

Amy Million

From: Heather McLaughlin
Sent: Tuesday, April 05, 2016 3:19 PM
To: Amy Million; Christina Ratcliffe
Subject: FW: Stop Crude By Rail (My comments for Public Record on Valero Crude by Rail)

For the record.

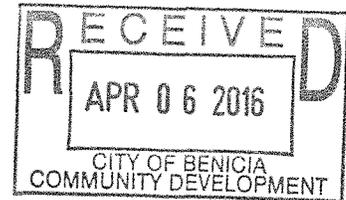
----- Forwarded message -----

From: "Joe Rego" <jmrego49@gmail.com>

Date: Fri, Apr 1, 2016 at 11:05 AM -0700

Subject: Stop Crude By Rail (My comments for Public Record on Valero Crude by Rail)

To: "Elizabeth Patterson" <EPatterson@ci.benicia.ca.us>, "Mark Hughes" <MHughes@ci.benicia.ca.us>, "Tom Campbell" <TCampbell@ci.benicia.ca.us>, "Alan Schwatzman" <ASchwartzman@ci.benicia.ca.us>, "Christina Strawbridge" <CStrawbridge@ci.benicia.ca.us>



Members of Benicia City Council,

I realize I am getting in my 2 cents at the last minute, or rather waited until the mid night hour as Wilson Pickett so appropriately sang that song in 1965 to express "Black Power", only this time it is to express "People Power" in support of the Benicia planning commissions resolution 16-1 and in opposition to your willingness to accommodate Valero Oil Company's appeal assertions or as I interpret it..... "the games they play"!!.

I am not just a mere resident of Benicia who, for the last 17 years, kept his head down and fended for his family and his property, I also happen to be a Marine Engineer, who happened to sail 21 years with the British Merchant Marine and then worked ashore for Sea-Land and Matson Navigation as Fleet Superintendent and then Manager for Fleet Maintenance. So no, I'm not naive and have a real hard time swallowing led!!

All the facts in favor of denying Valero their \$70 Million have been more than laid out to you via, letters, comments and social media. This crude is being shipped from Canada and from North Dakota. The crude oils are Tar-Sands and Bakken crude respectively. Have any of you evaluated the properties of these crude oils? I wonder, because if you did you would not be entertaining Valero's appeal; either that or you have your heads in the sand and are looking at a short term cash inflow, never mind the consequences. Unfortunately the consequences are so dire, you might just spend the rest of your lives or part of it in prison!! The law suits will drive you absolutely insane. The cries of agony and of despair from victims in the event of an explosion or fire from derailment will never be erased from your minds, and i'm being very very serious. Hundreds of Benician lives rest in your hand. Your planning commission has done its job and the risks outweigh the short term benefits. What you decide on will make or erase Benicia from the Solano County map. Until and unless crude oil transportation cars and their mode of transportation is declared "Fail Safe", there is no place for rail road transportation of crude oil. Let them continue Ocean and Pipeline modes of transportation.

So, in order to help you make up your mind, I am inserting very interesting and informative links from very well renowned news networks and research institutions for your review over this weekend. Please do read them and be very very informed.

Thank you.

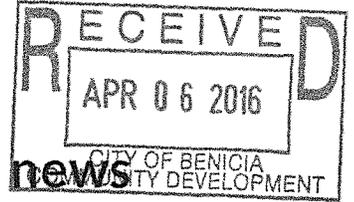
Sincerely,

Joseph Rego
521 Toyon Pl.
Benicia, CA 94510

<http://www.forbes.com/sites/jamesconca/2014/04/26/pick-your-poison-for-crude-pipeline-rail-truck-or-boat/#e2b36045777d>

<http://www.sightline.org/2014/01/21/why-bakken-oil-explodes/>

<http://www.bloomberg.com/news/articles/2014-01-02/bakken-crude-more-dangerous-to-ship-than-other-oil-u-s->



The Benicia Independent ~ crude by rail in the news

AIR QUALITY, BAY AREA AIR QUALITY MANAGEMENT DISTRICT (BAAQMD), LOCAL REGULATION,
SAN FRANCISCO BAY AREA, VALERO BENICIA REFINERY

VALERO REFINERY IN BENICIA FINED \$122,500 FOR PAST AIR POLLUTION VIOLATIONS

JUNE 25, 2015 | ROGER STRAW

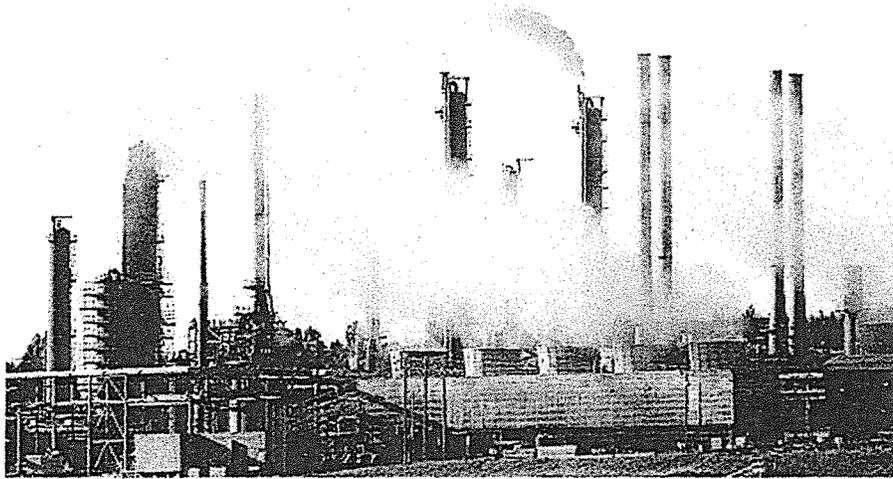
Repost from the Contra Costa Times

[Editor: It takes the Air District over 3 years to "settle" with Valero for polluting our air? In the past City officials have asked that these kinds of fines be redirected to the communities where the violations occur. My understanding is that BAAQMD Executive Officer Jack Broadbent indicated he would consider it, but never took any action. Seems the Air District wants to continue to use the fines for their own operations: "The penalty money will be used to fund air district inspections and enforcement actions." - RS]

Valero refinery in Benicia to pay \$122,500 in air pollution penalties

By Denis Cuff, 06/25/2015 12:49:50 PM PDT

SUBMITTED BY Madeline Kostek



Valero Refinery, Benicia, California

BENICIA — The Valero oil refinery has agreed to pay \$122,500 in civil penalties for air pollution violations during 2011, clean air regulators announced Thursday.

The settlement between Valero and the Bay Area Air Quality Management District covers 25 notices of violations, including one over odors at the refinery wastewater treatment plant.

Another 14 violations concerned excessive pollution detected by monitors at the Benicia plant, officials said.

“Violations of air quality regulations, no matter how minor, must be addressed and refineries held accountable,” Jack Broadbent, the air pollution district chief, said.

The penalty money will be used to fund air district inspections and enforcement actions.

The air district regulates stationary air pollution sources in the nine Bay Area counties.

Please share!

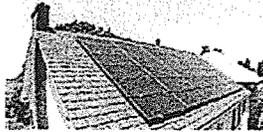




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Valero To Pay Nearly \$200K In Penalties To Bay Area Air District Over Benicia Refinery Violations

October 29, 2015 6:47 PM

Filed Under: Benicia, Fines, Refinery, Valero



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BENICIA (CBS SF) — Valero will pay \$196,000 in civil penalties to the Bay Area Air Quality Management District as part of a settlement over air quality violations at its Benicia Refinery, air district officials announced Thursday.



The settlement stems from violation notices the air district issued to Valero for incidents that occurred in 2012.

Violations referenced in the settlement include errors in the inspection database, which resulted in missed leak inspections for valves that had been omitted from the database, violations of emission limits, hydrocarbon vapor leaks from valve or seals on storage tanks, as well as late reports and minor administration violations, the air district said.

Valero corrected all of the violations once they were discovered,

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ENVIRONMENT

VALERO TO PAY OVER \$300,000 IN BAY AREA AIR QUALITY FINES

OCTOBER 23, 2013 | BRIAN LEUBITZ | LEAVE A COMMENT

Oil company settles claims against it for Benicia refinery

by Brian Leubitz

Sure, you know Valero from their brightly colored gas stations. But if you've been following California politics for a while, you may remember when Valero got involved here. They were a big funder in Prop 23, a measure to repeal our landmark climate change legislation. It turns out that they have some other plans for chemicals in California air, as they have settled and acknowledge violations:

The Valero Refining Co. has agreed to pay more than \$300,000 for repeated air quality violations, including gas leaks, over the past few years, regulators announced Tuesday. The company will pay \$300,300 in civil penalties for 33 violations in 2011 and 2012 at its petroleum refinery in Benicia, according to the Bay Area Air Quality Management District. (SF Chronicle)

Valero actually self-reported, so this is somewhat a sign of the system working. However, for the people of the East Bay who face increased asthma rates, the system really isn't working. Children in Richmond have asthma rates twice normal rates, and air quality is thought to be chiefly responsible.

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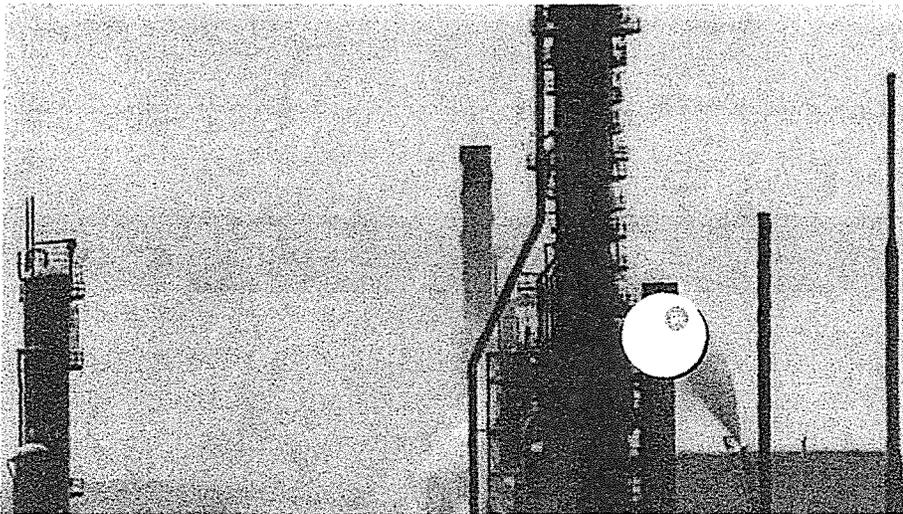
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Valero to Pay \$183K Settlement to Air District Over Air Quality Violations

By Bay City News



The Valero refinery in Benicia.

Valero has agreed to pay an \$183,000 civil penalty to the Bay Area Air Quality Management District to settle air quality violations at its Benicia refinery, according to district officials.

The settlement covers fines from seven air quality violations that occurred at the refinery in 2010, according to air district spokesman Tom Flannigan.

- ExxonMobil Fined for Violating Clean Air Decree at Four Refineries

The violations stemmed from an upset of the refinery's fluid catalytic cracking

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Next on Patch » Garage Destroyed In Concord House Fire
(<http://patch.com/california/concord-ca/garage-destroyed-concord-house-fire>)

Valero Refinery to Pay Fines in Air Quality Violations

\$130,500 will cover six emission and 15 administrative violations, according to the Bay Area Air Quality Management District.

Concord, CA

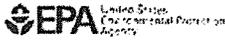
By ADALTO NASCIMENTO (Patch Staff) - (<http://patch.com/users/adalto-nascimento-ba12cc06>) ©
November 16, 2011 2:41 pm ET

0

- Bay City News

The Valero refinery in Benicia reached an agreement with the Bay Area Air Quality Management District to pay a \$130,500 civil penalty related to air quality violations that occurred in 2008 and 2009, the air district announced today.

"Businesses in the Bay Area have a responsibility to protect public health by following air quality regulations," Jack Broadbent, air district executive director, said.



Newsroom

News Releases - Hazardous Waste

Valero Refinery agrees to pay U.S. EPA \$97,940 to settle environmental violations

Release Date: 4/1/2005

Contact Information: Contact: Laura Gentile (gentile.laura@epa.gov) - 415/947-4227 (desk) or 415/760-9161 (cell)

SAN FRANCISCO – Yesterday the Valero Refinery in Benicia, Calif. agreed to pay the U.S. Environmental Protection Agency \$97,940 penalty for alleged violations of state and federal hazardous waste regulations.

The EPA fined Valero, which is located at 3400 E. Second St., for the following violations of federal Resource Conservation and Recovery Act:

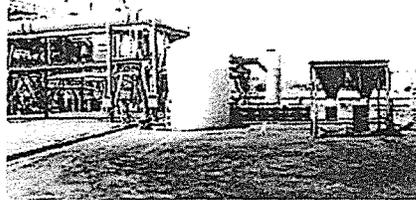
- * treating and storing sludge from petroleum processing -- a hazardous waste -- on a concrete pad without a permit;
- * failure to maintain decontamination equipment;
- * failure to label containers of hazardous waste with required information; and
- * transportation of hazardous waste on a public road without a manifest.

"Improper hazardous waste management can put the surrounding community at risk," said Jeff Scott, director of the EPA's waste management division for the EPA's Pacific Southwest office. "This settlement sent a message to the regulated community that the EPA is committed to aggressively enforcing safe hazardous waste handling requirements."

The EPA discovered the violations during a June 2003 site inspection. Valero is required to pay the penalty by the end of April.

Valero is a petroleum refinery located on approximately 450 acres in Benicia, Calif. Valero processes approximately 180,000 barrels of crude oil each day to manufacture gasoline, jet fuel, diesel fuel, liquid propane gas, coke and asphalt.

The EPA regulates the proper treatment, storage, transportation, disposal and general handling of hazardous waste under the federal Resource Conservation and Recovery Act.



Valero Diversion Tank Pad

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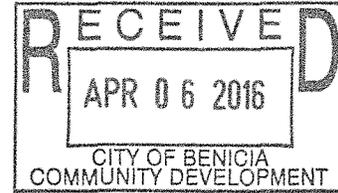
Recent additions

- 03/29/2016 [EPA Initiates Second Review of Hudson River PCB Cleanup: Public Encouraged to Participate](#)
- 03/28/2016 [EPA to Hold Public Hearing in Washington, D.C. on Risk Management Program Proposed Rule](#)
- 03/28/2016 [Two Connecticut Companies Settle EPA Claims of Violating PCB Regulations](#)
- 03/28/2016 [EPA reaches settlement with Brenntag Northeast for alleged environmental violations at Reading, Pa. facility](#)
- 03/24/2016 [EPA Accepting Public Comments on Proposal to Ban the Dumping of Sewage from Boats into the St. Lawrence River](#)

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Amy Million

From: Sheila Clyatt <saclyatt@gmail.com>
Sent: Wednesday, April 06, 2016 8:13 AM
To: Amy Million
Subject: Crude by Rail



Valero Crude by Rail

Hello, my name is Sheila Clyatt, I am a resident of Benicia

I ask you to deny this permit tonight because if you grant an extension you could compromise your jurisdiction on the outcome. Valero could establish precedent in another location thereby mandating an outcome here. Once this happens, the citizens of Benicia would lose all representation.

There are many reasons to deny a land use permit: some include Contamination to Sulfer Springs, building in flood zone, increased water usage and air quality.

Despite the claim that this plan would improve overall air quality, anyone listening at past hearings clearly understands that the calculations presented in the FEIR are comparing incompatible data.

But more importantly, Valero is only running at 60% capacity allowing for it to not only run more trains, but also to continue to import and export oil by ship. It makes financial sense that Valero would continue shipping the byproducts of crude or even crude itself to its current market in China. Thereby making all projected air quality figures irrelevant.

China is aggressively seeking oil and the oil companies are scrambling to be ready to take advantage of this new flush market. The International Energy Agency expects China's oil imports to increase to 13 million barrels a day by 2030. According to the executive director of Oil Change International, **Valero has contracted to "take at least 100,000 barrels of tar sands crude a day from North America. Furthermore, in**

response to this prime market Valero has laid out an aggressive export strategy to its investors and has beefed up its Port Arthur refinery to process future demands.” Now it’s trying do the same in Benicia. And who takes all the risk, for this profit? You and I.

