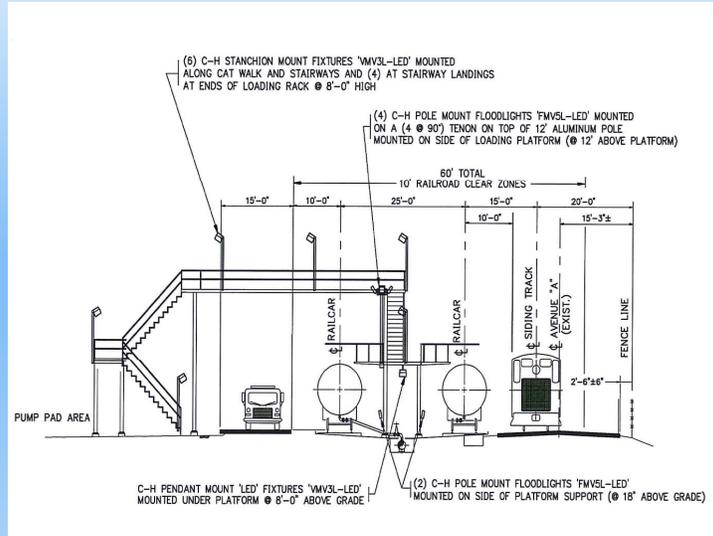
New Track for Unloading Rack



Unloading Rack



Unloading Rack Lighting



Zoning Ordinance Consistency

- General Industrial (IG) Zoning District
- Use Permit required
- Project complies with all Development Standards for IG Zoning District

General Plan Consistency

- Industrial Uses - protect, retain, and encourage
- City Roads – multi-modal, scenic views and LOS D
- Community Health & Safety

Draft Conditions of Approval

- 14 draft conditions of approval
 - Compliance with BMC, CBC, MMRP
 - Storm water Management
 - Emergency access & response

Use Permit Findings

1. That the proposed location of the use is in accordance with the objectives of the Zoning Ordinance and the purposes of the IG district
2. That the proposed use is consistent with the General Plan and will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood of the use.
3. That the proposed use will comply with the provisions of the Zoning Ordinance, including any specific condition required for the proposed conditional use.

Environmental Review

1. Is it a "project"?
2. Exemption or Initial Study
3. Environmental Impact Report

Environmental Review Timeline for CBR

- Initial Study and MND - 2013
- Scoping and Draft EIR- 2014
- Revised Draft EIR - 2015
- Final EIR - 2016

Environmental Review

Cory Barringhaus, ESA
Janna Scott, ESA

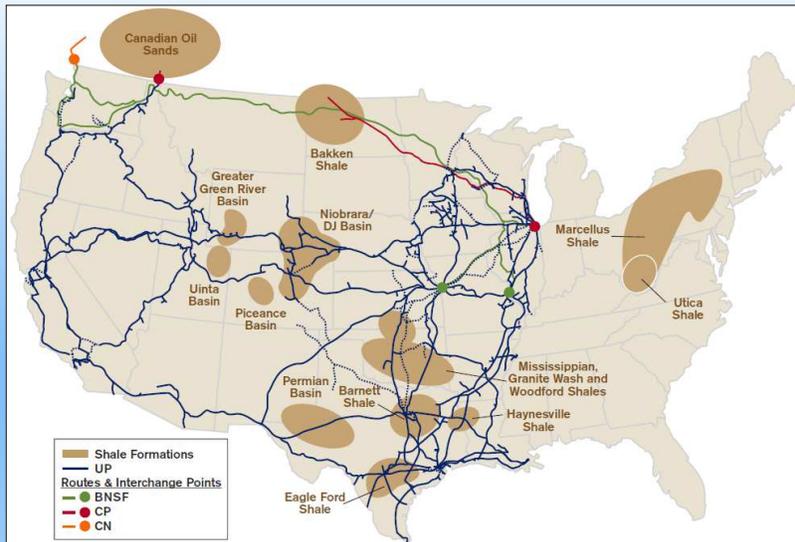
Final EIR - Summary of Environmental Impacts

- 8 impacts reduced via mitigation
- 11 significant and unavoidable impacts related to rail transport

