

Valero Crude by Rail Project
Public Comments received Revised DEIR Public Review Period
October 24-30, 2015

Commenter	Date Received
Agencies	
San Francisco Bay Conservation and Development Commission	26-Oct-15
County of Placer	28-Oct-15
Solano County Department of Resource Management	28-Oct-15
Bay Area Air Quality Management District	29-Oct-15
Air Pollution Control and Air Quality Management Districts	29-Oct-15
Yolo-Solano Air Quality Management District	29-Oct-15
Sacramento Area Council of Governments	30-Oct-15
County of Yolo	30-Oct-15
City of Davis	30-Oct-15
County of Nevada Community Development Agency	30-Oct-15
Placer County Air Pollution Control District	30-Oct-15
Organizations	
Benicia Industrial Park Association	29-Oct-15
Benicians for a Safe and Healthy Community	30-Oct-15
Natural Resources Defense Council	30-Oct-15
Cool Davis Foundation	30-Oct-15
350 Sacramento	30-Oct-15
Safe Fuel and Energy Resources California	30-Oct-15
Planning Commissioners	
Elizabeth Radtke	28-Oct-15
Steve Young	29-Oct-15
Don Dean	30-Oct-15
Applicant	
Chris Howe (2 letters)	30-Oct-15
John Flynn	30-Oct-15
Individuals	
Dennis Lowry	26-Oct-15
Alan L. Thompson & Slyvia T. Thompson	26-Oct-15
Sue Kibbe	27-Oct-15
Bob and Judi Hayward	27-Oct-15
Carol Warren	27-Oct-15
Jean Jackman	27-Oct-15
Jan Rein	27-Oct-15
Ernest Pacheco	27-Oct-15
Roger Straw	27-Oct-15
Alan Jackman	27-Oct-15
Paul Brady	27-Oct-15
Mark Brett	27-Oct-15

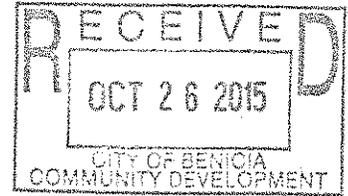
Jerri Curry	27-Oct-15
Theresa Ritts	27-Oct-15
Elizabeth Crowley	27-Oct-15
Robert Peters	27-Oct-15
Anne and John Syer	28-Oct-15
Diane Simon	28-Oct-15
Mari Anna Vinson Feldman	28-Oct-15
Rick Stierwalt	28-Oct-15
Nick Despota	28-Oct-15
Nancy Hilden	28-Oct-15
John Lazorik	28-Oct-15
Jamie Boston	28-Oct-15
Christine Robbins	28-Oct-15
Rodger Shields	28-Oct-15
Judith Sullivan	28-Oct-15
Elizabeth Berteaux	28-Oct-15
Greg Imazu	28-Oct-15
Regina and John Hamel	28-Oct-15
Laura Zucker	28-Oct-15
David Frank	29-Oct-15
Larry Oppenheimer	29-Oct-15
Remigio Pasibe	29-Oct-15
Sophie Pasibe	29-Oct-15
Gregg & Leslie Swan	29-Oct-15
Theresa Ritts	29-Oct-15
Ernie Abbott	29-Oct-15
Janet Johnson	29-Oct-15
Michele Rowe-Shields	29-Oct-15
Rebecca Sgambati	29-Oct-15
Dawn Cornell	29-Oct-15
Kathleen Sailor	29-Oct-15
Joseph M. Martino	29-Oct-15
Lynne Nittler (2 Letters) - plus 55 additional names	29-Oct-15
Marisol Pacheco-Mendez	30-Oct-15
Mairead and Marcus Byrne	30-Oct-15
Myra Nissen	30-Oct-15
Peter Stanzler	30-Oct-15
Rick Donnelly	30-Oct-15
Dennett Hutchcroft & Cynthia Pauley	30-Oct-15
Catherine Chaney	30-Oct-15
Ronald Stein	30-Oct-15
Richard Freeman	30-Oct-15
Roger Straw	30-Oct-15
Marta Beres	30-Oct-15
Susan Gustofson	30-Oct-15

Karen Kingsolver	30-Oct-15
Michael Monasky	30-Oct-15
Kathy Kerridge	30-Oct-15
Carole Sky	30-Oct-15
Larry Miller	30-Oct-15
Dan Smith	30-Oct-15
Fred Millar	30-Oct-15
James Egan	30-Oct-15
Robert Segerdell	30-Oct-15
Charles Davidson	30-Oct-15
Brian Stone	30-Oct-15
Martin MacKerel	30-Oct-15
Diane Merrick	30-Oct-15
Lisa Reinertson (2 letters)	30-Oct-15
Jack Ruszel (5 letters)	30-Oct-15
Giovanna Sensi-Isolani	30-Oct-15
Jan Ellen Rein and Clifford Manous (2 Letters)	30-Oct-15
Rev. Mary Susan Gast	30-Oct-15
Carole Sky	30-Oct-15
Eleanor Prouty	30-Oct-15
Ed Ruszel	30-Oct-15
Shoshana Wechsler	30-Oct-15
Richa Harley	30-Oct-15
Marialee Neighbours	30-Oct-15
Beate Bruhl	30-Oct-15
Madeline Koster	30-Oct-15
Mr. & Mrs. Addison Jones	30-Oct-15
Karen Berndt	30-Oct-15
Parisa LoBianco	30-Oct-15
Craig Snider	30-Oct-15
Alan C Miller	30-Oct-15
Lisa Reinertson	30-Oct-15
Jackie Zanaeri	30-Oct-15
Diane Hill	30-Oct-15
Identical Comments	
"Protect Our Communities and Deny Valero's Rail Project"	10/27/15 - 10/30/15
"I support the Valero Crude by Rail project"	10/28/15 - 10/30/15
"Reject Valero's dangerous oil trains project"	10/27/15 - 10/30/15
"Reject Valero's dangerous oil trains project" - With Modifications	10/27/15 - 10/29/15

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

October 22, 2015



Ms. Amy Million, Principal Planner
Community Development Department
250 East L Street
Benicia, CA 94510

SUBJECT: Valero Crude by Rail Project - Revised Draft Environmental Impact Report
BCDC Inquiry File SL.BN.6927.1; SCH#: 2013052074

Dear Ms. Million:

Thank you for the opportunity to comment on the Revised Draft Environmental Impact Report for the Valero Crude by Rail Project (RDEIR). Although the San Francisco Bay Conservation and Development Commission (Commission) has not reviewed the document, the following are staff comments based on our review of the document in the context of the Commission's authority under the McAteer-Petris Act (California Government Code Sections 66600 et seq.) and the federal Coastal Zone Management Act (CZMA). While staff reviews documents such as the RDEIR generally for consistency with the *San Francisco Bay Plan*, in the area of Suisun Marsh where the proposed project would be located, the policies of the Suisun Marsh Preservation Act (Marsh Act) and the *Suisun Marsh Protection Plan* (Marsh Plan) apply more specifically.

The Commission also designates certain shoreline areas for uses that must be located on the waterfront, such as ports and water-related industry (which includes the shipment of crude oil and related products), to avoid potential filling of the Bay to accommodate water-related uses where the waterfront has been developed for uses that do not require a shoreline location. According to a letter received from you dated August 9, 2013, the project is located outside our "shoreline band" permit jurisdiction; however, the refinery is located within a water-related industry priority use area as shown on Bay Plan Map 2.

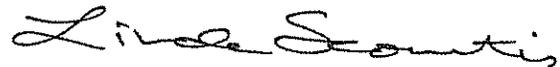
As stated in our letter of August 30, 2013, under the CZMA, in the event a federal permit, license or federal funding is provided a project located in a priority use area, the Commission has the authority to determine whether the activity is consistent with its law and policies. If there will be any such federal involvement associated with the project, the project proponent should contact our Chief of Permits, Bob Batha, to discuss the possible need for consistency determination by the Commission. We also exercise regulatory authority in the Primary Area of the Suisun Marsh, and appellate authority in the Secondary Area of the Marsh.

Amy Million
Page 2
October 22, 2015

Also in our 2013 comments, staff expressed interest in knowing the status of contingency planning in the event of an accident, particularly in light of the proximity of the rail route to Suisun Marsh and wildlife refuge priority use areas (see Bay Plan Maps 2 and 3). We note that the DEIR included, and the RDEIR expanded on, an evaluation of risks associated with rail transport of crude, both at the refinery and along the route to the facility. Additionally, as discussed in the DEIR, Valero maintains an approved contingency plan that describes the facility's integrated response program that would include coordinated federal, state and local efforts to respond to a spill or fire.

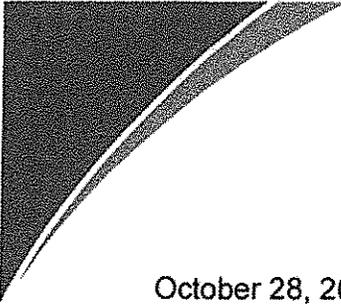
Unfortunately, BCDC was not in receipt of the June 2014 DEIR, and therefore is restricted in our review at this time. Please contact me at 415.352-3644 or linda.scourtis@bcdc.ca.gov should you have any questions.

Sincerely,



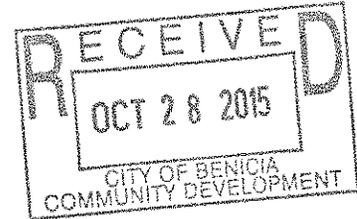
LINDA SCOURTIS
Coastal Planner

cc: Katie Shulte-Joung, State Clearinghouse



October 28, 2015

Amy Million, Principal Planner
City of Benecia Community Development
250 East L Street
Benecia, Ca 94510
AMillion@ci.benecia.ca.us



Re: Use Permit Application No. 12PLN-00063 (SCH# 2013052074); Valero Benecia
Crude Oil by Rail Project: Valero Benecia Refinery

Dear Ms. Million:

Placer County writes to express its concerns about the proposed Valero oil terminal in the City of Benecia. If approved, this could increase the flow of Bakken crude oil along the Interstate 80/Donner Pass line and the Interstate 5/Highway 65 Union Pacific rail line, both of which feed into the Union Pacific railyard in Roseville, CA. Bakken Crude is highly flammable and there have been several derailments and subsequent explosions of Bakken rail trains across North America. While Union Pacific has stated that currently no Bakken crude is flowing through Placer County, we are concerned that the construction of this facility will create conditions that would cause this flammable product to be regularly transported through our County. Within Placer County, the Union Pacific-owned rail lines run through populated areas from Roseville to the Nevada border.

Furthermore, the Kinder Morgan Gas Pipeline essentially runs conterminously with the rail line and Interstate 80. A large-scale catastrophe could destroy portions of one or more of our communities, halt east/west traffic and commerce, cause extensive environmental damage and possibly spark a catastrophic wildfire in the already drought impacted forested areas of the County.

We have reviewed the letter that the Town of Truckee submitted and support the position of the Town. We have also reviewed and endorse the August 28, 2014 comments submitted by the Sacramento Area Council of Governments (SACOG).

We support any and all actions that create a safer national rail transport system. This includes, but is not limited to, the rapid deployment of new CPC -1232 Compliant Tank Cars, a new national Positive Train Control system, accident reduction training, and all other feasible safety measures that make our rail lines as safe as possible, including the

Amy Million, Principal Planner
City of Benecia Community Development
Re: Use Permit Application No. 12PLN-00063 (SCH# 2013052074); Valero Benecia Crude
Oil by Rail Project: Valero Benecia Refinery
Page 2 of 2

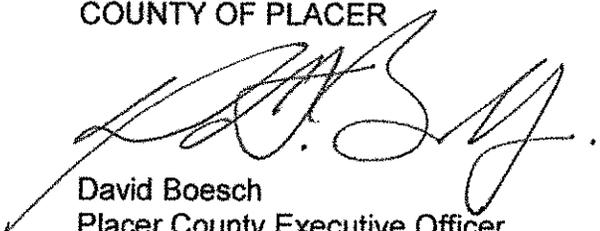
measures recommended by Truckee and SACOG. We urge the Federal Railroad Administration, the Department of Transportation, Congress and Union Pacific to work together to protect the public interest as it relates to improving rail transport safety.

While we support Union Pacific and the many positive community and economic impacts of the railroads, we urge that these safety improvements be undertaken prior to the approval of this proposed terminal.

Should you have any questions or require additional information, please contact John McEldowney, Office of Emergency Services Program Manager, at 530-889-4601 or jmceldow@placer.ca.gov.

Sincerely,

COUNTY OF PLACER



David Boesch
Placer County Executive Officer

Cc: Tony Lashbrook, Town Manager, Truckee
Mike McKeever, Executive Director, SACOG
John McEldowney, Office of Emergency Services Program Manager

BILL EMLLEN
Director
(707) 784-6765

TERRY SCHMIDTBAUER
Assistant Director
(707) 784-6765

JAGJINDER SAHOTA
Environmental Health Manager
(707) 784-6765

DEPARTMENT OF RESOURCE MANAGEMENT

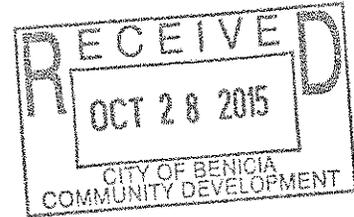


SOLANO
COUNTY

675 Texas Street, Suite 5500
Fairfield, CA 94533-6342
(707) 784-6765
Fax (707) 784-4805

www.solanocounty.com

Environmental Health Division



October 28, 2015

Amy Million, Principal Planner
City of Benicia
Community Development Department
250 East L Street
Benicia, CA 94510

RE: Valero Benicia Crude by Rail Project. Recirculated Draft Environmental Impact Report

Dear Ms. Million:

Solano County Department of Resource Management has reviewed the City of Benicia's Recirculated Draft Environmental Impact Report ("DEIR") related to the project at the Valero Benicia Refinery (Valero Project). The purpose of the Valero Project is to install new equipment, pipelines, and infrastructure to allow the refinery to receive a portion of its crude oil feedstock deliveries by rail tank car. This may result in the daily delivery of up to 70,000 barrels of crude oil by rail to the refinery, which will divert up to approximately 80% of Valero's crude oil deliveries away from marine vessel deliveries.

As part of this project, it is necessary for the crude to be delivered using the Union Pacific Railroad's (UPRR) line. The recirculated DEIR addresses UPRR's routes that are up-rail of Solano County including portions that run to the Nevada and Oregon borders. Solano County does not have any specific comments on this portion of the DEIR. However, Solano County's comments in response to the original draft EIR circulation continue to stand. Those comments from September 8, 2014 are attached.

We look forward to your response to Solano County as part of the final EIR. For questions you may contact Matthew Geisert at 707-784-3314 or Jag Sahota at 707-784-3308.

Sincerely,

A handwritten signature in black ink that reads "Bill Emlen".

Bill Emlen
Director, Solano County Department of Resource Management

SAEED IRAVANI
Building Official
Building & Safety

MIKE YANKOVICH
Program Manager
Planning Services

JAGJINDER SAHOTA
Manager
Environmental Health

SUGANTHI KRISHNAN
Senior Staff Analyst
Administrative Services

MATT TUGGLE
Engineering Manager
Public Works
Engineering

CHARLES BOWERS
Operations Manager
Public Works
Operations

CHRIS DRAK
Parks Service
Manager
Parks

Attachment:

1. September 8, 2014 Valero Benicia Crude by Rail Project DEIR letter

cc: Erin Hannigan, Chair, Board of Supervisors
John Vasquez, Vice Chair, Board of Supervisors
James Spering, Member, Board of Supervisors
Linda Seifert, Member, Board of Supervisors
Skip Thomson, Member, Board of Supervisors
Birgitta Corsello, County Administrator
Donald Ryan, Emergency Manager



SOLANO COUNTY
Department of Resource Management

Administration Division
675 Texas Street, Suite 5500
Fairfield, CA 94533
www.solanocounty.com

Telephone No: (707) 784-6765
Fax: (707)784-4805

Bill Emlen, Director
Terry Schmidtbauer, Assistant Director

September 8, 2014

Amy Million, Principal Planner
City of Benicia
Community Development Department
250 East L Street
Benicia, CA 94510

RE: Valero Benicia Crude by Rail Project Draft Environmental Impact Report

Dear Ms. Million:

Solano County Department of Resource Management has reviewed the City of Benicia's Draft Environmental Impact Report ("DEIR") related to the project at the Valero Benicia Refinery (Valero Project). The purpose of the Valero Project is to install new equipment, pipelines, and infrastructure to allow the refinery to receive a portion of its crude oil feedstock deliveries by rail tank car. This may result in the daily delivery of up to 70,000 barrels of crude oil by rail to the refinery, which will divert up to approximately 80% of Valero's crude oil deliveries away from marine vessel deliveries.

As part of this project, it is necessary for the crude to be delivered using the Union Pacific Railroad's (UPRR) line that runs through incorporated cities and unincorporated areas of Solano County. In unincorporated Solano County, UPRR's route includes portions that run through marshlands and other sensitive habitat. We feel that the DEIR underestimates potential impacts to these sensitive areas. Additionally, based on our discussion with other emergency response agencies, and review of our own authority as a Certified Unified Program Agency, we feel that the DEIR does not fully address issues related to emergency response, such as updates to county-wide emergency response plans and provisions for training and equipment for emergency responders, or provide all mitigation measures necessary to prevent accidents from occurring or provide for completely effective response to accidents should they occur.

Based on review of the documents, the Department of Resource Management has comments and suggested mitigation measures for the following impact statements provided in the DEIR:

Building & Safety David Cliche Chief Building Official	Planning Services Mike Yankovich Program Manager	Environmental Health Vacant Program Manager	Administrative Services Suganthi Krishnan Sr. Staff Analyst	Public Works- Engineering Matt Tuggle Engineering Manager	Public Works- Operations Wayne Spencer Operations Manager
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1. Impact Statement 4.7-2 describing that the Valero Project "could pose significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment". This impact is listed as "Less Than Significant" with no mitigation measures provided. The Department of Resource Management disagrees with this finding as written and believes this is a significant impact that requires mitigation.

Information used to support the DEIR's "Less Than Significant" with no mitigation required finding includes the following:

- Valero has committed to the use of the more protective CPC 1232 tank cars: Valero is in the process of purchasing or leasing CPC 1232 tank cars, which are more protective than DOT 111 tank cars, for use in the unit trains that will transport crude oil from Roseville to Benicia.

The Department concurs that CPC 1232 tanks cars are more protective than DOT 111 tank cars. While the DEIR uses CPC 1232 tank cars in its analysis, there appears to be only a voluntary commitment by Valero to utilize them, and there is no mitigation measure requiring only the use of the more protective CPC 1232 tank cars by Valero for this project. Therefore, the Department recommends a specific mitigation measure be added to ensure that CPC 1232 tanks cars, or tank cars that provide better protection, will be used once the facility begins to receive crude by rail from this project (see recommended mitigation measure M1 below).

- Implementation of a 40 MPH speed limit in High Threat Urban Areas reducing potential for derailment and spills: The speed of the unit trains will be reduced to 40 miles per hour for High Threat Urban Areas (HTUAs), which includes cities along the route from Roseville to Benicia, and that a release of crude oil would be less likely to occur with the use of the more fortified CPC 1232 rail cars and the reduced speeds.

The Department cannot concur with the analysis of High Threat Urban Areas (HTUAs) used in the DEIR. It is correct that the American Association of Railroads and their members have adopted a 40 mile per hour speed limit for trains transporting crude oil in HTUAs. However, according to the U.S. Department of Transportation press release dated February 21, 2014 (Attachment 1), this voluntary agreement is only for trains utilizing the older DOT 111's, not using the CPC 1232's as Valero is proposing for this project. Also, HTUAs exclude most of Solano County per the U.S. Department of Homeland Security, Transportation Security Administration definition contained in the Code of Federal Regulations, 49 Part 1580, Appendix A (pages 443 and 444; Attachment 2). That document states that the HTUA for the Bay Area is defined as only extending 10 miles beyond Vallejo, and the HTUA for the Sacramento Area is defined as only extending 10 miles beyond Sacramento. As the project proposes to use CPC 1232 tank cars, and most of the UPRR route within Solano County is more than 10 miles from Vallejo and Sacramento, large portion of Solano County is not included within a HTUA, or covered by any voluntary speed restriction agreement as stated in the DEIR. The Department recommends an additional mitigation measure to ensure train speeds do not exceed 40 MPH throughout Solano County (see recommended mitigation measure M2 below).

By way of example is the Lynchburg, Virginia derailment incident that occurred in April 2014 and is discussed in the DEIR. In this incident, a train traveling at 23 MPH derailed along the James River, resulting in rupture of two CPC 1232 cars and

release of 30,000 gallons that was mostly consumed by fire on the James River (proposed Code of Federal Regulations, Docket No. PHMSA-2012-0082 (HM-251), Table 3; Attachment 3). Therefore, the use of CPC 1232 tank cars at low speeds does not alone mitigate the potential impact from a train derailment. Additional mitigation measures should be required to reduce the likelihood of derailment and to ensure proper and quick responses to spills and fires, and possible explosion, should a derailment occur to support the concept of less than significant.

- Less impact due to lower population density in unincorporated areas of Solano County: Tank car rupture in certain portions of Solano County will have less of an impact due to the lower population density in those areas.

The Department cannot agree with the assertion that impacts will be less in areas with lower population density given the environmentally sensitive conditions along much of the route in unincorporated Solano County. Solano County has direct experience with infrequent petroleum releases in the Suisun Marsh, resulting in significant impacts to the marsh. For example, in 2004 there was a similar, unlikely and infrequent event of a pipeline release of 84,966 gallons of diesel within the Suisun Marsh. This resulted in the deployment of significant resources from the federal, state, and local agencies, and personnel and contractors from the responsible party, to mitigate the environmental harm from the incident. Environmental restoration from the incident was required for six years after the release, and Solano County staff was consistently involved throughout this process. This event, though infrequent, clearly resulted in a significant impact and has a direct parallel to the Valero project.

An example from outside Solano County is the train derailment at Aliceville, Alabama in November 2013 that resulted in a crude oil release into a swamp, impacting wildlife and disrupting commerce. The Aliceville derailment resulted in a deployment of resources from federal, state, and local agencies, as well as the responsible party, to extinguish the resulting fire and mitigate the impacts of the release. As of April 2014 this effort was still ongoing. This, too, shows that infrequent events in sensitive habitats do cause significant impacts. Additional mitigation measures are required to reduce the likelihood of derailment and to ensure proper response should it occur.

Given the above concerns, the Department believes that the project does have significant impact and additional mitigation measures are necessary. The Department understands that UPRR's transportation of commodities is interstate commerce and is regulated by federal law and regulations. However, Valero, as recipient of the crude products by rail, does have the ability to obtain commitments from UPRR to improve tank car and rail line safety for Valero's project. The Department requests the following mitigation measures to be implemented prior to receipt of crude by rail at Valero as a result of this project:

- M1. CPC 1232 tank cars will be used for the project. Valero will ensure that UPRR uses Valero's CPC 1232 tank cars, or tanks cars owned by Valero that are more protective once developed and available, within Solano County for this project.
- M2. Crude rail unit train speeds will be reduced throughout Solano County. Valero will obtain a commitment from UPRR to reduce crude oil train speeds to no more than 40 miles per hour throughout all of Solano County, including the cities of Dixon, Vacaville, Fairfield, Suisun City, and the unincorporated areas.

- M3. Improvements to crude rail train controls and braking will be implemented. Valero will obtain a commitment from UPRR to implement the following for trains used in the project within Solano County: 1) use distributed power, in the form of an engine 2/3 the length of the unit train; and 2) use positive train control, which is the use of a system that will monitor and control train movement to prevent collisions with other trains. The use of these systems will increase the braking capability of each train to prevent an accident, or, in the event of an incident, reduce the impact from a derailment.
- M4. Improvements to track safety. Valero will obtain a commitment from UPRR to increase track safety specifically within Solano County by: 1) performing at least one more internal rail inspection each year above those required by the Federal Rail Administration regulations; 2) conduct at least two high-tech track geometry inspections each year; and 3) increase trackside safety technology by installing wayside wheel bearing detectors in Solano County (at least two within county boundary).
- M5. Response capabilities, equipment, and procedures to respond to accidental releases will be provided. Valero will obtain a commitment from UPRR to provide information on an ongoing basis on UPRR's capabilities, equipment and procedures to respond to incidents in Solano County. Valero will also provide the Solano County Certified Unified Program Agency information on all of Valero's response capabilities.
- M6. Assistance in training local fire departments and districts on responding to crude by rail incidents and fighting industrial fires shall be provided during the life of the project.
- o Valero will sponsor emergency response drills free of charge for local emergency response agencies regarding crude by rail within Solano County. Valero must obtain a commitment from UPRR to participate in drills and exercises. If UPRR is unable to participate, Valero will still use their CPC 1232 tank cars at their facility and obtain assistance from the TransCAER organization for the drill and/or exercise. The drills/exercises will be coordinated through the Solano County Office of Emergency Services in coordination with the Solano County Fire Chiefs Association, and
 - o Valero will work with the Solano County Emergency Manager and the Solano County Fire Chiefs Association on an ongoing basis to offer and pay for personnel from Solano County fire departments and districts located along the railroad transportation corridor to obtain industrial firefighter training.
- This training will ensure a qualified cadre of locally available fire personnel to address any fires from a train derailment involving the rail transport of crude oil within Solano County.
- M7. Valero will ensure adequate foam and equipment are available along the route used to deliver their crude. Valero will work with Solano County Emergency Manager and the Solano County Fire Chiefs Association to establish caches of foam and necessary equipment at various fire departments/districts facilities within Solano County located in the vicinity of the railroad transportation corridor.
- M8. Valero will work on an ongoing basis with the Solano County Emergency Manager and the Solano County Fire Chiefs Association to establish a

maintenance program to ensure the viability of the equipment and foam caches located throughout Solano County.

- M9. Valero will provide the Department of Resource Management and Solano County Office of Emergency Services with the anticipated schedule of unit trains arriving to the Valero Benicia Refinery on an ongoing basis. This will allow emergency responders to schedule staff and stage equipment appropriately to be ready for response.
2. Impact Statement 4.7-7 regarding impairing implementation of, or physically interfering with, an adopted emergency response plan or emergency evaluation plan is listed as less than significant with mitigation. The Department of Resource Management disagrees that this impact is fully mitigated as described in the DEIR.

The DEIR discusses that Valero responds to emergencies at the Valero Benicia Refinery, that the City of Benicia has overall responsibility within the City, and that the Valero Project would not pose a potentially significant new impact to existing City of Benicia emergency/evacuation response plans. However, the DEIR does not address the impact to emergency/ evacuation response plans within the remainder of Solano County. The Environmental Health Service Division, as the Solano County Certified Unified Program Agency (CUPA), is responsible for preparing and revising the Solano County Area Plan, which is the countywide contingency plan for responding to hazardous materials incidents mandated by state law. The potential impacts and necessary updates to the Area Plan have not been addressed in the DEIR. The Department of Resource Management requests the following mitigation measures be implemented:

- M10. Valero Benicia Refinery personnel will assist the Department of Resource Management, Environmental Health Services Division, as the CUPA, in revising the Solano County Hazardous Materials Area Plan to better address hazardous materials incidents at the refinery, and the response to incidents during the transportation of hazardous materials to or from Valero, including response at the refinery and along transportation routes.
- M11. Valero Benicia Refinery personnel will sponsor and commit to having annual drills and/or exercises coordinated with the Solano County Office of Emergency Services, fire departments/districts, and other responders within Solano County that exercise components of the Area Plan. Valero will obtain input from Solano County CUPA on the drill design to verify it addresses components of the Area Plan.
3. Impact Statement 4.5-3 discusses the slumping and subsidence of soils, including those resulting from seismic activity, and the rail tipping potential. The Department of Resource Management cannot adequately evaluate whether Mitigation Measure 4.5-3 is sufficient to address any rail tipping potential because a geotechnical report that incorporates site specific geologic data is not included as an attachment to the DEIR. Therefore the DEIR should include the geotechnical report prepared for the construction of the rail spur or a previous geotechnical report that includes site specific data from the area of the proposed rail spur.

In conclusion the Department of Resource Management requests that DEIR address and incorporate the comments stated herein. For questions, you may also contact Matthew Geisert at 707-784-3314 or Terry Schmidtbauer at 707-784-3157.

Sincerely,



Bill Emlen
Director, Solano County Department of Resource Management

Attachments:

1. U.S. Department of Transportation press release dated February 21, 2014
2. Department of Homeland Security, Transportation Security Administration in the Code of Federal Regulations, 49 Part 1580, Appendix A (page 443 and 444).
3. Proposed Code of Federal Regulations, Docket No. PHMSA-2012-0082 (HM-251), Table 3.

cc: Linda Seifert, Chair, Board of Supervisors
Erin Hannigan, Vice Chair, Board of Supervisors
James Spering, Member, Board of Supervisors
John Vasquez, Member, Board of Supervisors
Skip Thomson, Member, Board of Supervisors
Birgitta Corsello, County Administrator
Donald Ryan, Emergency Manager

**Freight Railroads Join U.S. Transportation Secretary Foxx in
Announcing Industry Crude By Rail Safety Initiative**

WASHINGTON, D.C., Feb. 21, 2014 – The nation’s major freight railroads today joined U.S. Transportation Secretary Anthony Foxx in announcing a rail operations safety initiative that will institute new voluntary operating practices for moving crude oil by rail. The announcement follows consultations between railroads represented by the Association of American Railroads (AAR) and the U.S. Department of Transportation (DOT), including the leadership of the Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

The announcement today covers steps related to crude by rail operations. Additional issues relating to the safe transport of crude oil, such as tank car standards and proper shipper classification of crude oil, are being addressed separately.

“We share the Administration’s vision for making a safe rail network even safer, and have worked together to swiftly pinpoint new operating practices that enhance the safety of moving crude oil by rail,” said AAR President and CEO Edward R. Hamberger. “Safety is a shared responsibility among all energy-supply-chain stakeholders. We will continue to work with our safety partners – including regulators, our employees, our customers and the communities through which we operate – to find even more ways to reinforce public confidence in the rail industry’s ability to safely meet the increased demand to move crude oil.”