Americans could become little more than middle man, taking the risk of spills and increased pollution, while the oil goes abroad. So why do this? To be clear, petro companies have one goal – to sell as much oil as they can for the highest price. The decision of what are “significant and unavoidable impacts” becomes purely a financial matter. In fact, the only beneficiary in this project is Valero’s bottom line.

Valero continues to guarantee safety is their priority. I don’t doubt that, but over and over again we see accidents happen. Just over two months ago three tank cars derailed under the Benicia Bridge and all I could think about was thank God they weren’t filled with crude. According to the Federal Railroad Administration over three trains derailed daily on average in the US between 2012 and 2015. When there is an accident who will bear the burden of the cost? If the City Council insists on granting this permit over all testimony to the contrary, they must mandate insurance for expenses that the city will incur. This was briefly discussed at an earlier hearing but was over ridden due to Valero’s shaky legal argument that they are unaccountable due to the federal indirect pre-emption laws.

I trained with BERT—Benicia Emergency Response Team. I was told that when the earthquake hits Benicia there would not be enough first responders to meet the medical or safety needs throughout town. Many homes and businesses in Benicia are old structures with brickwork and poor foundations and won’t survive a quake. If you grant this permit, when the next major earthquake occurs, the primary manpower will be directed to the highest crisis situation which will inevitably be the expanded Valero site. This will mandate that all other medical and safety emergencies in Benicia will become secondary. We will be beyond our coping ability and it potentially disastrous.

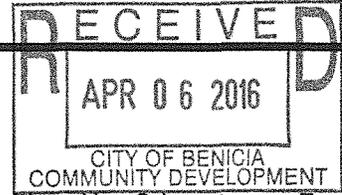
At one of the former public hearings there was a physician who said that he was interested in opening a cancer research facility in Benicia because he could see how the city was working to support the vision of being a healthy place to live. Bike trails, walking paths, open space, community gardens, clean air and a sense of safety. These are all features that can attract

innovative new businesses, which would boost our tax base. Isn't diversification and viability important to development of the industrial park to its highest and best use?

And what about the current businesses in the industrial park? They may be forced leave because of inadequate access for emergency vehicles, increased traffic congestion, and potential threat of being located next to the proposed loading and unloading racks.

I urge you to support the determination made by the planning commission over a thorough multi year process and voiced by the citizens of Benicia to deny this permit. Thank you for your attention.

Amy Million



From: Marilyn Bardet <mjbardet@comcast.net>
Sent: Tuesday, April 05, 2016 5:46 PM
To: Amy Million
Cc: Elizabeth Patterson; Mark Hughes; Christina Strawbridge; Alan Schwartzman; Tom Campbell
Subject: Photos to enter into public record: Industrial Park Infrastructure: potential hazards/impacts near RR tracks along Bayshore Rd

Hello Amy,

The following photos, which I took in the industrial park last week, on March 29, from 5:30 p.m. - 6 p.m., I had hoped to be able to present to the City Council. But without enough time to discuss properly, it was not possible to show them. One of my key concerns expressed in official BSHC DEIR Response comments, was the lack of photos and other visual documentation describing the vicinity of Park Rd, all the rail spurs in the park, and the immediate environs of East Channel Rd. There was not even a whole map of the industrial park, to give relative distances from the proposed CBR Project's offloading racks. There was no documentation of the actual companies located in the park, nor visual indication of the kinds of petroleum infrastructure that exists off-site of the refinery.

Please enter the following photos (BATCH I) into the public record. I've provided a caption below each photo to describe what is most relevant to the CBR Project discussion of potential impacts and hazards.

Thank you,
Marilyn



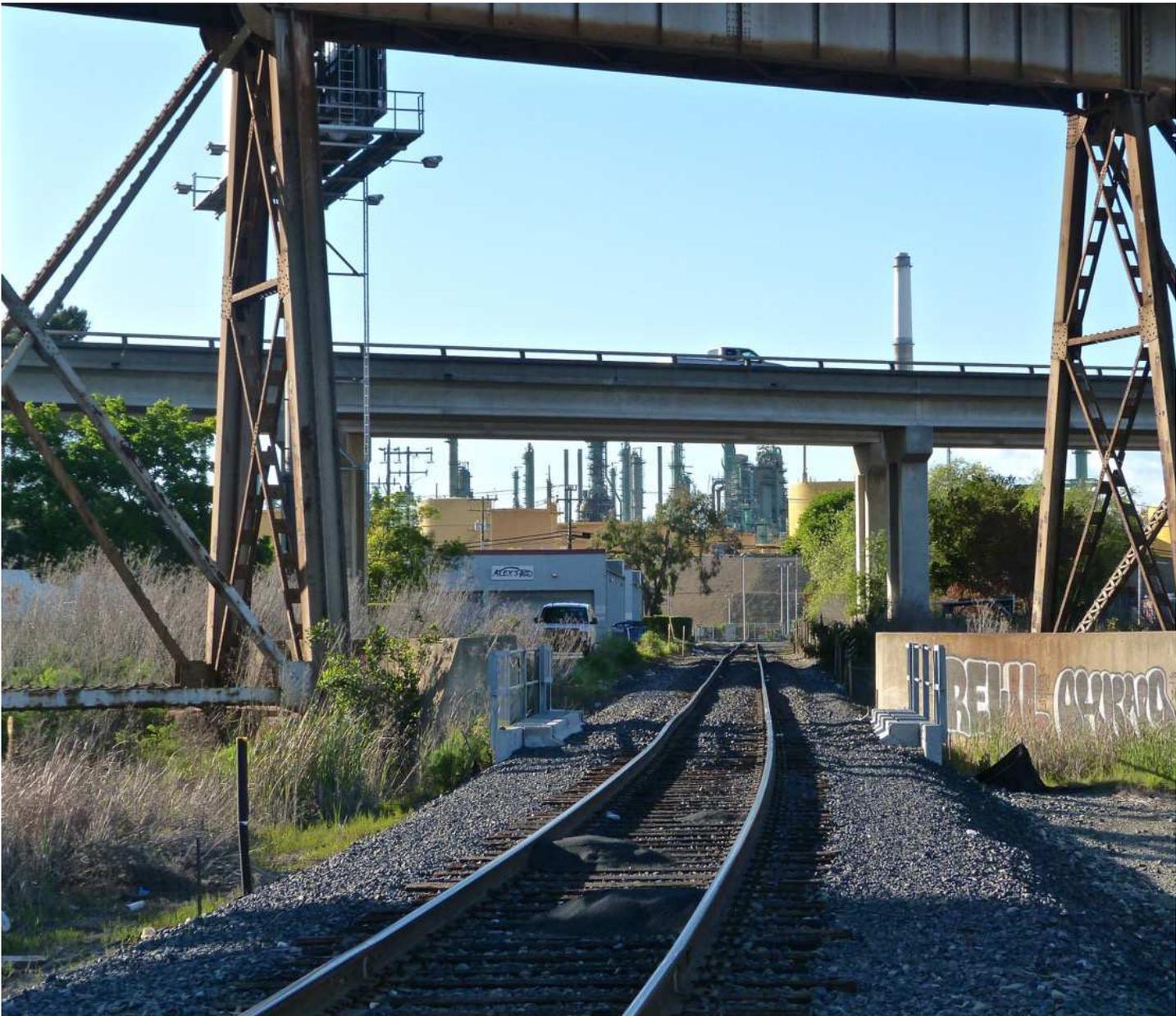
Photo for orientation. Taken from driveway of Alex's Auto Repair, looking south to Ironworkers bldg along Bayshore Rd.



Ironworkers Apprenticeship Training Bldg, Bayshore Rd. private driveway crossed by UPRR tracks



Ironworker's bldg driveway and tracks on right; note proximity of UPRR Trestle Bridge and piers near tracks (close-ups, next pictures)



UPRR tracks running toward Park Rd along Bayshore Rd. Note the slight curve in tracks at this point, near UPRR rail trestle bridge pier, which is “guarded” by a cement wall, about 5 ft high.



Valero pet-coke train: Note —680 piers and proximity of refinery storage tanks and processing block. Park Rd intersection is just beyond Alex’s Auto Repair (visible through pier of trestle bridge on left.)



Infrastructure right near tracks. Photo taken from Alex's Auto driveway. Tracks are just behind what you see here.



Valero coke train operated by UPRR. Note UPRR trestle bridge pier directly next to locomotive, and I-680 overpass above.



UPRR locomotive, note sign saying "Remote Control locomotive"



Valero coke train with one locomotive and 13 hopper cars. Note comparative heights of train and bridge and trestle piers. I suspect that, in a derailment at this location, the weight of two crude-loaded tank cars could seriously damage the trestle bridge pier seen on the right behind the hopper car.



Track elevation built up above ground level, created by packed rock (typical); however, see that the full height of the concrete wall surrounding the trestle bridge pier is not exposed, so that in a derailment, a single, crude-loaded tank car or two, could fall against the cement wall and likely puncture, spilling oil, likely causing major damage to the wall, and possibly destabilizing the pier. If fire ensued, (caused by gases ignited by hot metal couplings' friction or hot rails could potentially also damage steel strength of pier's girders.



Another view of tracks and trestle piers, looking southeast toward Ironworkers bldg along Bayshore Rd.



Note from this angle, how close the tracks appear to cement wall protecting pier.



Alex's Auto Repair, with UPRR tracks immediately adjacent, with petroleum infrastructure next to driveway on right.



The tracks here have switches (seen right beyond garbage cans) located just before the RR crossing at Park Rd.



Switches in tracks — note curve as tracks lead into refinery. This is the route for all trains heading into Valero.



Kinder Morgan pipelines underground, presumably below or along tracks.



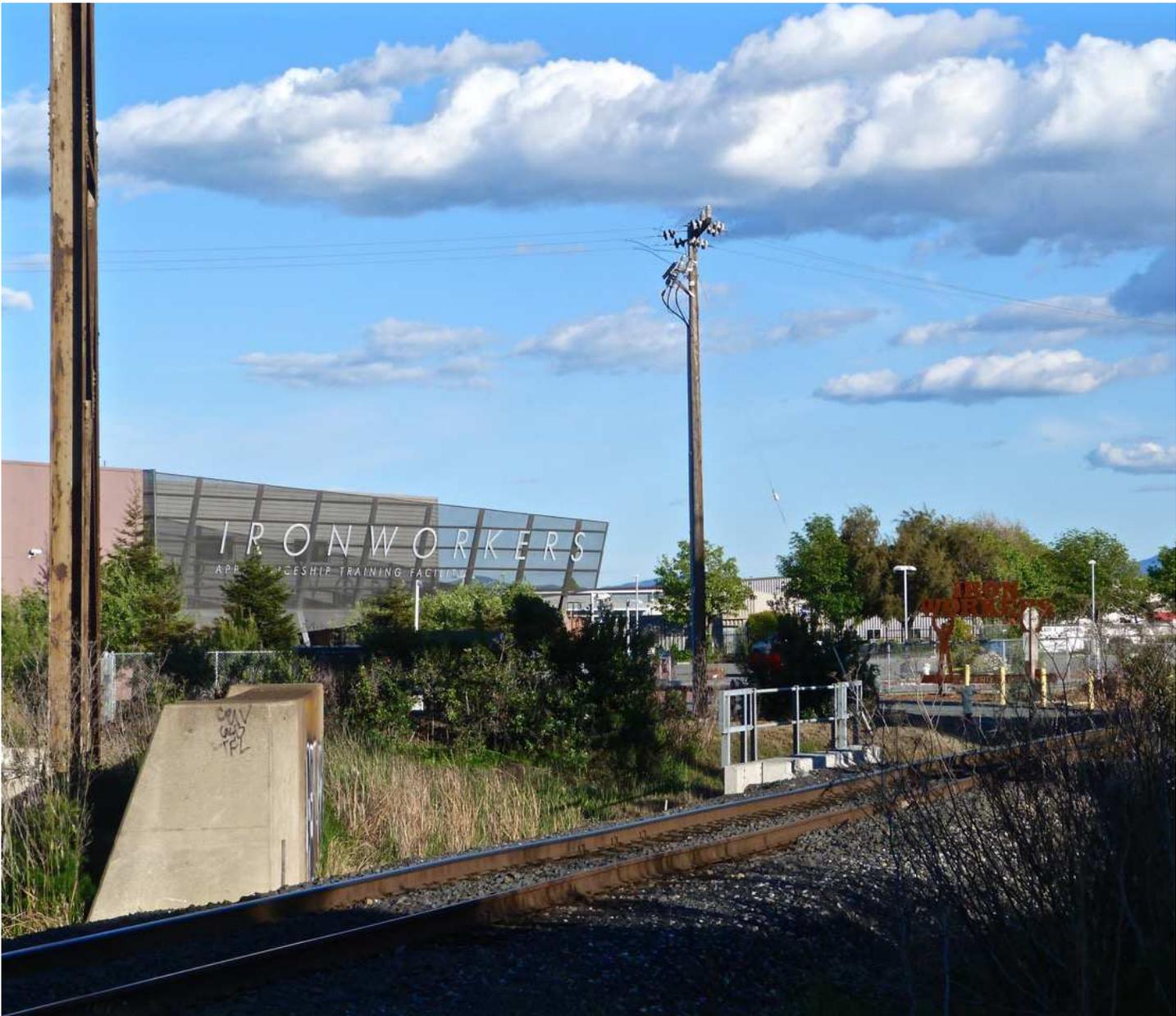
Another view of tracks with Kinder Morgan pipeline warning signs located very near the UPRR trestle bridge pier.



Note height of trestle bridge and location of other infrastructure along stretch of track. Photo taken from Alex's Auto Repair driveway.



Note condition and seeming vulnerability of the steel piers for trestle, which must have been built at the same time - 1929-30, as UP's trestle bridge over the Carquinez Strait.



One more: track + cement wall + trestle pier + Ironworkers bldg. driveway.



“Compound” of overpasses for I-680 and UPRR tracks leading to UPRR trestle bridge over the Strait.



UPRR trains pass over Benicia enroute south, including trains carrying other hazardous materials, etc.



Bayshore Off Ramp from I-680 at 5:30 pm. Major trucks use this ramp; estimates of traffic backups should account for truck usage at rush hour, and at other routine times of business. Note storage tank above.



Grasses and other vegetation between I-680 and trestle bridge — fire could erupt here if crude spill occurred. Fire could get very hot, affecting steel piers.

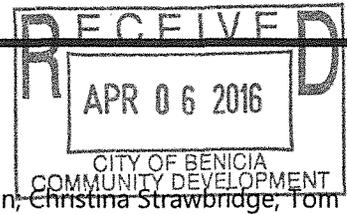


Two car transport vehicles that have come from Bayshore Rd and the port area, about to turn onto I-680 on ramp, (or left up Park Rd. - not sure which.)



Van immediately following car trailers, coming from I-680 off ramp onto Bayshore Rd.

Amy Million



From: Marilyn Bardet <mjbardet@comcast.net>
Sent: Wednesday, April 06, 2016 10:41 AM
To: Amy Million
Cc: Elizabeth Patterson; Mark Hughes; Alan Schwartzman; Christina Strawbridge; Tom Campbell
Subject: For the public record on Valero CBR Project: BATCH II Photos

Good morning, Amy,

Please add the following photos and captions to the record. The photos were taken by me on several dates which I've identified in captions.

BATCH II photos all taken on Nov. 5, 2013, late afternoon after coke train derailment that had occurred earlier in the afternoon.)

- Valero coke train derailment at Park Rd, trains and trackage, infrastructure.
- Park Rd RR crossing intersection (near entrance to refinery); traffic
- Manifest freight trains on UPRR tracks along Bayshore Rd.

