

# **APPENDIX G**

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## **Preemption of CEQA by the ICCTA**

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### Preemption of CEQA by the ICCTA

Many, if not most, of the comments received on the DEIR addressed potential off-site impacts from the operation of trains travelling to and from the Refinery. Potential off-site impacts from rail operations include the risk of crude oil releases from tank cars, the impact of locomotive emissions on air quality, the impact of noise on biological resources living along the rail corridor, and the impact of rail crossings on traffic.

Valero has taken the position that the Interstate Commerce Commission Termination Act (“ICCTA”) preempts the City’s ability to require CEQA review of impacts from the Project, including both impacts from on-site activities, such as construction and operation of the unloading rack, and impacts from off-site rail operations. Valero’s position is set forth in Appendix H.

The City disagrees with Valero in part and agrees in part. The City has concluded as follows:

1. The ICCTA does *not* preempt the application of CEQA to Valero’s on-site activities, including construction and operation of the proposed unloading rack and related equipment.
2. The ICCTA *does* preempt the City’s ability to mitigate impacts from rail operations.
3. The ICCTA *may well* preempt the City’s ability to require disclosure of impacts from rail operations under CEQA. There is no case law authority directly on point, however, and the issue is uncertain. The City has decided to continue with disclosure of impacts from rail operations unless and until a court, in a binding precedent, clearly rules that the ICCTA preempts the disclosure requirements of CEQA as applied to impacts from rail operations.

#### **I. The ICCTA Does Not Preempt the Application of CEQA to Valero’s On-Site Activities.**

Under prevailing case law, CEQA clearly applies to Valero’s proposed on-site unloading rack and related facilities because (1) Valero owns and operates the unloading facilities; (2) in constructing and operating the facilities, Valero is not acting as an agent of Union Pacific; and (3) Union Pacific will not control the operation of the unloading facilities. On similar facts, courts and the STB have consistently held that the ICCTA does not preempt the application of state and local land use and environmental laws.<sup>1</sup> The decisions make it clear that ICCTA preemption applies to unloading facilities if, and only if, the railroad owns and operates the facilities or the operator is an agent of the railroad.

In *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011), for example, a freight railroad entered into an agreement with Coastal Distribution whereby Coastal would construct and operate a transloading facility on a rail yard leased by the railroad. The

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<sup>1</sup> See, e.g., *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

transloading facility would be used to handle building materials and debris from construction and demolition activities. The city's zoning ordinance prohibited waste transfer facilities. When the project was almost constructed, the city served a stop work order on Coastal on the ground that the transloading facility was a prohibited use under the zoning ordinance.

The railroad and Coastal Distribution filed suit against the city, seeking to enjoin the city from enforcing the zoning ordinance against the waste transfer facility. At the same time, the city petitioned STB for a declaratory order that the zoning ordinance was not preempted.

The STB concluded in *New York and Atlantic Railway* that the STB does not have exclusive jurisdiction over the waste transfer facility because the railroad's responsibility and liability for the cars "end when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to [the railroad's] locomotive."<sup>2</sup> The STB explained that it has exclusive jurisdiction over transloading facilities if, and only if, "the activities are performed by a rail carrier or the rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party's operation."<sup>3</sup>

The court in *New York and Atlantic Railway* agreed with the STB. The court held that Coastal Distribution's proposed waste transfer facility did not constitute "transportation by rail carrier" because the railroad did not own or operate the facility and Coastal was not acting as an agent of the railroad. Therefore, the ICCTA did not preempt the application of the city's local zoning regulations.<sup>4</sup>

Similarly, in *Florida East Coast Railway*, a railroad leased a rail yard property in the City of West Palm Beach to Rinker Materials Corporation, a third party corporation. Rinker used the rail yard as a transloading facility for the distribution of aggregate, a material used to make cement. The city issued cease and desist orders to the railroad and Rinker because Rinker's transloading operation did not comply with the city's zoning, and Rinker failed to obtain a business license. The railroad sued the city, seeking a declaration that the ICCTA preempted the application of the city's zoning and business license ordinances to Rinker's transloading operations.

The court in *Florida East Coast Railway* concluded that the application of the city's ordinances to Rinker's transloading facility did not constitute regulation of "transportation by rail carrier" within the meaning of the ICCTA preemption provision.<sup>5</sup> The court explained as follows:

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.'<sup>6</sup>

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<sup>2</sup> *Ibid.*

<sup>3</sup> *New York & Atlantic Ry. Co. v. Surface Tranp. Bd., supra*, 635 F.3d at 69.

<sup>4</sup> *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66, 73 (2nd Cir. 2011).

<sup>5</sup> *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001).