Under the industry’s voluntary efforts, railroads will take the following steps:

Increased Track Inspections – Effective March 25, railroads will perform at least one additional internal-rail inspection each year above those required by new FRA regulations on main line routes over which trains moving 20 or more carloads of crude oil travel. Railroads will also conduct at least two high-tech track geometry inspections each year on main line routes over which trains with 20 or more loaded cars of crude oil are moving. Current federal regulations do not require comprehensive track geometry inspections.

Braking Systems – No later than April 1, railroads will equip all trains with 20 or more carloads of crude oil with either distributed power or two-way telemetry end-of-train devices. These technologies allow train crews to apply emergency brakes from both ends of the train in order to stop the train faster.

Use of Rail Traffic Routing Technology – No later than July 1, railroads will begin using the Rail Corridor Risk Management System (RCRMS) to aid in the determination of the safest and most secure rail routes for trains with 20 or more cars of crude oil. RCRMS is a sophisticated analytical tool, developed in coordination with the federal government, including the U.S. Department of Homeland Security (DHS), PHMSA and FRA. Railroads currently use RCRMS in the routing of security sensitive materials. This tool takes into account 27 risk factors – including volume of commodity, trip length,

population density along the route, local emergency response capability, track quality and signal systems – to assess the safety and security of rail routes.

Lower Speeds – No later than July 1, railroads will operate trains with 20 or more tank cars carrying crude oil that include at least one older DOT-111 car no faster than 40 miles-per-hour in the federally designated 46 high-threat-urban areas (HTUA) as established by DHS regulations. In the meantime, railroads will continue to operate trains with 20 or more carloads of hazardous materials, including crude oil, at the industry self-imposed speed limit of 50 miles per hour.

Community Relations - Railroads will continue to work with communities through which crude oil trains move to address location-specific concerns that communities may have.

Increased Trackside Safety Technology – No later than July 1, railroads will begin installing additional wayside wheel bearing detectors if they are not already in place every 40 miles along tracks with trains carrying 20 or more crude oil cars, as other safety factors allow.

Increased Emergency Response Training and Tuition Assistance – Railroads have committed by July 1 to provide \$5 million to develop specialized crude by rail training and tuition assistance program for local first responders. One part of the curriculum will be designed to be provided to local emergency responders in the field, as well as comprehensive training will designed to be conducted at the Transportation Technology Center, Inc. (TTCI) facility in Pueblo, Colo. The funding will provide program development as well as tuition assistance for an estimated 1500 first responders in 2014.

Emergency Response Capability Planning – Railroads will by July 1 develop an inventory of emergency response resources for responding to the release of large amounts of crude oil along routes over which trains with 20 or more cars of crude oil operate. This inventory will include locations for the staging of emergency response equipment and, where appropriate, contacts for the notification of communities. When the inventory is completed, railroads will provide DOT with information on the deployment of the resources and make the information available upon request to appropriate emergency responders.

Railroads will continue to work with the Administration and rail customers to address other key shared safety responsibilities, including federal tank car standards and the proper shipper classification and labeling of oil moving by rail. PHMSA is currently reviewing public comments on increasing federal tank car standards.

To learn more about all railroads do to continuously improve the safety of America's rail system, please visit www.aar.org.

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For more information contact: AAR Media Relations at media@aar.org or 202-639-2345.

About AAR: The Association of American Railroads (AAR) is the world's leading railroad policy, research and technology organization focusing on the safety and productivity of rail carriers. AAR members include the major freight railroads of the U.S., Canada and Mexico, as well as Amtrak. Learn more at www.aar.org. Follow us on Twitter: AAR_FreightRail or Facebook: www.facebook.com/freightrail.

Transportation Security Administration, DHS

Pt. 1580, App. A

- (6) Discharge, discovery, or seizure of a firearm or other deadly weapon on a train or transit vehicle or in a station, terminal, facility, or storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.
 - (7) Indications of tampering with passenger rail cars or rail transit vehicles.
 - (8) Information relating to the possible surveillance of a passenger train or rail transit vehicle or facility, storage yard, or other location used in the operation of the passenger railroad carrier or rail transit system.
 - (9) Correspondence received by the passenger railroad carrier or rail transit system indicating a potential threat to rail transportation.
 - (10) Other incidents involving breaches of the security of the passenger railroad carrier or the rail transit system operations or facilities.
- (d) Information reported should include, as available and applicable:
- (1) The name of the passenger railroad carrier or rail transit system and contact information, including a telephone number or e-mail address.
 - (2) The affected station, terminal, or other facility.
 - (3) Identifying information on the affected passenger train or rail transit vehicle including number, train or transit line, and route, as applicable.
 - (4) Origination and termination locations for the affected passenger train or rail transit vehicle, including departure and destination city and the rail or transit line and route.
 - (5) Current location of the affected passenger train or rail transit vehicle.
 - (6) Description of the threat, incident, or activity.
 - (7) The names and other available biographical data of individuals involved in the threat, incident, or activity.
 - (8) The source of any threat information.

[73 FR 73173, Nov. 26, 2008, as amended at 74 FR 23657, May 20, 2009]

APPENDIX A TO PART 1580—HIGH THREAT URBAN AREAS (HTUAs)

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
AZ	Phoenix Area *	Chandler, Gilbert, Glendale, Mesa, Peoria, Phoenix, Scottsdale, Tempe, and a 10-mile buffer extending from the border of the combined area.	Phoenix, AZ
CA	Anaheim/Santa Ana Area	Anaheim, Costa Mesa, Garden Grove, Fullerton, Huntington Beach, Irvine, Orange, San Juan, and a 10-mile buffer extending from the border of the combined area.	Anaheim, CA; Santa Ana, CA
	Bay Area	Berkeley, Daly City, Fremont, Hayward, Oakland, Palo Alto, Richmond, San Francisco, San Jose, Santa Clara, Sunnyvale, Vallejo, and a 10-mile buffer extending from the border of the combined area.	San Francisco, CA; San Jose, CA; Oakland, CA
	Los Angeles/Long Beach Area	Burbank, Glendale, Inglewood, Long Beach, Los Angeles, Pasadena, Santa Monica, Santa Clarita, Torrance, Simi Valley, Thousand Oaks, and a 10-mile buffer extending from the border of the combined area.	Los Angeles, CA; Long Beach, CA
	Sacramento Area *	Elk Grove, Sacramento, and a 10-mile buffer extending from the border of the combined area.	Sacramento, CA
	San Diego Area *	Chula Vista, Escondido, and San Diego, and a 10-mile buffer extending from the border of the combined area.	San Diego, CA
CO	Denver Area	Arvada, Aurora, Denver, Lakewood, Westminster, Thornton, and a 10-mile buffer extending from the border of the combined area.	Denver, CO
DC	National Capital Region	National Capital Region and a 10-mile buffer extending from the border of the combined area.	National Capital Region, DC
FL	Fort Lauderdale Area	Fort Lauderdale, Hollywood, Miami Gardens, Miamar, Pembroke Pines, and a 10-mile buffer extending from the border of the combined area.	N/A
	Jacksonville Area	Jacksonville and a 10-mile buffer extending from the city border	Jacksonville, FL
	Miami Area	Hialeah, Miami, and a 10-mile buffer extending from the border of the combined area.	Miami, FL
	Orlando Area	Orlando and a 10-mile buffer extending from the city border	Orlando, FL
	Tampa Area *	Clearwater, St. Petersburg, Tampa, and a 10-mile buffer extending from the border of the combined area.	Tampa, FL
GA	Atlanta Area	Atlanta and a 10-mile buffer extending from the city border	Atlanta, GA
HI	Honolulu Area	Honolulu and a 10-mile buffer extending from the city border	Honolulu, HI
IL	Chicago Area	Chicago and a 10-mile buffer extending from the city border	Chicago, IL
IN	Indianapolis Area	Indianapolis and a 10-mile buffer extending from the city border	Indianapolis, IN
KY	Louisville Area *	Louisville and a 10-mile buffer extending from the city border	Louisville, KY

State	Candidate urban area	Geographic area captured in the data count	Previously designated urban areas included
LA	Baton Rouge Area*	Baton Rouge and a 10-mile buffer extending from the city border	Baton Rouge, LA.
MA	New Orleans Area Boston Area	New Orleans and a 10-mile buffer extending from the city border Boston, Cambridge, and a 10-mile buffer extending from the border of the combined area.	New Orleans, LA. Boston, MA.
MD	Baltimore Area	Baltimore and a 10-mile buffer extending from the city border	Baltimore, MD.
MI	Detroit Area	Detroit, Sterling Heights, Warren, and a 10-mile buffer extending from the border of the combined area.	Detroit, MI.
MN	Twin Cities Area	Minneapolis, St. Paul, and a 10-mile buffer extending from the border of the combined entity.	Minneapolis, MN; St. Paul, MN.
MO	Kansas City Area	Independence, Kansas City (MO), Kansas City (KS), Olathe, Overland Park, and a 10-mile buffer extending from the border of the combined area.	Kansas City, MO.
NC	St. Louis Area	St. Louis and a 10-mile buffer extending from the city border	St. Louis, MO.
NC	Charlotte Area	Charlotte and a 10-mile buffer extending from the city border	Charlotte, NC.
NE	Omaha Area*	Omaha and a 10-mile buffer extending from the city border	Omaha, NE.
NJ	Jersey City/Newark Area	Elizabeth, Jersey City, Newark, and a 10-mile buffer extending from the border of the combined area.	Jersey City, NJ; Newark, NJ.
NV	Las Vegas Area*	Las Vegas, North Las Vegas, and a 10-mile buffer extending from the border of the combined entity.	Las Vegas, NV.
NY	Buffalo Area* New York City Area	Buffalo and a 10-mile buffer extending from the city border New York City, Yonkers, and a 10-mile buffer extending from the border of the combined area.	Buffalo, NY. New York, NY.
OH	Cincinnati Area	Cincinnati and a 10-mile buffer extending from the city border	Cincinnati, OH.
OH	Cleveland Area	Cleveland and a 10-mile buffer extending from the city border	Cleveland, OH.
OH	Columbus Area	Columbus and a 10-mile buffer extending from the city border	Columbus, OH.
OH	Toledo Area*	Oregon, Toledo, and a 10-mile buffer extending from the border of the combined area.	Toledo, OH.
OK	Oklahoma City Area*	Norman, Oklahoma and a 10-mile buffer extending from the border of the combined area.	Oklahoma City, OK.
OR	Portland Area	Portland, Vancouver, and a 10-mile buffer extending from the border of the combined area.	Portland, OR.
PA	Philadelphia Area	Philadelphia and a 10-mile buffer extending from the city border	Philadelphia, PA.
PA	Pittsburgh Area	Pittsburgh and a 10-mile buffer extending from the city border	Pittsburgh, PA.
TN	Memphis Area	Memphis and a 10-mile buffer extending from the city border	Memphis, TN.
TX	Dallas/Fort Worth/Arlington Area	Arlington, Carrollton, Dallas, Fort Worth, Garland, Grand Prairie, Irving, Mesquite, Plano, and a 10-mile buffer extending from the border of the combined area.	Dallas, TX; Fort Worth, TX; Arlington, TX.
TX	Houston Area	Houston, Pasadena, and a 10-mile buffer extending from the border of the combined entity.	Houston, TX.
TX	San Antonio Area	San Antonio and a 10-mile buffer extending from the city border	San Antonio, TX.
WA	Seattle Area	Seattle, Bellevue, and a 10-mile buffer extending from the border of the combined area.	Seattle, WA.
WI	Milwaukee Area	Milwaukee and a 10-mile buffer extending from the city border	Milwaukee, WI.

*FY05 Urban Areas eligible for sustainment funding through the FY06 Urban Areas Security Initiative (UASI) program; any Urban Area not identified as eligible through the risk analysis process for two consecutive years will not be eligible for continued funding under the UASI program.

APPENDIX B TO PART 1580—SUMMARY OF THE APPLICABILITY OF PART 1580
 (This is a summary—see body of text for complete requirements)

Security measure and rule section	Freight railroad cars that transport specified hazardous materials	Freight railroad cars transporting specified hazardous materials (§ 1580.100(b))	Rail operations at certain facilities that ship (i.e., offer, prepare, or load for transportation) hazardous materials	Rail operations at certain facilities that receive or unload hazardous materials within an HTUA	Passenger railroad cars and rail transit systems	Certain other rail operations (private, business, freight, electric, trolley, excursion)
Allow TSA to inspect (§ 1580.5)	X	X	X	X	X	X
Appoint rail security coordinator (§ 1580.101 freight; § 1580.201 passenger)	X	X	X	X	X	(1)
Report significant security concerns (§ 1580.105 freight; § 1580.203 passenger)	X	X	X	X	X	X
Provide location and shipping information for rail cars containing specified hazardous materials if requested (§ 1580.103)		X	X	X		

Dakota, prompting authorities to issue a voluntary evacuation of the city and surrounding area. On November 8, 2013, a train transporting crude oil to the Gulf Coast from North Dakota derailed in Aliceville, Alabama, spilling crude oil in nearby wetlands ignited. On July 6, 2013, a catastrophic railroad accident occurred in Lac-Mégantic, Quebec, Canada, when an unsecured and unattended freight train transporting crude oil rolled down a descending grade and subsequently derailed, resulting in the unintentional release of lading from multiple tank cars. The subsequent fires and explosions, along with other effects of the accident, resulted in the deaths of 47 individuals. In addition, the derailment caused extensive damage to the town center, a release of hazardous materials resulting in a massive environmental impact that will require substantial clean-up costs,

and the evacuation of approximately 2,000 people from the surrounding area.

Accidents involving HHFTs transporting ethanol can also cause severe damage. On August 5, 2012, a train derailed 18 of 106 cars, 17 of which were carrying ethanol, near Plevna, MT. Twelve of the 17 cars released lading and began to burn, causing two grass fires, a highway near the site to be closed, and over \$1 million in damages. On October 7, 2011, a train derailed 26 loaded freight cars (including 10 loaded with ethanol) approximately one-half mile east of Tiskilwa, IL. The release of ethanol and resulting fire initiated an evacuation of about 500 residents within a 1/2-mile radius of the accident scene, and resulted in damages over \$1.8 million. On June 19, 2009, near Rockford, IL, a train derailed 19 cars, all of which contained ethanol, and 13 of the derailed cars caught fire. The derailment destroyed a section of single main track

and an entire highway-rail grade crossing. As a result of the fire that erupted after the derailment, a passenger in one of the stopped cars was fatally injured, two passengers in the same car received serious injuries, and five occupants of other cars waiting at the highway/rail crossing were injured. Two responding firefighters also sustained minor injuries. The release of ethanol and resulting fire initiated a mandatory evacuation of about 2,000 residents within a 1/2-mile radius of the accident scene and damages of approximately \$1.7 million. The EPA estimated that 60,000 gallons of ethanol spilled into an unnamed stream, which flowed near the Rock and Kishwaukee Rivers.

The following table highlights the risk of HHFTs by summarizing the impacts of selected major train accidents involving trains of Class 3 flammable liquid.

TABLE 3—MAJOR CRUDE OIL/ETHANOL TRAIN ACCIDENTS IN THE U.S. [2006-2014]

Location	Date (MM/YY)	Number of tank cars derailed	Number of crude oil/ethanol cars penetrated	Speed at derailment in miles per hour (mph)	Material and type of train	Product loss (gallons of crude or ethanol)	Fire	Type of train accident or cause of train accident
LaSalle, CO	05/14	5	1	9	Crude Oil (unit)	5,000	No	To Be Determined (TBD).
Lynchburg, VA	04/14	17	2	23	Crude Oil (unit)	30,000	Yes	TBD.
Vandergrift, PA	02/14	21	4	31	Crude Oil	10,000	No	TBD.
New Augusta, MS	01/14	26	25	45	Crude Oil	90,000	No	TBD.
Casselton, ND	12/13	20	18	42	Crude Oil (unit)	476,436	Yes	Collision.
Aliceville, AL	11/13	26	25	39	Crude Oil (unit)	630,000	Yes	TBD.
Plevna, MT	08/12	17	12	25	Ethanol	245,336	Yes	TBD.
Columbus, OH	07/12	3	3	23	Ethanol	53,347	Yes	TBD—NTSB Investigation.
Tiskilwa, IL	10/11	10	10	34	Ethanol	143,534	Yes	TBD—NTSB Investigation.
Arcadia, OH	02/11	31	31	46	Ethanol (unit)	834,840	Yes	Rail Defect.
Rockford/Cherry Valley, IL	06/09	19	13	19	Ethanol (unit)	232,963	Yes	Washout.
Painesville, OH	10/07	7	5	48	Ethanol	76,153	Yes	Rail Defect.
New Brighton, PA	10/08	23	20	37	Ethanol (unit)	485,278	Yes	Rail Defect.

Note 1. The term "unit" as used in this chart means that the train was made up only of cars carrying that single commodity, as well as any required non-hazardous buffer cars and the locomotives.

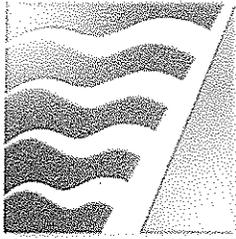
Note 2. All accidents listed in the table involved HHFTs.

Note 3. All crude oil or crude oil/LPG accidents involved a train transporting over 1 million gallons of oil.

While not all accidents involving crude oil and ethanol release as much product or have as significant consequences as those shown in this

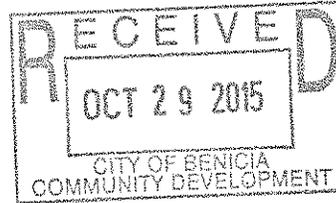
table, these accidents indicate the potential harm from future releases. Table 4 provides a brief summary of the justifications for each provision in this

NPRM, and how each provision will address the safety risks described previously.



**BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT**

October 28, 2015



Ms. Amy Million
City of Benicia
Community Development Department
250 East L. Street
Benicia, CA 94510

RE: Valero Benicia Crude-by- Rail Project Recirculated Draft Environmental Impact Report

Dear Ms. Million:

Thank you for the opportunity to comment on the Valero Benicia Crude by Rail Project (Project) Recirculated Draft Environmental Report (RDEIR). The purpose of the RDEIR is to evaluate the potential air quality impacts that could occur uprail of the Valero Benicia Refinery. The intent of the Project is to provide an alternate means to deliver crude oil to the Valero Benicia Refinery other than by ship. Union Pacific Railroad (UPRR) will transport up to 70, 000 barrels per day of crude oil from various points of origin in two daily 50 car trains to the Valero Benicia Refinery. The Project also involves upgrades to tracks, rail spurs, pumps, pipeline unloading racks and underground infrastructure.

The Air District's original comments provided on the DEIR on September 15, 2014 are still relevant, and are incorporated herein by reference. Below are our comments on the air quality analysis in the RDEIR.

Health Risk Analyses

Air District staff has reviewed the Health Risk Analysis modeling parameters (Appendix B) that were used to estimate the potential increase in health risks associated with the Project near the Valero Benicia Refinery and for a location in the City of Fairfield and has the following comments:

1. Please provide justification for using an optimum average fuel efficiency of 1,005 ton-mile per gallon based on 1992 EPA document (EPA-420-R-92-009) when more recent data from EPA (EPA-420-F-09-025) in 2009 have an average locomotive fuel efficiency of 400 ton-mile per gallon.

- ALAMEDA COUNTY**
Tom Bates
Margaret Fujoka
Scott Haggerty
Nate Miley
- CONTRA COSTA COUNTY**
John Giola
David Hudson
Karen Mitchoff
Mark Ross
- MARIN COUNTY**
Katie Rice
- NAPA COUNTY**
Brad Wagenknecht
- SAN FRANCISCO COUNTY**
John Avalos
Edwin M. Lee
Eric Mar
(Vice-Chair)
- SAN MATEO COUNTY**
David J. Canepa
Carol Groom
(Chair)
- SANTA CLARA COUNTY**
Cindy Chavez
Liz Kniss
(Secretary)
Rod G. Sinks
- SOLANO COUNTY**
James Spering
- SONOMA COUNTY**
Teresa Barrett
Shirlee Zane

Jack P. Broadbent
EXECUTIVE OFFICER/APCO

2. The current modeling using AERMOD relies on meteorological data from the former Nut Tree Restaurant in Vacaville. Air District staff recommends using meteorological data in Fairfield or Suisun for evaluating sensitive receptor impacts. Previous use of meteorological data in the Valero Crude-by-Rail DEIR from the sewage treatment plant in the City of Suisun was acceptable to the Air District.
3. Table 3 presents estimated cancer risks and PM_{2.5} concentrations from stationary sources and mobile sources using the Air District's Google Earth tools. The screening values that the Air District provides on the Google Earth tools have not been updated to incorporate the latest OEHHA values, except for the age sensitivity values. Please adjust the screening values related to age sensitivity, breathing rate, exposure duration, and the amount of time at home.
4. Table 4 presents the combined risk values at the maximum exposed residence near the Valero Benicia Refinery. Cancer risks identified in the CEQA document for the 2002 Valero Improvement Project (VIP) were used to estimate the refinery's contribution to the offsite resident. Please ensure that the VIP CEQA analysis was comprehensive and includes all sources at the refinery that could impact the nearest receptor. For example, the VIP does not evaluate PM_{2.5} emissions, flare emissions, standby generators, and other sources not included in the VIP. In addition, the VIP modeling results for cancer risk should be amended to account for the latest OEHHA values related to age sensitivity, breathing rate, exposure duration, and the amount of time at home.
5. Please provide the detailed calculations used to estimate locomotive diesel particulate matter emissions used in the modeling.
6. Air District staff recommends that emissions from associated ships supporting Valero that are not displaced by the Valero Crude-by-Rail Project be included in the cumulative health risk analysis.

If the revised health risk analysis per the Air District's comments above result in significant estimated health risks to sensitive receptors, the Air District recommends that the City identify sufficient mitigation measures to reduce the impact to acceptable levels.

Greenhouse Gases

Project construction and operation would result in a net increase of approximately 13,609 metric tons of greenhouse gas emissions (CO₂e) per year, and therefore the emissions of greenhouse gases (GHG) that would be generated by the Project would be cumulatively considerable (RDEIR Table 4.6-5, Impact 4.6-1). The RDEIR, however, states the Project would not conflict with the City of Benicia Climate Action Plan (Page 2-61). Air District staff recommends the City of Benicia provide the analysis to support this conclusion.

The Commercial and Industrial sector is the largest contributor to the City of Benicia's total greenhouse gas emissions. The City of Benicia's Emissions Inventory indicates that approximately 95 percent of the Community's total emissions are related to commercial and industrial uses; 20% of these emissions are attributed to the Valero Refinery and Port of Benicia (City of Benicia 2009 CAP). Objective IC4 of the City of Benicia's Climate Action Plan (CAP): Encourage the Refinery to Continue to Reduce Emissions, aims at improving air quality and decreasing asthma rates by implementing strategies that will result in GHG and toxic air contaminant reductions. Strategy IC 4-1: Continue Implementing Capital Improvement Programs, urges the refinery to utilize the most current modernized equipment, and Strategy IC4-2: Investigate Onsite Energy Production, encourages on-site energy production measures such as photovoltaic and wind power. The RDEIR omits any discussion of these strategies as mitigation for the significant GHG emissions associated with this project. Air District staff recommends that the RDEIR include all feasible measures to minimize GHG impacts, particularly measures included in the City's CAP.

Change in Crude

Valero plans to purchase and process a range of crudes but does not expect to increase the total crude oil throughput or increase production of existing products or by-products. Air District staff recommends that the RDEIR address the potential changes in emissions associated with handling lighter crude, which can have higher volatile organic compound (VOC) content than the existing crude being processed; this can lead to increased fugitive emissions during transport and storage which should be evaluated for air quality impacts.

Air District staff is available to assist the City of Benicia in addressing these comments. If you have any questions, please contact Andrea Gordon, Senior Environmental Planner, at (415) 749-4940 or agordon@baaqmd.gov.

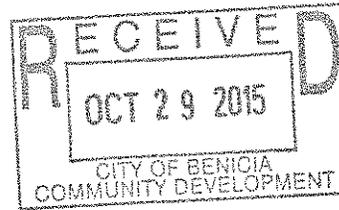
Sincerely,



Jean Roggenkamp
Deputy Executive Officer

cc: BAAQMD Director James Spering

October 26, 2015



Ms. Amy Million
City of Benicia
Community Development Department
250 East L. Street
Benicia, CA 94510



Dear Ms. Amy Million,

The Air Pollution Control and Air Quality Management Districts (Air Districts) that have participated in this coordinated comment letter appreciate the efforts of the City of Benicia for including an expanded air quality evaluation in the affected "uprail" air basins identified in the Valero Benicia Crude by Rail Project (Project) Revised Draft Environmental Impact Report (RDEIR).



The significant air quality impacts identified in the RDEIR are of considerable concern to the Air Districts due to the potential for local and regional health impacts resulting from the substantial increase in ozone precursor and toxic air contaminants that will result from this Project. In addition, since the release of the RDEIR, the U.S. EPA has promulgated a new lower ozone ambient air quality standard that may cause some of the Air Districts to now be classified as non-attainment and/or make it more difficult for those Air Districts already classified as nonattainment to reach attainment.



According to the analysis in the RDEIR, the Project will result in a substantial increase in ozone precursors in each of the uprail air basins analyzed, resulting in significant air quality impacts. Unfortunately, the RDEIR does not identify any mitigation measures to lessen the significant impacts. The RDEIR references federal preemption prohibiting the City of Benicia from regulating UPRR's rail operations "either directly, by dictating routing or choice of locomotives, or indirectly by requiring Valero to pay a mitigation fee or purchase emission offsets." Therefore, the City of Benicia asserts that these types of mitigation measures are infeasible per the California Environmental Quality Act (CEQA). We disagree with this conclusion. We believe the Interstate Commerce Commission Termination Act (ICCTA) preempts permit requirements that could prevent a railroad from conducting operations authorized by the Surface Transportation Board (agency with regulatory authority over railroads) and from making regulations on matters already regulated by that Board. In other words, another agency cannot prevent a railroad from conducting its operations or unreasonably burden interstate commerce.



The ICCTA therefore does not preempt the City of Benicia from requiring an applicant for a discretionary project, in this case Valero, from mitigating a project's significant air quality impacts just because the emissions come from railroad operations. Requiring the applicant to implement an offsite mitigation program to reduce the project's air quality impacts would not be in violation of the federal preemption because the mitigation requirement would not require the applicant to achieve the emission reductions from UPRR. Valero can implement the offsite mitigation program either to fund their own offsite mitigation projects

within each air basin, or they could provide an offsite mitigation fee to fund projects through air districts' existing grant programs, where the implementation of an offsite mitigation program may not require any participation by UPRR or affect its operations. Requiring Valero to offset the Project's emissions through an offsite mitigation program is well within the discretion of the lead agency. Additionally, the implementation of an offsite mitigation program has been considered feasible by numerous jurisdictions throughout the State and accepted by air districts. The CEQA Guidelines (Section 15364) definition of feasible is:

"Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.

The RDEIR has not adequately evaluated the "feasibility" of an offsite mitigation program that could be implemented by Valero, or alternatively participation in an offsite mitigation fee program in consultation with each impacted Air District, who would then utilize the offset fee to reduce equivalent emissions necessary to lessen the Project's significant air quality impacts. Several Air District CEQA Guidelines have provisions for offsite mitigation and a number of projects have participated in this strategy. As applicable, individual Air Districts' CEQA Guidelines should be consulted for more details. The incorrect assertion that the federal preemption legally prohibits the City of Benicia from imposing an offsite mitigation strategy/fee on Valero does not provide the substantial evidence required for a lead agency to approve a project with significant impacts, or support any findings of infeasibility as required by CEQA.

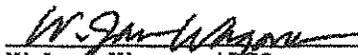
Since payment of offsite mitigation fees has been implemented in numerous jurisdictions throughout the State, it is considered a feasible mitigation measure accepted by the Air Districts. Therefore, the Air District's recommend that the City of Benicia require Valero to mitigate this Project's significant air quality impacts to the extent feasible, within each district or air basin, to reduce the significance of the proposed Project's impacts. If Valero wishes to avoid funding offsite mitigation efforts, perhaps they can work with UPRR to voluntarily commit to using Tier 4 locomotives within the California borders for this Project and significantly reduce the air quality impacts.

The Air Districts looks forward to working with the City of Benicia to develop and implement a successful offsite mitigation strategy for this project. If you have any questions, please contact Andrea Gordon, Senior Environmental Planner with the Bay Area Air Quality Management District at (415) 749-4940.

Sincerely,



Jack P. Broadbent, Executive Officer/APCO
Bay Area AQMD



W. James Wagoner, APCO
Butte County AQMD



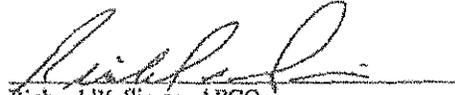
Christopher D. Brown, AICP/APCO
Feather River AQMD



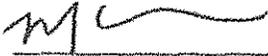
Tom Christoff, APCO
Placer County APCD



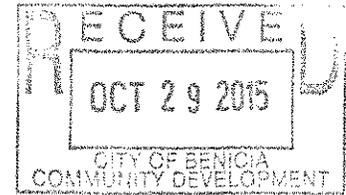
Larry Greene, Executive Director/APCO
Sacramento AQMD



Richard W. Simon, APCO
Shasta County AQMD



Mat Ehrhardt, P.E. Executive Director/APCO
Yolo-Solano AQMD



October 27, 2015

Ms. Amy Million, Principal Planner
City of Benicia
Community Development Department
250 East L Street
Benicia, CA 94510

Dear Ms. Million:

The Yolo-Solano Air Quality Management District (District) has received the Revised Draft Environmental Impact Report (DEIR) for the Valero Crude by Rail Project (Project). The Project would allow the Benicia Valero Refinery to receive a portion of its crude via rail. The crude is expected to be transported to the Roseville Rail Yard, and then west through several counties to Benicia. There are several different routes that could be used, but all these routes would affect the District. We have reviewed the document and offer the following comments:

- As noted in the District's comments on the original DEIR, the project would create new emissions of ozone precursors within the Sacramento Federal Nonattainment Area (SFNA), which includes Sacramento and Yolo counties, as well as portions of Placer, El Dorado, Solano, and Sutter counties. The SFNA is in nonattainment for the federal and State air quality standards for ozone. Consequently, while it is appropriate to evaluate the Project's impact in each individual air district, it is also important to evaluate the entire impact of the project on the SFNA. When the emissions generated by the Project in each air district are combined, a total of as much as 56 tons per year of nitrogen oxides (approximately) will be generated in the SFNA.
- As pointed out in the DEIR, because the City of Benicia has no authority to impose emission controls on tanker car locomotives it is likely not feasible to mitigate the Project's emissions directly. However, the City should also look at the possibility of requiring the applicant to "offset" the Project's emissions by obtaining emissions reductions from elsewhere in the SFNA. Several regional programs are implemented in the SFNA to incentivize cleaner technologies that can accrue reductions of ozone precursor emissions. These programs could provide opportunities for the applicant to mitigate the overall impact of the Project in the SFNA. The applicant could also work with the railroad to provide incentives for voluntarily implementing cleaner locomotive technology.