Thank you,
Marilyn



Just past Park Rd RR crossing, coke train derailed at Park Rd, train was decoupled and some hopper cars hauled back onto Valero property shown here. 11/5/13



Coke train car, wheel marked at derailment. Rail spur into refinery. Project trains would take spur (not seen here) that leads north, to the right. 11/5/13



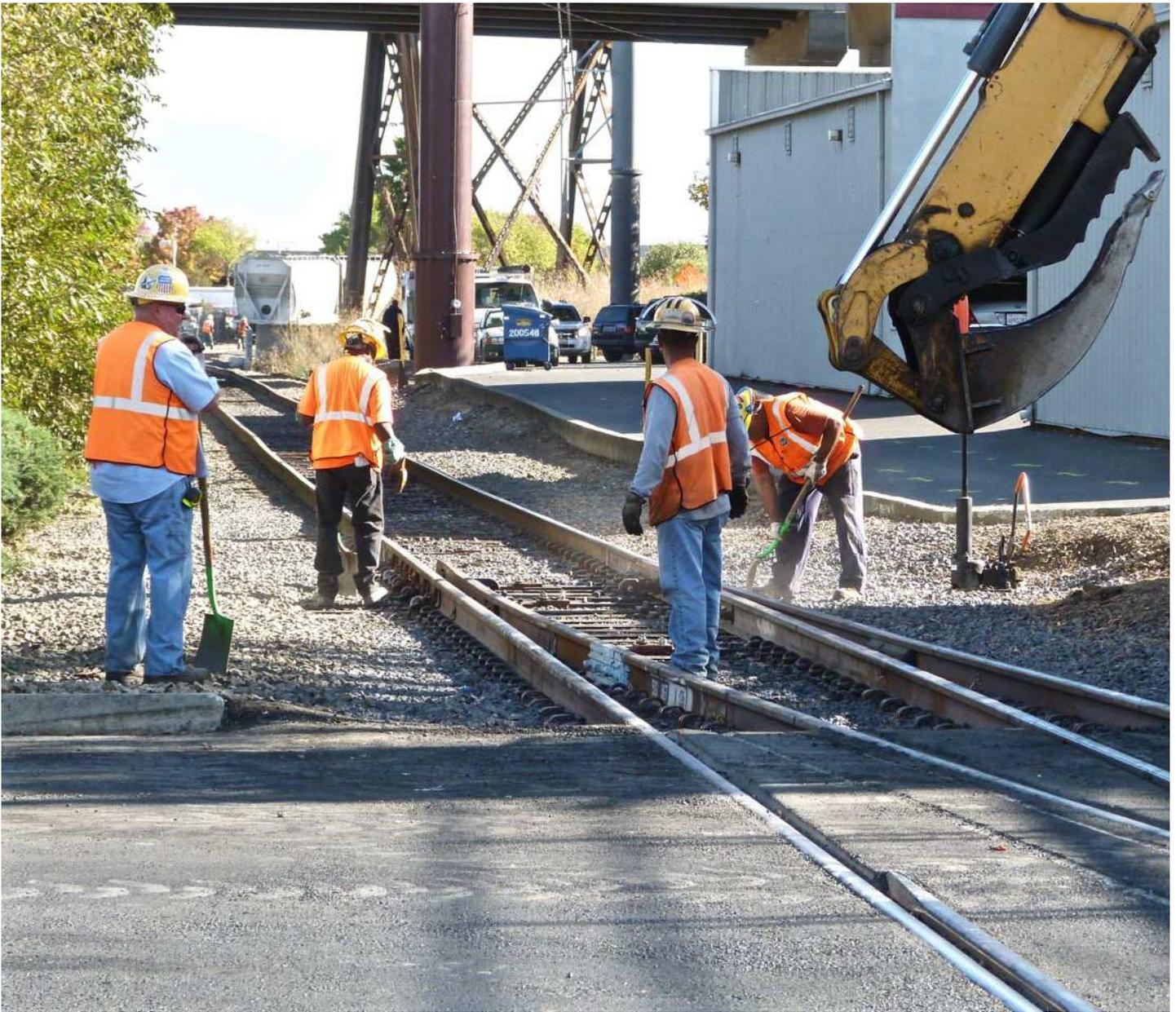
UPRR Park St. utility box on right 11/5/13



close up (zoom) of coke train wheel 11/5/13



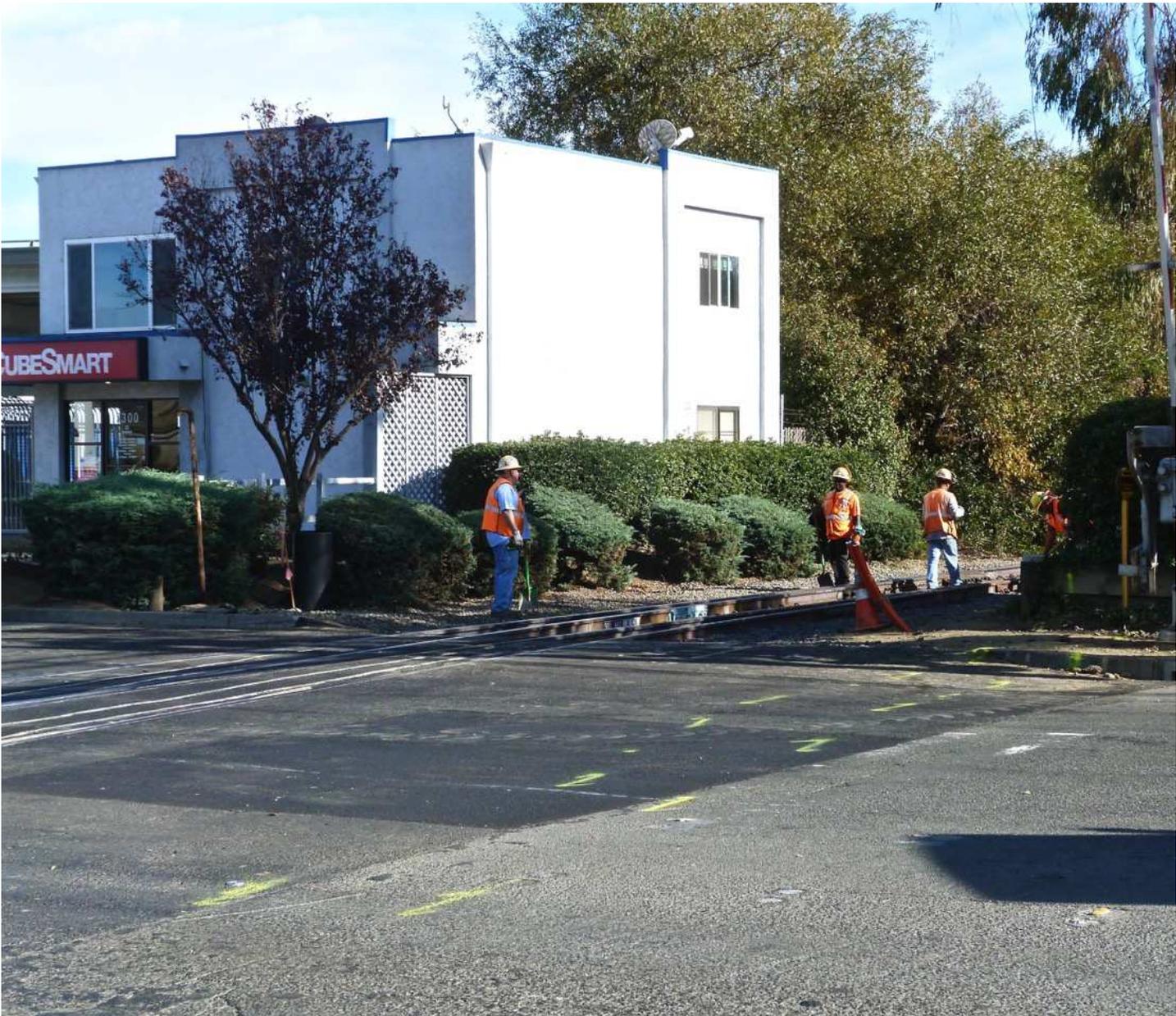
At Park Rd RR crossing, looking east past Alex's Auto Repair, along tracks bordering Bayshore Rd. After port-bound coke train derailment, train was decoupled and part of train left behind is visible beyond, adjacent and very near Rail Trestle Bridge pier. 11/5/13



UPRR work crew after derailment, at potential trouble spot, at rail switch just before Park Rd intersection (Alex's Auto Repair on right) 11/5/13



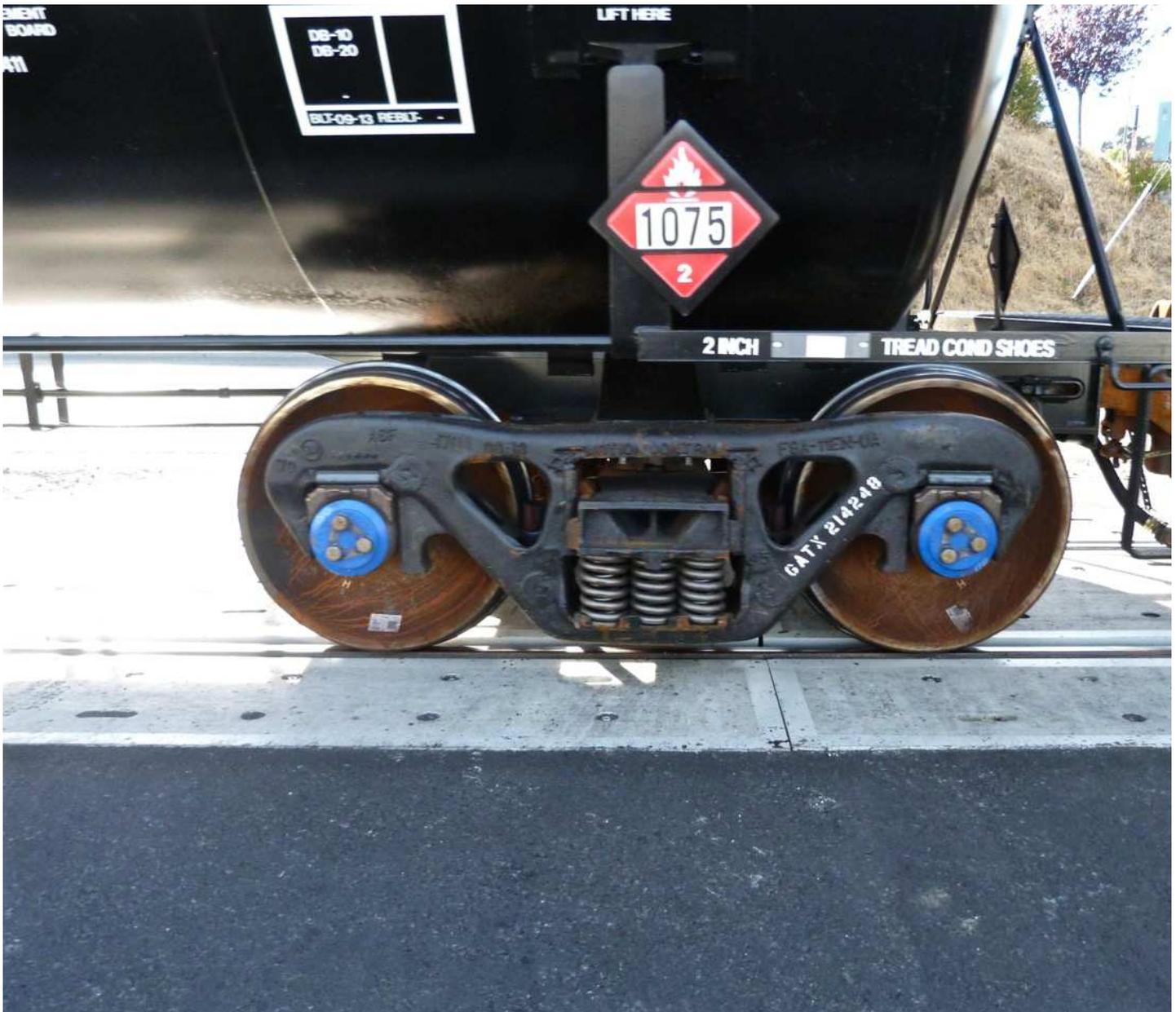
Park Rd RR crossing. After derailed coke train was decoupled. Note track switches right at intersection. Alex's Auto Repair on left. 11/5/13



Park Rd. RR crossing with Cube Smart company just north and adjacent to tracks 11/5/13



LPG tank cars, part of manifest freight train moving into Industrial Park on UP rail spur bordering Bayshore Rd. Ruszel Woodworks on left, train crossing driveway. 11/5/13



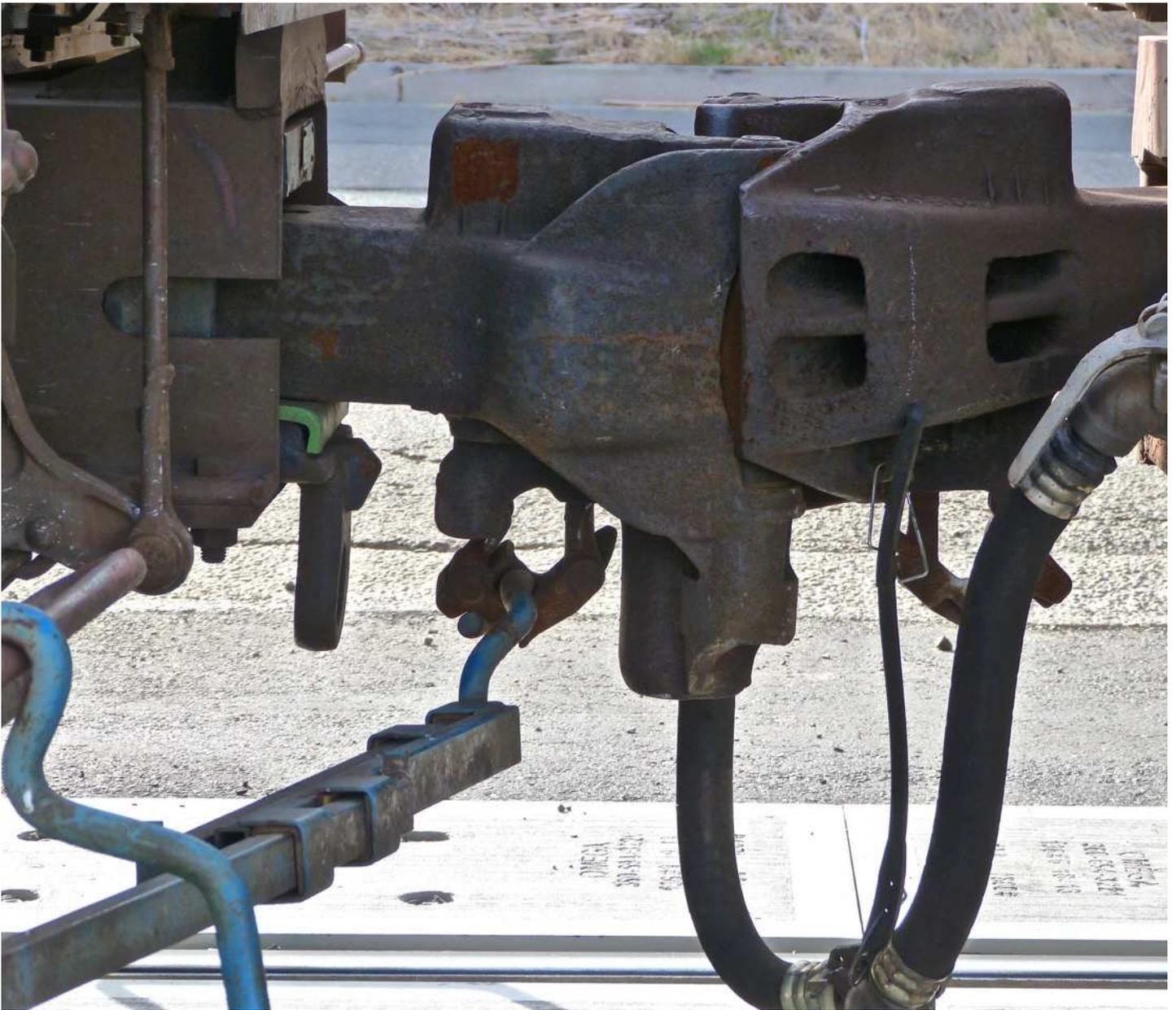
Tank car wheels and insignia noting contents classification for Liquefied Petroleum Gas (LPG). Note wheel assembly and couplings, which are sources of metal friction and sparks. 11/5/13



UPRR sign alerting company employer and employees to contact UP in the case of train blocking private driveway. Ruszel Woodworks on left. Manifest freight train with mix of box cars and LPG tank cars was slowly passing by, then stopped and backed up, making terrifying screeching noises and clanging of couplings. 11/5/13



Coupling between two box cars of manifest freight train stopped along Bayshore Rd UP rail spur 11/5/13