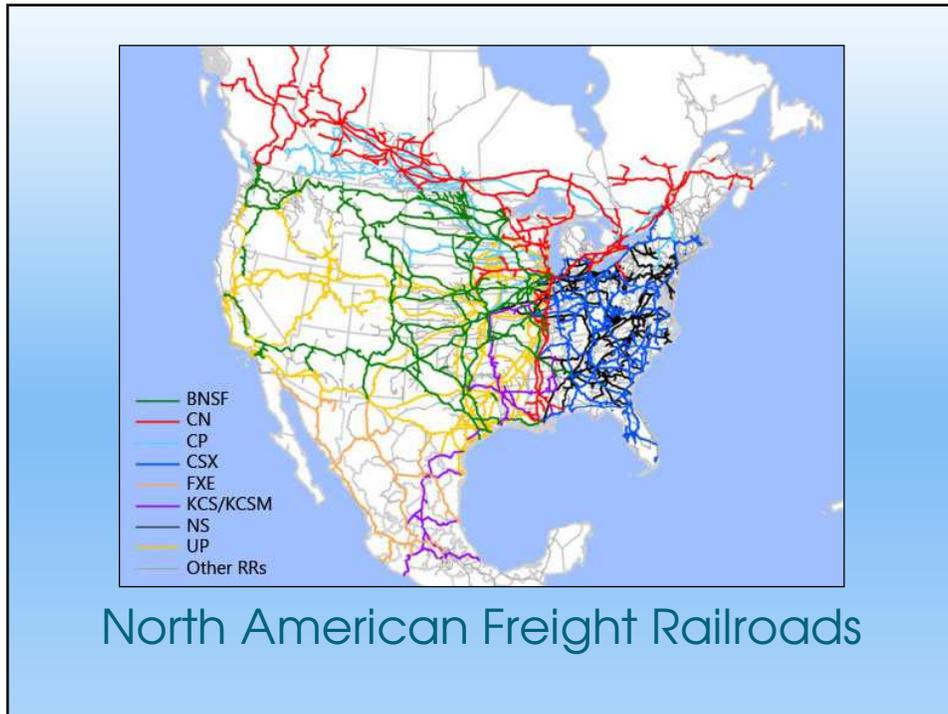
Uprail Routes



California Class I Rail System



Union Pacific Crude Oil Rail Network



EIR Conclusions

- Eight non-rail related impacts can be reduced to less than significant with mitigation :
 - Air Quality
 - Biological Resources
 - Energy Conservation
 - Geology and Soils
 - Hydrology and Water Quality

EIR Conclusions

- Eleven impacts would be significant and unavoidable – all rail-related:
 - 5 in Air Quality
 - 2 in Greenhouse Gas Emissions
 - 1 in Biological Resources
 - 3 in Hazards and Hazardous Materials

Air Quality

- Project emissions within the Bay Area Basin would be less than significant
- Emissions from locomotives transporting tank cars outside the Bay Area would exceed thresholds of air districts located along project routes
- Cumulatively considerable impacts and conflicts with air quality plans of these air districts

Greenhouse Gas Emissions

- GHG emissions would exceed threshold primarily due to locomotive emissions
- Exceedance of threshold indicates project would not be consistent with GHG reduction goals set by State

Biological Resources

- Increased frequency of trains along possible routes would result in an increase in potential for wildlife collisions, especially in sensitive habitats such as riparian corridors, wetlands, and marshes where higher number of wildlife species are supported

Hazards and Hazardous Materials

- Proposed tank car impacts due to reasonably foreseeable accident conditions; same conclusion for new tank cars required by U.S. Department of Transportation
- Cumulatively significant for proposed and newly required tank car designs
- Wildland fire impacts also significant

Hazards and Hazardous Materials

- Significant unavoidable secondary effects from accidents would occur to Biological Resources, Cultural Resources, Geology, and Hydrology

Local Traffic Impacts

- Project would add up to four train crossings per day at Park Road, each approximately 8 minutes
- Delay caused by Project-related trains would be less than the delay caused under current baseline conditions
- Vehicle queues on Park Road, Bayshore Road and onto the I-680 northbound off-ramp would be less than significant

Emergency Access

- Impacts related to emergency access and response would be less than significant
 - Operational Aid Agreement
 - Acceptable response times, including to the Benicia Industrial Park

Recap

- 8 non rail-related impacts reduced to less than significant with mitigation measures
- 11 rail-related impacts would be significant and unavoidable
 - Mitigation preempted by federal law
 - No feasible mitigation is available; impacts would remain significant and unavoidable

Overview of Legal Issues

Brad Hogin, Contract Attorney
for the City of Benicia

Staff Position on Preemption

- CEQA Applies to Onsite Operations
- Rail Impacts Are Disclosed
- Mitigation of Rail Impacts is *Preempted*
- City Cannot Decline to Certify the EIR
or
- Deny the Use Permit Based on Rail Impacts

ICCTA Preemption

- STB Has Exclusive Jurisdiction Over Rail Operations
- Jurisdiction Includes:
 - Operation of Locomotives & Rail Cars on Track
 - Construction & Operation of Ancillary Facilities