The District appreciates the opportunity to comment on the revised DEIR for this project. If you have any questions about the comments included in this letter, please feel free to contact me at 530-757-3668 or email me at mjones@ysagmd.org.

Sincerely,

A handwritten signature in black ink that reads "Matthew R Jones". The signature is written in a cursive style with a large, prominent "R".

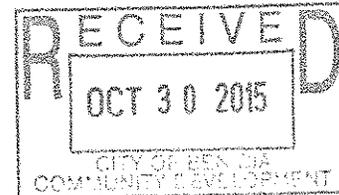
Matthew Jones
Supervising Planner, YSAQMD



October 30, 2015

Via Mail and Email

Amy Million, Principal Planner
City of Benicia
Community Development Department
250 East L Street
Benicia, California 94510



Re: Valero Benicia Crude by Rail Project Revised Draft Environmental Impact Report

Dear Ms. Million:

On behalf of its 22 city and 6 county member jurisdictions, the Sacramento Area Council of Governments (SACOG) submits the following comments on the Revised Draft Environmental Impact Report (RDEIR) for the Valero Benicia Crude by Rail Project.¹

While the City of Benicia has revised the Draft Environmental Impact Report (DEIR), we understand that the Project is unchanged. Specifically, the Project proposes daily shipments of 70,000 barrels of crude oil to the Valero Benicia Refinery. (RDEIR at 2-3.) The crude oil tank cars would originate at unidentified sites in North America, would be shipped to the Union Pacific Railroad (UPRR) Roseville Yard, and would be assembled there into two daily 50-car trains to Benicia. (RDEIR at 2-3.)

In August 2014, we submitted a comment letter in response to the original DEIR for the Project. As our Board of Directors made clear at that time, SACOG's interest is to ensure that all appropriate measures, based upon a full investigation of the risks, are taken to protect the safety of our residents and their communities, businesses and property throughout the region. In that regard, our Board has indicated that, at a minimum, the measures to protect our region should include the following:

¹ SACOG submits this letter as a joint powers agency, exercising the common powers of its members pursuant to a joint powers agreement. However, this letter is not an exhaustive treatment of the RDEIR's compliance with the California Environmental Quality Act or of the concerns of all of its members, some of whom may provide separate comments.

Auburn
Citrus Heights
Colfax
Davis
El Dorado County
Elk Grove
Folsom
Galt
Isleton
Lincoln
Live Oak
Loomis
Marysville
Placer County
Placerville
Rancho Cordova
Rocklin
Roseville
Sacramento
Sacramento County
Sutter County
West Sacramento
Wheatland
Winters
Woodland
Yolo County
Yuba City
Yuba County

- Advance notification to county and city emergency operations offices of all crude oil shipments (to facilitate more rapid and appropriate public safety responses);
- Limitations on storage of crude oil tank cars in urbanized areas of any size, and appropriate security for all shipments;
- Support, including full cost funding, for training and outfitting emergency response crews;
- Utilization of freight cars with electronically controlled pneumatic brakes, rollover protection, and other features that mitigate to the extent feasible the risks associated with crude oil shipments;
- Funding for rail safety projects (e.g., replacement/upgrade of existing tracks, grade separations, Positive Train Control, etc.);
- Utilization of best available inspection equipment and protocols;
- Implementation of Positive Train Control to prioritize areas with crude oil shipments; and
- Prohibition on shipments of unstabilized crude oil that has not been stripped of the most volatile elements, including flammable natural gas liquids.

In order not to restate our August 28, 2014, letter, we have attached it as Exhibit A hereto.

Over the last year, we have continued to meet with our members to discuss this Project, to become informed about the risks associated with crude oil transportation by rail, to discuss measures to avoid or minimize the serious risks associated with operating crude oil trains through our communities, and to track and comment on legislative/regulatory developments at the state and federal levels. We have also discussed our concerns with representatives from UPRR and the Valero Benicia Refinery.

Our earlier letter expressed grave concern that the DEIR concluded that crude oil shipments by rail pose no “significant hazard” to our communities, and we urged the City of Benicia to revise the DEIR to fully inform decision makers and the public of the potential risks of the Project. We thank the City for deciding to revise the DEIR, and we appreciate that the RDEIR now correctly concedes that rail shipments of crude oil through our region pose a very substantial risk and that the shipments will result in crude oil spills, fires, and explosions.

However, our letter also urged the City to “address adequate mitigation measures to ensure the safety of our communities.” The obligation derives directly from the California

Environmental Quality Act (CEQA), which mandates that an EIR must not only inform decision makers and the public about the potential environmental impacts of proposed projects, but must also describe mitigation measures that could, if implemented, minimize significant environmental effects. (CEQA Guidelines, §§15126(c), 15126.1(a)). CEQA Guidelines section 15370(b) defines “mitigation” to include “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation.” And while the RDEIR discloses that the Project will result in significant impacts to the environment associated with train derailments, it adopts not a single mitigation measure to address these very significant impacts.

SACOG is committed to ensuring that all feasible measures are taken to protect the safety of the communities in our region. Attached as Exhibit B is a map that depicts the freight rail alignments for crude oil shipments through the greater Sacramento region. The map provides data on area population, housing, health facilities, and schools in close proximity to the rail lines. The map shows that *nearly one quarter* of the region’s population lives within one-half mile of the crude oil shipments.² We urge the City of Benicia to adopt all feasible mitigation measures that will protect our communities before the catastrophic events forecast by the RDEIR occur.

Comments on the RDEIR

The California Environmental Quality Act (CEQA) mandates that an EIR identify and analyze all potentially significant adverse effects of a project, including both direct and indirect impacts and short-term and long-term impacts. CEQA also mandates that an EIR describe and adopt all feasible mitigation measures to substantially reduce the significant impacts of a project. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.1, 15126.2.) The RDEIR is deficient in numerous respects, as set forth below.

The RDEIR Fails to Identify and Adopt Feasible Mitigation Measures Related to Safety Preparedness

In an about face from the original DEIR, the RDEIR discloses that the Project will result in significant impacts to the environment associated with train derailments and unloading accidents that lead to hazardous materials spills, fires, and explosions. It concedes that these train derailments could result in substantial adverse secondary effects, including to Biological Resources, Cultural Resources, Geology and Soils, and Hydrology and Water Quality. However, the RDEIR summarily concludes that these significant impacts are unavoidable because any

² The map does not depict the sensitive habitat, species, waterways, infrastructure, businesses, and other assets that will be impacted by the expected accidents from the Project.

attempt to adopt mitigation measures, including compliance with newly-adopted SB 861, would unlawfully “regulate UPRR’s rail operations.” We disagree with the City’s conclusion.

First, it should be noted that there are many mitigation measures that will, indisputably, substantially reduce the impacts of shipping crude oil by rail. We identified some of those measures in our prior letter and we also list them above. Many of these measures are similar to the measures recommended by the California Interagency Rail Safety Working Group in its report, *Oil by Rail Safety in California* (June 14, 2014). Specifically, that report concluded that the current regulatory environment does not address the risks of increased oil by rail transport. As a consequence, the report recommended the following actions to address those deficiencies.

- Increase the number of California Public Utilities Commission rail inspectors
- Improve emergency preparedness and response programs
 - Expand the Oil Spill Prevention & Response Program to cover inland oil spills
 - Provide additional funding for local emergency responders
 - Review and update of local, state and federal emergency response plans
 - Improve emergency response capabilities
 - Request improved guidance from United States Fire Administration on resources needed to respond to oil by rail incidents
 - Increase emergency response training
- Request improved identifiers on tank placards for first responders
- Request railroads to provide real-time shipment information to emergency responders
- Request railroads provide more information to affected communities
- Develop and post interactive oil by rail map
- Request DOT to expedite phase out of older, riskier tank cars
- Accelerate implementation of new accident prevention technology
 - Positive train control
 - Electronically-controlled pneumatic brakes

- Update California Public Utilities Commission incident reporting requirements
- Request railroads provide the State of California with broader accident and injury data
- Ensure compliance with industry voluntary agreement
 - Increased track inspections
 - Braking systems
 - Use of rail traffic routing technology
 - Lower speeds
 - Increased trackside safety technology
- Ensure state agencies have adequate data

The City will note that many of these measures relate to the critical needs to prepare for the inevitable accidents that will affect our communities, including: the need for emergency preparedness and response programs; additional funding for local emergency responders; improved emergency response capabilities; increased training of emergency responders; and improved and real-time data. Moreover, implementation of these measures would not impair or impact UPRR's rail operations. Rather, these are measures that should be adopted and imposed on the shipper, the applicant for the Project that is causing the environment impacts identified in the RDEIR. These measures will not impact rail operations or transportation, and the RDEIR's suggestion otherwise is simply wrong.

As the Attorney General of California recently asserted in connection with litigation over SB 861, which amended the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, the Interstate Commerce Commission Termination Act (ICCTA) only preempts state laws that regulate rail "transportation," as defined by statute. (*Association of American Railroads et al. v. California Office of Spill Prevention and Response et al.*, Case No 2:14-cv-02354-TLN-CKD, Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at pp. 18 – 32 [attached hereto as Exhibit C].) Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rail transportation, and states are expressly preempted from regulating all of the following:

- (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....

(49 U.S.C. § 10501(b).) As a result, state laws that impede rail transportation are preempted.

ICCTA defines “transportation” as:

- (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).)

The Attorney General notes that while this definition of ‘transportation’ is expansive, it does not encompass everything touching on railroads. Subsection (A) focuses on physical instrumentalities “related to the movement of passengers or property,” and Subsection (B) on “services related to that movement.” When state laws do not directly affect rail transportation – either the instrumentalities or the related services – or the effect on rail transportation is merely remote or incidental, the ICCTA does not preempt them. (Citing *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 808 (5th Cir. 2011) (ICCTA preempts only when state law “directly” manages rail transportation, such as train speed, length, and scheduling, but not a negligence claim that has an incidental effect).) For instance, ICCTA does not preempt a state law requiring railroads to pay for pedestrian crossings over their tracks. (*Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008).) And state laws are not preempted “merely because they reduce the profits of a railroad” or have high compliance costs.

The Attorney General also notes that ICCTA does not preempt generally applicable, non-discriminatory state laws, including electrical, plumbing and fire codes, and direct environmental regulations enacted for the protection of public health and safety, so long as such laws do not directly impede rail transportation. (Citing *Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 643 (2d Cir. 2005).) Under the ICCTA, “States retain their police powers, allowing them to create health and safety measures....” (*Adrian & Blissfield*, 550 F.3d at p. 541; see also *Green Mountain R.R. Corp.*, 404 F.3d at p. 643.) For example, ICCTA would not preempt a state law that prohibited railroads from dumping harmful substances. (*S. Coast Air Quality Mgmt. Dist.*, 622 F.3d at p. 1097.)

Based on this analysis, the Attorney General concludes that the provisions of SB 861, which requires railroads to have approved spill plans and certificates of financial responsibility, does not impede rail transportation because it does not directly (or indirectly) affect rail instrumentalities or rail services. It does not regulate train speed, length, routes, or scheduling. Instead, akin to a law prohibiting the dumping of harmful substances, SB 861 is a valid exercise of California's police power, designed to protect the health and safety of the state's waters after a spill occurs. While railroads will likely incur some costs in preparing spill plans and meeting the financial responsibility requirement, the effect of those costs on rail transportation is remote and incidental. (See *Adrian & Blissfield*, 550 F.3d at p. 541.)

That same conclusion must be reached here, where the feasible mitigation measures apply to the applicant/shipper outside the rail corridor and operations, and where the Project imposes an unfunded obligation on local communities to prepare, train, equip, and supply their first responders for known rail accidents and the consequences thereof. This is a massive financial burden on our communities, a burden that is part of the real cost of the Project applicant's proposal to ship crude oil by rail.

The RDEIR Fails to Adopt Additional Feasible Mitigation Measures within Valero's Control

In addition to ignoring measures that would address safety preparedness in our communities, the RDEIR also fails to consider measures outside rail operations that are admittedly within Valero's control, specifically the type of tank cars used to transport the crude oil and the nature of the product being shipped.

With regard to the type of tank cars, the RDEIR states that Valero will own or lease the cars. Therefore, adopting mitigation measures on the type of tank car, the required braking system and rollover protection, as well as other tank car features is within the City's authority and responsibility. Such measures would not regulate train configuration or operations, routes, or scheduling. Rather, they regulate the rail cars that the applicant has the responsibility to buy or lease for the Project.³

Any assertion that such measures are preempted in these circumstances is flawed. The entire RDEIR risk analysis is based upon the assumption that Valero has control over, and will voluntarily use, safer tank cars than required by current federal standards. Having relied on that control to minimize the risk of harm and environmental impacts disclosed in the RDEIR,

³ If the availability of adequate tank cars is an issue, deliveries can be phased in over time. Because Valero controls the tank cars, it can also provide more detailed labeling on the tank cars regarding the type and origin of the oil product. This would not require a change to the DOT classification or placarding system.

Valero cannot then assert that mitigation measures relating to the tank cars are preempted because they would so fundamentally control railroad operations.

Similarly, the Project applicant has complete control over the crude oil products to be shipped to its Benicia facility. (RDEIR at pp. 3-7 to 3-14.) The City could and should require the applicant to purchase for shipment only crude oil products that have been stripped of the most volatile elements, including flammable natural gas liquids. As disclosed in the RDEIR, the impacts associated with train derailments relate, in great part, to the risk of fires and explosions. These fires and explosions are directly related to the applicant's election to transport crude oil that contains volatile elements – elements that can feasibly be removed prior to shipment. Again, such a measure does not impact UPRR's rail operations but is a measure that could reasonably and feasibly be imposed on Valero.

Conclusion

We appreciate the City's decision to revise the DEIR, which finally acknowledges the very substantial hazard that the proposed crude shipments by rail pose to our region. Having taken that action, however, we urge the City to identify and adopt feasible mitigation measures to avoid or reduce those impacts. We have identified a number of measures above that we believe the City has the authority and responsibility to impose on the Project applicant under CEQA, and we are aware that other measures exist. We understand that these measures come at a cost to the applicant. There should be no question that this cost should be borne by the applicant, not by our residents and communities who will bear the impacts of these shipments.

Sincerely,

A handwritten signature in blue ink that reads "Don Saylor". The signature is written in a cursive, flowing style.

Don Saylor
SACOG Board Chair

DS:KET:le

Enclosures



August 28, 2014

Amy Million, Principal Planner
Community Development Department
250 East L Street
Benicia, CA 94510

Re: Valero Benicia Crude by Rail Project Draft Environment Impact Report

Dear Ms. Million:

On behalf of its 22 city and 6 county member jurisdictions, the Sacramento Area Council of Governments (SACOG) submits the following comments on the Draft Environmental Impact Report (DEIR) for the Valero Benicia Crude by Rail Project.¹ The Project, as described in the DEIR, proposes daily shipments of 70,000 barrels of crude oil to the Valero Benicia Refinery. The crude oil tank cars would originate at unidentified sites in North America, would be shipped to the Union Pacific Railroad Roseville Yard, and would be assembled there into two daily 50-car trains to Benicia.

Over the last several months, we have been meeting with our members to discuss this Project, to become informed about the risks associated with crude oil transportation by rail, and to discuss measures to avoid or minimize the serious risks associated with operating crude oil trains through the communities in our region. We have discussed our concerns with representatives from Union Pacific Railroad and the Valero Benicia Refinery. As our Board of Directors has made clear, SACOG's interest is to ensure that all appropriate measures, based upon a full investigation of the risks, are taken to protect the safety of our residents and their communities, and businesses and property throughout the region. In that regard, our Board has indicated that, at a minimum, the measures to protect our region should include the following:

- Advance notification to county and city emergency operations offices of all crude oil shipments (to facilitate more rapid and appropriate public safety responses);
- Limitations on storage of crude oil tank cars in urbanized areas (of any size), and appropriate security for all shipments;

¹ SACOG submits this letter as a joint powers agency, exercising the common powers of its members pursuant to a joint powers agreement. However, this letter is not an exhaustive treatment of the DEIR's compliance with the California Environmental Quality Act or of the concerns of all of its members, many of whom may also provide separate comments.

- Support, including full cost funding, for training and outfitting emergency response crews;
- Utilization of freight cars, with electronically controlled pneumatic brakes, rollover protection, and other features, that mitigate to extent feasible the risks associated with crude oil shipments;
- Funding for rail safety projects (e.g., replacement/upgrade of existing tracks, grade separations, Positive Train Control, etc.);
- Utilization of best available inspection equipment and protocols;
- Implementation of positive train controls to prioritize areas with crude oil shipments; and
- Prohibition on shipments of unstabilized crude oil that has not been stripped of the most volatile elements, including flammable natural gas liquids.

Unfortunately, the DEIR never gets to a discussion of these measures—or any other measures that might ensure the safety of our region—because the DEIR concludes that crude oil shipments by rail pose no “significant hazard” whatsoever. We believe that conclusion is fundamentally flawed, disregards the recent events demonstrating the very serious risk to life and property that these shipments pose, and contradicts the conclusions of the federal government, which is mobilizing to respond to these risks.

On May 7, 2014, the United States Department of Transportation in fact concluded that crude oil shipments by rail pose not merely a significant hazard, but an “*imminent hazard*,” stating:

“Upon information derived from recent railroad accidents and subsequent DOT investigations, the Secretary of Transportation (Secretary) has found that an unsafe condition or an unsafe practice is causing or otherwise constitutes an imminent hazard to the safe transportation of hazardous materials. Specifically, a pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).”

...

“An imminent hazard, as defined by 49 U.S.C. 5102(5), constitutes the existence of a condition relating to hazardous materials that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable

completion date of a formal proceeding begun to lessen the risk that death, illness, injury or endangerment.”²

Under these circumstances, we urge the City of Benicia to revise the DEIR so that it will fully inform decision-makers and the public of the potential risks of the Project and address adequate mitigation measures to ensure the safety of our communities. With that objective in mind, in the following pages we address some of the very substantial deficiencies in the DEIR—deficiencies which apparently have caused the DEIR to fail to analyze and consider the significant adverse impacts of the Project and to evaluate all feasible mitigation to reduce those impacts to a less than significant level.

Comments on the DEIR

The California Environmental Quality Act (CEQA) mandates that an EIR identify and analyze all potentially significant adverse effects of a project, including both direct and indirect impacts, and short-term and long-term impacts. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.2.) The DEIR is deficient in numerous respects, as set forth below.

The DEIR fails to consider the risk of fire and explosion as a threshold of significance.

Although the sample Initial Study checklist found in Appendix G to the CEQA Guidelines is an obvious and commonly used source of thresholds of significance, agencies may not rely on it exclusively when a particular project, or particular circumstances, gives rise to environmental concerns not addressed in the checklist. In *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, the court held that an agency cannot rely on a reflexive determination to follow the significance thresholds in Appendix G without regard to whether those standards are broad enough to encompass the scope of the project at issue. The court explained that, “in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.” (116 Cal. App. 4th at p. 1109.)

In this instance, in complete reliance on Appendix G, and without considering the very real and substantial risks of the transportation of crude by rail, the DEIR does not address the risk of fire and explosion in its thresholds of significance. Specifically, in the only threshold of significance potentially applicable to the risk of transportation, the DEIR adopts the following for Hazards and Hazardous Materials:

² Emergency Restriction/Prohibition Order DOT-OST-2014-0067 (May 7, 2014) (<http://www.dot.gov/briefing-room/emergency-order>).

“Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the *release of hazardous materials into the environment.*”³

As has been reported widely over the last several years, the character and quality of the domestic and Canadian crude oil currently being transported by rail across the United States has dramatically shifted the public safety concern from a hazardous material release to fiery explosions. A series of oil derailments in just the last two years has created a policy imperative in both Washington, D.C., and Sacramento. As United States Secretary of Transportation Anthony Foxx recently stated, “as a nation we are a little bit caught off guard by the growth of our energy production and we have to catch up very quickly.”⁴

Indeed, the following major accidents have heightened concern about the risks involved in shipping crude by rail.

- **Lac Mégantic, Quebec**—On July 5, 2013, a train with 72 loaded tank cars of crude oil from North Dakota moving from Montreal, Quebec, to St. John, New Brunswick, stopped at Nantes, Quebec, at 11:00 pm. The operator and sole railroad employee aboard the train secured it and departed, leaving the train on shortline track with a descending grade of about 1.2%. At about 1:00 AM, it appears the train began rolling down the descending grade toward the town of Lac-Mégantic, about 30 miles from the U.S. border. Near the center of town, 63 tank cars derailed, resulting in multiple explosions and subsequent fires. There were 47 fatalities and extensive damage to the town. 2,000 people were evacuated. The initial determination was that the braking force applied to the train was insufficient to hold it on the 1.2% grade and that the crude oil released was more volatile than expected.
- **Gainford, Alberta**—On October 19, 2013, nine tank cars of propane and four tank cars of crude oil from Canada derailed as a Canadian National train was entering a siding at 22 miles per hour. About 100 residents were evacuated. Three of the propane cars burned, but the tank cars carrying oil were pushed away and did not burn. No one was injured or killed. The cause of the derailment is under investigation.
- **Aliceville, Alabama**—On November 8, 2013, a train hauling 90 cars of crude oil from North Dakota to a refinery near Mobile, Alabama, derailed on a section of track through a wetland near Aliceville, Alabama. Thirty tank cars derailed and some dozen burned. No one was injured or killed. The derailment occurred on a shortline railroad’s track that had been inspected a few days earlier. The train was traveling under the speed limit for this track. The cause of the derailment is under investigation.

³ DEIR, p. 4.7-13 (emphasis added).

⁴ Politico, Morning Transportation (April 24, 2014), <http://www.politico.com/morningtransportation/0414/morningtransportation13715.html>.

- **Casselton, North Dakota**—On December 30, 2013, an eastbound BNSF Railway train hauling 106 tank cars of crude oil struck a westbound train carrying grain that shortly before had derailed onto the eastbound track. Some 34 cars from both trains derailed, including 20 cars carrying crude, which exploded and burned for over 24 hours. About 1,400 residents of Casselton were evacuated but no injuries were reported. The cause of the derailments and subsequent fire is under investigation.
- **Plaster Rock, New Brunswick**—On January 7, 2014, 17 cars of a mixed train hauling crude oil, propane, and other goods derailed likely due to a sudden wheel or axle failure. Five tank cars carrying crude oil caught fire and exploded. The train reportedly was delivering crude from Manitoba and Alberta to the Irving Oil refinery in Saint John, New Brunswick. About 45 homes were evacuated but no injuries were reported.
- **Philadelphia, Pennsylvania**—On January 20, 2014, 7 cars of a 101-car CSX train, including 6 carrying crude oil, derailed on a bridge over the Schuylkill River. No injuries and no leakage were reported, but press photographs showed two cars, one a tanker, leaning over the river.
- **Vandergrift, Pennsylvania**—On February 13, 2014, 21 tank cars of a 120-car train derailed outside Pittsburgh. Nineteen of the derailed cars were carrying crude oil from western Canada, and four of them released product. There was no fire or injuries.
- **Lynchburg, Virginia**—On April 30, 2014, 15 cars in a crude oil train traveling at low speed derailed in the downtown area of this city. Three cars caught fire, and some cars derailed into a river along the tracks. The immediate area surrounding the derailment was evacuated. No injuries were reported.⁵

Notwithstanding that the United States Department of Transportation, among others, has determined that Bakken Crude “has a higher gas content, higher vapor pressure, lower flash point and boiling point...which correlates to increased ignitability and flammability,”⁶ and that the

⁵ Congressional Research Service, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress (May 5, 2014). In March and April 2013, there were also two derailments of Canadian Pacific trains, one in western Minnesota and the other in Ontario, Canada; less than a tank car of oil leaked in each derailment and neither incident caused a fire. While operators may have implemented safety precautions to address the operational deficiencies exposed over the last few years, these incidents also demonstrate the unpredictability of what can happen by transporting such volatile materials by rail. Addressing safety concerns on such an ad hoc basis will not reduce the overall risks.

⁶ Report summarizing the analysis of Bakken crude oil data:
http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf.

recent events listed above have spurred a massive emergency effort at the federal level to address safety concerns,⁷ the DEIR dismisses them in a footnote, stating that “Not every tank car derailment results in a spill, fire, or explosion.”⁸ With that simple artifice, the DEIR justifies limiting its analysis to “derailments that result in a release of crude oil.”⁹ As discussed below, even the Release Rate Analysis used to conclude that there is a less than significant impact from Hazards and Hazardous Materials completely ignores the risk of fire and explosion.¹⁰

Having failed to establish a significance threshold that addresses the most critical health and safety risk from crude oil shipments by rail—fire and explosion—the DEIR fails to conduct the necessary analysis of such risks and fails to identify the mitigation measures necessary to protect the communities along the rail routes to the Project site.

The Project poses a “significant hazard” to the public and the environment through reasonably foreseeable upset and accident conditions.

By any measure or standard, the Project poses a “significant hazard” to the communities along the rail routes to the Project site. First, the Release Rate Analysis used to conclude that the transportation of crude oil by rail poses a less significant hazard to people and the environment is fundamentally flawed in numerous respects. Second, even if the Release Rate Analysis were accurate, its findings do not support the conclusion of less than significant impacts.

The Release Rate Analysis is flawed as a tool to assess the potential environmental impacts of the project.

As a threshold matter, it should be noted that the Release Rate Analysis is the sole basis in the DEIR for concluding that the hazards posed by the Project are less than significant. That Analysis is flawed.

First, the Analysis does not even address the most significant risks to persons, property, businesses, and the sensitive lands along the rail routes to the Project site. As noted above, the risk of fire and explosion are substantial, as evidenced by the series of events over the last two years which have attracted national and international attention and a call for immediate rail operations reforms. In fact, the Analysis does not even consider the recent events, limiting its analysis to derailments over the 5-year period from 2005-2009. This narrow focus misses most of the massive growth in crude oil shipments nationwide. Since 2007, crude oil by rail has seen a 6000% increase, driven largely by the extraordinary increases in energy development in the

⁷ DEIR at pp. 4.7-5 to 4.7-10.

⁸ DEIR, at p. 4.7-17, fn. 4.

⁹ DEIR, at p. 4.7-17, fn. 4.

¹⁰ See Railroad Crude Oil Release Rate Analysis for Route between Roseville and Benicia, DEIR, Appendix F.

Bakken Formation in North Dakota and Montana.¹¹ The Analysis never, in fact, analyzes the impact of this tremendous growth in dangerous crude oil rail shipments.

Second, as discussed in more detail below, the Analysis does not accurately assess the potential environmental impacts of the Project because it disregards the full geographic scope of the Project. Specifically, the Analysis only considers potential derailments from Roseville to Benicia. This Analysis does not evaluate potential derailments along the entire rail routes from the oil fields to Roseville, the assemblage and other activities in the Roseville Rail Yard, and the utilization of siding or storage tracks during transportation.

Third, the Analysis minimizes the potential risk of derailment by assuming a “just-in-time” supply chain—that is, that Union Pacific 50-car unit trains will travel from Roseville to Benicia without incident and will be immediately available for processing at Valero, that the trains or tank cars would never be stored or moved to sidings, and that no incidents (including accidents or maintenance) would ever delay delivery to Valero. As the DEIR readily acknowledges, however, Valero does not control the movement of tank cars on the rail line—Union Pacific does. And freight shipments do not operate on regular schedules. Valero can request Union Pacific to meet certain schedules, but has no ability to control the ultimate schedule of the rail operations. As such, it cannot guarantee the “just-in-time” service assumed in the Release Rate Analysis. The shipments also may come with greater frequency and fewer tank cars, which would increase traffic on the alignment and substantially increase the risk.

Fourth, by using national derailment rates the Analysis does not assess the Project specific conditions of these shipments. Of particular note, the Analysis reveals that over 1.3 miles of rail from Roseville to Benicia is FRA Class 1 track—track which has a 15.5 times greater risk of derailment than FRA Class 5 track.¹² However, the Analysis does not consider the location of the Class 1 track, the operational components of the track, the proximity of the track to highly populated areas, schools, hospitals, dangerous facilities, or sensitive lands or habitat.¹³

In light of these flaws, the Rate Release Analysis does not adequately assess the risks associated with the Project’s crude oil shipments.

¹¹ <http://www.franken.senate.gov/files/letter/140404RailSafety.pdf>. Note that in Northern California alone, crude oil shipments by rail increased by 57% in 2013. (<http://www.planetizen.com/node/67904>.) Crude oil production in the Bakken region has nearly tripled from 2010 to 2013. (http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf.)

¹² Railroad Crude Oil Release Rate Analysis for Route between Roseville and Benicia, DEIR, Appendix F, at p. 6.

¹³ Although the DEIR lists schools within a quarter mile of the rail line (DEIR, at p. 4.7-23), it does not analyze the risks associated with the risks associated with such proximity other than the air quality impacts.

Even were it not flawed, the Release Rate Analysis does not assess the potential environmental impacts of the Project or support the conclusion that crude oil by rail shipments do not pose a significant hazard.

While the DEIR adopts a “significant hazard” test as the threshold of significance, the DEIR never defines or describes the nature of that test. Rather, it merely determines that, under the optimum conditions described in the DEIR, a crude oil train release incident exceeding 100 gallons will only occur every 111 years and then concludes on that basis that the Project poses no significant hazard risk. The DEIR can only reach that conclusion by ignoring the nature of the crude oil being shipped, the specific risks posed by such shipments, and the circumstances of the shipments (including all operational possibilities, specific track and facilities in use, and operating conditions) in relation to the communities, populations, businesses, and land through which the shipments will travel.