Coupling between box cars, close up: Note condition of metal and how the couplings move during stop and start motions and the heat and friction that action represents. 11/5/13



manifest train moving toward Park Rd RR crossing. Note engine attached to the end of train. There are no track loops for moving trains in and out of the Industrial Park, so trains must have engines on both ends to allow for changing directions on linear rail spurs. Note also track curve. 11/5/13



UPRR mainline tracks at switch with UP's rail spur that leads into the Industrial Park. Project trains coming from Roseville would switch onto the spur on right, and have to move up toward the Benicia Bridge in order to get the length of 50 cars and 3 locomotives onto the spur that runs along Bayshore Rd. 11/5/13



Components of electronic rail switch very near Park Rd RR crossing. Photo taken from Alex's Auto Repair driveway. 11/5/13



At Park Rd RR crossing. Coke train hopper cars visible behind truck. 11/5/13



Park Rd RR crossing – following coke train derailment; many types of large tractor trailers and other types of trucks, including All Points Petroleum trucks pass through the intersection routinely. As shadows show, this is late afternoon. 11/5/13



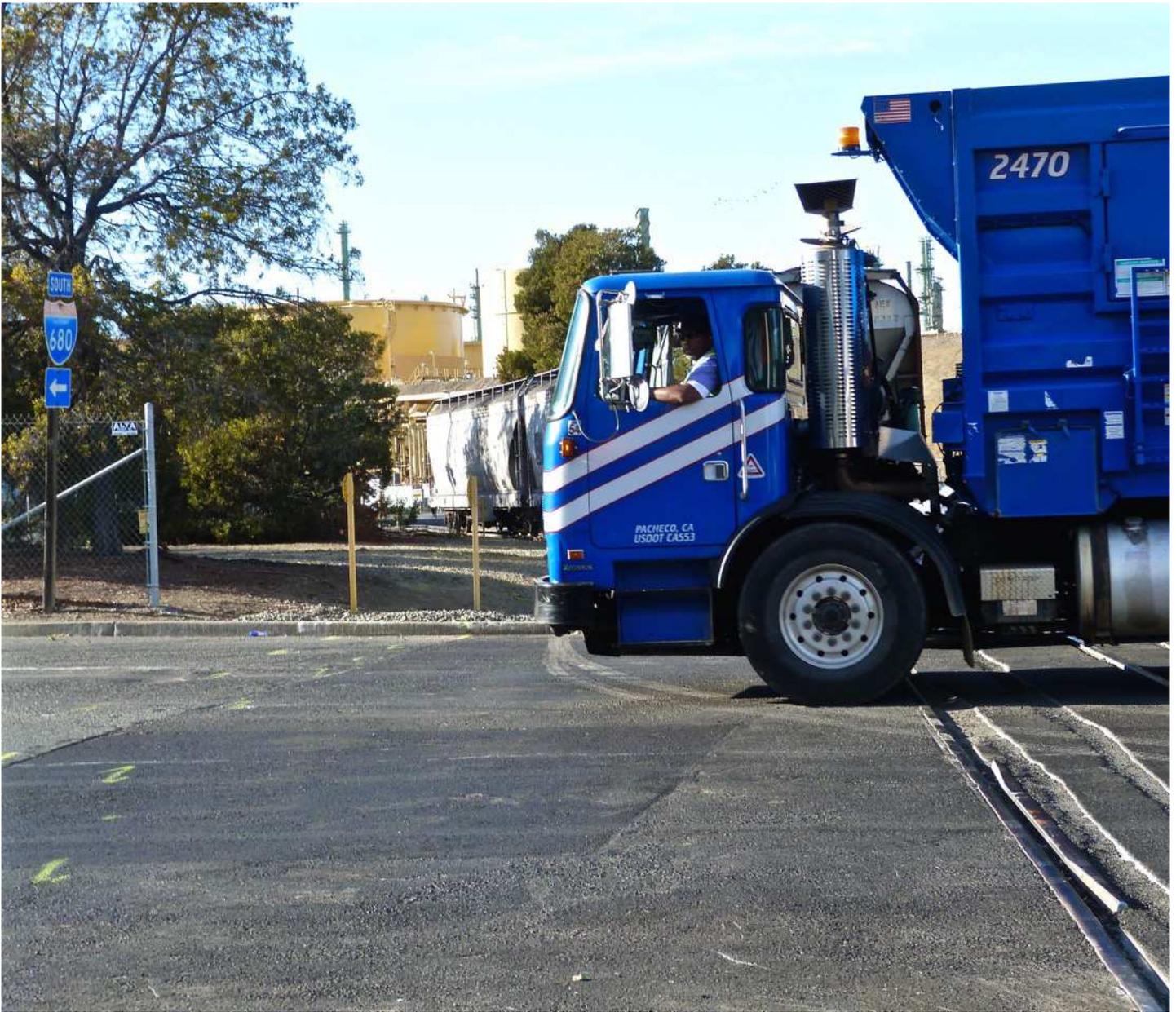
Typical traffic, mix of large trucks and cars 11/5/13



Park Rd RR crossing, after coke train derailment. Note switch in middle of intersection, Truck loaded with hazmat (contents unknown, but insignia shows flammable liquids on board). Imagine with crude-loaded trains coming through. 11/5/13



Park Rd RR crossing. El Rancho Catering Van— property owner along Park Rd near Industrial Way intersection, at time photo was taken. 11/5/13



Park Rd RR crossing; Allied Waste truck passing through toward I-680 on ramp southbound. 11/5/13



Looking west: All Points Petroleum tanker truck moving through Park Rd intersection/RR crossing, heading north. Coke train hopper car barely visible above truck cab's hood. 11/5/13

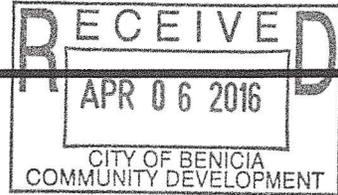


Looking west: another big rig cargo truck moving through Park Rd UPRR crossing, heading south on Park Rd. 11/5/13



Yet another large rig passing through Park Rd UPRR crossing. Just standing there, trucks going by constantly.
11/5/13

Amy Million



From: Marilyn Bardet <mjbardet@comcast.net>
Sent: Wednesday, April 06, 2016 12:29 PM
To: Amy Million
Cc: Elizabeth Patterson; Mark Hughes; Christina Strawbridge; Alan Schwartzman; Tom Campbell
Subject: Photos for the public record on Valero CBR Project: BATCH III – Sulphur Springs Creek with Project site and East Channel Rd. March 22, 2016

Hello again, Amy,

This is Batch III of photos for the public record on the Valero CBR Project. All of the following pictures were taken on March 22, 2016. They show current conditions of Sulphur Springs Creek, with the proposed site for the CBR Project's rail offloading racks in the background. There are a few shots of East Channel Rd. and a few companies, seen from street.

As before, I'm ccing the mayor and councilmembers to whom I would have wanted to show these photos, to help them understand the particular vicinity of the proposed rail terminal on Valero property. Several of my photos of Sulphur Springs Creek were reproduced by Phyllis Fox in her most recent comment letter, submitted April 4th, which was part of the submission by Adams Broadwell for Safe Fuels and Energy Resources of California (SAFER California).

I've also included links to satellite Google Maps with zoom-ins on the several companies located along East Channel Rd. For Benicia Fabrication and Machine Shop and CONCO, I've included those map links within the caption under photo. I didn't take a picture of PRAXAIR. Google link to satellite photo for PRAXAIR is here: [Google Maps](#). (Google maps are maneuverable so you can travel overhead over the entire length of East Channel Rd and other companies just to the east, between East Channel Rd and Industrial Way.)

The importance of the satellite photos is that you can see the infrastructure and how much equipment and activity goes on outdoors, and in open bays, thus exposing employees in the case of major accident at the refinery and Project-related rail accident or worse case event such as BLEVE. Phyllis Fox report (recent letter submitted April 4th) cites technical reasons why Qualified Risk Analysis done for the RDEIR is incomplete and inaccurate re estimates for cumulative effects associated to BLEVE and estimates for fatalities, etc.

Thank you,

Marilyn

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Thank you,

Marilyn



Standing along northern end of East Channel Rd, I took this picture of riparian corridor conditions, creek hidden by foliage. Storage tanks seen behind are part of Valero tank farm. Storage tank in foreground is "floating lid" type. The proposed rail offloading racks would run between fenceline, and this tank. Photo only shows portion at the far northern end of proposed Project site. 3/22/16



Looking north at northern-most end of Valero property, seen from East Channel Rd, riparian corridor of Sulphur Springs Creek in foreground. 3/22/16



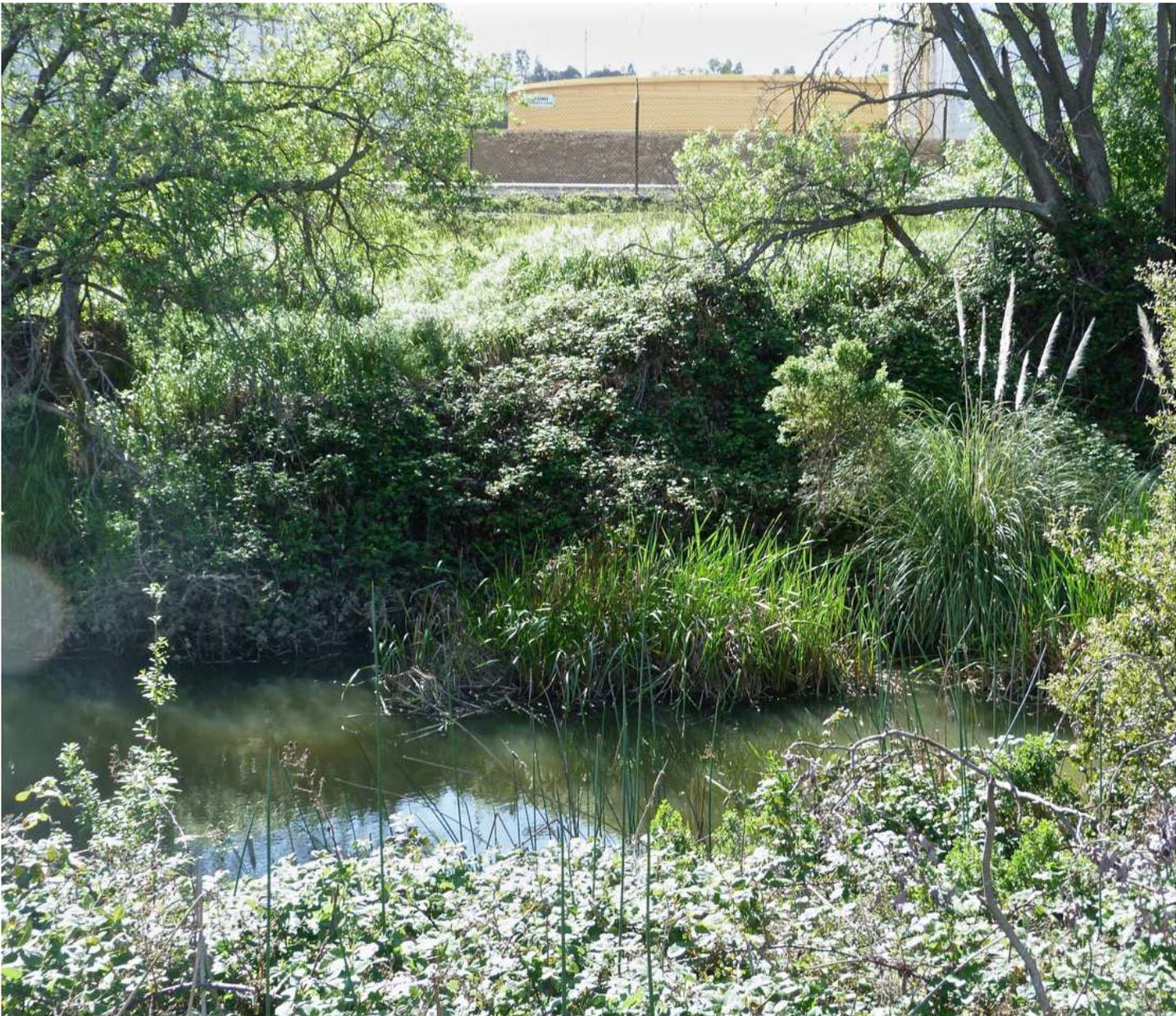
Looking south from northern end of East Channel Rd.; on left, Benicia Fabrication & Machine Shop, 101 East Channel Rd., involving heavy machining, arc welding and trucking, with open bays. 3/22/16 [Benicia Fabrication & Machine](#)



Looking across Sulphur Springs Creek's dense riparian vegetation toward tank farm and location of proposed CBR Project rail offloading rack site. Tanks seen are "floating lid" type. 3/22/16



Flowing water, pool, Sulphur Springs Creek and vegetation. 3/22/16



Water flowing in Sulphur Springs Creek, midway along East Channel Rd. 3/22/16



Water flowing in Sulphur Springs Creek, with Valero fenceline and tank farm seen behind. Grey steel tanks are “floating lid” types.



“mud island” in Sulphur Springs Creek and vegetation. Water flows to Suisun Bay. (I don’t know names of any existing rare or native species of plants that grow along or in the creek, nor the names of the many critters that travel through the corridor.) 3/22/16



Looking south, along Sulphur Springs Creek toward southern end of East Channel Rd. 3/22/16



One of the buildings, part of Benicia Fabrication & Machine Shop, East Channel Rd., Note open bay. 3/22/16. See [Google Maps](#) for satellite view of company equipment and infrastructure outdoors.



CONCO is located across from site of CBR proposed rail offloading racks and trackage leading to them. See Google satellite map that you can maneuver to see the amount of activity of trucking and plant operations outside bays and in parking areas. [Google Maps](#) 3/22/16



Sulphur Springs Creek in foreground, toward southern end of East Channel Rd.; not trailer truck with crane on roadway adjacent to Valero fence line (on road that would be removed to construct new trackage for entering proposed rail offloading racks??) 3/22/16



Looking northwest, Valero pipe infrastructure crossing Sulphur Springs Creek and going underground below East Channel Rd. 3/22/16



close up of Valero pipe infrastructure crossing Sulphur Springs Creek, along East Channel Rd. 3/22/16



Other gate-like structure crossing over Sulphur Springs Creek 3/22/16



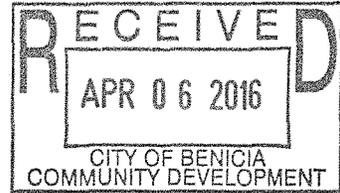
Sulphur Springs Creek in foreground hidden by vegetation; huge tank “floating lid” type, with evidence of activity with machinery along fenceline. 3/22/16



Grasses matting over Sulphur Springs Creek bed. Great place for nesting birds or other small wildlife. 3/22/16

Amy Million

From: Andres Soto <andres@cbeval.org>
Sent: Wednesday, April 06, 2016 12:35 PM
To: Amy Million
Cc: Brad Kilger; Christina Ratcliffe
Subject: Please add to the public record
Attachments: STB letter for Benicia City Council.docx; STBAlexandriaDecision39626.pdf; Florida East Coast Ry Co v City of West Palm Beach.rtf



Ms. Million:

Please add the attached documents to the record for the Valero Crude By Rail project,

Paz,

Andrés

STB letter for Benicia City Council
Regarding a continuance of Valero Benicia's Crude by Rail Appeal

Dear Councilmembers:

The bombshell request by Valero at your meeting on March 15, to have you issue a continuance of the Public Hearing of Valero's appeal of the Benicia Planning Commission's denial of Valero's dangerous Crude By Rail project is out of order, without justification and should be denied out right.

Valero seeks a Declaratory Order and a Temporary Retraining Order AGAINST the City of Benicia from the federal Surface Transportation Board because of the lawful decision by the Benicia Planning Commission. Do not fall for this red herring. It is merely a distraction.

I was as stunned, as you were, to hear this request and immediately presumed Valero had something up its sleeve that I had not anticipated. But now that I have researched the STB's authority and activities, and spoken to a staff attorney for the STB itself, I am convinced more than ever that Valero's request is the wrong question in the wrong forum at the wrong time. It is merely a distraction.

I went to the STB website and identified the agency's specific duties and jurisdiction. Having read this, I then decided to contact the STB's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC). I called the OPAGAC and spoke to a staff attorney, Mr. Gabriel Mayer.

I discussed the possibility of Valero requesting the DO/TRO for its Crude By Rail project. Mr. Meyer informed me that the staff would examine the request, if received, and analyze whether it was an issue the staff or Board would decide, if at all. In any event the STB is not the final authority on federal pre-emption. The state and federal courts serve that purpose.