“It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations”

- Quote cited in 22 published cases

Types of Preempted Regulation

- “Preclearance” Requirements
- Requirements That “Have the Effect of Governing or Managing Rail Transportation”

CEQA Applies to Onsite Operations

- Union Pacific Does Not Own or Operate the Unloading Rack
- Valero is Not Acting as an Agent of Union Pacific

Clearly Preempted

- Mitigation of Rail Impacts Through Conditions or Alternatives
- Permit Denial Based on Rail Impacts
- “Overriding Considerations” Requirement as to Rail Impacts

Preclearance of Private Projects

- The Status of the Applicant is Not Dispositive
- The Nature of the Regulation is Dispositive
 - Cities May Address Local Impacts
 - Cities May *Not* Address Rail Impacts

Cities May Not Address Rail Impacts

- Alexandria
 - City Preempted from Regulating Private Trucks Serving Transloading Facility Owned by RR
- Winchester (STB 35749)
 - City Preempted From Regulating a Segment of Private Track Used by Railroad

BOSTON AND MAINE CORPORATION AND..., 2013 WL 3788140...

KeyCite Yellow Flag - Negative Treatment
 Distinguished by SEA-3, INC/PETITION FOR DECLARATORY ORDER, S.T.B., March 16, 2015
 2013 WL 3788140 (S.T.B.)
 Surface Transportation Board (S.T.B.)

BOSTON AND MAINE CORPORATION AND SPRINGFIELD TERMINAL
 RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Decided: July 19, 2013
 Service Date: July 19, 2013
 SURFACE TRANSPORTATION BOARD DECISION
 Docket No. FD 35749

to the Board's jurisdiction. Thus, even if we construed the Town's action narrowly as directed solely at Tighe, and solely at a short piece of allegedly private track located adjacent to the warehouse, there remains a fundamental conflict between the Town's regulation and the rights of Tighe and Pan Am to request and provide, respectively, common carrier rail service under the Interstate Commerce Act. That conflict must be resolved in favor of federal law. Accord Norfolk S. Ry. v. City of Alexandria, 608 F.3d 150, 158-60 (4th Cir. 2010) (city cannot seek to regulate interstate commerce indirectly by regulating trucks that would use the carrier's transload facility). Otherwise, states and localities could engage in impermissible regulation of the interstate freight rail network under the guise of local regulations directed at the shippers who would use the network, and thereby create the patchwork of conflicting local regulations that Congress sought to avoid in the Interstate Commerce Act.

**Boston and Main
 Surface Transportation
 Board Decision
 2013 WL 3788140 (S.T.B.)**

to distribution centers and, ultimately, to retail customers.³

Residents living near these tracks filed a complaint with the Town's zoning authorities relating to the use of the tracks, in particular the noise of trains coupling and switching at night.⁴ In August 2012, the Town's Zoning Board of Appeal (ZBA) held that the area around the tracks "is being used as a freight yard which is not allowed" under municipal zoning laws.⁵ Pan Am states that Tighe appealed this decision to state court, but that the parties jointly moved to remand the proceeding to the ZBA for reconsideration of the presumption issue.⁶ On June 25, 2013, the ZBA submitted to the Town an amended decision after remand, directing that all rail traffic to the warehouse "immediately cease and desist."⁷ Pan Am thereafter filed its petition for declaratory order with the Board on July 1, 2013.

Pursuant to its discretionary authority under 5 U.S.C. § 554(G) and 49 U.S.C. § 721, the Board, by decision served on July 3, 2013, instituted a declaratory order proceeding to resolve the controversy over whether application of the Town's zoning laws

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Cities May Address Local Impacts

- West Palm Beach
 - Zoning Ordinance Prohibits Transloading Facility in Residential Zone
- Babylon
 - Zoning Ordinance Prohibits Waste Transfer Facilities
- Newington (SEA-3, STB 35853)
 - Zoning Regulation Addresses Local Impacts of Transloading Facility

CEQA Disclosure Requirement May Be Preempted

- Is the Disclosure Requirement an Unlawful Preclearance Requirement?
- Or, Does it Only Have a “Remote & Incidental” Impact on Rail Operations?

San Luis Obispo Approach to Preemption

- CEQA Applies to Onsite Operations
- Rail Impacts Are Disclosed
- Mitigation of Rail Impacts is *Preempted*
- Permit Denial Based on Both Onsite & Rail Impacts

Planning Commission
 Development Plans/Coastal Development Permit #DRC2012-00095 / Phillips 66 Company
 Page 13

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

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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).