At a common sense level, the conclusion that no “significant hazard” exists is absurd in light of the massive mobilization at the federal level to intervene to make crude oil transport by rail safer. As noted above, the United States Department of Transportation recently concluded that crude oil shipments by rail pose an “imminent hazard.”¹⁴ And while the DEIR cites the extensive and repeated federal regulatory calls to improve the safety of crude oil shipments,¹⁵ the DEIR simply concludes that no significant hazard exists.

In a similar context, the National Inventory of Dams classification system defines as a significant hazard circumstances when “Failure or misoperation results in no probable loss of human life but can cause economic loss, environmental damage, disruption of lifeline facilities, or can impact other concerns.” As noted, the DEIR does not even attempt to define a significant hazard, and it never gets to the real crux of risk assessment because it never evaluates—either on a general basis or on a community-specific basis—the specific nature of the hazard, the potential risk of harm to people, property, or human activities, and the potential impacts and magnitude of the hazard.¹⁶ It merely concludes that a crude oil release every 111 years is not significant.

The critical component missing from the DEIR’s analysis is the magnitude of the risk, even from events that may only occur rarely, because small risks of serious illness or death are potentially significant. For example, Sacramento Metropolitan Air Quality Management District’s evaluation criterion for cancer risk is *276 in a million*.¹⁷ And in this regard the DEIR completely

¹⁴ Emergency Restriction/Prohibition Order DOT-OST-2014-0067 (May 7, 2014) (<http://www.dot.gov/briefing-room/emergency-order>).

¹⁵ DEIR, at pp. 4.7-5 to 4.7-10.

¹⁶ See, e.g., FEMA Risk Assessment Process, at <http://www.ready.gov/risk-assessment>.

¹⁷ See, e.g., SMAQMD Recommended Protocol for Evaluating the Location of Sensitive Land Uses Adjacent to Major Roadways (March 2011), at <http://www.airquality.org/ceqa/SLUMajorRoadway/SLURecommendedProtoco2.4-Jan2011.pdf>.)

fails. Not only does it completely disregard the magnitude of the risk to the communities along the rail alignment, it appears to assume that they do not even exist.¹⁸ It fails to discuss the impact of a crude oil release in those communities and, as noted, it specifically excludes any discussion of fire or explosion. The DEIR also fails to discuss or analyze the specific nature of the crude oil likely to be shipped to Valero. Clearly, the flammability and volatility of the Bakken Formation crude oil, and the high viscosity and toxicity of the Canadian bitumen, were not previously anticipated by the shipping industry. Only now—after significant loss to life and property—is the federal government responding to this emergency. The facts are that qualities and characteristics of crude oil in the United States are not even known at this point. Sixteen United States Senators recently called for funding of Operation Classification, a study of the crude oil properties by the Pipeline and Hazardous Materials Safety Administration (PHMSA), that is viewed as an important step in informing future regulatory actions.¹⁹

A September 2013 report from the National Oceanic and Atmospheric Administration highlighted the risks of Canadian bitumen. In order to transport bitumen, natural gas condensate or synthetic crude oil is typically added, which may contain elevated benzene levels and sulfur content that is heavier than air, and has a relatively low flash point and flammability. Bitumen is also heavier than water, unlike most crude oil, which poses other risks. These facts lead to the conclusion that there is the potential for both environmental and human hazards from exposure to bitumen, whether leaked or burned.²⁰

Canadian bitumen also has raised particular concerns in the aftermath of a 2010 pipeline spill into Talmadge Creek, which flows into the Kalamazoo River in Michigan. The observations from the spill strongly suggest that the bitumen may pose different hazards, and possibly different risks, than other forms of crude oil. Approximately 850,000 gallons of oil spilled into the Creek. After three years of cleanup activities, the EPA observed that the bitumen “will not appreciably biodegrade,” which has led to a decision to dredge the river. As of September 2013, the response costs were \$1.035 billion, substantially higher than would be anticipated to remediate conventional oil.²¹

The properties of Bakken shale oil, although highly variable even within the same oil field, are generally much more volatile than other types of crude. In January of this year, PHMSA issued

¹⁸ The DEIR makes passing reference to the cities between Roseville and Benicia, but even then it does not list the cities of Citrus Heights or West Sacramento, nor the unincorporated areas of Placer, Sacramento, and Yolo counties. DEIR, at p. 4.7-16.

¹⁹ <http://www.franken.senate.gov/files/letter/140404RailSafety.pdf>. The letter erroneously referred to the study as “Operation Backpressure.”

²⁰ Transporting Alberta Oil Sands Products: Defining the Issues and Assessing the Risks (September 2013) NOAA Technical Memorandum NOS OR&R 44.

²¹ Congressional Research Service, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress (May 5, 2014), at p. 13.

a safety alert warning that recent derailments and resulting fires indicate that crude oil being transported from the Bakken region may be more flammable than traditional heavy crude oil.²²

But the federal response to these, whatever its final form, does not relieve the DEIR of fully analyzing the nature of the potential crude oil to be shipped, regardless of the source, and of mitigating the risks presented by the Project's crude oil shipments.

The DEIR fails to analyze the potential environmental impacts of crude oil transport beyond the Roseville to Benicia alignment.

Although the DEIR concedes the necessity to analyze the environmental impacts beyond the immediate Project site to include the crude oil transportation route, the analysis falls far short of the requirements of CEQA. As a threshold matter, the DEIR improperly limits its analysis to the route from Roseville to Benicia, claiming as "speculative" the originating site of the crude oil. In fact, within the Sacramento region there are only five rail subdivisions which lead to the Roseville Yard: Fresno, Martinez, Roseville, Sacramento, or Valley.²³ Of these, only the Roseville, Sacramento, and Valley subdivisions connect to the north or east where such shipments will originate. Limiting the analysis to Roseville to Benicia is arbitrary and the DEIR must analyze the full environmental impacts of each potential route.

In *Muzzy Ranch v. Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372, the California Supreme Court made clear that it is a lead agency's responsibility to consider even geographically distant environment impacts. CEQA broadly defines the relevant geographical environment as "the area which will be affected by a proposed project." (Pub. Resources Code, § 21060.5.) Consequently, "the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1582-1583.) Indeed, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) The DEIR cannot just assume that crude oil tank cars will magically appear in Roseville, but must account for the potential impacts of transporting those cars through other communities and property in the Sacramento region.

Additionally, as noted above, the DEIR completely disregards the train assembly activities in the Roseville Yard in close proximity to residential neighborhoods. It also assumes that a "just-in-time" supply chain can and will be used for the Project. As a consequence, the DEIR's

²² PHMSA, Safety Alert—January 2, 2014, Preliminary Guidance from OPERATION CLASSIFICATION.

²³ See State Office of Emergency Services Rail Risk Map (<http://california.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=928033ed043148598f7e511a95072b89>).

evaluation of the Project's potential impacts does not consider the risks associated with crude oil tank cars being stored before they can be processed at the Valero facility and does not discuss the possible locations for such storage. As noted, since Valero concedes that it ultimately cannot control the timing of the crude oil shipments, it must account for such events. By failing to discuss these storage needs, the DEIR fails to analyze the entire project. As set forth in the CEQA Guidelines, a "project" is "the whole of an action" that may result in either a direct physical environmental change or a reasonably foreseeable indirect change. (CEQA Guidelines, § 15378; see also *Habitat & Watershed Caretakers v City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297; *Banning Ranch Conservancy v City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220.) In *Whitman v Board of Supervisors* (1979) 88 Cal.App.3d 397, for example, an EIR for oil facilities was overturned in part because it failed to analyze the impact of pipelines that would need to be built to service the facilities. Similarly here, the Project analyzed must consider all of the reasonably foreseeable operational details.

The DEIR fails to analyze the cumulative impacts of the Project.

While the DEIR's purported cumulative analysis identifies some 17 crude oil by rail, refinery, and refinery related projects, it does not assess the increased risk of multiple crude oil rail shipments, from multiple trains, serving multiple projects in California.²⁴ The DEIR dismisses the potential for any increase in risk due to multiple crude oil rail projects by opining that any explosion/leakage from a rail car would be separate and apart from any other such explosion/leakage and thus there could be no cumulative impact. However, this omits the fact that a key factor in the risk analysis relied on in the DEIR is the number of train-miles traveled.²⁵ Therefore, as the cumulative number of train trips increase along a particular rail alignment, the risk of accidents increases. The DEIR should have considered whether the proposed Project's contribution to this risk is cumulatively considerable. And at least two of the projects identified in the DEIR are expected to result in new crude oil shipments along the same rail alignment: the WesPac Pittsburg Energy Infrastructure Project and the Phillips 66 Company Rail Spur Extension Project. The DEIR fails to analyze those cumulative impacts.

Additionally, when, as here, a DEIR's evaluation of cumulative impacts is based on a list of past, present, and probable future projects, it must include in that list any project "producing related impacts, including, if necessary, projects outside the lead agency's control." (CEQA Guidelines, § 15130(b)(1)(A).) Here, the DEIR has failed to consider in its list of reasonably foreseeable future projects the full potential for overall increase in rail cars traveling along the paths that will be taken by the Valero rail cars. Surely any addition of rail cars on the tracks would produce related impacts (e.g., collisions).

²⁴ DEIR, at pp. 5-6 to 5-11, 5-16.

²⁵ See Univ. of Illinois, Railroad Crude Oil Release Rate Analysis for Route between Roseville, CA and Benicia, CA (June 2014), p. 3, at http://www.ci.benicia.ca.us/vertical/Sites/%7B3436CBED-6A58-4FEF-BFDF-5F9331215932%7D/uploads/Appendix_F_Railroad_Crude_Oil_Release_Rate_Analysis.pdf.

The DEIR improperly conflates its description of the Project with measures intended to reduce or avoid the clear impacts of the Project.

In at least two respects, although it is ambiguous at best on these points, the DEIR describes what purport to be elements of the Project intended to reduce, avoid, or mitigate the potential environmental impacts of the Project. The first is the general “commitment” to use CPC-1232 tank cars, rather than the legacy DOT-111 tank cars for transporting crude oil.²⁶ The second is the incorporation of the “General Railroad Safety” measures to be undertaken by Union Pacific.²⁷ Such a device was rejected by the court in *Lotus v. Dep’t of Transportation* (2014) 223 Cal. App. 4th 645.

The *Lotus* court held that measures designed to avoid, minimize, rectify, reduce, or compensate for a significant impact are not “part of the project,” but should be presented as mitigation measures in response to the identification of significant environmental effects. “By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.” This “short-cutting of CEQA requirements...precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences.” CEQA requires a lead agency to consider a proposed project, evaluate its environmental impacts and, if significant impacts are identified, to describe feasible mitigation measures to reduce the impacts. The court explained that simply stating there will be no significant impacts because the project incorporates special attributes is not adequate or permissible. Among other things, the device avoids the requirement to adopt an enforceable mitigation monitoring program. (223 Cal. App. 4th at pp. 656-58.)

Similarly, conflating the mitigation measures with Project description shortcuts full disclosure of the potential environmental impacts and risks of the Project, avoids a full exploration of the feasible mitigation measures to address those impacts and risks, and circumvents a mitigation monitoring program, which is essential to make all of these elements enforceable.

Conclusion

We urge the City of Benicia to substantially revise the DEIR for this Project so that it will fully inform the public and the City Council of the full impacts of this Project and analyze all available mitigation to reduce those impacts to a less than significant level.

²⁶ DEIR, at p. 4.7-17.

²⁷ DEIR, at p. 4.7-15 to 4.7-16.

We appreciate your consideration and would be happy to answer any questions you may have about our comments.

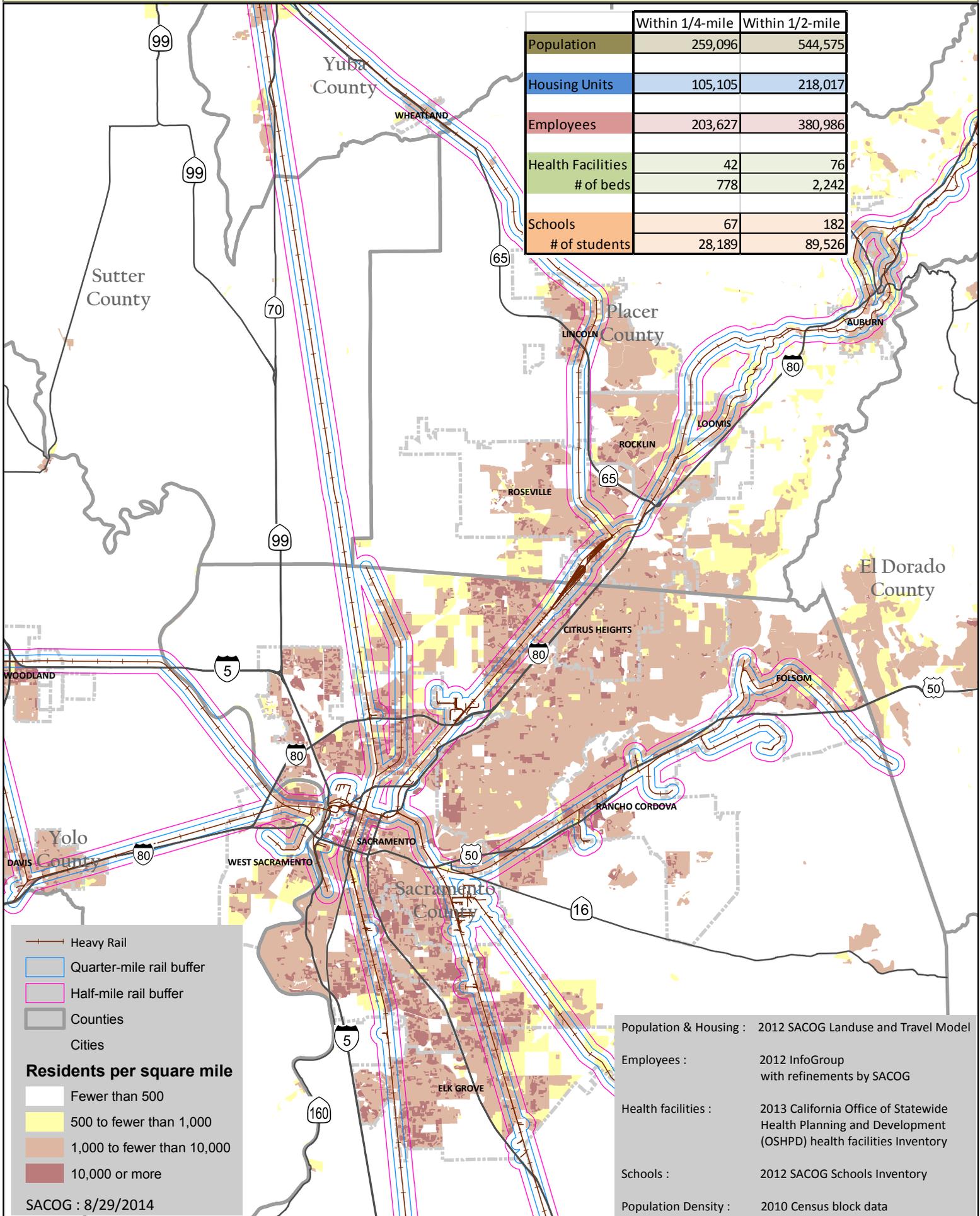
Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cohn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Steve Cohn
SACOG Board Chair

SC:le

Potential Derailment Risk Zones Greater Sacramento Region



	Within 1/4-mile	Within 1/2-mile
Population	259,096	544,575
Housing Units	105,105	218,017
Employees	203,627	380,986
Health Facilities	42	76
# of beds	778	2,242
Schools	67	182
# of students	28,189	89,526

— Heavy Rail
 Quarter-mile rail buffer
 Half-mile rail buffer
 Counties
 Cities

Residents per square mile

Fewer than 500
 500 to fewer than 1,000
 1,000 to fewer than 10,000
 10,000 or more

SACOG : 8/29/2014

Population & Housing : 2012 SACOG Landuse and Travel Model
 Employees : 2012 InfoGroup with refinements by SACOG
 Health facilities : 2013 California Office of Statewide Health Planning and Development (OSHPD) health facilities Inventory
 Schools : 2012 SACOG Schools Inventory
 Population Density : 2010 Census block data

1 KAMALA D. HARRIS, State Bar No. 146672
 Attorney General of California
 2 RANDY L. BARROW, State Bar No. 111290
 Supervising Deputy Attorney General
 3 NICHOLAS C. STERN, State Bar No. 148308
 CAROLYN NELSON ROWAN, State Bar No. 238526
 4 STACEY L. ROBERTS, State Bar No. 237998
 SCOTT LICHTIG, State Bar No. 243520
 5 KRISTIN B. PEER, State Bar No. 251326
 Deputy Attorneys General
 6 1300 I Street, Suite 125
 P.O. Box 944255
 7 Sacramento, CA 94244-2550
 Telephone: (916) 323-3840
 8 Fax: (916) 322-5609
 E-mail: Nicholas.Stern@doj.ca.gov

9 *Attorneys for Defendants*
California Office of Spill Prevention and Response,
 10 *Thomas M. Cullen, Jr., California Administrator for*
Oil Spill Response, and Kamala D. Harris, Attorney
 11 *General of the State of California*

12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14
 15
 16 **ASSOCIATION OF AMERICAN**
 17 **RAILROADS, UNION PACIFIC**
 18 **RAILROAD COMPANY AND BNSF**
RAILWAY COMPANY,

19 Plaintiffs,

20 v.

21 **CALIFORNIA OFFICE OF SPILL**
 22 **PREVENTION AND RESPONSE,**
THOMAS M. CULLEN, JR.,
 23 **CALIFORNIA ADMINISTRATOR FOR**
OIL SPILL RESPONSE, in his official
 24 **capacity, AND KAMALA D. HARRIS,**
 25 **ATTORNEY GENERAL OF THE STATE**
OF CALIFORNIA, in her official capacity,

26 Defendants.

Case No. 2:14-cv-02354-TLN-CKD

**DEFENDANTS' MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR PRELIMINARY
 INJUNCTION**

Date: January 15, 2015
 Time: 2:00 p.m.
 Dept: 2
 Judge: The Honorable Troy L. Nunley
 Trial Date: None set
 Action Filed: October 7, 2014

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INTRODUCTION

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, Cal. Gov't Code §§ 8574.1–8574.10, 8670.1–8670.95 and Cal. Pub. Res. Code §§ 8750–8760 (Lempert-Keene Act or Act) was originally enacted in 1990 to address the significant threats posed by oil spills in California's marine waters. At that time, the majority of California's crude oil came from overseas sources. The Act required vessels and marine facilities to prepare oil spill contingency plans (spill plans) and obtain certificates of financial responsibility demonstrating their ability to pay for cleanup costs and damages in the event of a spill.

In June of 2014, responding to a dramatic increase in overland transportation of oil, the Legislature passed Senate Bill (S.B.) 861. S.B. 861 amended the Lempert-Keene Act to protect all waters of the state, not just marine waters. The Act now requires inland facilities with the potential to spill oil into state waters to prepare spill plans and obtain certificates of financial responsibility. Railroads transporting oil as cargo are one of the types of facilities that have that potential and are now subject to the Act.

The Association of American Railroads, Union Pacific Railroad Company, and BNSF Railway Company (the Railroads) seek to preliminarily enjoin enforcement of S.B. 861, claiming it is preempted by federal law. Their motion should be denied for multiple reasons.

First, the Railroads have not demonstrated they are likely to suffer imminent, irreparable harm in the absence of an injunction. The Act imposes no immediate obligations on the Railroads, implementing regulations have not been issued, and no enforcement action is threatened. Their alleged harm is pure speculation, which is not a basis for injunctive relief.

Second, the Railroads are not likely to succeed on the merits of their claims. While a number of federal acts regulate railroad safety, equipment, and operations, none of those acts preempt the Lempert-Keene Act, a generally applicable law designed to protect water quality. The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20167 (FRSA), does not preempt the spill plan requirements because they do not relate to railroad safety or security; rather, spill plans relate to what happens *after* a spill occurs. Further, the United States Department of Transportation (DOT) regulations on which the Railroads rely were issued pursuant to DOT's authority under the

1 Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, 33 U.S.C. §§
2 1251–1388 (FWPCA).¹ DOT determined in 1996 that regulations it issues pursuant to its
3 FWPCA authority do not preempt state spill plan requirements.

4 Nor does the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109
5 Stat. 803 (codified in scattered sections of 49 U.S.C.) (ICCTA), preempt the spill plan and
6 certificate of financial responsibility requirements. ICCTA only preempts state laws that regulate
7 rail *transportation*. The Lempert-Keene Act does no such thing. It is a generally applicable law
8 designed to protect public health and environment, and it will not delay, alter, or stop the
9 Railroads' operations.

10 The Railroads' preemption claims under the Locomotive Inspection Act, 49 U.S.C. §§
11 20701–20703 (LIA), and the Safety Appliance Act, 49 U.S.C. §§ 20301–20306 (SAA), are also
12 unlikely to succeed because the Lempert-Keene Act does not regulate locomotive equipment and
13 safety or the safety components of rail cars.

14 Third, the balance of equities tips sharply in favor of denying injunctive relief. California's
15 interest in protecting the State's limited water sources is overwhelming. Oil spills present an
16 indisputable risk of harm to California's waters. The dramatic increase in overland transportation
17 of oil has increased the threat of inland spills. An injunction against the Act's enforcement as to
18 railroads, a source of oil spills, would create a significant gap in the Act's overall effectiveness.

19 Because none of the prerequisites for injunctive relief are met, defendants California Office
20 of Spill Prevention and Response (OSPR), Thomas M. Cullen, Jr., California Administrator for
21 Oil Spill Response (Administrator), and Kamala D. Harris, Attorney General of the State of
22 California (collectively, the State) respectfully request that the Court deny the Railroads' Motion
23 for a Preliminary Injunction.²

24 _____
25 ¹ The Federal Water Pollution Control Act is commonly known as the Clean Water Act.

26 ² On October 30, 2014, Defendants filed a Motion to Dismiss the complaint in which
27 OSPR raised the defense of sovereign immunity under the Eleventh Amendment. That motion
28 will be heard at the same time as the instant motion. By joining in this opposition, OSPR does not
waive the sovereign immunity defense, nor does it consent to the jurisdiction of this Court. *See*
Cal. Indep. Sys. Operator Corp. v. Reliant Energy Serv., Inc., 181 F. Supp. 2d 1111, 1122-1123
(E.D. Cal. 2001).

1 **THE LEMPert-KEENE ACT: STATUTORY AND REGULATORY BACKGROUND**

2 **I. THE LEMPert-KEENE ACT ADDRESSED DISCHARGES OF OIL INTO MARINE**
3 **WATERS.**

4 The Lempert-Keene Act was originally enacted in 1990 to address the threat posed by
5 discharges of petroleum into marine waters of the State of California by vessels and marine
6 facilities along the coast. Cal. Gov't Code § 8670.2 (amended June 20, 2014). The Act declared
7 that transportation of oil can pose a significant threat to environmentally sensitive areas, and
8 “California’s coastal waters, estuaries, bays, and beaches are treasured environmental and
9 economic resources which the state cannot afford to place at undue risk from an oil spill.” *Id.* §
10 8670.2(b), (e) (amended June 20, 2014). For these reasons, the Legislature found that the State
11 should improve its response to oil spills that occur in marine waters. *Id.* § 8670.2(j) (amended
12 June 20, 2014).

13 To accomplish this goal, the Lempert-Keene Act required, *inter alia*, “marine facilities” and
14 “vessels” to prepare spill plans to be approved by the Administrator. *Id.* §§ 8670.3(f), (y),
15 8670.29(a) (amended June 20, 2014). The Act also required marine facilities and vessels to obtain
16 certificates of financial responsibility demonstrating the ability to pay for damages, including
17 cleanup costs, that may arise in the event of an oil spill. *Id.* §§ 8670.37.51, 8670.37.53 (amended
18 June 20, 2014).

19 **II. S.B. 861 EXPANDED THE ACT TO COVER ALL WATERS OF THE STATE.**

20 In June of 2014, the Legislature passed S.B. 861, which expanded the Lempert-Keene Act
21 and the Administrator’s responsibilities to cover not only marine waters, but all waters of the state.
22 *Id.* §§ 8670.28, 8670.29(a), 8670.37.51, 8670.3(ag). As part of this expansion, S.B. 861 amended
23 the Act to apply not only to vessels and marine facilities but also to inland facilities. *Id.* §
24 8670.3(g)(1), (ae). Subject to limited exceptions not applicable here, “facility” is now defined as
25 follows:

26 “Facility” means any of the following located in state waters or located where an oil
27 spill may impact state waters:
28 (A) A building, structure, installation or equipment used in oil exploration, oil well
 drilling operations, oil production, oil refining, oil storage, oil gathering, oil
 processing, oil transfer, oil distribution, or oil transportation.

- 1 (B) A marine terminal.
- 2 (C) A pipeline that transports oil.
- 3 (D) A railroad that transports oil as cargo.
- 4 (E) A drill ship, semisubmersible drilling platform, jack-up type drilling rig, or any other floating or temporary drilling platform.

5 *Id.* § 8670.3(g)(1). Thus, contrary to the Railroads’ unsupported assertion that it is a “crude-by-rail regulation,”³ S.B. 861 broadened the Act to protect all waters of the state by regulating multiple types of marine and inland facilities with the potential to impact state waters. Railroads transporting oil as cargo happen to be one of the types of facilities that have that potential.

8 The Act now requires inland facilities, including railroads, to have spill plans and demonstrate financial ability to pay for damages in the event of an oil spill in state waters.

10 **A. Oil Spill Contingency Plans**

11 With respect to spill plans, the Act provides, “an owner or operator of a facility” must have an approved oil spill contingency plan while operating in waters of the state or where a spill could impact waters of the state. *Id.* § 8670.29(a). Section 8670.28, in turn, provides that the Administrator shall adopt regulations governing the contents of spill plans. *Id.* § 8670.28(a).

15 Among other things, the spill plans will specify the types of cleanup equipment that must be available and the maximum time that will be allowed for deployment of cleanup personnel and equipment. *Id.* §§ 8670.29, 8670.28(c). The plans will also identify the Oil Spill Response Organizations with whom the facilities have contracted. *Id.* § 8670.29(b)(6). These response organizations are the entities that provide spill remediation services by utilizing the cleanup equipment specified in the spill plans. *Id.* § 8670.29(b)(6). The spill plans will also provide for training and drills of the plans, in coordination with federal, state, and local government entities, response organizations, and operators. *Id.* §§ 8670.10, 8670.29(b)(9). The owners and operators

23 ³ The Railroads claim that, shortly after S.B. 861 was passed, nameless “State officials” touted California as the first state to implement crude-by-rail safety regulations. However, their only authority is an article, which neither identifies nor quotes the “officials” who allegedly made this statement. Rather, the language appears to be the words of an unidentified author. Even if a state “official” had made this statement, it would not be controlling or even evidence of legislative intent in light of the Act’s contrary language and stated purpose. *See Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986) (explaining that an individual legislator’s statement should not be given controlling effect and should not be evidence of legislative intent in the absence of consistent statutory language or legislative history).

1 of facilities must submit the plans to the Administrator for review and approval, which will be
2 based on the standards in the regulations; the review must be completed within 30 days. *Id.* §§
3 8670.31, 8670.29(b)(9).

4 **B. Certificates of Financial Responsibility**

5 As amended, the Act also requires an owner or operator of a facility where a spill could
6 impact waters of the state to apply for and obtain a certificate of financial responsibility. *Id.*
7 § 8670.37.51(d). To receive a certificate of financial responsibility, the applicant must
8 demonstrate the ability to pay for any damage that might arise from an oil spill. *Id.* §
9 8670.37.53(c)(1). Financial responsibility may be demonstrated several ways: “by evidence of
10 insurance, surety bond, letter of credit, qualifications as a self insurer, or any combination thereof
11 or other evidence.” *Id.* § 8670.37.54(a).

12 **C. Enforcement Provisions**

13 Certain types of knowing, intentional, and negligent violations of the requirements to have
14 an approved spill plan and a certificate of financial responsibility may lead to criminal, civil, and
15 administrative penalties. *Id.* §§ 8670.64(c)(2)(C), 8670.65, 8670.66(b), 8670.67.5. In addition, the
16 Administrator *may* issue a cease and desist order of up to 90 days for noncompliance, subject to
17 terms and conditions the Administrator may determine are necessary to ensure compliance. *Id.* §
18 8670.69.4(a)-(c). However, a cease and desist order need not require a stoppage of operations;
19 rather, an order could narrowly require compliance with the law (e.g., requiring a railroad to
20 submit a spill plan). The Railroads are already aware that the Administrator has no intention of
21 using this provision to stop railroad operations, Br. in Supp. of Mot. for Prelim. Inj. (Pls.’ Br.) 12
22 n.13, ECF No. 6-1, and the forthcoming regulations will likely confirm this position.

23 **III. THE ADMINISTRATOR HAS NOT YET ADOPTED REGULATIONS IMPLEMENTING THE**
24 **S.B. 861 AMENDMENTS.**

25 The Railroads concede that the Administrator has not adopted regulations implementing
26 S.B. 861. Compl. ¶ 39 & n.3, ECF No. 1; Pls.’ Br. 12 n.12. Although the Administrator has been
27 meeting with stakeholders, including railroads, regarding the regulations, so far drafts are only
28

1 preliminary. Defs.’ Mem. P. & A. in Supp. of Mot. to Dismiss (Mot. to Dismiss) 6:16-17, ECF
2 No. 18-1.

3 Nor has the State threatened to enforce the challenged provisions against the Railroads in
4 the absence of the regulations. While the Railroads allege that anonymous “State regulators []
5 persist in threatening enforcement of the statute,” Pls.’ Br. 3:22-23, they do not allege that the
6 State has threatened to enforce any of the challenged provisions in the absence of final regulations.
7 Indeed, such an allegation would be contradicted by other statements recognizing that S.B. 861
8 will not be enforced until after the Administrator adopts the implementing regulations. *See, e.g.*,
9 Compl. ¶ 46; Pls.’ Br. 12 n.12. It would also be contradicted by letters sent from the
10 Administrator to “Rail, inland production, pipeline and mobile unit transfer operators,” which
11 expressly informed rail operators that “OSPR will not enforce the provisions of Government
12 Code section 8670.64 through 8670.67 as they relate to contingency plans and certificates of
13 financial responsibility until *after* the emergency regulations have been promulgated.” Mot. to
14 Dismiss 6:26–7:6 (emphasis added).