<sup>6</sup> *Ibid.*

Thus, the court concluded, “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.”<sup>7</sup>

In support of Valero’s position that the ICCTA preempts the application of CEQA to the on-site unloading facilities, Valero cites the decision in *Norfolk Southern Ry Co v City of Alexandria* 608 F.3d 150 (2010). The *Norfolk Southern Railway* case, however, does not support this conclusion. In *Norfolk Southern Railway*, a railroad constructed and began operating an ethanol transloading facility in the City of Alexandria, Virginia. The railroad used the facility to transfer ethanol from rail cars to trucks operated by third parties. The city adopted an ordinance regulating the hauling of bulk materials, including ethanol, within the city limits. The City unilaterally issued a permit to the transloading facility under its haul ordinance. The permit limited the materials that could be hauled; specified hauling routes; and restricted the days and times of hauling. The railroad refused to comply with the permit conditions, on the assumption that the application of the haul ordinance to the facility was preempted by the ICCTA.

The city petitioned STB for a declaration that the city had the authority to regulate the transloading facility, and the railroad filed an action for declaratory relief in federal court. The STB found that the transloading facility constitutes “transportation by a rail carrier,” such that the city’s haul ordinance was preempted. The federal district court reached the same conclusion.<sup>8</sup>

The *Norfolk Southern Railway* case does not control here, however, because, in *Norfolk Southern Railway*, the railroad actually owned and operated the transloading facility. In contrast, the Valero unloading facilities, like the transloading facilities in *New York And Atlantic Railway* and *Florida East Coast Railway*, would be owned and operated by a third party (Valero), which in no way would be acting as an agent of the railroad (Union Pacific).

In sum, it is clear that CEQA applies to the unloading rack and related on-site facilities proposed as part of the crude-by-rail project.

## **II. The ICCTA Preempts the City’s Authority to Mitigate Impacts from Union Pacific’s Rail Operations.**

Under the ICCTA, the federal Surface Transportation Board (“STB”) has exclusive jurisdiction to regulate transportation by rail carrier.<sup>9</sup> The ICCTA preemption provision is quite broad, covering virtually all aspects of railroad operations.<sup>10</sup> As a number of courts have stated, “it is

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<sup>7</sup> *Id.* at 1332.

<sup>8</sup> *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 160 (4th Cir. 2010).

<sup>9</sup> 49 U.S.C. § 10501(b).

<sup>10</sup> *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 839 (E.D. Ky. 2004) (49 U.S.C. § 10501(b) grants the STB exclusive jurisdiction “over nearly all matters of rail regulation”).

difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations."<sup>11</sup>

In light of the STB's exclusive jurisdiction, state and local governments may not directly regulate rail operations. Thus, for example, state and local governments may not place limits on emissions from locomotives,<sup>12</sup> limit the amount of time that trains can block grade crossings,<sup>13</sup> or require railroads to obtain permits before constructing new or modified tracks and related facilities.<sup>14</sup>

The ICCTA also preempts any attempt by state and local governments to regulate railroad operations indirectly.<sup>15</sup> Simply put, the ICCTA preempts any regulations that "may reasonably be said to *have the effect* of managing or governing rail transportation."<sup>16</sup> One court held, for example, that a city may not limit the number of trucks entering and leaving a railroad offloading facility, even though the railroad did not own or operate the trucks, because the limit on truck trips would effectively limit the number of rail cars that could be unloaded.<sup>17</sup> To take another example, a number of courts have held that the ICCTA preempts state common law claims against railroads, including claims for negligence,<sup>18</sup> tortious interference,<sup>19</sup> and nuisance.<sup>20</sup> In reaching this conclusion, the courts have emphasized that common law claims effectively regulate railroad operations just as any "preventative relief" that a state government might obtain through direct regulation.<sup>21</sup>

The DEIR and/or the RDEIR identify significant offsite impacts from rail operations in certain areas, including air quality, hazards, biological resources, and greenhouse gas emissions. There are various mitigation measures that might reduce and/or avoid these impacts, such as limiting the number of rail deliveries that Valero may accept per day, requiring Valero to purchase

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<sup>11</sup> See, e.g., *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025, 1030; *CSX Transp Inc v Georgia Public Service Com'n*, 944 F.Supp. 1573, 1581 (N.D. Georgia 1996).

<sup>12</sup> *Association of American Railroads v South Coast Air Quality Management District*, 622 F.3d 1094 (9th Cir. 2010).

<sup>13</sup> *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001); *People v Burlington Northern Santa Fe RR*, 209 Cal.App.4th 1513 (2012); *CSX Trans., Inc. v. Plymouth*, 92 F.Supp.2d 643 (E.D.Mich.2000).

<sup>14</sup> See, e.g., *Green Mountain RR Corp v Vermont*, 404 F.3d 638 (2nd Cir. 2005) (the ICCTA preempts a city's pre-construction permit requirement as applied to rail project); *City of Auburn v. United States Government*, 154 F.3d 1025 (9th Cir. 1998) (the ICCTA preempts a county from requiring a railroad to obtain permits before making improvements to an existing rail line);

<sup>15</sup> *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 842 (E.D. Ky. 2004) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, (1992)); *Guckenberg v. Wisconsin Central Ltd*, 178 F.Supp.2d 954, 958 (E.D. Wisconsin 2001) (same).