**SLO - Phillips 66 Crude
 by Rail Project
 Staff Report p. 13**

Planning Commission
 Development Plans/Coastal Development Permit #DRC2012-00095 / Phillips 66 Company
 Exhibit C

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 15200 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, Hazardous and Inherently Unstable 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.

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.

Following the circulation of the Public Draft EIR, additional biological survey efforts were conducted in 2015 by Arcadis and Loides 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 2008).

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 lizards. 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)

**SLO - Phillips 66 Crude
 by Rail Project
 Staff Report Exhibit C p. 1**

Planning Commission
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 Page 16

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 6):** 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 (SLOAPCD) 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 SLOAPCD cancer risk CEQA threshold is 10 in a million for toxic emissions. These activities include movement of the

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 watersheds. 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 86) 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

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Planning Commission
 Development Plan/Coastal Development Permit #DRC2012-00095 / Phillips 66 Company
 Page 4

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 Findings."

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.

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.

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**SLO - Phillips 66 Crude
 by Rail Project
 Staff Report p. 4**

	BAY AREA AIR QUALITY MANAGEMENT	Ms. Millon Page 2 February 8, 2016 A similar mitigation measure to the one recommended by the Air Districts for this Project was recently included in a DEIR and FEIR for a crude by rail project in San Luis Obispo County, which states:
<p>A similar mitigation measure to the one recommended by the Air Districts for this Project was recently included in a DEIR and FEIR for a crude by rail project in San Luis Obispo County, which states:</p>		
Kern County Mark Stone MARIPOSA COUNTY Katie Rice NAPA COUNTY David Thompson SAN FRANCISCO COUNTY Jeff Wain TULARE COUNTY	All the rev is a add acc stat 939 ELLIS STREET	documentation from each Air District to the San Luis Obispo County Planning and Building Department that emissions reductions have been secured for the life of the project prior to issuance of the Notice to Proceed. Bay Area Air District staff maintains that the offsite mitigation measure is feasible for this Project to implement and therefore recommends that the City require the Project proponents to mitigate the air quality impacts associated with this Project within each air basin to the maximum
<p>mitigation measure. The recommended mitigation measure would not place any burden on Union Pacific Railroad (UPRR) by requiring cleaner locomotives to be used for the Project, and therefore would not conflict with the federal preemption.</p>		
James Smith City Davis SONOMA COUNTY Terrell Burns Shiloh Zane Jack P. Boardman EXECUTIVE OFFICER/BAAQMD	the sh rev is a add acc stat	potential air pollution impacts from the 2002 Valero Improvement Project DEIR, underestimates the number of remaining ship calls to the refinery, uses unreasonable locomotive fuel efficiency estimates, omits some sources of emissions, and does not evaluate the potential health impacts from PM2.5 emissions. In our comment letters, Bay Area Air District staff requested that the City provide additional analysis in the FEIR to make up for these deficiencies (and others) so that the Project's air quality impacts would be more accurately characterized. The City did not attempt to revise or expand on the Project's cumulative air quality and health risk analyses. Instead, the City claims that the cumulative analysis and health risk assessment reflects the "most recent data available." Air District staff respectively disagrees with this opinion.

BAAQMD Letter re Benicia – Valero p. 2

Kern County Approach to Preemption

- All Aspects of CEQA Are Preempted as to Rail Impacts
 - Including the Disclosure Requirement
- Permit Decision Based *Solely* on Onsite Impacts

County of Kern 7.0 Response to Comments

- 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 474

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.

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)

X 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

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.

by the federal government. The comment states that 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

Alon Crude by Rail Project
 Responses to Comments
 p. 7-183

Alon Refinery/Field Refinery Crude Mobility Project 7-183 August 2014
 Final Environmental Impact Report

Appeal

- Filed February 29, 2016
- Introduction overview:
 - Scope of the project
 - Federal government's authority
 - "Misleading" legal argument
 - Refinery's emissions
- Four major issues identified

Appeal Issues:

1. The findings are preempted by Federal law
2. The findings are inconsistent with CEQA
3. The findings are contrary to law and not supported by substantial evidence
4. The Planning Commission violated the law and the Benicia Code of Conduct

Recommendation for March 15, 2016

1. Confirm the future hearing dates of April 4, 6, and 19, if needed;
2. Hear the presentations by Staff and the Applicant and questions from the Council; and
3. Continue this item to April 4 for Staff follow up on Council questions and for public comment including organized opposition.

Potential Council Actions on the Project

- A. Deny the appeal
- B. Decline to certify the EIR and remand back to staff
- C. Uphold the appeal and
 - i. Adopt the draft Resolution certifying the FEIR, SOC and MMRP
 - ii. Adopt the draft Resolution approving the Use Permit