15 **PROCEDURAL BACKGROUND**

16 Despite the absence of regulations implementing the S.B. 861 amendments, the Railroads
17 filed this suit seeking to enjoin the amendments’ enforcement on October 7, 2014. Compl. ¶ 1.
18 On October 30, 2014, the State filed a Motion to Dismiss the Complaint for lack of ripeness and
19 because the Railroads’ claims against OSPR are barred by the doctrine of sovereign immunity.
20 The parties stipulated for the Motion to Dismiss to be heard on the same day as the Motion for
21 Preliminary Injunction. Because the Motion to Dismiss identified a jurisdictional defect, the
22 Court should not reach the merits of the Railroads’ Motion for Preliminary Injunction. However,
23 if the Court nevertheless does reach the merits, the Motion for Preliminary Injunction should be
24 denied for the reasons stated below.

25 **ARGUMENT**

26 The Railroads’ Motion for Preliminary Injunction should be denied because a preliminary
27 injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the
28 plaintiff is entitled to relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008). The

1 moving parties “face a difficult task in proving that they are entitled to this extraordinary
2 remedy.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Here, the Railroads
3 cannot establish *any* of the prerequisites to the relief sought: (1) they are not likely to suffer
4 irreparable harm; (2) they are not likely to succeed on the merits; and (3) an injunction would not
5 be in the public interest and the equities weigh against an injunction. *See Winter*, 555 U.S. at 20.

6 **I. THE COURT SHOULD DENY THE RAILROADS’ MOTION BECAUSE THEY WILL NOT**
7 **SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED.**

8 Without the promulgation of S.B. 861 implementing regulations or any threat of
9 enforcement, the Railroads invite this Court into the foggy realm of speculation about whether,
10 and if so when, they will suffer irreparable injury. A plaintiff seeking a preliminary injunction
11 must establish irreparable harm is likely and not merely possible in the absence of an injunction.
12 *Winter*, 555 U.S. at 22; *Earth Island*, 626 F.3d at 474 (“a showing of a mere possibility of
13 irreparable harm is not sufficient”). A plaintiff must also show “immediate threatened injury.”
14 *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Speculative
15 injury is not enough to constitute irreparable harm for purposes of issuing injunctive relief. *Id.*
16 Where a party sues to enjoin enforcement of an allegedly unconstitutional state law, the threat of
17 enforcement must be imminent and the injury must not be conjectural:

18 In suits such as this one, which the plaintiff intends as a “first strike” to prevent a
19 State from initiating a suit of its own, the prospect of state suit must be imminent, for
20 it is the prospect of that suit which supplies the necessary irreparable injury. *Ex Parte*
21 *Young* thus speaks of enjoining state officers “*who threaten and are about to*
commence proceedings,” and we have recognized in a related context that a
conjectural injury cannot warrant equitable relief.

22 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (quoting *Ex Parte Young*, 209
23 U.S. 123, 156 (1908)) (citations omitted). “Any other rule (assuming it would meet Article III
24 case-or-controversy requirements) would require federal courts to determine the constitutionality
25 of state laws in hypothetical situations where it is not even clear the State itself would consider its
26 law applicable.” *Id.*

27 *Morales* provides an example of the kind of imminence necessary for injunctive relief
28 based on a threat of state suit. *Id.* at 379-80. Because the state officials threatened enforcement of

1 the challenged state laws and guidelines, as evidenced by multiple advisory memoranda and
2 formal letters of intent to sue major airlines, the *Morales* court found irreparable harm and
3 granted injunctive relief. *Id.* at 382.

4 The State's Eleventh Amendment protection from damages claims does not absolve the
5 Railroads from their burden of proving *likely, imminent* irreparable injury. The Railroads'
6 erroneously rely on *Cal. Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1140 (E.D. Cal.
7 2011), for the proposition that they will suffer irreparable harm without an injunction because
8 they cannot recover their costs of complying with S.B. 861 against the State due to sovereign
9 immunity. In *Maxwell-Jolly*, the plaintiff sought to enjoin the state from *continuing to implement*
10 *legislation* freezing the rates at which California reimbursed hospitals providing inpatient Medi-
11 Cal services. The rate freeze was already in force and plaintiff's member hospitals would receive
12 lesser frozen rates absent an injunction. *Id.* at 1134.

13 The Railroads' pre-enforcement claims, however, are distinct from those in *Morales* and
14 *Maxwell-Jolly* because the enactment of S.B. 861 did not impose any affirmative obligations on
15 the Railroads. S.B. 861's implementing regulations have not yet been issued. Compl. ¶ 39; *see*
16 *also* Mot. to Dismiss 6:14-16. Absent implementing regulations, the State cannot assess whether
17 the Railroads violate the law or whether, when and how the State will enforce such requirements
18 against the Railroads. The State has certainly not threatened enforcement of the unissued
19 regulations against the Railroads. In fact, the Administrator informed the Railroads that there
20 would be no enforcement until after implementing regulations have been promulgated. Compl. ¶
21 39; *see also* Mot. to Dismiss 6:27-7:6. Accordingly, the Railroads have not shown even a scintilla
22 of evidence of an imminent state suit against them arising out of S.B. 861.⁴

23 The Railroads' claimed harm amounts to nothing more than conjectural injury. The
24 Railroads submit only the Declarations of John Lovenburg and Robert Grimaila⁵ (Declarants) as

25 ⁴ The issues of ripeness raised in the State's Motion to Dismiss and irreparable injury are
26 interrelated because this matter involves a pre-enforcement challenge and there is no threat of
27 imminent prosecution. As such, the State hereby incorporates by reference the factual and legal
28 basis set forth in the Motion to Dismiss, which establishes that the Railroads' Complaint is
unripe.

⁵ *See* Defendants' Objections to Evidence Offered in Support of Plaintiffs' Motion for

(continued...)

1 evidence in support of their request for emergency relief; however, these Declarations actually
2 illustrate the lack of imminent and actual harm. Neither Declarant attests to the Railroads
3 presently incurring costs or losing business as a result of S.B. 861. Rather, Declarants surmise
4 ways in which S.B. 861 may impact five areas: 1) location-specific environmental planning, 2)
5 response training and logistics, 3) response practice drilling, 4) “best achievable technology,” and
6 5) financial certification. Grimaila Decl. ¶¶ 10-23; Lovenburg Decl., ¶¶ 8-22. Declarants merely
7 guess at possible costs and lost business at some unknown time.

8 Similarly, Declarants’ contention that S.B. 861 will open the door to a multiplicity of
9 regional requirements is sheer speculation. Declarants cite no evidence that any other states or
10 local governments have enacted, or will imminently enact, legislation similar to S.B. 861. *See*
11 *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) (no evidence of conflicting
12 local regulations so ordinance not preempted). Thus, neither Declaration suffices to establish
13 imminent, concrete loss or threat of actual injury. These Declarations should be disregarded as
14 based on pure conjecture.

15 In this pre-enforcement case, the record shows, at best, a “dubious and speculative”
16 possibility of harm.” *Col. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir.
17 1985). This Court should decline the Railroads’ invitation to speculate as to whether they will
18 suffer any harm at all, let alone harm that is irreparable, at some indefinite point in the future.

19 **II. THE COURT SHOULD DENY THE RAILROADS’ MOTION BECAUSE THEY ARE NOT**
20 **LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.**

21 That the Railroads’ preemption claims are unlikely to succeed provides another basis for
22 denying their Motion. *See Winter*, 555 U.S. at 20. They are unlikely to succeed because S.B. 861
23 does not regulate rail safety, rail transportation, locomotive parts, or safety components on rail
24 cars. In fact, none of the federal statutes cited by the Railroads preempt a state law like the
25 Lempert-Keene Act, i.e., a generally applicable law designed to protect water quality by
26 preparing for and facilitating cleanup in the event of an oil spill into waters of the state.

27 _____
(...continued)

28 Preliminary Injunction, filed concurrently with this Opposition.

1 **A. The Presumption Against Preemption Applies, so the Express Preemption**
2 **Clauses Must Be Read Narrowly.**

3 The starting point for preemption analysis is the presumption that a state’s historic police
4 powers to protect the health and safety of its citizenry are not superseded unless that is Congress’
5 clear and manifest purpose. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947);
6 *Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003). “States traditionally have
7 had great latitude under their police powers to legislate as to the protection of the lives, limbs,
8 health, comfort, and quiet of all persons.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)
9 (internal quotation marks and citation omitted).

10 Courts have applied this presumption in cases involving railroads. For instance, a court
11 applied the presumption to ICCTA in a railroad’s suit that challenged a city’s zoning and
12 occupational licensing laws. *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324,
13 1328-29 & nn.1-2 (11th Cir. 2001); *see also Union Pac. R.R. Co. v. Cal. Pub. Util. Comm’n*, 346
14 F.3d 851, n. 17 (9th Cir. 2003) (presumption applied to FRSA claim); *S. Pac. Transp. Co. v. Pub.*
15 *Util. Comm’n*, 9 F.3d 807, 810 (9th Cir. 1993) (presumption applied to FRSA and LIA claims).

16 The proper focus for determining whether the presumption applies is the purpose of the
17 state law. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). The purpose of S.B. 861 is to protect
18 water quality, an area within the state’s traditional police powers. *Askew v. Am. Waterways*
19 *Operators, Inc.*, 411 U.S. 325, 328-29 (1973) (state police power over oil spills); *Pac. Merch.*
20 *Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir. 2011) (environmental regulation
21 traditionally within state authority). Therefore, the Court must apply the presumption against
22 preemption to S.B. 861. In doing so, the Court must read the express preemption clauses that the
23 Railroads rely upon “narrowly,” and it can find preemption only if it determines that such was
24 Congress’ clear and manifest intent. *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1055 (E.D.
25 Cal. 2013).

26 **B. The FRSA Does Not Preempt S.B. 861 Spill Plan Requirements.**

27 The Railroads’ assertion that the FRSA preempts S.B. 861’s spill plan requirements is not
28 likely to succeed for two reasons. First, the FRSA preempts state laws that relate to rail safety or

1 security; since spill plans do not affect either of these, the FRSA does not preempt S.B. 861.
2 Second, the DOT regulations that the Railroads claim preempt S.B. 861 were issued pursuant to
3 FWPCA authority, so not even DOT asserts that they preempt state laws.

4 **1. The Spill Plan Requirements Relate to Protecting California’s Water**
5 **Quality, Not Railroad Safety.**

6 The FRSA’s preemption provision states that laws, regulations, and orders “related to
7 railroad safety and ... railroad security shall be nationally uniform to the extent practicable.” 49
8 U.S.C. § 20106(a)(1). The purpose of the FRSA is to “promote safety in every area of railroad
9 operations and reduce railroad-related accidents.” 49 U.S.C. § 20101. The Railroads assume that
10 the State will assert that S.B. 861’s spill plan requirements are valid simply because they address
11 “environmental concerns.” Pls.’ Br. 17:14-16. But their assumption is mistaken.

12 The reason S.B. 861 is unrelated to railroad safety and security is not because it addresses
13 environmental concerns, but because it has *nothing to do* with either rail operations or reducing
14 rail accidents. It will not change how the Railroads operate, and it does not require them to
15 change the type of tank cars they use, their routes, the amount or types of oil they transport, or the
16 speeds they travel. Instead, S.B. 861 relates to what happens *after* an accident occurs. It requires a
17 railroad (and other facilities) to have a plan for how it will clean up the oil *after* the oil has spilled
18 into waters of the state. Because S.B. 861’s spill plan requirements relate to water quality after an
19 accident, not rail safety or security, the FRSA does not preempt them.

20 **a. The Railroads’ Authorities Fail to Demonstrate a Connection**
21 **Between Spill Plans and Rail Safety.**

22 The Railroads’ assertion that spill plan requirements are “related to railroad safety” is
23 unsupported. They first rely on a DOT amicus curiae brief, which asserted that the FRSA
24 preempted a state’s requirement that railroads carry emergency response information onboard
25 their trains. Pls.’ Br. 18:2-7 (citing App. of Unreported and Uncodified Auth. (Pls.’ App.), Ex. 3,
26 ECF No. 6-4, at 12). But this emergency response information, required pursuant to the
27 Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101-5128, should not be
28 confused with spill plans. The purpose of emergency response information is to aid first

1 responders during the first minutes after a hazardous materials accident and to keep them and the
2 public safe from explosions, fires, and toxic gases. *See* 49 C.F.R. § 172.602(a). Unlike a spill plan,
3 the HMTA’s emergency response information does not address how to clean up an oil spill. *See*
4 *People v. Union Pac. R.R. Co.*, 47 Cal. Rptr. 3d 92, 114 (2006) (“FRSA addresses a number of
5 particular safety aspects of railroad activity (49 U.S.C. §§ 20131-20153), but it does not speak to
6 the transportation of dangerous materials or to the discharge of such materials into the
7 environment.”). Therefore, the amicus brief does not demonstrate that spill plans relate to rail
8 safety or security.

9 The Railroads attempt to force a connection between spill plans and rail safety by
10 emphasizing the breadth of the phrase “related to” in the FRSA. Pls.’ Br. 18 n.18. But they go too
11 far. While it is a broad phrase, both the Ninth Circuit and the Supreme Court have cautioned that
12 it does not draw in everything. After all, “[e]verything is related to everything else.” *Air*
13 *Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492,
14 502 (9th Cir. 2005) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.,*
15 *N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). Simply because the source of the oil
16 of which S.B. 861 is concerned may be a rail accident does not mean that S.B. 861 is “related to”
17 rail safety – S.B. 861 affects neither the frequency nor the magnitude of rail accidents so it does
18 not fall within the scope of the FRSA’s preemption provision.

19 The Railroads next rely on the legislative findings and declarations in S.B. 861, as if the bill
20 itself admits to being “related to” rail safety. Pls.’ Br. 18:7-9 (quoting Cal. Gov’t Code §
21 8670.2(k)). But the emphasis of the Legislature’s declaration is on cleaning up oil spills, not rail
22 safety. *E.g.*, Cal. Gov’t Code § 8670.2(j) (“California government should improve its response
23 and management of oil spills that occur in state waters.”). And there is nothing remarkable about
24 the declaration that the Railroads quote: “Those who transport oil through or near the waters of
25 the state must meet minimum safety standards and demonstrate financial responsibility.” *Id.* §
26 8670.2(k). This statement does not specify whether the referenced safety standards are federal or
27 state standards, and it does not specify whether they apply to railroads, pipelines, or some other
28 type of facility – it is just a general declaration. In fact, S.B. 861 neither contains rail safety

1 standards nor mandates that the Administrator promulgate them. Therefore, the declaration in
2 section 8670.2(k) cannot support a claim of preemption.

3 Lastly, the Railroads rely on a case in which a railroad challenged a state law that limited
4 the use of train whistles in order to reduce noise pollution. Pls. Br. 18:12-16. The Ninth Circuit
5 concluded that the state law was not preempted because, while the FRSA regulates how loud train
6 whistles must be, it does not regulate where they must be sounded. *S. Pac.*, 9 F.3d at 813. Before
7 reaching that conclusion, however, the court found that the state law was related to rail safety,
8 despite that its purpose was to reduce noise, because the law affected train whistles, the purpose
9 of which is to prevent rail accidents. *Id.* at 812-13 & n.6. But that analysis has no application here,
10 since, unlike train whistles, spill plans do not prevent accidents and are unrelated to rail safety,
11 not only in purpose but also in effect. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88,
12 105-106 (1992) (“In assessing the impact of a state law on the federal scheme, we have refused to
13 rely solely on the legislature’s professed purpose and have looked as well to the effects of the
14 law.”). Therefore, none of the Railroads’ authority demonstrates that spill plans relate to rail
15 safety or that they are within the scope of the FRSA.

16 **b. Congress Addressed Spill Plans in the Federal Water Pollution**
17 **Control Act, Which Does Not Preempt State Authority.**

18 Congress itself did not address spill planning in either the FRSA or the HMTA. Rather,
19 Congress addressed this subject in the FWPCA, which directly addresses the issue of spill plans
20 for vessels, railroads, and other facilities:

21 The President shall issue regulations which require an owner or operator of a tank
22 vessel or facility described in subparagraph (C) to prepare and submit to the President
23 a plan for responding, to the maximum extent practicable, to a worst case discharge,
and to a substantial threat of such a discharge, of oil or a hazardous substance.

24 33 U.S.C. § 1321(j)(5)(A)(i). S.B. 861 and section 1321 address the same subject: protection of
25 the waters and natural resources of the state and the United States, respectively. *Compare* Cal.
26 Gov’t Code § 8670.28(a) *with Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008). And both
27 S.B. 861 and section 1321 address spill plans, personnel, equipment, training, and drills. *Compare*
28 Cal. Gov’t Code §§ 8670.28(a), 8670.29(b) *with* 33 U.S.C. § 1321(j)(5)(D).

1 DOT acknowledged that when it issued regulations relating to spill plans applicable to
2 railroads, it was implementing section 1321(j)(5) of the FWPCA, not the FRSA: “This final rule
3 implements two separate mandates under the [FWPCA].” Oil Spill Prevention and Response
4 Plans, 61 Fed. Reg. 30533-01, 30533 (June 17, 1996) (codified at 49 C.F.R. pt. 130) (citing 33
5 U.S.C. § 1321(j)(1)(C), (j)(5)). This section of the FWPCA has a savings clause that expressly
6 preserves state authority within its scope, including spill plans:

7 Nothing in this section shall be construed as preempting any State or political
8 subdivision thereof from imposing any requirement or liability with respect to the
9 discharge of oil or hazardous substance into any waters within such State, or with
respect to any removal activities related to such discharge.

10 33 U.S.C. § 1321(o)(2); *see also id.* § 1370 (savings clause applicable to entire FWPCA). Rather
11 than preempt state authority, the FWPCA allows for cooperation between the federal and state
12 governments. *Askew*, 411 U.S. at 332; *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 491 (9th
13 Cir. 1984) (“Congress has indicated emphatically that there is no compelling need for uniformity
14 in the regulation of pollutant discharges—and that there is a positive value in encouraging the
15 development of local pollution control standards stricter than the federal minimums.”). DOT
16 recognized the application of this savings clause to its regulation of railroad spill plans:

17 This provision indicates that Federal regulation under 33 U.S.C. 1321 does not
18 preempt, but rather accommodates, regulation by States and political subdivisions
19 concerning the same subject matter. Thus, the establishment of oil spill prevention
and response plan requirements in this rule will affect neither existing State and local
regulation in the area, nor State and local authority to regulate in the future.

20 61 Fed. Reg. at 30539. Thus, S.B. 861’s spill plan requirements are not related to the FRSA;
21 instead, they are related to the FWPCA, which does not preempt states from regulating in this
22 area. Since spill plans do not affect rail safety or security, the FRSA does not preempt S.B. 861.

23 **2. Even if Spill Plans Did Relate to Rail Safety, the FRSA Does Not**
24 **Preempt S.B. 861 Because DOT’s Regulations Were Issued Pursuant**
to FWPCA Authority.

25 Even if S.B. 861’s spill plan requirements were related to rail safety, which they are not, the
26 FRSA does not preempt state laws until DOT “prescribes a regulation or issues an order covering
27 the subject matter of the State requirement.” 49 U.S.C. § 20106(a)(2). Here, the only regulations
28 or orders issued by DOT that cover the subject matter of S.B. 861’s spill plan requirements were

1 issued pursuant to DOT's FWPCA authority. As DOT itself has stated, such regulations do not
2 preempt state law. 61 Fed. Reg. at 30539.

3 **a. The Railroads' Burden to Establish that Federal Regulations**
4 **Cover the Subject Matter Is Extremely Difficult to Meet.**

5 "[P]reemption under the FRSA is extremely difficult to establish" *Glow v. Union Pac. R.*
6 *Co.*, 652 F. Supp. 2d 1135, 1145 (E.D. Cal. 2009). The Railroads must "establish more than that
7 they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which
8 indicates that pre-emption will lie only if the federal regulations substantially subsume the subject
9 matter of the relevant state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)
10 (citations omitted). "The term 'covering' is in turn employed within a provision that displays
11 considerable solicitude for state law in that its express pre-emption clause is both prefaced and
12 succeeded by express saving clauses." *Id.* at 665. "[T]his is not an easy standard to meet" *S.*
13 *Pac.*, 9 F.3d at 812. "FRSA preemption is even more disfavored than preemption generally." *Id.*
14 at 813.

15 **b. The Only Regulations that Address Spill Plans Were Issued**
16 **Pursuant to the FWPCA.**

17 The Railroads contend that DOT's regulations in 49 C.F.R. Parts 130, 172, and 174 meet
18 this high standard, covering "the subject matter of hazardous materials transportation, including
19 oil spill contingency planning." Pls.' Br. 14:23-15:4. A review of the subjects covered in two of
20 these three parts, Parts 172 and 174, reveals that they do not address spill plans at all. For instance,
21 the scope of Part 172 is as follows:

22 This part lists and classifies those materials which the Department has designated as
23 hazardous materials for purposes of transportation and prescribes the requirements for
24 shipping papers, package marking, labeling, and transport vehicle placarding
applicable to the shipment and transportation of those hazardous materials.

25 49 C.F.R. § 172.1. It contains nothing about cleaning up oil spills. As a result, despite the general
26 references to Parts 172 and 174, the Railroads' brief mostly just cites to regulations in Part 130.
27 Pls.' Br. 5:12-6:12.

1 The only regulations that the Railroads cite from Parts 172 and 174 have nothing to do with
2 spill plans. The Railroads reference emergency response information, *id.* 18:6, which is in Part
3 172, but which, as explained above, is entirely distinct from spill plans. And they cite to a Federal
4 Register notice that asserts federal preemption, Pls.’ Br. 19:3-7, but which applies to rail tank car
5 design and operation – again, nothing to do with spill plans. *See Hazardous Materials: Improving*
6 *the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 Fed. Reg. 1770-01,
7 1770, 1792-93 (Jan. 13, 2009) (to be codified at 49 C.F.R. pts. 171, 172, 173, 174 and 179).
8 Therefore, the DOT regulations that address spill plans are codified in 49 C.F.R. pt. 130. Those
9 regulations were all issued pursuant to the FWPCA. Pls.’ Br. 17 n.16 (citing 61 Fed. Reg. at
10 30533).

11 **c. Regulations Issued Pursuant to DOT’s FWPCA Authority Do**
12 **Not Preempt Because DOT Did Not Have This Authority When**
13 **Congress Enacted the FRSA.**

14 The Railroads contend that the FWPCA regulations in Part 130 cover the subject matter of
15 spill plans for purposes of FRSA preemption just like other DOT regulations. Pls.’ Br. 16:20-
16 17:13. However, neither the Railroads’ cited authority nor DOT’s own interpretation support this
17 conclusion.

18 Courts have held that DOT regulations can preempt state laws whether the regulations were
19 issued under DOT’s FRSA authority or under some other enabling legislation. *Easterwood*, 507
20 U.S. at 663 n.4. For instance, in *Easterwood*, the preempting regulations were issued pursuant to
21 the Highway Safety Act. *Id.* (negligence claim based on train’s speed preempted). In other cases,
22 DOT’s regulations issued pursuant to the HMTA were likewise found to cover the subject matter
23 at issue for purposes of FRSA preemption. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 671 &
24 n.6 (D.C. Cir. 2005) (preempted law sought to restrict railroad’s route).

25 But not all DOT regulations preempt state laws. According to the Supreme Court and DOT,
26 FRSA preemption applies only to regulations that DOT issued pursuant to authority existing
27 when the FRSA was enacted or authority that is a direct outgrowth therefrom. *Easterwood*, 507
28 U.S. at 663 n.4; 61 Fed. Reg. at 30539; Pls.’ App., Ex. 4 at 11. In *Easterwood*, the Court
described the history of the FRSA and the Highway Safety Act. *Easterwood*, 507 U.S. at 661-62.

1 The FRSA had directed DOT to develop solutions to safety problems posed by grade crossings.
2 *Id.* DOT did so, which led to the Highway Safety Act of 1973. *Id.* at 662-63. In explaining why
3 DOT's Highway Safety Act regulations covered the subject matter of state law under the FRSA,
4 the Court stated the preempting regulations were issued pursuant to 23 U.S.C. § 130 of the
5 Highway Safety Act, which was a "direct outgrowth of FRSA." *Easterwood*, 507 U.S. at 663 n.4.

6 The Court's limitation on the scope of FRSA preemption is consistent with DOT's
7 interpretation, as set forth in a United States Supreme Court amicus curiae brief filed by the
8 United States, which the Railroads filed as authority in this case. Pls.' App., Ex. 4. The amicus
9 brief explains that when Congress enacted the FRSA, it intended uniformity to apply to
10 regulations issued pursuant to the FRSA and pursuant to DOT's *preexisting* authority:

11 When Congress enacted FRSA, it recognized that the Secretary had diverse sources
12 of statutory authority, enacted over many years, with which to address rail safety
13 issues, and it determined not to alter those sources of authority. Accordingly, in order
14 to achieve a nationally uniform regime for rail safety, preemption had to apply to
15 regulations issued, not only under the new authority provided by FRSA, but also
16 under the Secretary's preexisting statutory authority; otherwise the desired uniformity
17 could not be attained.

18 Pls.' App., Ex. 4 at 11.

19 The amicus brief also states that a House Committee Report collected these preexisting
20 authorities. *Id.* at 8 (citing H.R. Rep. No. 91-1194, App. B at pp. 40-65 (1970); Def's Request for
21 Judicial Notice (Def's RJN), Ex. 1). Among these authorities was the Explosives and Other
22 Dangerous Articles Act, a precursor to the HMTA. Pls.' App., Ex. 4 at 8-9, 12. The Explosives
23 Act is listed among the preexisting authorities in the House Committee Report. Def's RJN, Ex. 1
24 at 60. Thus, the limited scope of FRSA preemption is consistent with *Williams*, 406 F.3d at 671 &
25 n.6, in which the preempting DOT regulations were authorized by the HMTA.

26 What was not among DOT's preexisting authorities was the FWPCA. The FRSA was
27 enacted in 1970, two decades before Congress amended the FWPCA to include spill plans. *See* 61
28 Fed. Reg. at 30533. The FWPCA directs the President, not DOT, to issue regulations regarding
29 spill plans. *Id.* (citing 33 U.S.C. § 1321(j)(5)). The President, in turn, delegated this authority to
30 the Secretary of Transportation. *Id.* Neither the FWPCA nor its precursors were listed in the
31 House Committee Report that collected DOT's preexisting authorities. Def's RJN, Ex. 1 at pp.

1 40-65. Therefore, the FWPCA is not a preexisting DOT authority, and the Part 130 regulations,
2 issued pursuant to DOT's delegated FWPCA authority, do not preempt S.B. 861.

3 DOT has confirmed that regulations it issues pursuant to its FWPCA authority do not
4 preempt state spill plans. It stated: "the establishment of oil spill prevention and response plan
5 requirements in this rule will affect neither existing State and local regulation in the area, nor
6 State and local authority to regulate in the future." 61 Fed. Reg. at 30539.

7 Furthermore, in this final rule, DOT rejected a request from the American Trucking
8 Association to issue the rule under the "joint authority" of the FWPCA and the HMTA in order to
9 give the rule preemptive effect. *Id.* DOT concluded that its rule was issued solely under the
10 authority of the FWPCA, so the preemptive effect of the HMTA (and, therefore, the FRSA) did
11 not apply. *Id.* DOT's conclusion is consistent with the holdings in *Easterwood* and *Williams*, the
12 FRSA's legislative history expressing the intent of Congress, and the position of the United States
13 in its Supreme Court amicus brief.

14 Planning for how to clean up oil spills, whether from railroads or other sources, does not
15 affect rail operations or reduce rail accidents. That is why Congress addressed this subject in the
16 FWPCA, not the FRSA. Since S.B. 861's spill plan requirements do not relate to rail safety, the
17 FRSA does not preempt them. Furthermore, since DOT's spill plan regulations were issued
18 pursuant to its FWPCA authority, as opposed to any DOT authority existing at the time of the
19 FRSA's enactment, DOT's regulations do not cover the subject matter of spill plans and do not
20 preempt S.B. 861.

21 **C. ICCTA Does Not Preempt S.B. 861 Because S.B. 861 Does Not Regulate**
22 **Rail Transportation.**

23 The Railroads' ICCTA preemption argument also fails. ICCTA only preempts state laws
24 that regulate rail "transportation," as defined by statute. *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331
25 (quoting 49 U.S.C. § 10501(b)). S.B. 861 is not preempted since it neither manages nor governs
26 rail transportation in any manner. The Railroads contend that ICCTA preempts two of S.B. 861's
27 requirements: the requirement that railroads get their spill plans approved by the Administrator,
28 and the requirement that they obtain certificates of financial responsibility to show they could pay

1 the damages from a worst case oil spill. Pls.’ Br. 19:12-13. But neither requirement regulates rail
2 transportation.

3 Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rail
4 transportation. States are expressly preempted from regulating all of the following:

5 (1) transportation by rail carriers, and the remedies provided in this part with respect
6 to rates, classifications, rules (including car service, interchange, and other operating
7 rules), practices, routes, services, and facilities of such carriers; and

8 (2) the construction, acquisition, operation, abandonment, or discontinuance of spur,
9 industrial, team, switching, or side tracks, or facilities

10 49 U.S.C. § 10501(b). As a result, state laws that impede rail transportation are preempted.

11 ICCTA defines “transportation” as:

12 (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property,
13 facility, instrumentality, or equipment of any kind related to the movement of
14 passengers or property, or both, by rail, regardless of ownership or an agreement
15 concerning use; and

16 (B) services related to that movement, including receipt, delivery, elevation, transfer
17 in transit, refrigeration, icing, ventilation, storage, handling, and interchange of
18 passengers and property

19 49 U.S.C. § 10102(9). “While certainly expansive, this definition of ‘transportation’ does not
20 encompass everything touching on railroads. Subsection (A) focuses on physical instrumentalities
21 ‘related to the movement of passengers or property,’ and Subsection (B) on ‘services related to
22 that movement.’” *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). For
23 instance, in *City of Auburn v. U.S.*, the city sought to require a railroad to comply with its
24 environmental permit review process prior to re-establishing a route for a main rail line. 154 F.3d
25 1025 (9th Cir. 1998). Since rail routes are part of rail transportation, the permit review process
26 interfered with rail transportation and was therefore preempted. *Id.* at 103; *see also Norfolk S. Ry.*
27 *Co. v. City of Alexandria*, 608 F.3d 150, 155 (4th Cir. 2010) (finding permit requirements that
28 limited the products a railroad could haul from its transloading facility and the haul route were
preempted).