I have attached below are copies of the **STB Overview** and the **Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC)** to my remarks. I advise you to research this yourself. Do not rely on staff or the consultants.

"The Surface Transportation Board is an independent adjudicatory and economic-regulatory agency charged by Congress with resolving railroad rate and service disputes and reviewing proposed railroad mergers."

While the Overview of the STB does identify that, ***"The agency has authority to investigate rail service matters of regional and national significance"***, my conversation with the Mr. Meyer indicated it is specifically related to rail projects or projects that occur on railroad property, not off rail issues. Mr. Meyer further indicated there are many cases relative to the facts as I presented them to him. He

sent me links to an STB decision from a case in Alexandria, VA, and a court case from Florida, also attached.

Mr. Meyer also indicated that since Valero would be making that request, not Union Pacific AND because the project is entirely on Valero property within the City of Benicia's sole jurisdiction, he could not foresee circumstances in which the STB would issue the DO/TRO.

Surely Valero knows this, so why would Valero even suggest such a ludicrous proposition? On this I will not speculate, but I can foresee what would happen if you DID decide to issue the continuance.

First, you be abrogating your responsibility to defend Benicia's interest by submitting to a dubious authority to define Benicia's local land use authority as a favor to a major corporation.

Second, because Valero has clearly lost the hearts and minds of Benicians and the vote of the Planning Commission, forestalling the project decision allows Valero to protect any councilmembers running for office who may be project supporters from the public wrath in November should they approve the project prior to the election.

Third, it sets a dangerous precedent of rewarding applicants who forum shop for an outside agency to exert its will over our community. You are under no obligation to grant this request and do not even need to take a vote on it. A hearing on this request for a continuance would just delay the inevitable – a hearing the merits of the Valero Dangerous Crude By Rail Project itself. If Valero felt it needed this determination from the STB, it should have done so months ago. Why haven't they asked California Attorney General Kamala Harris?

For Benicia's sake, on April 4th, deny the request for a continuance, start public testimony on the project and make the right decision for Benicia's future health and safety.

<http://www.stb.dot.gov/stb/about/overview.html>

Overview of the STB

The Surface Transportation Board is an independent adjudicatory and economic-regulatory agency charged by Congress with resolving railroad rate and service disputes and reviewing proposed railroad mergers. [2]The agency has jurisdiction over railroad rate and service issues and rail restructuring transactions (mergers, line sales, line construction, and line abandonments); certain trucking company, moving van, and non-contiguous ocean shipping company rate matters; certain intercity passenger bus company structure, financial, and operational matters; and rates and services of certain pipelines not regulated by the Federal Energy Regulatory Commission. The agency has authority to investigate rail service matters

of regional and national significance. ¶¶ Created on January 1, 1996 by the ICC Termination Act of 1995, the Board is the successor to the former Interstate Commerce Commission (1887-1995) and was administratively aligned with the U.S. Department of Transportation from 1996 to mid-December 2015. The STB Reauthorization Act of 2015 established the STB as a wholly independent federal agency on December 18, 2015.

The STB staff is divided into the following offices.

- **The Office of the General Counsel** provides legal advice to the STB and defends agency actions that are challenged in court...
- **The Office of Economics** performs three primary functions: data gathering and reporting, economic and policy analysis in support of Board decisions, and applied economic analysis, most notably the development of the STB's costing system. The Office of Economics audits Class I railroads.
- **The Office of Environmental Analysis** is responsible for undertaking environmental reviews of actions proposed before the agency, according to the national Environmental Policy Act and other environmental laws, and making environmental recommendations to the board.
- **The Office of the Managing Director** handles agency administrative matters, such as facility, budget, and personnel management.
- **The Office of Proceedings** researches and prepares draft decisions.

The Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) serves as the public's point of contact to the STB as well as the agency's outreach arm. It works with members of Congress, the public and the media to answer questions and provide information about the STB's procedures, regulations and actions. The office houses the Rail Customer and Public Assistance Program, which provides an informal venue for the private-sector resolution of shipper-railroad disputes, and also assists Board stakeholders seeking guidance in complying with Board decisions and regulations. The office also oversees all aspects of rail operations subject to the agency's jurisdiction to ensure that such operations are consistent with each carrier's statutory responsibilities. This office maintains the STB library.

http://www.stb.dot.gov/stb/about/office_ocps.html

¶ The **Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC)** serves as the STB's primary contact point with the public. The office interacts with members of Congress, executive agencies, state and local governments, news media, stakeholders, and other interested persons to provide information and informal guidance as to the STB's procedures, regulations, and actions. OPAGAC also serves as the agency's compliance arm, overseeing the actions of transportation carriers subject to the agency's jurisdiction to ensure that these carriers are operating in compliance with their statutory responsibilities. ¶ Office staff members are thoroughly knowledgeable about the STB and its processes, as well as the operational components of the rail industry. They are available to answer questions about the STB's official decisions, pending cases, and the laws that we implement. OPAGAC does not provide opinions about how the STB Members will

vote on a particular case, or when a case will be decided. OPAGAC houses the STB's Rail Customer and Public Assistance Program. Initiated in 2000, the Program provides an informal venue for the private-sector resolution of shipper-railroad disputes, and also assists Board stakeholders seeking guidance in complying with Board decisions and regulations. At no cost to parties, the Program facilitates communication among the various segments of the rail-transportation industry, and encourages solutions to railroad operational and service issues without the use of litigation or the Board's formal processes.

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35157

THE CITY OF ALEXANDRIA, VIRGINIA—PETITION FOR DECLARATORY ORDER

Decided: February 17, 2009

In this decision, the Board determines that the operation of an ethanol transloading facility owned by Norfolk Southern Railway Company (NS) within the City of Alexandria, VA (Alexandria or the City), constitutes transportation by rail carrier and, therefore, is shielded from most state and local laws, including zoning laws, by the preemption provision in 49 U.S.C. 10501(b).

BACKGROUND

NS has begun operation of an ethanol transloading facility (the Facility) within the City pursuant to an operating agreement with RSI Leasing, LLC (RSI). On June 17, 2008, Alexandria filed a petition for declaratory order (Petition) seeking a Board determination that the City's zoning and other regulatory authorities are not preempted by 49 U.S.C. 10501(b) because the Facility is operated independently by RSI and does not constitute "transportation by rail carrier." On July 2, 2008, NS replied to the City's petition (NS July Reply), maintaining that the transloading operations at the Facility are part of "transportation by rail carrier."

On November 6, 2008, the Board issued a decision instituting this proceeding (November Decision). The Board stated that NS and Alexandria had not provided enough information about the relationship between NS and RSI and their responsibilities to each other and the transloading operations at the Facility for the Board to render an opinion. Therefore, the Board directed NS to submit specific additional information for the record. The City was provided the opportunity to file a reply. The parties made the requested filings.¹ We now have an adequate record upon which to rule.

¹ NS submitted its response to the November Decision on November 26, 2008 (NS November Response), and provided the original signatures for the verified statements and affidavits included in its response on December 1, 2008. The City filed a reply (City Reply) on December 8, 2008, along with a motion for protective order, which was granted in a decision in this proceeding served on December 29, 2008. On December 9, 2008, NS filed a petition for leave to file a reply and a limited reply to the City Reply (NS December Reply). The City consented to NS's filing a reply as part of an agreement on the use of documents obtained through discovery in federal court litigation between the parties. In the interest of compiling a full record, NS's unopposed petition for leave to file a reply to a reply will be granted.

DISCUSSION

At issue in this proceeding is whether the Board has jurisdiction over the transloading operations at the Facility, thus preempting local zoning and regulatory authority.² The Board has jurisdiction over “transportation by rail carrier” under 49 U.S.C. 10501. Accordingly, to qualify for federal preemption under section 10501(b), the activities at issue must constitute “transportation,”³ and must be performed by, or under the auspices of, a “rail carrier.”⁴ Alexandria asserts that the facts here are similar to those in other cases where the Board has found that the relationship between the rail carrier and a third-party service provider was not sufficient to establish that the activities of the third party were part of transportation by rail carrier.⁵ Alexandria also argues that the Facility does not qualify for preemption as a matter of law under regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA) at 49 CFR 174.304. We are not persuaded by these arguments for the reasons explained below.

Whether a particular activity is considered part of transportation by rail carrier under section 10501 is a case-by-case, fact-specific determination. In determining whether transloading activities come within the Board’s jurisdiction where a third party performs the physical transloading (transferring material to or from rail at a transloading facility), the Board has looked at such factors as: whether the rail carrier holds out transloading as part of its service; whether the railroad is contractually liable for damage to the shipment during loading or unloading; whether the rail carrier owns the transloading facility; whether the third party is

² The federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), shields railroad operations that are subject to the Board’s jurisdiction from the application of many state and local laws, including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation. See, e.g., Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) (Green Mountain); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—in Wilmington and Woburn, MA, STB Finance Docket No. 34797, slip op. at 7-9 (STB served July 10, 2007) for a discussion of the scope of Federal preemption under section 10501(b).

³ The term “transportation” is defined expansively in the statute to include “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,” and “services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property.” 49 U.S.C. 10102(9).

⁴ See 49 U.S.C. 10501; Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003) (Hi Tech). A rail carrier is a “person providing common carrier railroad transportation for compensation . . .” 49 U.S.C. 10102(5).

⁵ Petition at 6-8. The cases cited by the City are discussed infra.

compensated by the carrier or the shipper; the degree of control retained by the carrier over the third party; and the other terms of the contract between the carrier and the third party. Compare Green Mountain, 404 F.3d at 640 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier found to be part of rail transportation) with Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057 (STB served Feb. 1, 2008 and Sept. 26, 2008) (Babylon) (Board jurisdiction found not to extend to tenant of rail carrier where tenant, not rail carrier itself, had exclusive right to conduct transloading operation for construction and demolition debris and had exclusive responsibility to construct and maintain facilities and to market and bill the public for services); Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (Milford) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the carrier but the transloading services were not being offered as part of common carrier services offered to the public); and Hi Tech (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail).

We have carefully examined the record in this case, including the affidavits and documents included in the parties' submissions in response to the November Decision, and we conclude in this case that the Facility is part of NS's rail operations and that RSI is not conducting an independent business. Therefore, the Facility qualifies for federal preemption under section 10501(b).

A. The Relationship Between NS and RSI

Alexandria argues that the facts here are "directly analogous" to the facts in Hi-Tech, Milford and Babylon, where the Board found that transloading facilities were not part of transportation by rail carrier.⁶ We disagree. Unlike those cases, the facts here demonstrate that the transloading services at issue are operated under the auspices of NS and are part of NS's rail transportation service.

To begin with, NS owns the Facility and constructed it with NS's own funds.⁷ By contrast, in Hi-Tech, Milford and Babylon, the third-party contractors constructed or planned to construct the transloading facilities themselves.

Second, the NS-RSI operating agreement does not have any of the characteristics of a lease or license that would be consistent with RSI's conducting an independent business. NS

⁶ Petition at 8.

⁷ Alexandria makes much of the fact that NS consulted with RSI during the construction of the Facility. City Reply at 5-6. However, the fact that NS sought RSI's advice on the design and construction of the Facility does not show that transloading is not part of the service that NS provides to shippers. It is appropriate that RSI, as a company with expertise in ethanol transloading that would perform the physical transloading on behalf of NS, would have input in the design and construction of the Facility.

pays RSI a fee for RSI's services; RSI does not pay any fees for use of the Facility.⁸ In contrast, in Hi-Tech, Milford and Babylon, the transloaders paid rent or fees to the rail carriers for the use of the yard. Moreover, the term of the NS-RSI operating agreement is 2 years, and NS has the right to cancel for any reason on 60 days' notice. In contrast in Hi-Tech, Milford and Babylon, the transloaders had, or contemplated having, leases or licensing agreements that were long-term agreements.

Third, NS holds itself out as offering transloading service at the Alexandria terminal as part of its common carrier service, and transloading is bundled with the transportation services that NS provides to ethanol shippers.⁹ Furthermore, none of the ethanol shippers who are using the Facility are affiliated with RSI.¹⁰ There is no evidence that RSI holds itself out as providing transloading service at the Facility or that RSI has any contractual relationships relating to the Facility with any of the ethanol shippers. Indeed, a provision in the NS-RSI operating agreement specifically provides that RSI does not have the right to market the Facility.¹¹ By contrast, in Hi-Tech, Milford and Babylon, the third-party transloaders held themselves out as providing transloading service and had separate contractual relationships with customers for transloading and other arrangements.

Other evidence supports the conclusion that RSI does not have the rights associated with an independent transloading-related business. For example, the record here shows that RSI does not set, invoice for, or collect transloading fees charged to the shipper; NS retained these rights.¹² RSI receives a flat rate for each gallon of ethanol it transloads, regardless of the fee NS charges the shipper.¹³ RSI neither does, nor has the right to, market the Facility.¹⁴ RSI is not involved in the delivery of ethanol to the tank cars at the point of origin or the delivery of ethanol from the Facility to its final destination.¹⁵

By contrast, in Hi-Tech, Milford and Babylon, the third-party contractors had significant rights to provide transloading service as an independent business. In Hi-Tech, the third-party transloader contracted directly with shippers for the transportation of construction and demolition debris from the shippers' construction sites to the transloading facility and hired the trucks for the hauls. Hi-Tech, slip op. at 2. The third-party contractor set its own rates for the service. There was no evidence that the rail carrier quoted rates or otherwise charged shippers for use of the third-party transloader's facility. Id., slip op. at 7. Similarly, in Milford, the

⁸ NS November Response at 8.

⁹ Id. at 9.

¹⁰ Id. at 4.

¹¹ Id. at 6.

¹² Id. at 5.

¹³ NS December Reply at 3.

¹⁴ NS November Response at 6.

¹⁵ Id. at 9.

third-party was conducting a transloading and steel fabrication business—including delivery of the material to customers' sites by truck—which it offered directly to customers on its own terms. Milford, slip op. at 3. There was no evidence that the rail carrier intended to hold out transloading as part of its services or that the rail carrier was in any way involved in the business of transloading. Id. Likewise, in Babylon, the third-party transloader was entitled to charge a separate fee for transloading services, conducted all customer negotiations concerning transloading, and billed and collected the transloading fee from customers separately from the transportation charges. The third-party transloader also had the right to enter into separate agreements with customers in its own name for disposition of commodities after rail transportation. Babylon, slip op. at 5.

Moreover, the record here shows that the areas where RSI plays a role in the operations of the Facility are directly related to the physical act of ethanol transloading. RSI coordinates with trucking companies regarding transloading schedules once RSI is aware of incoming shipments, and it directs NS when to move tank cars at the Facility to and from the transloading track.¹⁶ All of RSI's activities here are consistent with RSI's providing a contract service that is part of NS's rail transportation business, which includes transloading in this case. Alexandria has failed to show that the services RSI provides to NS here related to transloading differ from any other type of contract services that a rail carrier might utilize to conduct its business.

Alexandria errs in suggesting that NS should not be able to qualify for federal preemption for the Facility by structuring its relationship with RSI in the way it has here because NS and RSI allegedly have a different relationship at other transloading facilities on NS's lines. Parties are free to enter into whatever arrangements will suit their needs at a particular facility. The record here shows that the transloading service in Alexandria is conducted as part of NS's business as a rail carrier. Therefore, the transloading activities at the Facility are part of rail transportation by rail carrier and come within the Board's jurisdiction.

Federal preemption can apply to a service that is provided to a rail carrier through an agent or a contractor. As noted earlier, the service need only be provided under the auspices of the rail carrier as part of rail transportation. Ethanol shipped by rail necessitates transloading operations like those performed at the Facility. RSI's role is sufficiently limited to the transloading activities at the Facility and its activities are sufficiently under the control of NS to make its activities part of NS's rail transportation. Therefore, the activities qualify for federal preemption under 49 U.S.C. 10501(b).

B. Effect of PHMSA Regulations

As noted in the November Decision, slip op. at 3, the City argues that the ethanol operations at the Facility come under PHMSA regulations at 49 CFR 174.304.¹⁷ Alexandria

¹⁶ City Reply at 6; NS November Response at 9.