<sup>16</sup> *People v Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1528 (2012) (emphasis added).

<sup>17</sup> *Norfolk Southern Ry Co v City Of Alexandria*, 608 F.3d 150 (2010).

<sup>18</sup> *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir.2001).

<sup>19</sup> *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 297 F.Supp.2d 326, 334 (D.Maine, 2003).

<sup>20</sup> *Rushing v. Kansas City S. Ry. Co.*, 194 F.Supp.2d 493, 500 (S.D.Miss.2001).

<sup>21</sup> *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004); *Guckenberg v Wisconsin Central Ltd*, 178 F.Supp.2d 954, 958 (E.D. Wisconsin 2001).

emissions credits to offset locomotive emissions, or requiring Valero to use upgraded tank cars that are not required by federal law. Any attempt by the city to condition project approval on such requirements, however, would be preempted, because the requirements would clearly “have the effect of managing or governing rail operations.” Limiting the number of rail deliveries that Valero could accept, for example, would effectively reduce the number of train trips that Union Pacific may operate on its lines. Requiring Valero to purchase emissions credits to offset locomotive emissions would essentially be an indirect way of regulating locomotive emissions. Finally, any attempt to require Valero to use upgraded tank cars that are not required by federal law would infringe on the STB’s exclusive jurisdiction to prescribe tank car design standards. All of these mitigation requirements would be preempted.

### **III. While the ICCTA May Preempt Disclosure of Rail Impacts Under CEQA, There is No Clear Authority on Point.**

CEQA requires lead agencies to identify and disclose a project’s potential environmental impacts before approving the project. CEQA is a law of general application, and governs approval of any non-exempt project that may result in a physical change in the environment.

Valero takes the position that the ICCTA preempts even the disclosure aspect of CEQA as applied to rail operations. In other words, Valero maintains that the City is legally prohibited from requiring disclosure of offsite impacts from rail operations, such as locomotive emissions or rail safety impacts, as a condition of project approval – even though CEQA generally requires disclosure of all impacts that would be caused by a project, wherever those impacts may occur.

There is no case or STB decision directly on point involving CEQA or any other state or local environmental or land use law. That is, there is no case considering whether a city that clearly has jurisdiction over the construction and operation of *onsite* unloading facilities must -- or indeed may -- require disclosure of *offsite* impacts created by trains traveling to and from the onsite operation.

On the one hand, a court might well conclude that requiring disclosure of rail impacts as part of a pre-construction permitting process has a direct and impermissible effect on rail operations because the disclosure requirement could delay the project indefinitely. Under this theory, the application of CEQA’s disclosure requirement to rail impacts would be controlled by the “preclearance” cases and STB decisions that Valero cites in its letter.<sup>22</sup>

On the other hand, there is an argument to be made that merely requiring disclosure of rail impacts has only a “remote or incidental” impact on rail operations, such that ICCTA preemption does not apply. Requiring disclosure of information about potential rail impacts, in itself, arguably does not have the same impact on operations as, for example, mitigation measures that

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<sup>22</sup> These authorities include, among others, *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *City of Auburn v. U.S. Gov’t*, 154 F.3d 1025, 1031 (9th Cir. 1998), as amended (Oct. 20, 1998); *City of Encinitas v North San Diego County Transit Development Bd* 2002 WL 34681621; *Desertxpress Enterprises LLC--Petition for Declaratory Order Fed. Carr. Cas.* P 37238 (S.T.B.), 2007 WL 1833521.

effectively limit the number of trains that Union Pacific can operate, or regulate locomotive emissions.

There are some, but not many, cases where a court or the STB found that the effect of a state or local law on rail operations was merely “remote or incidental.” As explained above, the courts and the STB have concluded that regulation of a transloading facility owned and operated by a private party has only a remote and incidental effect on rail operations.<sup>23</sup> The courts and the STB have also concluded that agencies can enforce water quality laws against railroads discharging earth and waste from construction projects into water bodies.<sup>24</sup> Finally, in one of its opinions, the STB provided the following list as examples of permissible “pre-construction” conditions:

Examples of solutions that appear to us to be reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.<sup>25</sup>

None of the existing authorities, however, directly addresses the issue at hand – whether the ICCTA preempts CEQA’s disclosure requirement to the extent that it would require disclosure of impacts from rail operations as a condition of approving Valero’s project. Thus, the City intends to continue requiring disclosure unless and until a court, in a binding precedent, clearly rules that the ICCTA preempts disclosure under CEQA under similar facts.

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<sup>23</sup> See, e.g., *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1339 (11th Cir. 2001); *Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line*, 2 S.T.B. 330 (1997).

<sup>24</sup> See, e.g., *United States v. St. Mary's Ry. W., LLC*, 989 F. Supp. 2d 1357 (S.D. Ga. 2013).

<sup>25</sup> *Joint Petition for Declaratory Order - Boston & Maine Corp. & Town of Ayer, Ma*, Fed. Carr. Cas. (CCH) ¶ 38352 (Apr. 30, 2001)