Where state laws do not directly affect rail transportation – either the instrumentalities or
the related services – or the effect on rail transportation is merely remote or incidental, ICCTA
does not preempt them. *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094,
1097-98 (9th Cir. 2010); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 808 (5th Cir. 2011) (ICCTA

1 preempts only when state law “directly” manages rail transportation, such as train speed, length,
2 and scheduling, but not a negligence claim that has an incidental effect). For instance, ICCTA
3 does not preempt a state law requiring railroads to pay for pedestrian crossings over their tracks.
4 *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008). And state
5 laws are not preempted “merely because they reduce the profits of a railroad” or have high
6 compliance costs. *Id.*

7 ICCTA also does not preempt generally applicable, non-discriminatory state laws,
8 including electrical, plumbing and fire codes, and direct environmental regulations enacted for the
9 protection of public health and safety, so long as such laws do not directly impede rail
10 transportation. *Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 643 (2d Cir. 2005). Under
11 ICCTA, “[s]tates retain their police powers, allowing them to create health and safety
12 measures” *Adrian & Blissfield*, 550 F.3d at 541; *see also Green Mountain R.R. Corp.*, 404
13 F.3d at 643. For example, ICCTA would not preempt a state law that prohibited railroads from
14 dumping harmful substances. *S. Coast Air Quality Mgmt. Dist.*, 622 F.3d at 1097.

15 S.B. 861, which requires railroads to have approved spill plans and certificates of financial
16 responsibility, does not impede rail transportation. It does not directly (or indirectly) affect rail
17 instrumentalities or rail services. It does not regulate train speed, length, or scheduling. Nor does
18 it require a railroad to change its routes, the designs of its locomotives or rail cars, or what it
19 transports. Instead, akin to a law prohibiting the dumping of harmful substances, S.B. 861 is a
20 valid exercise of California’s police power, designed to protect the health and safety of the state’s
21 waters after a spill occurs. S.B. 861, together with the Lempert-Keene Act, which it amends, is a
22 generally applicable law that applies not just to railroads but also to vessels, pipelines, refineries,
23 transfer facilities, and other inland and marine facilities that have the potential for spilling oil that
24 could impact state waters. *See Cal. Gov’t Code § 8670.3(g)(1)*. While railroads will likely incur
25 some costs in preparing spill plans and meeting the financial responsibility requirement, the effect
26 of those costs on rail transportation is remote and incidental. *See Adrian & Blissfield*, 550 F.3d at
27 541.

28

1 The Railroads entirely ignore the foregoing, instead arguing that the spill plan approval and
2 certificate of financial responsibility requirements constitute “preclearance” requirements, and
3 that the financial responsibility requirement is preempted because the STB directly regulates the
4 subject. Pls.’ Br. 19:12-13. Both arguments fail.

5 **1. ICCTA Does Not Preempt Pre-Approvals as Long as They Do Not**
6 **Impede Rail Transportation.**

7 S.B. 861 requires oil spill contingency plans to be submitted to the Administrator for review
8 and approval. Cal. Gov’t Code § 8670.31(a). It also requires railroads to apply for and obtain a
9 certificate of financial responsibility. *Id.* § 8670.37.51(d). The Railroads argue these are both
10 “impermissible pre-clearance mandate[s]” because they could be used to deny them the ability to
11 proceed with activities that the STB has authorized. Pls.’ Br. 20:4-7, 21:8-21. But such a
12 requirement, whether it is called a pre-clearance mandate, a pre-approval, or a permit, is
13 preempted only if “by its nature, [it] could be used to deny a railroad the ability to conduct some
14 part of its operations or to proceed with activities that the [STB] has authorized” *Adrian &*
15 *Blissfield*, 550 F.3d at 540; *accord N.Y. Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d
16 238, 253 (3d Cir. 2007). S.B. 861’s requirements will not be used to deny the Railroads the ability
17 to conduct any part of their operations, so they are not preempted.

18 In *Green Mountain R.R. Corp.*, the state attempted to require the railroad to obtain a
19 preconstruction permit before building transloading facilities. 404 F.3d 638. This would have
20 delayed construction, so it was preempted. *Id.* at 643. Likewise, in *City of Auburn*, the city
21 attempted to require the railroad to get a permit before re-establishing a rail line. 154 F.3d 1025.
22 This, too, was preempted because the permit process could have delayed, altered, or prevented the
23 establishment of the line. *Id.* at 1031.

24 By contrast, S.B. 861’s plan approval and certificate requirements will not delay, alter, or
25 stop the Railroads’ operations. Once the Administrator issues regulations implementing S.B. 861,
26 facilities will be given sufficient time to comply with the new requirements. If they refuse to do
27 so, they may be subject to both criminal and civil penalties, but these penalties will not impede
28 their rail operations. *N.Y. Susquehanna and Western Ry.*, 500 F.3d at 255 (“Nothing prevents a

1 state from imposing a significant fine on months of noncompliance with valid regulations . . .”).
2 In addition, the Administrator could issue (though this is rare) a cease and desist order that would
3 require the noncompliant railroad to submit a spill plan or apply for a certificate of financial
4 responsibility. Cal. Gov’t Code § 8670.69.4(a)-(c). But such an order would not require the
5 railroad to cease operating or to alter its operations in any respect. Because S.B. 861’s
6 requirements will not impede rail transportation, they are not preempted.⁶

7 **2. The STB Does Not Regulate Financial Responsibility for Oil Spill**
8 **Response, so S.B. 861’s Financial Responsibility Requirement Is Not**
9 **Preempted.**

10 The Railroads also assert that S.B. 861’s financial responsibility requirement is preempted
11 because the STB directly regulates whether railroads are sufficiently capitalized to provide
12 common carrier services. Pls.’ Br. 20:16-22. However, S.B. 861 does not address whether a
13 railroad’s *business* is financially fit. Instead, it is concerned solely with whether the railroad has
14 the ability to pay *for spill cleanup*. The STB does not address oil spill damages whatsoever, so
15 S.B. 861’s financial responsibility requirement is not preempted.

16 Under ICCTA, the STB shall issue a certificate authorizing rail activities unless the Board
17 finds that such activities are inconsistent with public convenience and necessity. 49 U.S.C.
18 § 10901(c). When considering an application for a certificate, the STB determines “(1) whether
19 the applicant is fit, financially and otherwise, to undertake the construction and provide rail
20 service; (2) whether there is a public demand or need for the service; and (3) whether the
21 competition would be harmful to existing carriers.” *N. Plains Res. Council, Inc. v. Surface Transp.*
22 *Bd.*, 668 F.3d 1067, 1092 (9th Cir. 2011).

23 Certificates of financial responsibility under S.B. 861 serve an entirely different purpose.
24 The Administrator will certify a railroad has demonstrated the financial ability to pay for any

25 ⁶ The Railroads make a facial challenge to S.B. 861. As a result, they must demonstrate
26 that under no set of circumstances would S.B. 861 be valid. *U.S. v. Salerno*, 481 U.S. 739, 745
27 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount
28 successfully, since the challenger must establish that no set of circumstances exists under which
the Act would be valid.”). Here, this means that the Railroads must demonstrate that S.B. 861 is
preempted under any reasonable and lawful means of implementation in the forthcoming
regulations. One such reasonable and lawful means of implementation is that cease and desist
orders will not require railroads to cease or alter operations.

1 damages that might arise during an oil spill into waters of the state. Cal. Gov't Code
2 § 8670.37.53(c)(1). To obtain the certificate, the railroad has a number of options, including
3 providing the Administrator with evidence of insurance, a surety bond, a letter of credit, or
4 qualifications as a self-insurer. *Id.* § 8670.37.54(a). The Administrator has no interest in the
5 railroad's financial fitness – proof of insurance is all that is required; the Administrator would
6 examine the railroad's finances only if the railroad sought to qualify as self-insured and, even
7 then, the scope of examination would be extremely limited. Thus, since the STB does not regulate
8 a railroad's ability to pay for damages from an oil spill, ICCTA does not preempt S.B. 861's
9 financial responsibility requirement.

10 **D. The Locomotive Inspection Act and Safety Appliance Act Do Not Apply**
11 **and Do Not Preempt S.B. 861.**

12 The Railroads' claims under the LIA and SAA are also unlikely to succeed. Neither act
13 contains an express preemption clause, and neither implied field nor conflict preemption apply
14 because the LIA and SAA regulate different subject matters than S.B. 861.

15 “[T]he LIA applies only to aspects of the railroad that fit within the LIA’s definition—the
16 locomotive, its parts, and appurtenances—and no more.” *Becraft v. Norfolk S. Ry. Co.*, No.1:08-
17 CV-80, 2009 WL 1605293, at *3 (N.D. Ind. June 5, 2009); *see also* 49 U.S.C. § 20701
18 (describing prerequisites for use of locomotives). The LIA impliedly preempts “the field of
19 locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers
20 in the course of their employment.” *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997)
21 (citing *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605 (1926)). However, the LIA only regulates the
22 “design, construction, and material” of trains. *S. Pac.*, 9 F.3d at 811; *see also Glow*, 652 F. Supp.
23 2d at 1146.⁷ The LIA says nothing of oil spill response efforts, even if the spill occurs from a
24 train.

25 _____
26 ⁷ For example, pursuant to the LIA, the Secretary of Transportation has promulgated
27 regulations establishing various safety requirements for locomotives' brake systems, electrical
28 systems, and cab equipment, 49 C.F.R. § 229.41–229.140, locomotive crash worthiness design
requirements, 49 C.F.R. § 229.141–229.217, and locomotive electronics, 49 C.F.R. § 229.301–
229.319.

1 The SAA is similarly silent with respect to oil spill response. Rather, it requires specifically
2 enumerated safety components on rail cars. *Union Pac. R.R. Co.*, 346 F.3d at 869; *Milesco v.*
3 *Norfolk S. Co.*, 807 F. Supp. 2d 214, 223 (M.D. Pa. 2011). For example, locomotives and rail cars
4 must be equipped with automatic couplers, secure sill steps, efficient hand brakes, and secure
5 ladders and running boards. 49 U.S.C. § 20302(a)(1). The SAA “divests states of all authority to
6 regulate *on the devices enumerated therein.*” *Miller v. S. Pac. R.R.*, No. CIV. S-06-377, 2007 WL
7 266 9533, at *4 (E.D. Cal. 2007) (emphasis added) (“[C]ourts have consistently held that the
8 SAA ‘so far occupie[s] the field of legislation relating to the ‘equipment of [rail] cars with safety
9 appliances’”) (second and third alteration in original); *see also Union Pac. R.R.*, 346 F.3d at
10 869; *Garay v. Missouri Pac. R.R. Co.*, 38 F. Supp. 2d 892, 898 (D. Kan. 1999).

11 In contrast, nothing in S.B. 861 purports to regulate the design, construction, and material
12 of locomotives parts or appurtenances. Nor does it attempt to regulate couplers, brakes, or any
13 other of the safety devices enumerated in the SAA. Rather, S.B. 861 is designed to minimize the
14 impacts of an oil spill in state waters by requiring spill plans and certificates of financial
15 responsibility. To that end, the Administrator’s implementing regulations are to provide for the
16 “best achievable protection of waters and natural resources of the state.” Cal. Gov’t Code §§
17 8670.28(a), 8670.29(h).⁸ While the Railroads appear to believe that the “best achievable
18 technology” requirement will be used to force railroads to make modifications to their trains, this
19 is pure speculation. As explained above, the emphasis of the Lempert-Keene Act and the S.B. 861
20 amendments is on cleaning up oil spills, and the implementing regulations will likely provide for
21 the best achievable protection of state waters through the use of best achievable technologies such
22 as specialized types of containment booms, skimmers, and dispersants, not locomotive parts or
23 safety appliances. Because S.B. 861, on its face, does not require changes in the design,
24 construction, and material of locomotive parts and appurtenances or the use of safety appliances
25

26 ⁸ “Best achievable protection” is defined as “the highest level of protection that can be
27 achieved through both the use of the best achievable technology and those manpower levels,
28 training procedures, and operational methods that provide the greatest degree of protection
achievable.” *Id.* § 8670.3(b)(1).

1 enumerated in the SAA, the Railroads’ argument that the LIA and SAA preempt the “best
2 achievable protection” requirement is not likely to succeed.

3 In sum, because the Lempert-Keene Act serves the purpose of promoting water quality and
4 does not attempt to regulate railroad safety or security, rail transportation, or the design of
5 locomotives or rail cars, the Railroads’ facial challenge is unlikely to succeed, and preliminary
6 injunctive relief is therefore not appropriate.

7 **III. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF DENYING INJUNCTIVE**
8 **RELIEF AND AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.**

9 The balance of equities and public interest compel denial of the Railroads’ request for a
10 preliminary injunction. When ruling on a preliminary injunction, courts “must balance the
11 competing claims of injury and must consider the effect on each party of granting or withholding
12 the requested relief.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). In
13 exercising their sound discretion, courts should pay particular regard for the public consequences
14 in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S.
15 305, 312 (1982). Moreover, assessing the harm to the opposing party (balancing the equities) and
16 weighing the public interest “merge when the Government is the opposing party.” *Nken v. Holder*,
17 556 U.S. 418, 435 (2009).

18 The balance of the equities does not favor an injunction here because, as discussed in
19 Section I, above, the Railroads will not suffer *any* immediate harm if such extraordinary relief is
20 denied. The Railroads’ contention that an injunction is needed to avoid a patchwork of regional
21 requirements is speculative at best; while there may be an interest in “nationally uniform” rail
22 safety laws, S.B. 861 is not about rail safety or rail operations. S.B. 861 is about preparing for oil
23 spills in an effort to protect California’s invaluable natural resources and communities.

24 California’s interest in implementing the Lempert-Keene Act to protect the State’s waters is
25 indisputable and overwhelming. The fundamental purpose of the Act is to prevent harm to
26 California’s coastal and inland waters, “treasured environmental and economic resources that the
27 state cannot afford to place at undue risk from an oil spill.” Cal. Gov’t Code § 8670.2(e). Oil
28 spills present “an undeniable and patently apparent risk of harm” since such spills “could destroy

1 and disrupt ecosystems” critical to California’s interests. *Ocean Advocates v. U.S. Army Corps of*
2 *Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2004). In addition to purely environmental harm, given
3 California’s growing population and its current, years-long drought, the State’s interest in
4 protecting inland freshwater sources is stronger than ever.

5 Unfortunately, damage to California’s waters from inland oil spills is not a new
6 phenomenon. From 2008 to 2012 alone, there were many thousands of inland oil spills reported to
7 OSPR. Def’s RJN, Ex. 2. Dramatically exacerbating this existing threat, a recent boom in North
8 American crude oil sources, including crude feedstocks from North Dakota’s Bakken shale and
9 Canadian tar sands, will increase the amount of oil being transported over California’s rivers,
10 lakes, and streams. In response to this boom, at least thirteen different crude oil refineries and
11 terminals in California are proposing major expansions. Kristen Hayes, FACTBOX- California
12 Crude Slates and Oil-by-Rail Projects, Reuters, Sept. 10, 2014, available at
13 <http://in.reuters.com/article/2014/09/10/crude-railways-california-factbox->
14 [idINL2N0QK2OA20140910](http://in.reuters.com/article/2014/09/10/crude-railways-california-factbox-idINL2N0QK2OA20140910). Many of these expanding refineries and terminals are located in
15 land-locked areas such as Sacramento and Bakersfield that are inaccessible by marine vessel,
16 meaning that the increased oil feedstocks will be delivered exclusively by inland transportation
17 methods including pipelines and rail. *Id.* In Bakersfield alone, the Alon Refinery and the Plains
18 All American Terminal expansion proposals will increase the amount of oil traveling through
19 inland California by 12.2 million gallons of oil per day. *Id.* Taking all current proposals into
20 account, the amount of crude oil flowing through inland California could soon increase by
21 billions of gallons per year, markedly increasing the threat to California’s inland waters. *Id.* This
22 intensified threat necessitates increased preparedness.

23 At the same time, there is a need to ensure adequate resources will be available for response
24 efforts in the event of a spill. STB regulations do not evaluate a railroad’s ability to pay for
25 damages resulting from an oil spill. The DOT has described this as a “market failure” where “rail
26 companies are not insured against the full liability of the consequences of incidents involving
27 hazardous materials.” Def’s RJN, Ex. 3. The certificate of financial responsibility will fill this
28 regulatory void and ensure that taxpayers are not left holding the bag. But it may accomplish

1 more. Requiring proof of insurance could mean the difference between cleanup and permanent
2 environmental damage.

3 Given the environmental threat to California's waters from the amount of crude oil being
4 transported through inland California and the resulting need for preparedness, an injunction
5 preventing enforcement of the Act against an entire category of facilities with the potential for
6 spilling oil into state waters would most certainly not be in the public interest. To the contrary, the
7 public interest demands enforcement of the Act against all vessels, pipelines, refineries, transfer
8 facilities, railroads, and other inland and marine facilities that have the potential for spilling oil
9 that could impact state waters.

10 **CONCLUSION**

11 Because the Railroads have not established any of the prerequisites to extraordinary,
12 preliminary injunctive relief, the Court should deny the Railroads' Motion for Preliminary
13 Injunction.

14 Dated: December 5, 2014

Respectfully Submitted,

15 KAMALA D. HARRIS
16 Attorney General of California
17 RANDY L. BARROW
18 Supervising Deputy Attorney General

19 /s/ Carolyn Nelson Rowan
20 NICHOLAS C. STERN
21 CAROLYN NELSON ROWAN
22 Deputy Attorneys General
23 *Attorneys for Defendants*
24 *California Office of Spill Prevention and*
Response, Thomas M. Cullen, Jr.,
California Administrator for Oil Spill
Response, and Kamala D. Harris, Attorney
General of the State of California

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COUNTY OF YOLO

Board of Supervisors

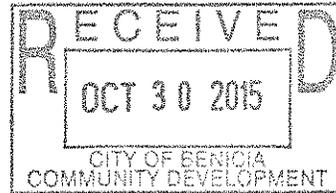
District 1, Oscar Villegas
District 2, Don Saylor
District 3, Matt Rexroad
District 4, Jim Provenza
District 5, Duane Chamberlain

625 Court Street, Room 204 • Woodland, CA 95695
(530) 666-8195 • FAX (530) 666-8193
www.yolocounty.org

County Administrator, Patrick S. Blacklock
Deputy Clerk of the Board, Julie Dachtler

October 30, 2015

Amy Million, Principal Planner
Community Development Department
250 East L. Street
Benicia, California 94510



Re: Valero Benicia Crude by Rail Project Revised Draft Environmental Impact Report

Dear Ms. Million:

Yolo County has reviewed the Revised Draft Environmental Impact Report (RDEIR) for the Valero Benicia Crude by Rail Project. We had submitted a comment letter in response to the original Draft Environmental Impact Report (DEIR) for the Project in July 2014, attached as Exhibit A. In our letter, we expressed our concerns with the methodology and conclusion in the DEIR that the shipment of oil by rail posed no "significant hazard" and we urged the City of Benicia to revise the DEIR to accurately assess the risk the shipment of oil by rail poses. The RDEIR revises the initial methodology of the DEIR and better captures the potential upstream impacts conceding that oil by rail indeed poses a substantial risk to the communities upstream of the Valero facility in Benicia.

However, despite correctly deeming oil by rail a substantial risk, the RDEIR fails to adopt a single mitigation measure to reduce this risk. The attached letter from the Sacramento Area Council of Governments, attached as Exhibit B, delineates numerous potential mitigation measures to reduce the risk of transporting oil by rail. We urge the City of Benicia to thoroughly review and consider the adoption of these mitigation measures.

Sincerely,

Matt Rexroad
Chair, Yolo County Board of Supervisors

Enclosures



COUNTY OF YOLO

Board of Supervisors

District 1, **Oscar Villegas**
District 2, **Don Saylor**
District 3, **Matt Rexroad**
District 4, **Jim Provenza**
District 5, **Duane Chamberlain**

625 Court Street, Room 204 • Woodland, CA 95695
(530) 666-8195 • FAX (530) 666-8193
www.yolocounty.org

County Administrator, **Patrick S. Blacklock**
Deputy Clerk of the Board, **Julie Dachtler**

July 15, 2014

VIA CERTIFIED MAIL AND E-MAIL

Amy Million, Principal Planner
Community Development Department
250 East L Street
Benicia, CA 94510

RE: Valero Benicia Crude by Rail Project Draft Environmental Impact Report

Dear Ms. Million:

Yolo County has reviewed the City of Benicia's Draft Environmental Impact Report ("DEIR") related to the project at the Valero Oil Refinery that would result in the daily delivery of 70,000 barrels of oil by rail to the Refinery (the "Valero Project"). The Valero Project would move approximately 80% of Valero's crude deliveries from ocean tankers to railways that traverse through our local communities and sensitive environmental resources. Notwithstanding the change in where the oil is traveling, the DEIR pays little attention to the potential upstream effects of increased oil by rail shipments through Placer, Sacramento, Yolo, Solano, and Contra Costa counties.

As discussed below, the DEIR provides only a brief review of the environmental, safety, and noise effects on upstream communities. This DEIR justifies this cursory analysis because the effects are "indirect" and not in the Project's immediate vicinity.¹ Under the California Environmental Quality Act ("CEQA"), EIRs are required to discuss the area that will be directly and indirectly affected by the project.² This area must not be defined so narrowly that a significant portion of the affected environment is ignored in the analysis.³ For this reason, the relevant geographical area for CEQA purposes may be larger than the project area.

¹ See, e.g., DEIR, p. 4.0-3 ("Project impacts that are indirect and/or difficult to predict are discussed in less detail than direct impacts that can be predicted with reasonable certainty."); p. 4.10-5 ("The analysis of indirect noise impacts from trains herein considers impacts in the City of Benicia in detail. Indirect impacts outside the City are considered in general terms.").

² See CEQA Guidelines §§ 15126.2(a), 15360; *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011) ("CEQA review includes the impacts a project may have in areas outside the boundaries of the project itself.").

³ See *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184 (2004); *County Sanitation Dist. No. 2 v. Kern County*, 127 Cal. App. 4th 1544 (2005).

Here, the geographic effects from the Valero Project are not difficult to predict. If the Valero Project is approved, two 50-car trains loaded with 70,000 barrels of crude would travel along a pre-determined, immutable route from Roseville to Benicia every day. Every day, two empty 50-car trains will travel the same route back. Indeed, there is no more uncertainty about the effects on upstream communities as on the areas in Benicia surrounding the Valero Refinery. All areas along the route will have the same trains traveling through them. But the significance of these effects will be different depending on the individual circumstances of each community. Given the effects of approving the Valero Project, the DEIR should consider their significance and possible mitigation on all affected communities in its analysis, as required under CEQA.⁴

For these and other reasons mentioned below, the DEIR should be substantially revised and recirculated for further public review.

A. The DEIR Dismisses Safety Concerns Related to the Transportation of Oil By Rail

The DEIR's conclusion that transportation of oil by rail poses a less than significant hazard to upstream communities is unsupported by the evidence presented in the report. Specifically, the analysis in Appendix F, upon which this finding is based, is inaccurate and irrelevant, both in terms of conclusions and methodology.

First, the conclusion derived from the methodology undermines the frequency of oil spills that can result from a train derailment. The statistical analysis states:

The results show that the expected occurrence of a crude oil train release incident exceeding 100 gallons is approximately 0.009 per year, or an average of about once per 111 years. The portion of the route traversing the Suisun wetland area has an even lower annual risk of a release incident equaling 0.00381, which corresponds to an average interval between incidents of 262 years.

While a once in a 100 year event might seem infrequent, the report's calculations also show that there is a 10% chance that there will be of a crude oil train release incident on the Roseville-Benicia route in the next decade. The County finds that such probabilities pose a significant hazard, especially considering the majority of the route is through populated areas and environmentally sensitive natural resources such as the Suisun wetlands.

Furthermore, the DEIR concluded that the risk of a spill is insignificant based solely on the frequency of a possible event, without considering its possible magnitude. To provide meaningful information, a risk analysis must consider both factors. Here, the DEIR's risk analysis concluded that a spill would statistically occur every 111 years, but whether a hundred year event is significant or insignificant depends on the magnitude of that event. A catastrophic explosion and spill in a populated area is different from a 100 gallon spill in a shipyard that is quickly cleaned up. For this reason, agencies around the country take significant steps to protect against infrequent events, even if they are not expected to occur but once a century.⁵ Additionally, any such magnitude analysis must contemplate the chemical characteristics of the oil being transported. The flammability and volatility of Bakken crude oil and the high viscosity

⁴ See *Muzzy Ranch v. Solano County Airport Comm'n*, 41 Cal. 4th 372 (2007) ("That the effects will be felt outside of the project area is one of the factors that determines the amount of detail required in any discussion.").

⁵ See, e.g., Louisiana Coastal Protection and Restoration Authority, *Louisiana's Comprehensive Master Plan for a Sustainable Coast*, p. 141 (2012), available at <http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf> (describing efforts to protect against 100 year flood events).

and toxicity of Canadian bitumen -- materials likely to be transported to the Valero Refinery -- both pose significant environmental hazards in the event of a derailment or other rail accident. Without considering the second half of the risk analysis, the DEIR cannot conclude that the risk of a spill is insignificant.

Additionally, the County contests the assumptions employed in the methodology and its failure to contemplate other factors which could increase the likelihood of a catastrophic accident:

- 1) The methodology assumes the exclusive use of the modern CPC-1232 tank cars. Current rail regulations mandate that the tank cars used to transport oil only adhere to the DOT-111 standards issued several decades ago. Those standards have proven to be insufficient, and are currently being revised. At numerous points, the DEIR describes Valero's "commitment" to use tank cars designed to the industry's CPC-1232 standards, rather than legacy DOT-111 tank cars.⁶ The DEIR does not describe how such a "commitment" would be binding on Valero and, consequently, it should not be considered in assessing the significance of related impacts. The DEIR does not consider the possibility that Valero might not have access to sufficient cars within the timeframe of the proposed project, a probable scenario in light of potential production capacity limitations and strong demand for modernized tank cars.⁷ Indeed, the DEIR acknowledges that as of April 2013, two thirds of all tank cars transporting crude oil in the United States are still the legacy DOT-111 tank cars.⁸ Without an explicit, binding guarantee from Valero that it will not ship oil in DOT-111 tank cars along the Roseville-Benicia route, any statistical analysis that ignores the risks associated with DOT-111 tank cars is insufficient and cannot be considered in evaluating potential environmental effects.
- 2) The DEIR ignores possible changes in safety regulations concerning oil tank cars. The DEIR also does not consider whether the industry CPC-1232 standards are sufficient to mitigate the risk of an oil spill. The Association of American Railroads ("AAR") recently indicated that federal regulations may impose new standards for crude oil tank cars that supersede the current specifications of the CPC-1232.⁹ The potential for regulatory uncertainty invalidates the DEIR's assumption of Valero's use of CPC-1232 cars in two ways. First, the federal government's implementation of more stringent guidelines suggests that the AAR-endorsed CPC-1232 standards may have not be adequate to safely transport crude oil. And second, regulatory uncertainty could delay Valero in acquiring a modern tank fleet and instead result in Valero using the only Federal Railroad

⁶ See DEIR, p. S-3 ("Valero has committed that, when the PHMSA regulations call for use of a DOT-111 car, Valero would use 1232 Tank cars rather than legacy DOT-111 cars."); *id.* p. 3-19 ("In one respect, however, Valero would exceed legal requirements. Valero has committed that, when the PHMSA regulations call for use of a DOT-111 car, Valero would use 1232 Tank cars rather than legacy DOT-111 cars."); *id.* p. 4.7-17 ("It was assumed that the refinery would use 1232 Tank Cars for all shipments, based on Valero's commitment to do so."); *id.* p. 4.7-19 ("If the Project were approved, Valero here would use only 1232 Tank Cars to transport oil from Roseville to Benicia.").

⁷ See Bloomberg BNA, Tank Car Design Debate Split Over Safety of Voluntary Industry Standard (March 18, 2014).

⁸ See DEIR, p. 4.7-6.

⁹ See http://www.nytimes.com/2014/06/25/business/new-rail-car-standards-anticipated-for-autumn.html?ref=energy-environment&_r=0

Administration approved tank car, the antiquated DOT-111.¹⁰ Without certainty that Valero will only use a certain tank car, the DEIR must analyze the safety risks for the kinds of cars that Valero will likely use. Absent this analysis, the DEIR is legally inadequate.

- 3) The methodology fails to consider accidents that occur in yard or on track sidings. By only considering derailments along FRA Class I track and not derailments in train yards or off of mainline track on sidings, the methodology understates the risk profile of crude by rail transportation. An accident in a rail yard could also pose additional risks, especially in event of a large oil release, given the proximity of other toxic and volatile material and cargo present in the yard.
- 4) The methodology assumes a “just-in-time” supply chain (receiving oil shipments only as they are needed in the production process) with supply equal to refinery capacity/demand. As such, the methodology fails to consider risks associated with increased sidings due to refinery shut down due to accident or maintenance. In such an event, would oil shipments be held at the fields? Would they be held at the Roseville yard or other rail yard between Benicia and point of origin? Would they be sided along the Roseville-Benicia route? Increased storage of hazardous materials at sidings along the Roseville-Benicia route could pose an additional risk, especially the siding locations in urban areas and near the Sacramento River and Yolo Bypass.
- 5) The methodology may underestimate the risk posed by the various track class segments. Although a small portion of the overall route, FRA Track Class 1 segment mentioned in the DEIR needs to be specifically identified given the Track Class 1 train derailment rate per million train-miles is 15.5 times higher than that of the FRA Track Class 5.¹¹ Is this segment a curve, switch, or at grade crossing? Is it in or near an urban area? Furthermore, the geography of the Roseville-Benicia route is largely urban with trains passing through numerous at grade crossings in densely populated urban areas. Such geography may in fact pose a higher derailment given the increase risk factors (at grade crossings, curves, etc.) associated with urban areas, as opposed to the national average, which is a mixture of both rural and urban. Rather than ignoring the actual conditions along the route in question, the report should fully consider conditions along anticipated rail routes in characterizing the risks associated with the Valero Project.