¹⁷ 49 CFR 174.304 states that “[a] tank car containing a Class 3 (flammable liquid) material, other than liquid road asphalt or tar, may not be transported by rail unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is

(continued . . .)

states that those regulations cannot be satisfied unless the ethanol tank cars are unloaded by a private operator, not by the railroad, and that, therefore, the Facility does not fall under the Board's jurisdiction. NS responds that the PHMSA regulations do not apply to the transloading activities that go on at the Facility.

Because the Board has no jurisdiction over PHMSA regulations at issue, we suggested in the November Decision that Alexandria might consider seeking a ruling from PHMSA or the United States Department of Transportation as to whether 49 CFR 174.304 prohibits a railroad from operating a facility for the transloading of ethanol. See November Decision, slip op. at 4-5. The Board provided the City with the opportunity to submit copies of any such rulings so that, if appropriate, we could take them into consideration in reaching our decision on the merits in this proceeding.

On November 12, 2008, NS submitted a letter from the Acting Chief, Standards Development in PHMSA's Office of Hazardous Materials Standards, regarding the application of 49 CFR 174.304. The letter states that section 174.304 is intended to apply to unloading operations at a facility that is the final destination for the material, and does not apply at a transloading facility on the property of a rail carrier where, as here, the material is transferred to other packaging (such as a tank truck) for further transportation to its final destination. The Board will consider this letter as determinative of the issue whether 49 CFR 174.304 applies to the Facility at issue here.

We have found in this decision that the Board has jurisdiction over the operations at the Facility, and, thus, that federal preemption applies to those activities. Consequently, local zoning and other requirements that could interfere with or prevent the transloading activities are preempted. We note, however, that, notwithstanding the finding that federal preemption applies here, historic police powers are retained and state and local government entities can take appropriate action to protect public health and safety so long as their actions do not serve to regulate railroad operations or unreasonably interfere with interstate commerce.

In addition, we encourage rail carriers to contact local officials to inform them of planned transloading activities prior to commencing operations and to update them regarding changes in existing transloading operations, as communications can improve any needed coordination of activities to promote safety and address potential emergency service response concerns in and around a railroad facility. The evidence here reflects that NS did communicate with a number of

(. . . continued)

to be delivered and unloaded (see §171.8 of this subchapter) or to a party using railroad siding facilities which are equipped for piping the liquid from the tank car to permanent storage tanks of sufficient capacity to receive the entire contents of the car." 49 CFR 171.8 defines 'private track' as "(i) Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way, or (ii) Track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee . . . where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage."

City officials during this process. We emphasize that a railroad's sharing information with officials of affected local communities before beginning operations would make those officials aware of the activities to be conducted and enable them to take steps to be prepared to respond if a problem should arise.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The City's petition for a declaratory order is granted as discussed in this decision.
2. NS's petition for leave to file a reply to a reply is granted.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey commented with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

I comment separately to note that the Board typically harmonizes its interpretation and implementation of the Interstate Commerce Act with other federal laws,¹⁸ such as relevant PHMSA regulations. Existing PHMSA regulations apparently do not apply to the circumstances of this proceeding. I urge PHMSA to consider whether it would be advisable to revise 49 CFR 174.304 to apply to rail transloading facilities under the circumstances present in this proceeding -- to the extent it has the authority to do so. If PHMSA does not currently have the authority to revise this regulation, it should consider seeking the authority to do so to close any regulatory gap.

¹⁸ Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001); Friends of the Aquifer, STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).

† KeyCite Yellow Flag - Negative Treatment
Distinguished by Texas Cent. Business Lines Corp. v. City of Midlothian, 5th Cir.(Tex.), February 1, 2012
266 F.3d 1324
United States Court of Appeals,
Eleventh Circuit.

FLORIDA EAST COAST RAILWAY COMPANY, a
Florida corporation, Plaintiff-Counter-
Defendant-Appellant,
v.
CITY OF WEST PALM BEACH, a Florida
municipal corporation, Defendant-Intervenor-
Defendant-Counter-Claimant-Third-Party-
Plaintiff-Appellee.

No. 00-14434.
|
Sept. 27, 2001.

Railway company brought action against city, seeking declaratory judgment that city's application of its zoning and licensing ordinances to activities of railroad's lessee taking place on railway's property were preempted by Interstate Commerce Commission Termination Act (ICCTA). City counterclaimed. The United States District Court for the Southern District of Florida, No. 00-08198-CV-DMM, Donald M. Middlebrooks, J., 110 F.Supp.2d 1367, held that ICCTA did not preempt city's application of its zoning and licensing ordinances to lessee's operations on railway property. Railway appealed. The Court of Appeals, Restani, Judge, held that city's application of ordinances was not "regulation of rail transportation" preempted by ICCTA.

Affirmed.

West Headnotes (17)

^[1] Federal Courts
⇨ Commerce

Court of appeals reviews de novo the district court's legal conclusion as to the pre-emptive scope of the Interstate Commerce Commission Termination Act (ICCTA). 49 U.S.C.A. § 701 et seq.

Cases that cite this headnote

^[2] Federal Courts
⇨ "Clearly erroneous" standard of review in general

The district court's factual findings will be set aside on appeal only if clearly erroneous.

Cases that cite this headnote

^[3] States
⇨ Preemption in general

Consideration of preemption under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. U.S.C.A. Const. Art. 6, cl. 2.

Cases that cite this headnote

^[4] States
⇨ Preemption in general

An assumption of nonpre-emption is not triggered when the state regulates in an area where there has been a history of significant federal presence. U.S.C.A. Const. Art. 6, cl. 2.

Cases that cite this headnote

^[5] States
⇨ State police power

Where a state acts in a field which the states have traditionally occupied, courts retain the assumption that the historic police powers of the states were not to be superseded by federal act unless that was the clear and manifest purpose

of Congress. U.S.C.A. Const. Art. 6, cl. 2.

1 Cases that cite this headnote

[6] States
⊖Congressional intent

Principles of federalism dictate that in the absence of clarity of intent, Congress cannot be deemed to have significantly changed the federal-state balance.

Cases that cite this headnote

[7] States
⊖State police power

Reliance on the presumption against pre-emption limits congressional intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

Cases that cite this headnote

[8] States
⊖Congressional intent

If a federal statute's terms can be read sensibly not to have a pre-emptive effect, the presumption against pre-emption controls, and no pre-emption may be inferred. U.S.C.A. Const. Art. 6, cl. 2.

2 Cases that cite this headnote

[9] Licenses
⊖Municipal corporations
Municipal Corporations
⊖Political Status and Relations

Zoning and Planning
⊖Other particular cases

City's zoning and occupational license ordinances, which city applied to lessee of railway property who was operating aggregate distribution center, were entitled to assumption of no preemption under the Supremacy Clause, in railway's action seeking declaratory judgment that such ordinances were preempted by the Interstate Commerce Commission Termination Act (ICCTA); ordinances were an exercise of local police power. U.S.C.A. Const. Art. 6, cl. 2; 49 U.S.C.A. § 701 et seq.

4 Cases that cite this headnote

[10] Zoning and Planning
⊖Public health, safety, morals, or general welfare

Municipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community.

Cases that cite this headnote

[11] States
⊖Congressional intent

The purpose of Congress is the ultimate touchstone in every pre-emption case.

1 Cases that cite this headnote

[12] States
⊖Congressional intent

Where Congress has included a specific provision in a statute governing the pre-emptive effect of the legislation, court must identify the domain expressly pre-empted; in doing so, court begins with the language employed by Congress and the assumption that the ordinary meaning of

that language accurately expresses the legislative purpose.

14 Cases that cite this headnote

Cases that cite this headnote

[13] **States**
⊖Congressional intent

When identifying the domain expressly preempted in a federal statute, the court examines the structure and purpose of the statute as a whole as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

[16] **Statutes**
⊖Language

Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Cases that cite this headnote

Cases that cite this headnote

[14] **States**
⊖Congressional intent

Enactment by Congress of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

[17] **Zoning and Planning**
⊖Other particular cases

Lessee's operation of aggregate distribution center on property which railway leased to it did not amount to "rail transportation" under the Interstate Commerce Commission Termination Act (ICCTA), but rather, "services" related to movement of property by rail, and therefore, court could consider ownership or control of property in determining whether city zoning ordinances which city applied to distribution center were preempted by ICCTA; lessee unloaded railway's cars at leased property, and then reloaded onto trucks owned or hired by lessee. 49 U.S.C.A. §§ 10102(9)(A, B), 10501(b).

Cases that cite this headnote

18 Cases that cite this headnote

[15] **Licenses**
⊖Municipal corporations
Municipal Corporations
⊖Political Status and Relations
Zoning and Planning
⊖Other particular cases

City's application of zoning and occupational license ordinances against lessee of railway property who was operating an aggregate distribution center was not "regulation of rail transportation" preempted by Interstate Commerce Commission Termination Act (ICCTA). 49 U.S.C.A. § 10501(b).

Attorneys and Law Firms

*1326 Stuart H. Singer, Kirkpatrick & Lockhart, Hollywood, FL, for Florida East Coast Ry. Co.

Claudia M. McKenna, West Palm Beach City Attorney's Office, Mayra Isabel Rivera-Delgado, Asst. City Atty., West Palm Beach, FL, for City of West Palm Beach.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT and WILSON, Circuit Judges, and RESTANI, Judge.

Opinion

RESTANI, Judge:

Appellant Florida East Coast Railway Company (“FEC”) seeks reversal of the district court’s final judgment denying declaratory and injunctive relief against appellee City of West Palm Beach (“West Palm Beach” or “the City”). FEC sought a determination from the district court that the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 701 *et seq.* (1994 and Supp.1998), pre-empts the City’s application of zoning and occupational license ordinances against the operations of Rinker Materials Corporation (“Rinker”) on property leased from FEC. We hold that the application of the ordinances does not constitute “regulation of rail transportation,” 49 U.S.C. § 10501(b), and therefore, is not pre-empted by the ICCTA.

Jurisdiction

The district court had federal question jurisdiction over the complaint seeking declaratory relief pursuant to 28 U.S.C. § 2201(a) and 28 U.S.C. §§ 1331, 1337. Appellate jurisdiction is under 28 U.S.C. § 1291.

Facts

FEC owns 24.5 acres of property on 15th Street (“15th Street yard”) in West Palm Beach, in an area otherwise zoned by the City as a multi-family high density residential district. Situated on this property are an office building, warehouses, five switching tracks, and two loading/unloading tracks. Although FEC had used the 15th Street yard for various intermodal operations for several years, the company ceased those operations in 1999 because of “diminishing business activity and cost of systems enhancements ... along with marginal revenue per unit.”

At the time FEC altered the nature of operations at the 15th Street yard, Rinker was FEC’s largest customer. Rinker is in the business of supplying building material including “aggregate,” the primary feedstock for cement. Rinker’s aggregate originates in quarries in Miami-Dade County. For years Rinker had engaged FEC to transport

the aggregate by rail to Rinker plants throughout Florida, including one on 7th Street in West Palm Beach.

In March of 1999, FEC and Rinker began discussing the possibility of a like-kind property exchange, whereby FEC would exchange its 15th Street yard for Rinker’s 7th Street plant. Rinker recognized, however, that the 15th Street yard was not properly zoned for its proposed aggregate distribution business. Michael Bagley, head of real estate at FEC, suggested that “[p]rior to approaching the City, it [may be] wise to get Rinker established on a small scale, under lease arrangement to set precedent for continued use and expansion as an aggregate terminal.” FEC and Rinker therefore negotiated a lease agreement and a trackage agreement whereby *1327 FEC would lease to Rinker twenty-one acres of the 15th Street yard (including the office building) and a side track. Additionally, FEC would no longer transport aggregate for Rinker to Rinker’s plants throughout Florida; instead, FEC’s rail services for Rinker would be limited to the transportation of the aggregate from the Miami-Dade quarries to the 15th Street yard. Operations under the new agreement commenced in January of 2000.

Once the aggregate entered the leased portion of the 15th Street yard, FEC’s involvement ended. On the property leased from FEC, Rinker situated its aggregate distribution business, as evidenced by signs initially posted in the 15th Street yard that read “CSR Rinker—West Palm Beach—Aggregate Distribution.” Sometime between February 14, 2000 and March 8, 2000, the signs were replaced with ones reading “FEC Distribution Terminal.” Rinker hired a company to undertake the unloading of the aggregate but provided certain necessary equipment for the aggregate distribution, including a \$79,300 truck-weighing scale and a \$7000 loader bucket scale, or “backhoe.” Then, Rinker employees loaded trucks, which were owned or hired by Rinker, and dispatched them to other Rinker plants or to external customers. Rinker employees coordinated the distribution network from the office building leased from FEC, including receiving requests for aggregate from Rinker plants and communicating with the aggregate truck drivers. Finally, Rinker was responsible for payment of its expenses on electricity, water, landscape maintenance, and telephone service.

On February 17, 2000, West Palm Beach issued Cease and Desist Orders to FEC and Rinker for operating a business that did not conform to the City’s pre-existing zoning ordinance. FEC and Rinker also received notice of violations of Section 18-7 of the City Ordinances for unlawfully operating a business without an occupational license. After a hearing in March of 2000, a special

magistrate found **FEC** and Rinker in violation of the zoning and occupational license ordinances, and therefore ordered both companies to cease and desist or face fines of \$1000 per day. **FEC** then filed its complaint seeking a declaratory judgment that **West Palm Beach's** actions were pre-empted by the ICCTA, and therefore, the **City** could not impose its zoning and occupational license requirements on Rinker's operations. **West Palm Beach** filed a counterclaim against **FEC** and a third-party claim against Rinker, seeking a declaratory judgment that the application of its local regulations was not pre-empted by federal law.

Discussion

¹¹ ¹² We review *de novo* the district court's legal conclusion as to the pre-emptive scope of the ICCTA; factual findings will be set aside only if clearly erroneous. See *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir.1998).

Presumption Against Pre-emption

¹³ ¹⁴ ¹⁵ ¹⁶ ¹⁷ ¹⁸ "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)). We recognize that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (state regulation of maritime commerce *1328 and employment). See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (same). Where the State acts "in a field which the States have traditionally occupied," however, we retain the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Principles of federalism, including the recognition that "the States are independent sovereigns in our federal system," *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240, dictate that in the absence of such

clarity of intent, Congress cannot "be deemed to have significantly changed the federal-state balance." *Jones v. United States*, 529 U.S. 848, 860, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (Stevens, J., concurring) (quoting *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)). Reliance on the presumption against pre-emption limits "congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).¹ Thus, "[i]f the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 116-17, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Souter, J., dissenting).

¹⁹ ¹⁰ The ordinances at issue in this case are entitled to this presumption of validity under the Supremacy Clause. Although the federal government through the ICCTA has legislated in "an area where there has been a history of significant federal presence," *1329 *Locke*, 529 U.S. at 108, 120 S.Ct. 1135, **West Palm Beach** is not legislating in that field of historic federal dominance. Rather, in contrast to the situation highlighted by the Court in *Locke*, **West Palm Beach** is acting under the traditionally local police power of zoning and health and safety regulation. The Supreme Court has long recognized the authority of local governments to establish guidelines for the use of property through such zoning ordinances. See generally *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). As we reiterated more recently, "[m]unicipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community." *Ga. Manufactured Hous. Ass'n*, 148 F.3d at 1309 (quoting *Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1525 (11th Cir.1988)). Because the alleged encroachment upon federal jurisdiction here does not occur by the municipality's legislating in a field of historic federal presence, but through the exercise of its inherently local powers, "[t]he principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption," *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 533, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (Blackmun, J., concurring), place a "considerable burden" on appellant. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997).

Nonpre-emption of West Palm Beach Ordinances

¹¹¹ ¹¹² ¹¹³ ¹¹⁴ When evaluating the pre-emptive scope of a federal statute, we recall that “[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case.” *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)). Where, as here, Congress has included a specific provision governing the pre-emptive effect of the legislation, we must “identify the domain expressly pre-empted.” *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608. In doing so, we “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Id.* at 532, 112 S.Ct. 2608 (Blackmun, J., concurring in part and dissenting in part) (citations and internal quotation marks omitted). We also examine the “structure and purpose of the statute as a whole’ ... as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.” *Medtronic*, 518 U.S. at 486, 116 S.Ct. 2240 (quoting *Gade*, 505 U.S. at 98, 112 S.Ct. 2374). In light of these general principles, the text, history, and purpose of the statute reveal that, because **West Palm Beach’s** application of its ordinances does not constitute “regulation of rail transportation,” 49 U.S.C. § 10501(b), the ICCTA does not pre-empt the **City’s** actions.³

*1330 Express Limitations of ICCTA Pre-emption

¹¹⁵ The key provision of the ICCTA, as it relates to this case, is as follows:

(b) 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.

49 U.S.C. § 10501(b). Although this subsection on its surface seems to provide for broad pre-emption, the text contains limitations on the reach of pre-emption vis-à-vis local legislation such as **West Palm Beach’s** zoning and occupational license ordinances.

¹¹⁶ First, the “State law” which is to be pre-empted is not defined. When Congress has sought to “underscore its intent that [the pre-emption provision] be expansively applied, [it has] used ... broad language in defining the ‘State law’ that would be pre-empted,” for example, by stating that such law included all “‘State action having the effect of law.’” *Ingersoll–Rand Co. v. McClendon*, 498 U.S. at 133, 138–39, 111 S.Ct. 478 (1990) (quoting ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1)). Second, the above-quoted provision limits pre-emption to “State law.”⁴ 49 U.S.C. § 10501(b) (emphasis added). In the context of railroad regulation, Congress has specifically identified when municipal law should be superseded by federal statute. *See, e.g.*, 49 U.S.C. § 11321(a) (“A rail carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including *State and municipal law*...”). *See also Norfolk & Western Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 128–29, 111 S.Ct. 1156, 113 L.Ed.2d 95 (1991) (discussing far-reaching coverage of § 11321(a), formerly § 11341(a), based on “clear, broad, and unqualified” language employed). By circumscribing the pre-emptive effect of the ICCTA to certain federal and *state* laws, Congress did not clearly include municipal laws such as **West Palm Beach’s** zoning ordinances within the plain reach of federal pre-emption. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (citations omitted). *See also Gutierrez v. Ada*, 528 U.S. 250, 255–56, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000) (unanimous *1331 opinion). Nevertheless, some municipal laws that would have the effect of burdensome state law may be pre-empted under the ICCTA, but because municipal law is not expressly pre-empted, its effects must be closely examined.

The ICCTA pre-emption provision does not preclude the application of “all other law.” *Cf.* 49 U.S.C. § 11341(a) (with regard to mergers and acquisitions, railroad companies exempt from “antitrust laws and from all other law, including State and municipal law”). Rather, express pre-emption applies only to state laws “with respect to *regulation* of rail transportation.” 49 U.S.C. § 10501(b) (emphasis added). This necessarily means something

qualitatively different from laws “with respect to rail transportation.” See *Bennett v. Spear*, 520 U.S. 154, 173, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (relying on “‘cardinal principle of statutory construction’ [that courts must] ‘give effect, if possible, to every clause and word of a statute.’”) (citations omitted). In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only “regulation,” i.e., those state laws that may reasonably be said to have the effect of “manag[ing]” or “govern[ing]” rail transportation, Black’s Law Dictionary 1286 (6th ed.1990), while permitting the continued application of laws having a more remote or incidental effect on rail transportation. See *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. N.A.*, 519 U.S. 316, 334, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) (“The prevailing wage statute alters the incentives, but does not dictate the choices, facing ERISA plans. In this regard, it is ‘no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.’”) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)). See also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S.Ct. 2404, 2417, 150 L.Ed.2d 532 (2001) (majority opinion) (finding express pre-emption where “there is no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising”); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) (“We have held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor.”) (emphasis in original).

In light of the above understanding of the statutory pre-emption provision in the ICCTA, existing zoning ordinances of general applicability, which are enforced against a private entity leasing property from a railroad for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws “with respect to regulation of rail transportation.” Cf. *Lorillard*, 533 U.S. at —, 121 S.Ct. at 2419 (majority opinion) (“There is a critical distinction, however, between generally applicable zoning regulations ... and regulations targeting cigarette advertising.”). See also *id.* at 2420. Both parties agree that the City does not impose its generally applicable zoning ordinances against FEC, thereby preventing FEC from operating in the otherwise residential neighborhood.³ *1332 Cf. *City of Auburn v. United States*, 154 F.3d 1025, 1029–31 (9th Cir.1998) (finding local environmental regulation applied against railroad to be pre-empted by ICCTA), cert. denied, 527 U.S. 1022, 119 S.Ct. 2367, 144 L.Ed.2d 771

(1999); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1098–1101 (D.Minn.1998) (finding city’s process of requiring railroad to obtain demolition permits pre-empted by ICCTA). We are not called upon to decide whether federal law would constrain the City’s exercise of its police power to limit FEC’s operations should it engage in an aggregate distribution business in exactly the same manner as Rinker. It is clear, however, that in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the railroad. The language of the ICCTA pre-emption provision in no way suggests that local regulation was to be so thoroughly disabled.

Definition of “Transportation”

¹⁷¹ Because the ICCTA defines “transportation” to include “facilit [ies] ... related to the movement of ... property ... by rail, regardless of ownership or an agreement concerning use,” 49 U.S.C. § 10102(9)(A) (1994 & Supp.1998),⁶ FEC urges that whether the activities that take place at the 15th Street yard are performed by FEC or some other entity should have no bearing on our pre-emption analysis. As a preliminary matter, we note that the statute ignores “ownership or agreement concerning use” solely with respect to any “facility, instrumentality, or equipment of any kind related to the movement of ... property.” *Id.* In contrast, the statute imposes no such limitation on “services related to [the movement of property].” § 10102(9)(B) (emphasis added). Therefore, to the extent that the language relied upon by FEC prevents us from interpreting the scope of the pre-emption provision based on whether FEC or Rinker controls the property at the 15th Street yard, the statutory definition of “transportation” does not prohibit our relying upon such a distinction when evaluating the “services” performed at the property.

Our review of the record indicates that we are, indeed, evaluating “services” performed at the property. When the aggregate reached the 15th Street yard, it was unloaded, stockpiled on the ground, organized by type and grade, and reloaded onto trucks owned or hired by Rinker. Rinker employees then weighed and dispatched the trucks to various destinations. These activities fall under the “services” provision of the statutory definition of *1333 “transportation,” as Rinker’s activities involved the “receipt, ... storage, handling, and interchange of ... property....” 49 U.S.C. § 10102(9). Thus, the statutory language indicates that ownership or control of the property is a factor that we may consider in determining

whether Rinker's activities are "rail transportation," and in ultimately deciding whether federal law pre-empts the City's zoning regulations in this case.

In addition to the statutory language, an analysis of the phrase "regardless of ownership or an agreement concerning use" in its historical context also supports the conclusion that the provision cannot bear the broad interpretation urged by *FEC*. The phrase originated in language found in the Hepburn Act of 1906, which amended significantly the Interstate Commerce Act of 1887 ("ICA"). The Hepburn Act amended the definition of transportation to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof*" Ch. 3591, § 1, 34 Stat. 584 (1906) (emphasis added). This language was not amended until 1978, when Congress reworded the definition to include such facilities related to the movement of property, "regardless of ownership or an agreement concerning use." Ch. 101, 92 Stat. 1337, 1339 (1978). As the 1978 legislative history indicates, however, these changes were adopted for "clarity and consistency," H.R. Rep. 95-1395, at 21, *reprinted in* 1978 U.S.C.A.N. 3009, 3030, and therefore, did not alter the meaning of the original phrase. Congress again ratified this understanding when adopting the same definition of transportation in the ICCTA. *See* ICCTA, Pub.L. No. 104-88, 109 Stat. 803, 806 (1995). We thus consider the language and history of the provision adopted by Congress in the 1906 Hepburn Act to ascertain Congressional intent behind the scope of the phrase "regardless of ownership or agreement concerning use." *See Lorillard*, 533 U.S. at —, 121 S.Ct. at 2415 (majority opinion) ("We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted.").

The "evil of discrimination was the principal thing aimed at" in the passage of the Interstate Commerce Act. *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 749, 51 S.Ct. 297, 75 L.Ed. 672 (1931) (citations omitted). *See also* *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U.S. 278, 284-85, 35 S.Ct. 351, 59 L.Ed. 576 (1915); *ICC v. Baltimore & O.R. Co.*, 145 U.S. 263, 275-77, 12 S.Ct. 844, 36 L.Ed. 699 (1892). In particular, Congress sought to eliminate the preferential rates given by railroad companies to certain shippers by declaring such discrimination unlawful and requiring railroads to publish their tariffs. ICA, Ch. 104, §§ 2 & 6, 24 Stat. 379, 379-82 (1887). The publication of tariffs prohibited railroads from the blatantly discriminatory practice of charging different rates to two similarly situated shippers through

"secret agreements" favoring certain customers. Clyde B. Atchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 Geo. Wash. L.Rev. 289, 313-14 (1937). In 1903, the Elkins Act provided the ICC with enhanced powers to promote compliance with the Interstate Commerce Act's anti-discrimination provisions and to impose greater penalties for behaviors facilitating the unequal treatment of shippers. *See* Elkins Act, Ch. 708, §§ 1-3, 32 Stat. 847, 847-49. *See also* Atchison, *supra*, at 324-25 & n. 95.

Notwithstanding these initial attempts to ensure equal access to railroad facilities for all shippers, discrimination persisted in the railroad industry primarily because of a continuing lack of transparency in *1334 rate formulation. On the one hand, a private car company⁷ could charge a shipper unlimited rates for the use of a private vehicle (such as a refrigeration car), and the shipper would have no recourse against such unregulated and unpredictable charges, as the private car line was not operated by the railroad and thereby not subject to provisions of the Interstate Commerce Act. On the other hand, in lieu of their earlier facially-discriminatory pricing policies, certain railroad companies began offering "discounts" on tariffs in exchange for the use of private cars, individual railroad switches, and other rail equipment owned by economically powerful shippers or private car companies. Such discounts were in excess of the true market value of the equipment temporarily used by the railroad. By thus "leasing" their equipment to the railroads or smaller shippers at inordinate rates that were not subject to public notice, these groups often received transportation services at prices below the levels of the published tariffs. Such favoritism resurrected the discriminatory treatment of smaller shippers. *See generally* 2 I.L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* 120-23 (1931); 1 *The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies* 721-27 (Bernard Schwartz, ed. 1973) [hereinafter *Economic Regulation*] (statement of Rep. Esch). The situation regarding this discrimination was summed up thus by one contemporaneous commentator: "The shippers were beyond the Commission's control; the private-car lines, as such, were not embraced within the Commission's jurisdiction; and there was serious question as to whether the special services rendered in connection with the use of private cars were subject to its regulation." Sharfman, *supra*, at 122.

Legislators referred to these continuing evils of discrimination throughout the hearings and debates as the basis for expanding the definition of "transportation." *See, e.g.*, 2 *Economic Regulation*, at 897 (statement of Rep. La

Follette); 40 Cong. Rec. 8343 (1906) (statement of Rep. Townsend); 40 Cong. Rec. 6438–40 (1906) (statements of Sens. Tillman and Lodge); 40 Cong. Rec. 6374–77 (1906) (statements of Sens. Dolliver, McCumber and Kittredge). That such a view was commonly held among Members of Congress is evidenced by its explication in the committee reports of each chamber. See 2 Economic Regulation, at 820, 822 (Report of Sen. Tillman)*; 1 Economic Regulation, at 618, 619–20 (House Report).

*1335 The Interstate Commerce Commission (ICC), as the agency responsible for oversight of the railroad industry pursuant to the Interstate Commerce Act, was well aware of the discrimination perpetrated by backdoor dealings between railroad companies and large shippers or private car lines. See Sharfman, *supra*, at 122–23 (citing ICC Annual reports of 1889, 1893, 1903, and 1904). When proposing to Congress the legislation that would become the Hepburn Act, and particularly the expanded statutory definition of “transportation,” the Interstate Commerce Commission noted the following:

It will be seen that the changes proposed in the first section [of the Interstate Commerce Act] are designated (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation, or respecting which there is dispute as to the power of the Commission.... The second purpose is sought to be accomplished by enlarging the definition of the term “transportation,” so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority.... [W]e do recommend that these [private car] charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the transportation charge, and be subject to the same supervision and control.... In brief, the proposed measure amends certain sections of the act to regulate commerce and is confined to such recommendations as are deemed necessary to effect

its intended purpose, and thereby furnish adequate protection against excessive and discriminating charges.

United States v. Pa. R.R. Co., 242 U.S. 208, 223–25, 37 S.Ct. 95, 61 L.Ed. 251 (1916) (quoting ICC’s proposed bill and explanations before Senate Commerce Committee). The revised definition of “transportation” adopted by Congress in the Hepburn Act of 1906, including the language “irrespective of ownership or of any contract, express or implied, for the use thereof,” was the exact language proposed by the ICC to provide it with the powers described above. See *id.* at 223, 37 S.Ct. 95.

The revised definition of “transportation” successfully addressed the hidden charges imposed on shippers by private car lines and larger shippers, thus furthering the original goal of the Interstate Commerce Act to eliminate discrimination in the railroad services provided to shippers. As described by one commentator,

The amended statute ... defined “transportation” as to embrace cars, vehicles, and all other instrumentalities of shipment or carriage, irrespective of ownership or contract, and all services rendered in connection with the property transported—thereby endowing the [ICC] with regulatory power over private cars and incidental services.... It [was] the instrumentalities and services of rail carriage which [had] been brought under the [ICC’s] full sway; and it [was] through the control of these instrumentalities and services that the use of private cars and the operation of private-car lines [were] encompassed by the [ICC’s] jurisdiction. *The [ICC’s] powers spring from the carriers’ utilization of privately-owned equipment.*

Sharfman, *supra*, at 124, 126 (emphasis added). That the addition of the phrase regarding ownership and contractual arrangements to the definition of “transportation” was intended to cover discrimination also seems to be the understanding of *1336 the ICC in the years shortly after the Hepburn Act went into effect.

Under the law as construed by the

courts, car lines and others engaged in leasing cars to shippers are not common carriers and thus do not come under direct control by the [ICC]. When a car, regardless of ownership, is being moved in interstate commerce by a common carrier subject to the act, there is no doubt of our power to control the carrier's operation of the car *so that there shall result no undue preference to any shipper.*

In the Matter of Private Cars, 50 I.C.C. 652, 677 (1918) (emphasis added). Thus, even after the definition of "transportation" had been amended under the Hepburn Act to include equipment not owned by the railroads, the ICC recognized that its jurisdiction, while expanded, was still limited to those activities that served the railroads in fulfilling their tasks as common carriers, or that affected the general public through concerns of possible discrimination. *See also Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 226–27 (1941); *In the Matter of Contracts of Express Companies for Free Transportation of Their Men and Material Over Railroads*, 16 I.C.C. 246, 250–51 (1909).

Given this statutory history, we reject **FEC's** reading of the phrase "regardless of ownership or agreement concerning use" found in the ICCTA's definition of "transportation." Congress employed this language specifically to grant the ICC jurisdiction over those facilities that, while not owned by the railroad companies, were nevertheless used in interstate commerce for the benefit of either the shipping public or the railroad companies themselves. Furthermore, even where the railroads owned the property in question, Congress explicitly intended that the leasing cost of equipment that constitutes "transportation" would be incorporated into the railroads' published tariffs so as to protect the public from the invidious discrimination characteristic of the era before the Hepburn Act. In this regard, the Supreme Court consistently has recognized the focus of the ICC's jurisdiction to be the protection of the general public rather than individual private entities. *See, e.g., R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 453–54, 66 S.Ct. 238, 90 L.Ed. 192 (1946); *Merchants' Warehouse Co. v. United States*, 283 U.S. 501, 507–11, 51 S.Ct. 505, 75 L.Ed. 1227 (1931); *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286, 304–06, 33 S.Ct. 83, 57 L.Ed. 226 (1912).