B. The DEIR Ignores Impacts on Traffic and Emergency Response in Communities Outside of Benicia

The DEIR devotes several pages to traffic and emergency response impacts in Benicia directly around the Valero facilities. This analysis included detailed crossing data, review of existing traffic flows, and consideration of mitigation measures. In comparison, for communities outside of Benicia, the analysis consists of using Google Earth to count the number of rail crossings along the route.¹²

¹⁰ See <http://www.railwayage.com/index.php/mechanical/freight-cars/tank-car-of-the-future-among-greenbrier-railcar-contracts.html>

¹¹ See DEIR, Appendix F p. 6.

¹² See DEIR, p. 4.11-10.

The Valero Project will result in four additional fifty-car trains traveling through the upstream communities along the route every day -- two loaded trains to Benicia, and two empty trains back. The DEIR recognizes that the trains will travel across 33 at-grade crossings, but presumes that the traffic volumes at all but the six crossings in urban areas “most likely are low.”¹³ For the crossings in urban areas, the DEIR simply states, “the duration of the crossings would be short because Project trains would be travelling at a speeds [sic] faster than the 5 mph at Park Road” *Id.*

The DEIR’s assumptions about the Valero Project’s effects on traffic in communities outside of Benicia are unsupported by any evidence. Rather than simply concluding, without any support, that traffic at rural crossings “would be low” and that delays in urban crossings “would be short,” the DEIR should consider the actual traffic conditions at the crossings affected by the project. The DEIR should consider data and other evidence before dismissing the impacts the project will have on Benicia’s sister communities, just as it did for crossings near the project site in Benicia.

Similarly, the DEIR also does not consider the cumulative impacts the additional trains will have on upstream communities. In contrast, the DEIR devotes several paragraphs to the cumulative impacts in Benicia.¹⁴ Many of these impacts are minimized by the timing of the trains, which are to be scheduled to travel through Benicia at times when there is less traffic. The DEIR does not specify whether the same conditions will be true in the other communities along the trains’ route and whether the trains’ cumulative impact will be significant. All of this information should be included in the DEIR; there is no legal or practical basis for treating upstream communities differently than those near the refinery.

Finally, the DEIR describes mitigation measures to be implemented to minimize the Valero Project’s effect on public safety response times, but limits the measures to crossings in Benicia.¹⁵ According to the DEIR, “[t]he probability of an emergency incident occurring at the same time as a Project train crossing [near the Valero Refinery] is low” because there are only two incidents a month in the industrial areas near the Valero Refinery. The DEIR provides certain mitigation measures in order to reduce the effects to less than significant, without considering whether similar measures are necessary to mitigate effects elsewhere. Indeed, certain areas along the route will have more emergency incidents than the industrial areas near the Valero Refinery, making additional mitigation measures necessary there as well. These issues require further discussion and analysis in the DEIR.

C. Noise Effects Outside of Benicia Area Should be Analyzed

The DEIR analyzes the indirect noise impacts from trains in the City of Benicia, but impacts outside Benicia are only considered in general terms.¹⁶ The geographic distinction is not explained nor does it make sense. Noise impacts in Benicia are insignificant in large part because the rail lines in Benicia travel through industrial areas, with the closest residence thousands of feet away.¹⁷ In comparison, many upstream residential communities and other noise-sensitive areas are immediately adjacent to the rail line and crossings.

¹³ See DEIR, p. 4.11-11.

¹⁴ See DEIR, pp. 4.11-10 and 5-20.

¹⁵ See DEIR, p. 4.11-20.

¹⁶ See DEIR, p. 4.10-5 (“The analysis of indirect noise impacts from trains herein considers impacts in the City of Benicia in detail. Indirect impacts outside the City are considered in general terms.”).

¹⁷ See DEIR, p. 4.10-11.

CEQA declares, “it is the policy of the state to . . . take all action necessary to provide the people of this state with . . . freedom from excessive noise.”¹⁸ Further, the DEIR must “consider qualitative factors as well as economic and technical factors.”¹⁹ The DEIR cannot eschew these requirements simply because the effects will occur beyond the political boundaries of the lead agency.²⁰

* * *

In conclusion, Yolo County finds that the current analysis of the impact of the transportation of oil by rail on upstream communities is insufficient. The County requests that the DEIR be revised and recirculated for additional public review for all of the reasons stated herein.

Sincerely,



Don Saylor
Chair, Yolo County Board of Supervisors

¹⁸ See Cal. Public Resources Code § 21001(b).

¹⁹ See Cal. Public Resources Code § 21001(g).

²⁰ See *Berkeley Keep Jets Over the Bay Committee v. Bd. Of Port Comm'ns of the City of Oakland*, 91 Cal. App. 4th 1344 (2001) (“Despite this outcry, the Port, in its draft EIR, does not even mention, much less analyze, Berkeley noise impacts because that city falls significantly outside the 65 CNEL corridor.”).



October 30, 2015

Via Mail and Email

Amy Million, Principal Planner
City of Benicia
Community Development Department
250 East L Street
Benicia, California 94510

Re: Valero Benicia Crude by Rail Project Revised Draft Environmental Impact Report

Dear Ms. Million:

On behalf of its 22 city and 6 county member jurisdictions, the Sacramento Area Council of Governments (SACOG) submits the following comments on the Revised Draft Environmental Impact Report (RDEIR) for the Valero Benicia Crude by Rail Project.¹

While the City of Benicia has revised the Draft Environmental Impact Report (DEIR), we understand that the Project is unchanged. Specifically, the Project proposes daily shipments of 70,000 barrels of crude oil to the Valero Benicia Refinery. (RDEIR at 2-3.) The crude oil tank cars would originate at unidentified sites in North America, would be shipped to the Union Pacific Railroad (UPRR) Roseville Yard, and would be assembled there into two daily 50-car trains to Benicia. (RDEIR at 2-3.)

In August 2014, we submitted a comment letter in response to the original DEIR for the Project. As our Board of Directors made clear at that time, SACOG's interest is to ensure that all appropriate measures, based upon a full investigation of the risks, are taken to protect the safety of our residents and their communities, businesses and property throughout the region. In that regard, our Board has indicated that, at a minimum, the measures to protect our region should include the following:

¹ SACOG submits this letter as a joint powers agency, exercising the common powers of its members pursuant to a joint powers agreement. However, this letter is not an exhaustive treatment of the RDEIR's compliance with the California Environmental Quality Act or of the concerns of all of its members, some of whom may provide separate comments.

- Advance notification to county and city emergency operations offices of all crude oil shipments (to facilitate more rapid and appropriate public safety responses);
- Limitations on storage of crude oil tank cars in urbanized areas of any size, and appropriate security for all shipments;
- Support, including full cost funding, for training and outfitting emergency response crews;
- Utilization of freight cars with electronically controlled pneumatic brakes, rollover protection, and other features that mitigate to the extent feasible the risks associated with crude oil shipments;
- Funding for rail safety projects (e.g., replacement/upgrade of existing tracks, grade separations, Positive Train Control, etc.);
- Utilization of best available inspection equipment and protocols;
- Implementation of Positive Train Control to prioritize areas with crude oil shipments; and
- Prohibition on shipments of unstabilized crude oil that has not been stripped of the most volatile elements, including flammable natural gas liquids.

In order not to restate our August 28, 2014, letter, we have attached it as Exhibit A hereto.

Over the last year, we have continued to meet with our members to discuss this Project, to become informed about the risks associated with crude oil transportation by rail, to discuss measures to avoid or minimize the serious risks associated with operating crude oil trains through our communities, and to track and comment on legislative/regulatory developments at the state and federal levels. We have also discussed our concerns with representatives from UPRR and the Valero Benicia Refinery.

Our earlier letter expressed grave concern that the DEIR concluded that crude oil shipments by rail pose no “significant hazard” to our communities, and we urged the City of Benicia to revise the DEIR to fully inform decision makers and the public of the potential risks of the Project. We thank the City for deciding to revise the DEIR, and we appreciate that the RDEIR now correctly concedes that rail shipments of crude oil through our region pose a very substantial risk and that the shipments will result in crude oil spills, fires, and explosions.

However, our letter also urged the City to “address adequate mitigation measures to ensure the safety of our communities.” The obligation derives directly from the California

Environmental Quality Act (CEQA), which mandates that an EIR must not only inform decision makers and the public about the potential environmental impacts of proposed projects, but must also describe mitigation measures that could, if implemented, minimize significant environmental effects. (CEQA Guidelines, §§15126(c), 15126.1(a)). CEQA Guidelines section 15370(b) defines “mitigation” to include “[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation.” And while the RDEIR discloses that the Project will result in significant impacts to the environment associated with train derailments, it adopts not a single mitigation measure to address these very significant impacts.

SACOG is committed to ensuring that all feasible measures are taken to protect the safety of the communities in our region. Attached as Exhibit B is a map that depicts the freight rail alignments for crude oil shipments through the greater Sacramento region. The map provides data on area population, housing, health facilities, and schools in close proximity to the rail lines. The map shows that *nearly one quarter* of the region’s population lives within one-half mile of the crude oil shipments.² We urge the City of Benicia to adopt all feasible mitigation measures that will protect our communities before the catastrophic events forecast by the RDEIR occur.

Comments on the RDEIR

The California Environmental Quality Act (CEQA) mandates that an EIR identify and analyze all potentially significant adverse effects of a project, including both direct and indirect impacts and short-term and long-term impacts. CEQA also mandates that an EIR describe and adopt all feasible mitigation measures to substantially reduce the significant impacts of a project. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.1, 15126.2.) The RDEIR is deficient in numerous respects, as set forth below.

The RDEIR Fails to Identify and Adopt Feasible Mitigation Measures Related to Safety Preparedness

In an about face from the original DEIR, the RDEIR discloses that the Project will result in significant impacts to the environment associated with train derailments and unloading accidents that lead to hazardous materials spills, fires, and explosions. It concedes that these train derailments could result in substantial adverse secondary effects, including to Biological Resources, Cultural Resources, Geology and Soils, and Hydrology and Water Quality. However, the RDEIR summarily concludes that these significant impacts are unavoidable because any

² The map does not depict the sensitive habitat, species, waterways, infrastructure, businesses, and other assets that will be impacted by the expected accidents from the Project.

attempt to adopt mitigation measures, including compliance with newly-adopted SB 861, would unlawfully “regulate UPRR’s rail operations.” We disagree with the City’s conclusion.

First, it should be noted that there are many mitigation measures that will, indisputably, substantially reduce the impacts of shipping crude oil by rail. We identified some of those measures in our prior letter and we also list them above. Many of these measures are similar to the measures recommended by the California Interagency Rail Safety Working Group in its report, *Oil by Rail Safety in California* (June 14, 2014). Specifically, that report concluded that the current regulatory environment does not address the risks of increased oil by rail transport. As a consequence, the report recommended the following actions to address those deficiencies.

- Increase the number of California Public Utilities Commission rail inspectors
- Improve emergency preparedness and response programs
 - Expand the Oil Spill Prevention & Response Program to cover inland oil spills
 - Provide additional funding for local emergency responders
 - Review and update of local, state and federal emergency response plans
 - Improve emergency response capabilities
 - Request improved guidance from United States Fire Administration on resources needed to respond to oil by rail incidents
 - Increase emergency response training
- Request improved identifiers on tank placards for first responders
- Request railroads to provide real-time shipment information to emergency responders
- Request railroads provide more information to affected communities
- Develop and post interactive oil by rail map
- Request DOT to expedite phase out of older, riskier tank cars
- Accelerate implementation of new accident prevention technology
 - Positive train control
 - Electronically-controlled pneumatic brakes

- Update California Public Utilities Commission incident reporting requirements
- Request railroads provide the State of California with broader accident and injury data
- Ensure compliance with industry voluntary agreement
 - Increased track inspections
 - Braking systems
 - Use of rail traffic routing technology
 - Lower speeds
 - Increased trackside safety technology
- Ensure state agencies have adequate data

The City will note that many of these measures relate to the critical needs to prepare for the inevitable accidents that will affect our communities, including: the need for emergency preparedness and response programs; additional funding for local emergency responders; improved emergency response capabilities; increased training of emergency responders; and improved and real-time data. Moreover, implementation of these measures would not impair or impact UPRR's rail operations. Rather, these are measures that should be adopted and imposed on the shipper, the applicant for the Project that is causing the environment impacts identified in the RDEIR. These measures will not impact rail operations or transportation, and the RDEIR's suggestion otherwise is simply wrong.

As the Attorney General of California recently asserted in connection with litigation over SB 861, which amended the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, the Interstate Commerce Commission Termination Act (ICCTA) only preempts state laws that regulate rail "transportation," as defined by statute. (*Association of American Railroads et al. v. California Office of Spill Prevention and Response et al.*, Case No 2:14-cv-02354-TLN-CKD, Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at pp. 18 – 32 [attached hereto as Exhibit C].) Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rail transportation, and states are expressly preempted from regulating all of the following:

- (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....

(49 U.S.C. § 10501(b).) As a result, state laws that impede rail transportation are preempted.

ICCTA defines “transportation” as:

- (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).)

The Attorney General notes that while this definition of ‘transportation’ is expansive, it does not encompass everything touching on railroads. Subsection (A) focuses on physical instrumentalities “related to the movement of passengers or property,” and Subsection (B) on “services related to that movement.” When state laws do not directly affect rail transportation – either the instrumentalities or the related services – or the effect on rail transportation is merely remote or incidental, the ICCTA does not preempt them. (Citing *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 808 (5th Cir. 2011) (ICCTA preempts only when state law “directly” manages rail transportation, such as train speed, length, and scheduling, but not a negligence claim that has an incidental effect).) For instance, ICCTA does not preempt a state law requiring railroads to pay for pedestrian crossings over their tracks. (*Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008).) And state laws are not preempted “merely because they reduce the profits of a railroad” or have high compliance costs.

The Attorney General also notes that ICCTA does not preempt generally applicable, non-discriminatory state laws, including electrical, plumbing and fire codes, and direct environmental regulations enacted for the protection of public health and safety, so long as such laws do not directly impede rail transportation. (Citing *Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 643 (2d Cir. 2005).) Under the ICCTA, “States retain their police powers, allowing them to create health and safety measures....” (*Adrian & Blissfield*, 550 F.3d at p. 541; see also *Green Mountain R.R. Corp.*, 404 F.3d at p. 643.) For example, ICCTA would not preempt a state law that prohibited railroads from dumping harmful substances. (*S. Coast Air Quality Mgmt. Dist.*, 622 F.3d at p. 1097.)

Based on this analysis, the Attorney General concludes that the provisions of SB 861, which requires railroads to have approved spill plans and certificates of financial responsibility, does not impede rail transportation because it does not directly (or indirectly) affect rail instrumentalities or rail services. It does not regulate train speed, length, routes, or scheduling. Instead, akin to a law prohibiting the dumping of harmful substances, SB 861 is a valid exercise of California's police power, designed to protect the health and safety of the state's waters after a spill occurs. While railroads will likely incur some costs in preparing spill plans and meeting the financial responsibility requirement, the effect of those costs on rail transportation is remote and incidental. (See *Adrian & Blissfield*, 550 F.3d at p. 541.)

That same conclusion must be reached here, where the feasible mitigation measures apply to the applicant/shipper outside the rail corridor and operations, and where the Project imposes an unfunded obligation on local communities to prepare, train, equip, and supply their first responders for known rail accidents and the consequences thereof. This is a massive financial burden on our communities, a burden that is part of the real cost of the Project applicant's proposal to ship crude oil by rail.

The RDEIR Fails to Adopt Additional Feasible Mitigation Measures within Valero's Control

In addition to ignoring measures that would address safety preparedness in our communities, the RDEIR also fails to consider measures outside rail operations that are admittedly within Valero's control, specifically the type of tank cars used to transport the crude oil and the nature of the product being shipped.

With regard to the type of tank cars, the RDEIR states that Valero will own or lease the cars. Therefore, adopting mitigation measures on the type of tank car, the required braking system and rollover protection, as well as other tank car features is within the City's authority and responsibility. Such measures would not regulate train configuration or operations, routes, or scheduling. Rather, they regulate the rail cars that the applicant has the responsibility to buy or lease for the Project.³

Any assertion that such measures are preempted in these circumstances is flawed. The entire RDEIR risk analysis is based upon the assumption that Valero has control over, and will voluntarily use, safer tank cars than required by current federal standards. Having relied on that control to minimize the risk of harm and environmental impacts disclosed in the RDEIR,

³ If the availability of adequate tank cars is an issue, deliveries can be phased in over time. Because Valero controls the tank cars, it can also provide more detailed labeling on the tank cars regarding the type and origin of the oil product. This would not require a change to the DOT classification or placarding system.

Valero cannot then assert that mitigation measures relating to the tank cars are preempted because they would so fundamentally control railroad operations.

Similarly, the Project applicant has complete control over the crude oil products to be shipped to its Benicia facility. (RDEIR at pp. 3-7 to 3-14.) The City could and should require the applicant to purchase for shipment only crude oil products that have been stripped of the most volatile elements, including flammable natural gas liquids. As disclosed in the RDEIR, the impacts associated with train derailments relate, in great part, to the risk of fires and explosions. These fires and explosions are directly related to the applicant's election to transport crude oil that contains volatile elements – elements that can feasibly be removed prior to shipment. Again, such a measure does not impact UPRR's rail operations but is a measure that could reasonably and feasibly be imposed on Valero.

Conclusion

We appreciate the City's decision to revise the DEIR, which finally acknowledges the very substantial hazard that the proposed crude shipments by rail pose to our region. Having taken that action, however, we urge the City to identify and adopt feasible mitigation measures to avoid or reduce those impacts. We have identified a number of measures above that we believe the City has the authority and responsibility to impose on the Project applicant under CEQA, and we are aware that other measures exist. We understand that these measures come at a cost to the applicant. There should be no question that this cost should be borne by the applicant, not by our residents and communities who will bear the impacts of these shipments.

Sincerely,

A handwritten signature in blue ink that reads "Don Saylor". The signature is written in a cursive, flowing style.

Don Saylor
SACOG Board Chair

DS:KET:le

Enclosures



August 28, 2014

Amy Million, Principal Planner
Community Development Department
250 East L Street
Benicia, CA 94510

Re: Valero Benicia Crude by Rail Project Draft Environment Impact Report

Dear Ms. Million:

On behalf of its 22 city and 6 county member jurisdictions, the Sacramento Area Council of Governments (SACOG) submits the following comments on the Draft Environmental Impact Report (DEIR) for the Valero Benicia Crude by Rail Project.¹ The Project, as described in the DEIR, proposes daily shipments of 70,000 barrels of crude oil to the Valero Benicia Refinery. The crude oil tank cars would originate at unidentified sites in North America, would be shipped to the Union Pacific Railroad Roseville Yard, and would be assembled there into two daily 50-car trains to Benicia.

Over the last several months, we have been meeting with our members to discuss this Project, to become informed about the risks associated with crude oil transportation by rail, and to discuss measures to avoid or minimize the serious risks associated with operating crude oil trains through the communities in our region. We have discussed our concerns with representatives from Union Pacific Railroad and the Valero Benicia Refinery. As our Board of Directors has made clear, SACOG's interest is to ensure that all appropriate measures, based upon a full investigation of the risks, are taken to protect the safety of our residents and their communities, and businesses and property throughout the region. In that regard, our Board has indicated that, at a minimum, the measures to protect our region should include the following:

- Advance notification to county and city emergency operations offices of all crude oil shipments (to facilitate more rapid and appropriate public safety responses);
- Limitations on storage of crude oil tank cars in urbanized areas (of any size), and appropriate security for all shipments;

¹ SACOG submits this letter as a joint powers agency, exercising the common powers of its members pursuant to a joint powers agreement. However, this letter is not an exhaustive treatment of the DEIR's compliance with the California Environmental Quality Act or of the concerns of all of its members, many of whom may also provide separate comments.

- Support, including full cost funding, for training and outfitting emergency response crews;
- Utilization of freight cars, with electronically controlled pneumatic brakes, rollover protection, and other features, that mitigate to extent feasible the risks associated with crude oil shipments;
- Funding for rail safety projects (e.g., replacement/upgrade of existing tracks, grade separations, Positive Train Control, etc.);
- Utilization of best available inspection equipment and protocols;
- Implementation of positive train controls to prioritize areas with crude oil shipments; and
- Prohibition on shipments of unstabilized crude oil that has not been stripped of the most volatile elements, including flammable natural gas liquids.

Unfortunately, the DEIR never gets to a discussion of these measures—or any other measures that might ensure the safety of our region—because the DEIR concludes that crude oil shipments by rail pose no “significant hazard” whatsoever. We believe that conclusion is fundamentally flawed, disregards the recent events demonstrating the very serious risk to life and property that these shipments pose, and contradicts the conclusions of the federal government, which is mobilizing to respond to these risks.

On May 7, 2014, the United States Department of Transportation in fact concluded that crude oil shipments by rail pose not merely a significant hazard, but an “*imminent hazard*,” stating:

“Upon information derived from recent railroad accidents and subsequent DOT investigations, the Secretary of Transportation (Secretary) has found that an unsafe condition or an unsafe practice is causing or otherwise constitutes an imminent hazard to the safe transportation of hazardous materials. Specifically, a pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).”

...

“An imminent hazard, as defined by 49 U.S.C. 5102(5), constitutes the existence of a condition relating to hazardous materials that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable

completion date of a formal proceeding begun to lessen the risk that death, illness, injury or endangerment.”²

Under these circumstances, we urge the City of Benicia to revise the DEIR so that it will fully inform decision-makers and the public of the potential risks of the Project and address adequate mitigation measures to ensure the safety of our communities. With that objective in mind, in the following pages we address some of the very substantial deficiencies in the DEIR—deficiencies which apparently have caused the DEIR to fail to analyze and consider the significant adverse impacts of the Project and to evaluate all feasible mitigation to reduce those impacts to a less than significant level.

Comments on the DEIR

The California Environmental Quality Act (CEQA) mandates that an EIR identify and analyze all potentially significant adverse effects of a project, including both direct and indirect impacts, and short-term and long-term impacts. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.2.) The DEIR is deficient in numerous respects, as set forth below.

The DEIR fails to consider the risk of fire and explosion as a threshold of significance.

Although the sample Initial Study checklist found in Appendix G to the CEQA Guidelines is an obvious and commonly used source of thresholds of significance, agencies may not rely on it exclusively when a particular project, or particular circumstances, gives rise to environmental concerns not addressed in the checklist. In *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, the court held that an agency cannot rely on a reflexive determination to follow the significance thresholds in Appendix G without regard to whether those standards are broad enough to encompass the scope of the project at issue. The court explained that, “in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.” (116 Cal. App. 4th at p. 1109.)

In this instance, in complete reliance on Appendix G, and without considering the very real and substantial risks of the transportation of crude by rail, the DEIR does not address the risk of fire and explosion in its thresholds of significance. Specifically, in the only threshold of significance potentially applicable to the risk of transportation, the DEIR adopts the following for Hazards and Hazardous Materials:

² Emergency Restriction/Prohibition Order DOT-OST-2014-0067 (May 7, 2014) (<http://www.dot.gov/briefing-room/emergency-order>).

“Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the *release of hazardous materials into the environment*.”³

As has been reported widely over the last several years, the character and quality of the domestic and Canadian crude oil currently being transported by rail across the United States has dramatically shifted the public safety concern from a hazardous material release to fiery explosions. A series of oil derailments in just the last two years has created a policy imperative in both Washington, D.C., and Sacramento. As United States Secretary of Transportation Anthony Foxx recently stated, “as a nation we are a little bit caught off guard by the growth of our energy production and we have to catch up very quickly.”⁴

Indeed, the following major accidents have heightened concern about the risks involved in shipping crude by rail.

- **Lac Mégantic, Quebec**—On July 5, 2013, a train with 72 loaded tank cars of crude oil from North Dakota moving from Montreal, Quebec, to St. John, New Brunswick, stopped at Nantes, Quebec, at 11:00 pm. The operator and sole railroad employee aboard the train secured it and departed, leaving the train on shortline track with a descending grade of about 1.2%. At about 1:00 AM, it appears the train began rolling down the descending grade toward the town of Lac-Mégantic, about 30 miles from the U.S. border. Near the center of town, 63 tank cars derailed, resulting in multiple explosions and subsequent fires. There were 47 fatalities and extensive damage to the town. 2,000 people were evacuated. The initial determination was that the braking force applied to the train was insufficient to hold it on the 1.2% grade and that the crude oil released was more volatile than expected.
- **Gainford, Alberta**—On October 19, 2013, nine tank cars of propane and four tank cars of crude oil from Canada derailed as a Canadian National train was entering a siding at 22 miles per hour. About 100 residents were evacuated. Three of the propane cars burned, but the tank cars carrying oil were pushed away and did not burn. No one was injured or killed. The cause of the derailment is under investigation.
- **Aliceville, Alabama**—On November 8, 2013, a train hauling 90 cars of crude oil from North Dakota to a refinery near Mobile, Alabama, derailed on a section of track through a wetland near Aliceville, Alabama. Thirty tank cars derailed and some dozen burned. No one was injured or killed. The derailment occurred on a shortline railroad’s track that had been inspected a few days earlier. The train was traveling under the speed limit for this track. The cause of the derailment is under investigation.

³ DEIR, p. 4.7-13 (emphasis added).

⁴ Politico, Morning Transportation (April 24, 2014), <http://www.politico.com/morningtransportation/0414/morningtransportation13715.html>.

- **Casselton, North Dakota**—On December 30, 2013, an eastbound BNSF Railway train hauling 106 tank cars of crude oil struck a westbound train carrying grain that shortly before had derailed onto the eastbound track. Some 34 cars from both trains derailed, including 20 cars carrying crude, which exploded and burned for over 24 hours. About 1,400 residents of Casselton were evacuated but no injuries were reported. The cause of the derailments and subsequent fire is under investigation.
- **Plaster Rock, New Brunswick**—On January 7, 2014, 17 cars of a mixed train hauling crude oil, propane, and other goods derailed likely due to a sudden wheel or axle failure. Five tank cars carrying crude oil caught fire and exploded. The train reportedly was delivering crude from Manitoba and Alberta to the Irving Oil refinery in Saint John, New Brunswick. About 45 homes were evacuated but no injuries were reported.
- **Philadelphia, Pennsylvania**—On January 20, 2014, 7 cars of a 101-car CSX train, including 6 carrying crude oil, derailed on a bridge over the Schuylkill River. No injuries and no leakage were reported, but press photographs showed two cars, one a tanker, leaning over the river.
- **Vandergrift, Pennsylvania**—On February 13, 2014, 21 tank cars of a 120-car train derailed outside Pittsburgh. Nineteen of the derailed cars were carrying crude oil from western Canada, and four of them released product. There was no fire or injuries.
- **Lynchburg, Virginia**—On April 30, 2014, 15 cars in a crude oil train traveling at low speed derailed in the downtown area of this city. Three cars caught fire, and some cars derailed into a river along the tracks. The immediate area surrounding the derailment was evacuated. No injuries were reported.⁵

Notwithstanding that the United States Department of Transportation, among others, has determined that Bakken Crude “has a higher gas content, higher vapor pressure, lower flash point and boiling point...which correlates to increased ignitability and flammability,”⁶ and that the

⁵ Congressional Research Service, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress (May 5, 2014). In March and April 2013, there were also two derailments of Canadian Pacific trains, one in western Minnesota and the other in Ontario, Canada; less than a tank car of oil leaked in each derailment and neither incident caused a fire. While operators may have implemented safety precautions to address the operational deficiencies exposed over the last few years, these incidents also demonstrate the unpredictability of what can happen by transporting such volatile materials by rail. Addressing safety concerns on such an ad hoc basis will not reduce the overall risks.

⁶ Report summarizing the analysis of Bakken crude oil data:
http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf.

recent events listed above have spurred a massive emergency effort at the federal level to address safety concerns,⁷ the DEIR dismisses them in a footnote, stating that “Not every tank car derailment results in a spill, fire, or explosion.”⁸ With that simple artifice, the DEIR justifies limiting its analysis to “derailments that result in a release of crude oil.”⁹ As discussed below, even the Release Rate Analysis used to conclude that there is a less than significant impact from Hazards and Hazardous Materials completely ignores the risk of fire and explosion.¹⁰

Having failed to establish a significance threshold that addresses the most critical health and safety risk from crude oil shipments by rail—fire and explosion—the DEIR fails to conduct the necessary analysis of such risks and fails to identify the mitigation measures necessary to protect the communities along the rail routes to the Project site.

The Project poses a “significant hazard” to the public and the environment through reasonably foreseeable upset and accident conditions.

By any measure or standard, the Project poses a “significant hazard” to the communities along the rail routes to the Project site. First, the Release Rate Analysis used to conclude that the transportation of crude oil by rail poses a less significant hazard to people and the environment is fundamentally flawed in numerous respects. Second, even if the Release Rate Analysis were accurate, its findings do not support the conclusion of less than significant impacts.

The Release Rate Analysis is flawed as a tool to assess the potential environmental impacts of the project.

As a threshold matter, it should be noted that the Release Rate Analysis is the sole basis in the DEIR for concluding that the hazards posed by the Project are less than significant. That Analysis is flawed.

First, the Analysis does not even address the most significant risks to persons, property, businesses, and the sensitive lands along the rail routes to the Project site. As noted above, the risk of fire and explosion are substantial, as evidenced by the series of events over the last two years which have attracted national and international attention and a call for immediate rail operations reforms. In fact, the Analysis does not even consider the recent events, limiting its analysis to derailments over the 5-year period from 2005-2009. This narrow focus misses most of the massive growth in crude oil shipments nationwide. Since 2007, crude oil by rail has seen a 6000% increase, driven largely by the extraordinary increases in energy development in the

⁷ DEIR at pp. 4.7-5 to 4.7-10.

⁸ DEIR, at p. 4.7-17, fn. 4.

⁹ DEIR, at p. 4.7-17, fn. 4.

¹⁰ See Railroad Crude Oil Release Rate Analysis for Route between Roseville and Benicia, DEIR, Appendix F.

Bakken Formation in North Dakota and Montana.¹¹ The Analysis never, in fact, analyzes the impact of this tremendous growth in dangerous crude oil rail shipments.

Second, as discussed in more detail below, the Analysis does not accurately assess the potential environmental impacts of the Project because it disregards the full geographic scope of the Project. Specifically, the Analysis only considers potential derailments from Roseville to Benicia. This Analysis does not evaluate potential derailments along the entire rail routes from the oil fields to Roseville, the assemblage and other activities in the Roseville Rail Yard, and the utilization of siding or storage tracks during transportation.