In this case, Rinker's use of the property at the 15th Street yard and the activities there performed by Rinker serve no

public function and provide no valuable service to **FEC**; rather, the arrangement between **FEC** and Rinker merely facilitates Rinker's operation of a private distribution facility on **FEC**-owned premises. Furthermore, record evidence, such as Rinker's being the sole **FEC** customer to use the 15th Street yard, Rinker's taking responsibility for its utility expenses on the property, and a sign on the property reading "CSR Rinker—West Palm Beach—Aggregate Distribution," indicates that Rinker's operation served a purely private function. As stated by the district court, "Rinker effectively ran a Rinker operation on **FEC** property." 110 F.Supp.2d at 1371. The factual findings supporting the district court's conclusion are not clearly erroneous. We also find that the district court properly applied the law to these facts in concluding that Rinker's activities at the 15th Street yard were not "rail transportation." Contrary to **FEC's** suggestion, therefore, the ICCTA's pre-emption of state regulation of rail "transportation" does not preclude a determination that certain actions taken by *1337 West Palm Beach, which might or might not be pre-empted if taken against **FEC**, do not violate the Supremacy Clause when applied against Rinker in its operations on **FEC** property.⁹

History and Purpose of the ICCTA

Our conclusion as to the meaning of the ICCTA pre-emption provision is bolstered by the history and purpose of the ICCTA itself. The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning. The pre-ICCTA statute expressly authorized regulation of certain railroad activities to be undertaken concurrently by the federal and state governments, while still other regulation would be the exclusive province of state law. For example, former section 10103 of Title 49 provided that "[e]xcept as otherwise provided in this subtitle, the remedies provided under this subtitle are *in addition to* remedies existing under another law or at common law." 49 U.S.C. § 10103 (1988) (emphasis added). Concurrent federal-state authority was also contemplated for much intrastate railroad activity. *See, e.g.,* 49 U.S.C. § 10501(b)-(d) (1988). Federal law also recognized exclusive state authority over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State...." 49 U.S.C. § 10907(b)(1) (1988). *See also* 49 U.S.C. § 11501(b) (1988) (acknowledging regulatory role of States over railroads). The ICCTA

removed the authority of the States to regulate those railroad activities that had previously been subject to state regulation or to concurrent federal-state regulation, providing instead for federal uniformity in the regulation of rail transport. *See* 49 U.S.C. § 10501 (1994 & Supp.1998).¹⁰

When identifying the principles of national “rail transportation policy” under the ICCTA, Congress deleted the previous statutory reference to “cooperat[ion] with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle.” *Compare* 49 U.S.C. § 10101a(9) (1988) *1338 with 49 U.S.C. § 10101 (1994 & Supp.1998). This deletion emphasizes the focus of the ICCTA on removing direct state regulation of railroads previously permitted for intrastate rail transport. The principles of national “rail transportation policy,” as continued from the previous statute, further reveal a general deregulatory focus, *see* 49 U.S.C. § 10101 (1994 & Supp.1998), but the regulation sought to be “minimize[d]” is at the federal (not local) level. 49 U.S.C. § 10101a(2) (1988); 49 U.S.C. § 10101(2) (1994 & Supp.1998). One House Report emphasized the balance sought to be achieved between the rights of States in the exercise of their police powers and the need for exclusivity in the “Federal scheme of economic regulation.... 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. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. One Senate Report noted the following:

[N]othing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. 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 waken the industry’s efficiency and competitive viability.¹¹

S. Rep. 104-176, at 6 (1995) (emphasis added). Finally, the report describing the bill as it appeared in its final

form after conference committee stated as follows:

The Conference provision [of 49 U.S.C. § 10501(b)] retains this general rule [of increased exclusivity for Federal remedies], while clarifying that *the exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally*. For example, criminal statutes governing antitrust matters not preempted by this Act, and laws defining *1339 such criminal offenses as bribery and extortion, remain fully applicable unless specifically displaced, *because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation*.

H.R. Conf. Rep. 104-422 (1995), at 167, *reprinted in* 1995 U.S.C.C.A.N. 850, 852 (emphases added). Allowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared “balkanization” of the railroad industry as companies sought to comply with those laws. Unlike direct regulation of railroads, which is not the case with the **West Palm Beach** zoning ordinance, and which was the focus of the statutory changes to the ICCTA, the zoning ordinances with which Rinker must comply, do not burden **FEC** with the patchwork of regulation that motivated the passage of the ICCTA. *Cf. Cipollone*, 505 U.S. at 519, 112 S.Ct. 2608 (recognizing existence of diverse state and local regulations as “catalyst” for passing federal legislation). While perhaps not optimally efficient for **FEC’s** operations, **West Palm Beach’s** zoning requirements do not impede the interstate functioning of the railroad industry.¹²

Conclusion

As the exercise of a traditionally local police power, **West Palm Beach’s** zoning and occupational license ordinances are entitled to an assumption of no pre-emption when evaluated pursuant to the Supremacy Clause. Against this presumption of validity, we conclude that the application of the ordinances against Rinker, based on the facts found by the district court, does not qualify as “regulation of rail transportation” and does not frustrate the objectives of federal railroad policy. The judgment of the district court

is therefore

All Citations

AFFIRMED.

266 F.3d 1324, 14 Fla. L. Weekly Fed. C 1288

Footnotes

* Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

1 *Cf. Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 779–80, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947) (Frankfurter, J., concurring):

When construing federal legislation that deals with matters that also lie within the authority, because within the proper interests, of the States, we must be mindful that we are part of the delicate process of adjusting the interacting areas of National and State authority over commerce. The inevitable extension of federal authority over economic enterprise has absorbed the authority that was previously left to the States. But in legislating, Congress is not indulging in doctrinaire, hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States.

2 Although there has been a history of such federal presence in the area of railroad regulation, the virtual exclusivity of federal regulation is a recent phenomenon. See *Fla. E. Coast Ry. v. City of West Palm Beach*, 110 F.Supp.2d 1367, 1373–74 (S.D.Fla.2000) (discussing history of railroad regulation). In fact, the federal government shared jurisdiction over important elements of railroad regulation with the States until the passage of the ICCTA. Compare 49 U.S.C. §§ 10501(b)-(d) and 10907(b)(1) (1988) (pre-ICCTA statute providing for concurrent federal-state jurisdiction or exclusive state jurisdiction over certain aspects of rail regulation) with 49 U.S.C. § 10501(b) (1994 & Supp.1998) (post-ICCTA statute providing for exclusive federal jurisdiction over regulation of rail transportation).

3 **FEC** argues that the **City's** application of its zoning ordinance is pre-empted based on express pre-emption (pursuant to 49 U.S.C. § 10501(b)) and implied pre-emption (i.e., that the **City's** actions frustrate the objectives of federal railroad regulation established by Congress). We conclude that the **City's** actions do not fall within the statutory pre-emption provision. "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608. Although such an "inference" does not necessarily foreclose the possibility of implied pre-emption, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995), our following evaluation of the context surrounding 49 U.S.C. § 10501(b) confirms that application of the **City's** zoning ordinance does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

4 The ICCTA defines "State" as "a State of the United States and the District of Columbia." 49 U.S.C. § 10102(8).

5 The STB's recent decision in *Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer, Mass.*, STB Fin. Docket No. 33971, 2001 WL 458685 (STB Apr. 30, 2001), relied upon by **FEC** in its supplemental filing, is therefore inapposite. The local government in *Boston and Maine* sought to restrict a *rail carrier's* construction of an automobile unloading facility because of environmental concerns. See *id.* at *1–2. The STB recognized as much when it stated that "state and local permitting or preclearance requirements ... are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny *the carrier* the right to construct facilities or conduct operations." *Id.* at *5 (emphasis added) (citation omitted).

6 The full definition of "transportation" under the ICCTA is as follows:

(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) (1994 & Supp.1998).

- 7 Private car lines did not transport passengers or property along railroad routes. They were companies, separate from rail carriers, that owned certain transportation equipment (e.g., different types of railroad cars) and, like some of the larger shippers, rented that equipment to shippers and railroad companies.
- 8 Although the Report of Senator Tillman cited herein is not technically a committee report of the Senate, Professor Schwartz explains that the Senate Commerce Committee could not produce a single report because the Senators in favor of the bill (i.e., the majority) could not agree on proposed amendments to the House bill and therefore could not produce a committee report. See 1 Economic Regulation, at 610. Only Senator Tillman submitted a report, and he became the floor leader for the bill. See *id.* Thus, the Tillman Report "is the nearest thing to a Senate committee report available...." *Id.* The Tillman Report is particularly reflective of Senate views with regard to the issue of defining "transportation," for the Senate eventually retained the House amended definition, which became law. Compare 1 Economic Regulation, at 723 (statement of Rep. Esch, quoting proposed definition of "transportation" in House bill) with Hepburn Act, Ch. 3591, § 1, 34 Stat. 584 (definition of "transportation").
- 9 In emphasizing that the scope of the pre-emption provision is limited to the direct regulation of rail transportation, we do not mean to suggest that only regulations applied against railroads are pre-empted by the ICCTA. Certain local regulations applied against a third-party may be so intertwined with the provision of rail transportation services to the public so as to frustrate the objectives of federal railroad regulation. Likewise, some regulations applied directly to railroads may not necessarily be pre-empted. See *N.Y. Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 1999 WL 715272, at *4-5 & n. 7 (Sept. 9, 1999) (suggesting that environmental regulation on dumping of waste, as applied to railroads, would not be pre-empted) (quoting *Cities of Auburn and Kent, Wash.—Petition for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, STB Fin. Docket No. 33200, 1997 WL 362017, at *6 (July 2, 1997), *aff'd*, *City of Auburn*, 154 F.3d 1025).
- 10 The loss of that state regulatory authority has been the focus of much of the caselaw on the pre-emptive effect of the ICCTA. See, e.g., *Burlington N. Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D.Mont.1997); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573 (N.D.Ga.1996); *Burlington N. R.R. Co. v. Page Grain Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996). While these cases have addressed the extent to which States still may be able to prevent stations from closing or tracks from moving, none have involved the general exercise of local police powers against a third party which has an incidental effect upon a railroad's activities.
- 11 In this regard, **FEC's** argument suggesting a conflict between the application of the **West Palm Beach** ordinances in this case and federal railroad policy is particularly inapt. **FEC's** claim of pre-emption is based essentially on the supposed interference of **West Palm Beach** with the railroad's efficient allocation of its resources (by leasing its property to Rinker instead of performing such services itself). This microeconomic focus is not consistent with the stated purposes of the ICCTA. In reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across the nation. See 49 U.S.C. § 10101 (1994 & Supp.1998). No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted. Naturally, at some level, all regulation places constraints on firms' profit-maximizing behavior; to allow **FEC's** argument to prevail would subsume all local regulation to the profit-maximizing priorities of individual railroad companies. The nationwide efficiency of the railroad industry, however, may still be preserved without necessarily denying the possibility of all local regulation. Cf. *Hayfield N. R.R. Co. v. Chicago & North Western Transport. Co.*, 467 U.S. at 635-36, 104 S.Ct. 2610 (1984) (unanimous decision):
Appellee also maintains that allowing appellant to bring condemnation proceedings after abandonment would contravene the overall purpose of the [Interstate Commerce] Act: to make the railroad industry more efficient and productive.... In light of Congress' imposition of solutions that subordinate opportunity costs to other considerations, state condemnation authority is not pre-empted merely because it may frustrate the economically optimal use of rail assets.
- 12 **FEC** places great emphasis on the **City's** hostile motivation in its enforcement of the zoning ordinance against Rinker. Quoting testimony by the Mayor of **West Palm Beach**, **FEC** argues that the **City** intended to impose additional costs on **FEC** and thereby sought to discontinue **FEC's** railroad operations in the residential area where the 15th Street facilities are located. See **FEC** Initial Br. at 44-46. That the **City** hoped **FEC** would move its railroad operations elsewhere is not relevant to our analysis: in evaluating whether the local regulation is pre-empted by the federal law, we focus on the federal statute (including its mandates and purposes) and determine the extent to which the actual effects of the local regulation interfere with the intended functioning of the federal law. See *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 1326-28, 149 L.Ed.2d

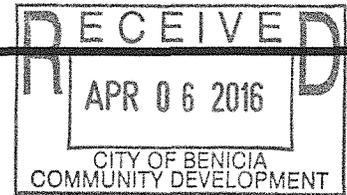
264 (2001). *Cf. Teper v. Miller*, 82 F.3d 989, 995 (11th Cir.1996) (“[I]t is the *effect* of the state law that matters in determining preemption, not its intent or purpose.”) (emphasis in original). Even if the City’s intentions are as FEC suggests, we nevertheless conclude that there is no frustration of the federal objective, and so the application of the local regulation must be upheld. *See Hayfield Northern*, 467 U.S. 622, 104 S.Ct. 2610, 81 L.Ed.2d 527 (where companies acting pursuant to state condemnation statute sought specifically to prevent railroad’s abandonment of line, state condemnation statute was nevertheless not pre-empted because federal statute did not occupy field and federal objectives had not been frustrated).

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Amy Million

From: KnowWho Services <noreply@knowwho.services>
Sent: Wednesday, April 06, 2016 10:51 AM
To: Amy Million
Subject: Public Comment re Valero Crude by Rail Project - Appeal Application No. 16PLN-00009



Dear Benicia City Council,

I'm writing to urge the Benicia City Council to back the Planning Commission's unanimous decision to reject Valero's proposal to transport explosive crude oil by rail through California communities to its refinery in Benicia, and to reject Valero's attempts to delay a final decision on this project.

The Planning Commission rightfully rejected this dangerous project because it "would be detrimental to the public health, safety, or welfare" of Benicians and communities along the oil train routes. The project's impacts include increased air pollution from refinery emissions (which could disproportionately affect low-income communities and communities of color) and oil spills during the offloading process (which could harm the Sulphur Springs Creek riparian corridor).

Furthermore, increases in the transportation of crude by rail has corresponded with an alarming increase in the number of derailments, spills, and explosions. More than five million Californians live in the blast zones of oil train routes, and this project would significantly increase the number of unsafe oil trains rolling through our communities.

As Attorney General Kamala Harris pointed out, the U.S. Department of Transportation found that rail shipments of highly volatile crude oil represent an "imminent hazard," such that a "substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur." I agree with regulators, elected officials, local residents, nurses, and the the many thousands of Californians who have sounded the alarm about the unacceptable risks posed by this project.

For these reasons, I again urge the City Council to reject Valero's oil train project, as well as its attempts to delay resolution of this issue.

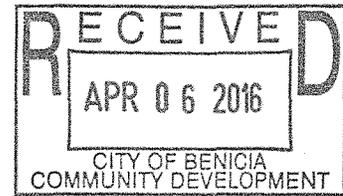
Thank you for your consideration.

Sincerely,

Charleen Kubota
1714 Indian Way
Oakland, CA 94611-
ckubota@library.berkeley.edu
(510) 622-3153

Amy Million

From: Justin Blecharczyk <jblecharc@gmail.com>
Sent: Tuesday, April 05, 2016 3:57 PM
To: Amy Million
Subject: I support the Valero Crude by Rail project



Dear Ms. Million,

I write today urging City Council to stand with Benicians in support of Valero's Crude by Rail Project. Simple on-site infrastructure projects such as these create new jobs and generate millions of dollars in local tax revenues that help keep our community, economy and business running.

I am also writing to support the continuance for a Surface Transportation Board opinion.

An opinion from the STB should:

- provide City Councilmembers with clear legal guidance on federal railroad operation preemption laws.
- protect our City from potential, unnecessary, costly litigation.

The City of Benicia and independent experts have spent more than three years closely reviewing this project and developing a comprehensive Final Environmental Impact Report (FEIR). These analyses go well beyond California Environmental Quality Act (CEQA) requirements. Most of the analyses concerned rail activity which the railroad already has the legal authority to provide. In addition, the analyses illustrated the project's many benefits for Benicia.

According to the DEIR, RDEIR, FEIR and economic analyses, this project WILL:

- Create 20 permanent, local, well-paying jobs and require an additional 120 skilled craftsman jobs during construction;
- Improve air quality and help California and the Bay Area achieve its climate goals by reducing greenhouse gas emissions by 225,000 metric tons per year;
- Operate under current air permits with the Bay Area Air Quality Management District (BAAQMD);
- Protects home values. Benicia's median home value is higher than those of neighboring communities including Vallejo and Martinez; Benicia's home values increased by 6% last year and are projected to grow even further in 2016. The Refinery supports Benicia's higher median home value by providing significant funding for improved local services and facilities.

Importantly, according to these analyses this project:

- Will not create additional health risks associated with project emissions;
- Will not change the type or amount of crude that the refinery processes;
- Will not increase process emissions;
- Will not change refinery operations.

Projects like these are economic drivers that help to make our community the best it can possibly be, and I strongly urge City Councilmembers to stand with Benicians in supporting the well-being of our City.

Sincerely,

Justin Blecharczyk
1740 Stow Ave
Walnut Creek, CA 94596