Third, the Analysis minimizes the potential risk of derailment by assuming a “just-in-time” supply chain—that is, that Union Pacific 50-car unit trains will travel from Roseville to Benicia without incident and will be immediately available for processing at Valero, that the trains or tank cars would never be stored or moved to sidings, and that no incidents (including accidents or maintenance) would ever delay delivery to Valero. As the DEIR readily acknowledges, however, Valero does not control the movement of tank cars on the rail line—Union Pacific does. And freight shipments do not operate on regular schedules. Valero can request Union Pacific to meet certain schedules, but has no ability to control the ultimate schedule of the rail operations. As such, it cannot guarantee the “just-in-time” service assumed in the Release Rate Analysis. The shipments also may come with greater frequency and fewer tank cars, which would increase traffic on the alignment and substantially increase the risk.

Fourth, by using national derailment rates the Analysis does not assess the Project specific conditions of these shipments. Of particular note, the Analysis reveals that over 1.3 miles of rail from Roseville to Benicia is FRA Class 1 track—track which has a 15.5 times greater risk of derailment than FRA Class 5 track.¹² However, the Analysis does not consider the location of the Class 1 track, the operational components of the track, the proximity of the track to highly populated areas, schools, hospitals, dangerous facilities, or sensitive lands or habitat.¹³

In light of these flaws, the Rate Release Analysis does not adequately assess the risks associated with the Project’s crude oil shipments.

¹¹ <http://www.franken.senate.gov/files/letter/140404RailSafety.pdf>. Note that in Northern California alone, crude oil shipments by rail increased by 57% in 2013. (<http://www.planetizen.com/node/67904>.) Crude oil production in the Bakken region has nearly tripled from 2010 to 2013. (http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8A422ABDC16B72E5F166FE34048CCCBFED3B0500/filename/07_23_14_Operation_Safe_Delivery_Report_final_clean.pdf.)

¹² Railroad Crude Oil Release Rate Analysis for Route between Roseville and Benicia, DEIR, Appendix F, at p. 6.

¹³ Although the DEIR lists schools within a quarter mile of the rail line (DEIR, at p. 4.7-23), it does not analyze the risks associated with the risks associated with such proximity other than the air quality impacts.

Even were it not flawed, the Release Rate Analysis does not assess the potential environmental impacts of the Project or support the conclusion that crude oil by rail shipments do not pose a significant hazard.

While the DEIR adopts a “significant hazard” test as the threshold of significance, the DEIR never defines or describes the nature of that test. Rather, it merely determines that, under the optimum conditions described in the DEIR, a crude oil train release incident exceeding 100 gallons will only occur every 111 years and then concludes on that basis that the Project poses no significant hazard risk. The DEIR can only reach that conclusion by ignoring the nature of the crude oil being shipped, the specific risks posed by such shipments, and the circumstances of the shipments (including all operational possibilities, specific track and facilities in use, and operating conditions) in relation to the communities, populations, businesses, and land through which the shipments will travel.

At a common sense level, the conclusion that no “significant hazard” exists is absurd in light of the massive mobilization at the federal level to intervene to make crude oil transport by rail safer. As noted above, the United States Department of Transportation recently concluded that crude oil shipments by rail pose an “imminent hazard.”¹⁴ And while the DEIR cites the extensive and repeated federal regulatory calls to improve the safety of crude oil shipments,¹⁵ the DEIR simply concludes that no significant hazard exists.

In a similar context, the National Inventory of Dams classification system defines as a significant hazard circumstances when “Failure or misoperation results in no probable loss of human life but can cause economic loss, environmental damage, disruption of lifeline facilities, or can impact other concerns.” As noted, the DEIR does not even attempt to define a significant hazard, and it never gets to the real crux of risk assessment because it never evaluates—either on a general basis or on a community-specific basis—the specific nature of the hazard, the potential risk of harm to people, property, or human activities, and the potential impacts and magnitude of the hazard.¹⁶ It merely concludes that a crude oil release every 111 years is not significant.

The critical component missing from the DEIR’s analysis is the magnitude of the risk, even from events that may only occur rarely, because small risks of serious illness or death are potentially significant. For example, Sacramento Metropolitan Air Quality Management District’s evaluation criterion for cancer risk is *276 in a million*.¹⁷ And in this regard the DEIR completely

¹⁴ Emergency Restriction/Prohibition Order DOT-OST-2014-0067 (May 7, 2014) (<http://www.dot.gov/briefing-room/emergency-order>).

¹⁵ DEIR, at pp. 4.7-5 to 4.7-10.

¹⁶ See, e.g., FEMA Risk Assessment Process, at <http://www.ready.gov/risk-assessment>.

¹⁷ See, e.g., SMAQMD Recommended Protocol for Evaluating the Location of Sensitive Land Uses Adjacent to Major Roadways (March 2011), at <http://www.airquality.org/ceqa/SLUMajorRoadway/SLURcommendedProtoco2.4-Jan2011.pdf>.)

fails. Not only does it completely disregard the magnitude of the risk to the communities along the rail alignment, it appears to assume that they do not even exist.¹⁸ It fails to discuss the impact of a crude oil release in those communities and, as noted, it specifically excludes any discussion of fire or explosion. The DEIR also fails to discuss or analyze the specific nature of the crude oil likely to be shipped to Valero. Clearly, the flammability and volatility of the Bakken Formation crude oil, and the high viscosity and toxicity of the Canadian bitumen, were not previously anticipated by the shipping industry. Only now—after significant loss to life and property—is the federal government responding to this emergency. The facts are that qualities and characteristics of crude oil in the United States are not even known at this point. Sixteen United States Senators recently called for funding of Operation Classification, a study of the crude oil properties by the Pipeline and Hazardous Materials Safety Administration (PHMSA), that is viewed as an important step in informing future regulatory actions.¹⁹

A September 2013 report from the National Oceanic and Atmospheric Administration highlighted the risks of Canadian bitumen. In order to transport bitumen, natural gas condensate or synthetic crude oil is typically added, which may contain elevated benzene levels and sulfur content that is heavier than air, and has a relatively low flash point and flammability. Bitumen is also heavier than water, unlike most crude oil, which poses other risks. These facts lead to the conclusion that there is the potential for both environmental and human hazards from exposure to bitumen, whether leaked or burned.²⁰

Canadian bitumen also has raised particular concerns in the aftermath of a 2010 pipeline spill into Talmadge Creek, which flows into the Kalamazoo River in Michigan. The observations from the spill strongly suggest that the bitumen may pose different hazards, and possibly different risks, than other forms of crude oil. Approximately 850,000 gallons of oil spilled into the Creek. After three years of cleanup activities, the EPA observed that the bitumen “will not appreciably biodegrade,” which has led to a decision to dredge the river. As of September 2013, the response costs were \$1.035 billion, substantially higher than would be anticipated to remediate conventional oil.²¹

The properties of Bakken shale oil, although highly variable even within the same oil field, are generally much more volatile than other types of crude. In January of this year, PHMSA issued

¹⁸ The DEIR makes passing reference to the cities between Roseville and Benicia, but even then it does not list the cities of Citrus Heights or West Sacramento, nor the unincorporated areas of Placer, Sacramento, and Yolo counties. DEIR, at p. 4.7-16.

¹⁹ <http://www.franken.senate.gov/files/letter/140404RailSafety.pdf>. The letter erroneously referred to the study as “Operation Backpressure.”

²⁰ Transporting Alberta Oil Sands Products: Defining the Issues and Assessing the Risks (September 2013) NOAA Technical Memorandum NOS OR&R 44.

²¹ Congressional Research Service, U.S. Rail Transportation of Crude Oil: Background and Issues for Congress (May 5, 2014), at p. 13.

a safety alert warning that recent derailments and resulting fires indicate that crude oil being transported from the Bakken region may be more flammable than traditional heavy crude oil.²²

But the federal response to these, whatever its final form, does not relieve the DEIR of fully analyzing the nature of the potential crude oil to be shipped, regardless of the source, and of mitigating the risks presented by the Project's crude oil shipments.

The DEIR fails to analyze the potential environmental impacts of crude oil transport beyond the Roseville to Benicia alignment.

Although the DEIR concedes the necessity to analyze the environmental impacts beyond the immediate Project site to include the crude oil transportation route, the analysis falls far short of the requirements of CEQA. As a threshold matter, the DEIR improperly limits its analysis to the route from Roseville to Benicia, claiming as "speculative" the originating site of the crude oil. In fact, within the Sacramento region there are only five rail subdivisions which lead to the Roseville Yard: Fresno, Martinez, Roseville, Sacramento, or Valley.²³ Of these, only the Roseville, Sacramento, and Valley subdivisions connect to the north or east where such shipments will originate. Limiting the analysis to Roseville to Benicia is arbitrary and the DEIR must analyze the full environmental impacts of each potential route.

In *Muzzy Ranch v. Solano County Airport Land Use Commission* (2007) 41 Cal. 4th 372, the California Supreme Court made clear that it is a lead agency's responsibility to consider even geographically distant environment impacts. CEQA broadly defines the relevant geographical environment as "the area which will be affected by a proposed project." (Pub. Resources Code, § 21060.5.) Consequently, "the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1582-1583.) Indeed, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) The DEIR cannot just assume that crude oil tank cars will magically appear in Roseville, but must account for the potential impacts of transporting those cars through other communities and property in the Sacramento region.

Additionally, as noted above, the DEIR completely disregards the train assembly activities in the Roseville Yard in close proximity to residential neighborhoods. It also assumes that a "just-in-time" supply chain can and will be used for the Project. As a consequence, the DEIR's

²² PHMSA, Safety Alert—January 2, 2014, Preliminary Guidance from OPERATION CLASSIFICATION.

²³ See State Office of Emergency Services Rail Risk Map (<http://california.maps.arcgis.com/apps/OnePane/basicviewer/index.html?appid=928033ed043148598f7e511a95072b89>).

evaluation of the Project's potential impacts does not consider the risks associated with crude oil tank cars being stored before they can be processed at the Valero facility and does not discuss the possible locations for such storage. As noted, since Valero concedes that it ultimately cannot control the timing of the crude oil shipments, it must account for such events. By failing to discuss these storage needs, the DEIR fails to analyze the entire project. As set forth in the CEQA Guidelines, a "project" is "the whole of an action" that may result in either a direct physical environmental change or a reasonably foreseeable indirect change. (CEQA Guidelines, § 15378; see also *Habitat & Watershed Caretakers v City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297; *Banning Ranch Conservancy v City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220.) In *Whitman v Board of Supervisors* (1979) 88 Cal.App.3d 397, for example, an EIR for oil facilities was overturned in part because it failed to analyze the impact of pipelines that would need to be built to service the facilities. Similarly here, the Project analyzed must consider all of the reasonably foreseeable operational details.

The DEIR fails to analyze the cumulative impacts of the Project.

While the DEIR's purported cumulative analysis identifies some 17 crude oil by rail, refinery, and refinery related projects, it does not assess the increased risk of multiple crude oil rail shipments, from multiple trains, serving multiple projects in California.²⁴ The DEIR dismisses the potential for any increase in risk due to multiple crude oil rail projects by opining that any explosion/leakage from a rail car would be separate and apart from any other such explosion/leakage and thus there could be no cumulative impact. However, this omits the fact that a key factor in the risk analysis relied on in the DEIR is the number of train-miles traveled.²⁵ Therefore, as the cumulative number of train trips increase along a particular rail alignment, the risk of accidents increases. The DEIR should have considered whether the proposed Project's contribution to this risk is cumulatively considerable. And at least two of the projects identified in the DEIR are expected to result in new crude oil shipments along the same rail alignment: the WesPac Pittsburg Energy Infrastructure Project and the Phillips 66 Company Rail Spur Extension Project. The DEIR fails to analyze those cumulative impacts.

Additionally, when, as here, a DEIR's evaluation of cumulative impacts is based on a list of past, present, and probable future projects, it must include in that list any project "producing related impacts, including, if necessary, projects outside the lead agency's control." (CEQA Guidelines, § 15130(b)(1)(A).) Here, the DEIR has failed to consider in its list of reasonably foreseeable future projects the full potential for overall increase in rail cars traveling along the paths that will be taken by the Valero rail cars. Surely any addition of rail cars on the tracks would produce related impacts (e.g., collisions).

²⁴ DEIR, at pp. 5-6 to 5-11, 5-16.

²⁵ See Univ. of Illinois, Railroad Crude Oil Release Rate Analysis for Route between Roseville, CA and Benicia, CA (June 2014), p. 3, at http://www.ci.benicia.ca.us/vertical/Sites/%7B3436CBED-6A58-4FEF-BFDF-5F9331215932%7D/uploads/Appendix_F_Railroad_Crude_Oil_Release_Rate_Analysis.pdf.

The DEIR improperly conflates its description of the Project with measures intended to reduce or avoid the clear impacts of the Project.

In at least two respects, although it is ambiguous at best on these points, the DEIR describes what purport to be elements of the Project intended to reduce, avoid, or mitigate the potential environmental impacts of the Project. The first is the general “commitment” to use CPC-1232 tank cars, rather than the legacy DOT-111 tank cars for transporting crude oil.²⁶ The second is the incorporation of the “General Railroad Safety” measures to be undertaken by Union Pacific.²⁷ Such a device was rejected by the court in *Lotus v. Dep’t of Transportation* (2014) 223 Cal. App. 4th 645.

The *Lotus* court held that measures designed to avoid, minimize, rectify, reduce, or compensate for a significant impact are not “part of the project,” but should be presented as mitigation measures in response to the identification of significant environmental effects. “By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA.” This “short-cutting of CEQA requirements...precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences.” CEQA requires a lead agency to consider a proposed project, evaluate its environmental impacts and, if significant impacts are identified, to describe feasible mitigation measures to reduce the impacts. The court explained that simply stating there will be no significant impacts because the project incorporates special attributes is not adequate or permissible. Among other things, the device avoids the requirement to adopt an enforceable mitigation monitoring program. (223 Cal. App. 4th at pp. 656-58.)

Similarly, conflating the mitigation measures with Project description shortcuts full disclosure of the potential environmental impacts and risks of the Project, avoids a full exploration of the feasible mitigation measures to address those impacts and risks, and circumvents a mitigation monitoring program, which is essential to make all of these elements enforceable.

Conclusion

We urge the City of Benicia to substantially revise the DEIR for this Project so that it will fully inform the public and the City Council of the full impacts of this Project and analyze all available mitigation to reduce those impacts to a less than significant level.

²⁶ DEIR, at p. 4.7-17.

²⁷ DEIR, at p. 4.7-15 to 4.7-16.

We appreciate your consideration and would be happy to answer any questions you may have about our comments.

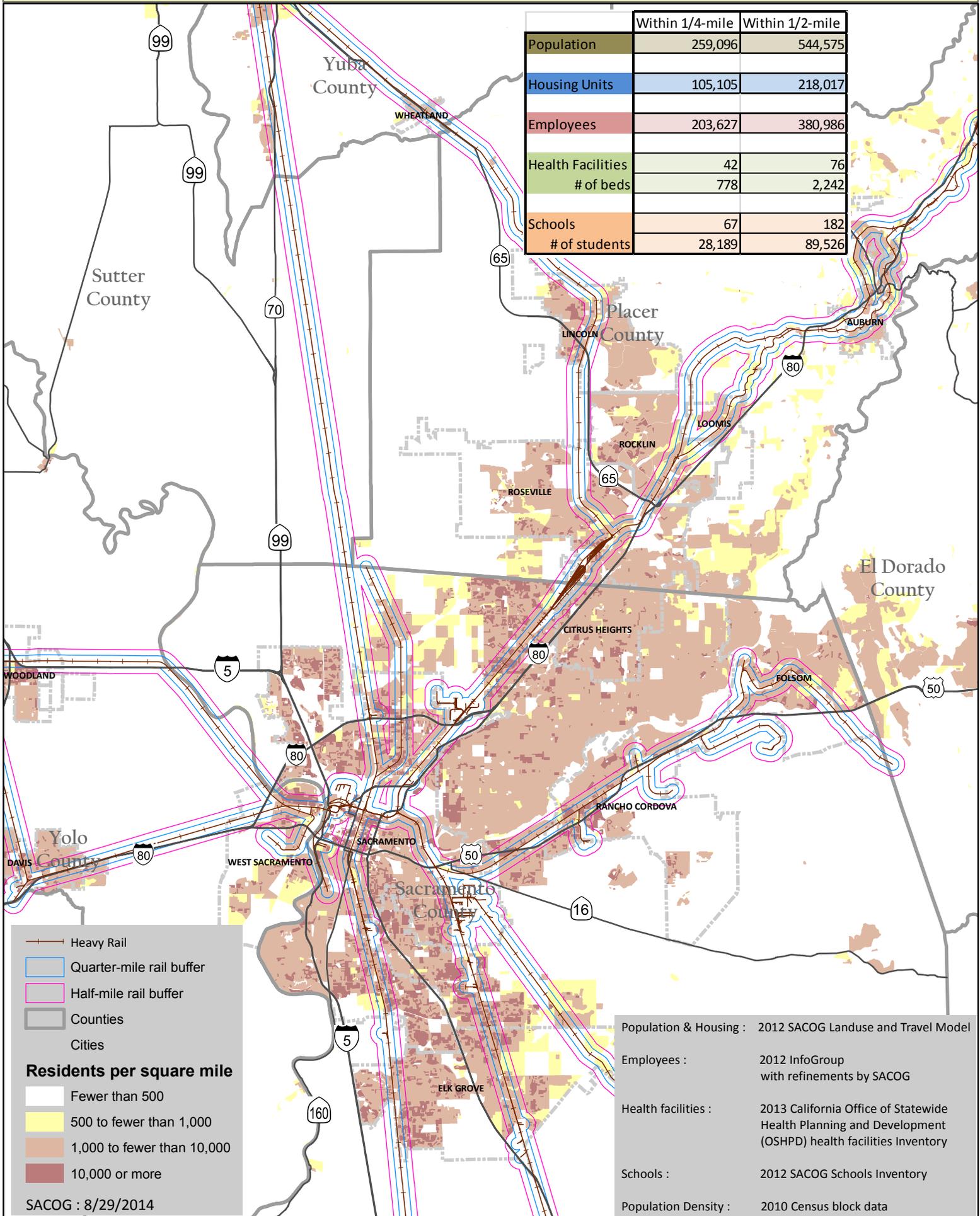
Sincerely,

A handwritten signature in black ink, appearing to read "Steve Cohn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Steve Cohn
SACOG Board Chair

SC:le

Potential Derailment Risk Zones Greater Sacramento Region



	Within 1/4-mile	Within 1/2-mile
Population	259,096	544,575
Housing Units	105,105	218,017
Employees	203,627	380,986
Health Facilities	42	76
# of beds	778	2,242
Schools	67	182
# of students	28,189	89,526

— Heavy Rail
 Quarter-mile rail buffer
 Half-mile rail buffer
 Counties
 Cities

Residents per square mile

Fewer than 500
 500 to fewer than 1,000
 1,000 to fewer than 10,000
 10,000 or more

SACOG : 8/29/2014

Population & Housing : 2012 SACOG Landuse and Travel Model
 Employees : 2012 InfoGroup with refinements by SACOG
 Health facilities : 2013 California Office of Statewide Health Planning and Development (OSHPD) health facilities Inventory
 Schools : 2012 SACOG Schools Inventory
 Population Density : 2010 Census block data

1 KAMALA D. HARRIS, State Bar No. 146672
 Attorney General of California
 2 RANDY L. BARROW, State Bar No. 111290
 Supervising Deputy Attorney General
 3 NICHOLAS C. STERN, State Bar No. 148308
 CAROLYN NELSON ROWAN, State Bar No. 238526
 4 STACEY L. ROBERTS, State Bar No. 237998
 SCOTT LICHTIG, State Bar No. 243520
 5 KRISTIN B. PEER, State Bar No. 251326
 Deputy Attorneys General
 6 1300 I Street, Suite 125
 P.O. Box 944255
 7 Sacramento, CA 94244-2550
 Telephone: (916) 323-3840
 8 Fax: (916) 322-5609
 E-mail: Nicholas.Stern@doj.ca.gov
 9 *Attorneys for Defendants*
California Office of Spill Prevention and Response,
 10 *Thomas M. Cullen, Jr., California Administrator for*
Oil Spill Response, and Kamala D. Harris, Attorney
 11 *General of the State of California*

12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14
 15
 16 **ASSOCIATION OF AMERICAN**
 17 **RAILROADS, UNION PACIFIC**
 18 **RAILROAD COMPANY AND BNSF**
RAILWAY COMPANY,

19 Plaintiffs,

20 v.

21 **CALIFORNIA OFFICE OF SPILL**
 22 **PREVENTION AND RESPONSE,**
 23 **THOMAS M. CULLEN, JR.,**
CALIFORNIA ADMINISTRATOR FOR
 24 **OIL SPILL RESPONSE, in his official**
 25 **capacity, AND KAMALA D. HARRIS,**
ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA, in her official capacity,

26 Defendants.

Case No. 2:14-cv-02354-TLN-CKD

DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

Date: January 15, 2015
 Time: 2:00 p.m.
 Dept: 2
 Judge: The Honorable Troy L. Nunley
 Trial Date: None set
 Action Filed: October 7, 2014

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INTRODUCTION

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, Cal. Gov't Code §§ 8574.1–8574.10, 8670.1–8670.95 and Cal. Pub. Res. Code §§ 8750–8760 (Lempert-Keene Act or Act) was originally enacted in 1990 to address the significant threats posed by oil spills in California's marine waters. At that time, the majority of California's crude oil came from overseas sources. The Act required vessels and marine facilities to prepare oil spill contingency plans (spill plans) and obtain certificates of financial responsibility demonstrating their ability to pay for cleanup costs and damages in the event of a spill.

In June of 2014, responding to a dramatic increase in overland transportation of oil, the Legislature passed Senate Bill (S.B.) 861. S.B. 861 amended the Lempert-Keene Act to protect all waters of the state, not just marine waters. The Act now requires inland facilities with the potential to spill oil into state waters to prepare spill plans and obtain certificates of financial responsibility. Railroads transporting oil as cargo are one of the types of facilities that have that potential and are now subject to the Act.

The Association of American Railroads, Union Pacific Railroad Company, and BNSF Railway Company (the Railroads) seek to preliminarily enjoin enforcement of S.B. 861, claiming it is preempted by federal law. Their motion should be denied for multiple reasons.

First, the Railroads have not demonstrated they are likely to suffer imminent, irreparable harm in the absence of an injunction. The Act imposes no immediate obligations on the Railroads, implementing regulations have not been issued, and no enforcement action is threatened. Their alleged harm is pure speculation, which is not a basis for injunctive relief.

Second, the Railroads are not likely to succeed on the merits of their claims. While a number of federal acts regulate railroad safety, equipment, and operations, none of those acts preempt the Lempert-Keene Act, a generally applicable law designed to protect water quality. The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20167 (FRSA), does not preempt the spill plan requirements because they do not relate to railroad safety or security; rather, spill plans relate to what happens *after* a spill occurs. Further, the United States Department of Transportation (DOT) regulations on which the Railroads rely were issued pursuant to DOT's authority under the

1 Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990, 33 U.S.C. §§
2 1251–1388 (FWPCA).¹ DOT determined in 1996 that regulations it issues pursuant to its
3 FWPCA authority do not preempt state spill plan requirements.

4 Nor does the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109
5 Stat. 803 (codified in scattered sections of 49 U.S.C.) (ICCTA), preempt the spill plan and
6 certificate of financial responsibility requirements. ICCTA only preempts state laws that regulate
7 rail *transportation*. The Lempert-Keene Act does no such thing. It is a generally applicable law
8 designed to protect public health and environment, and it will not delay, alter, or stop the
9 Railroads' operations.

10 The Railroads' preemption claims under the Locomotive Inspection Act, 49 U.S.C. §§
11 20701–20703 (LIA), and the Safety Appliance Act, 49 U.S.C. §§ 20301–20306 (SAA), are also
12 unlikely to succeed because the Lempert-Keene Act does not regulate locomotive equipment and
13 safety or the safety components of rail cars.

14 Third, the balance of equities tips sharply in favor of denying injunctive relief. California's
15 interest in protecting the State's limited water sources is overwhelming. Oil spills present an
16 indisputable risk of harm to California's waters. The dramatic increase in overland transportation
17 of oil has increased the threat of inland spills. An injunction against the Act's enforcement as to
18 railroads, a source of oil spills, would create a significant gap in the Act's overall effectiveness.

19 Because none of the prerequisites for injunctive relief are met, defendants California Office
20 of Spill Prevention and Response (OSPR), Thomas M. Cullen, Jr., California Administrator for
21 Oil Spill Response (Administrator), and Kamala D. Harris, Attorney General of the State of
22 California (collectively, the State) respectfully request that the Court deny the Railroads' Motion
23 for a Preliminary Injunction.²

24 _____
25 ¹ The Federal Water Pollution Control Act is commonly known as the Clean Water Act.

26 ² On October 30, 2014, Defendants filed a Motion to Dismiss the complaint in which
27 OSPR raised the defense of sovereign immunity under the Eleventh Amendment. That motion
28 will be heard at the same time as the instant motion. By joining in this opposition, OSPR does not
waive the sovereign immunity defense, nor does it consent to the jurisdiction of this Court. *See*
Cal. Indep. Sys. Operator Corp. v. Reliant Energy Serv., Inc., 181 F. Supp. 2d 1111, 1122-1123
(E.D. Cal. 2001).

1 **THE LEMPert-KEENE ACT: STATUTORY AND REGULATORY BACKGROUND**

2 **I. THE LEMPert-KEENE ACT ADDRESSED DISCHARGES OF OIL INTO MARINE**
3 **WATERS.**

4 The Lempert-Keene Act was originally enacted in 1990 to address the threat posed by
5 discharges of petroleum into marine waters of the State of California by vessels and marine
6 facilities along the coast. Cal. Gov't Code § 8670.2 (amended June 20, 2014). The Act declared
7 that transportation of oil can pose a significant threat to environmentally sensitive areas, and
8 “California’s coastal waters, estuaries, bays, and beaches are treasured environmental and
9 economic resources which the state cannot afford to place at undue risk from an oil spill.” *Id.* §
10 8670.2(b), (e) (amended June 20, 2014). For these reasons, the Legislature found that the State
11 should improve its response to oil spills that occur in marine waters. *Id.* § 8670.2(j) (amended
12 June 20, 2014).

13 To accomplish this goal, the Lempert-Keene Act required, *inter alia*, “marine facilities” and
14 “vessels” to prepare spill plans to be approved by the Administrator. *Id.* §§ 8670.3(f), (y),
15 8670.29(a) (amended June 20, 2014). The Act also required marine facilities and vessels to obtain
16 certificates of financial responsibility demonstrating the ability to pay for damages, including
17 cleanup costs, that may arise in the event of an oil spill. *Id.* §§ 8670.37.51, 8670.37.53 (amended
18 June 20, 2014).

19 **II. S.B. 861 EXPANDED THE ACT TO COVER ALL WATERS OF THE STATE.**

20 In June of 2014, the Legislature passed S.B. 861, which expanded the Lempert-Keene Act
21 and the Administrator’s responsibilities to cover not only marine waters, but all waters of the state.
22 *Id.* §§ 8670.28, 8670.29(a), 8670.37.51, 8670.3(ag). As part of this expansion, S.B. 861 amended
23 the Act to apply not only to vessels and marine facilities but also to inland facilities. *Id.* §
24 8670.3(g)(1), (ae). Subject to limited exceptions not applicable here, “facility” is now defined as
25 follows:

26 “Facility” means any of the following located in state waters or located where an oil
27 spill may impact state waters:
28 (A) A building, structure, installation or equipment used in oil exploration, oil well
 drilling operations, oil production, oil refining, oil storage, oil gathering, oil
 processing, oil transfer, oil distribution, or oil transportation.

- 1 (B) A marine terminal.
- 2 (C) A pipeline that transports oil.
- 3 (D) A railroad that transports oil as cargo.
- 4 (E) A drill ship, semisubmersible drilling platform, jack-up type drilling rig, or any
5 other floating or temporary drilling platform.

6 *Id.* § 8670.3(g)(1). Thus, contrary to the Railroads’ unsupported assertion that it is a “crude-by-
7 rail regulation,”³ S.B. 861 broadened the Act to protect all waters of the state by regulating
8 multiple types of marine and inland facilities with the potential to impact state waters. Railroads
9 transporting oil as cargo happen to be one of the types of facilities that have that potential.

10 The Act now requires inland facilities, including railroads, to have spill plans and
11 demonstrate financial ability to pay for damages in the event of an oil spill in state waters.

12 **A. Oil Spill Contingency Plans**

13 With respect to spill plans, the Act provides, “an owner or operator of a facility” must have
14 an approved oil spill contingency plan while operating in waters of the state or where a spill could
15 impact waters of the state. *Id.* § 8670.29(a). Section 8670.28, in turn, provides that the
16 Administrator shall adopt regulations governing the contents of spill plans. *Id.* § 8670.28(a).

17 Among other things, the spill plans will specify the types of cleanup equipment that must be
18 available and the maximum time that will be allowed for deployment of cleanup personnel and
19 equipment. *Id.* §§ 8670.29, 8670.28(c). The plans will also identify the Oil Spill Response
20 Organizations with whom the facilities have contracted. *Id.* § 8670.29(b)(6). These response
21 organizations are the entities that provide spill remediation services by utilizing the cleanup
22 equipment specified in the spill plans. *Id.* § 8670.29(b)(6). The spill plans will also provide for
23 training and drills of the plans, in coordination with federal, state, and local government entities,
24 response organizations, and operators. *Id.* §§ 8670.10, 8670.29(b)(9). The owners and operators

25 ³ The Railroads claim that, shortly after S.B. 861 was passed, nameless “State officials”
26 touted California as the first state to implement crude-by-rail safety regulations. However, their
27 only authority is an article, which neither identifies nor quotes the “officials” who allegedly made
28 this statement. Rather, the language appears to be the words of an unidentified author. Even if a
state “official” had made this statement, it would not be controlling or even evidence of
legislative intent in light of the Act’s contrary language and stated purpose. *See Brock v. Pierce
Cnty.*, 476 U.S. 253, 263 (1986) (explaining that an individual legislator’s statement should not be
given controlling effect and should not be evidence of legislative intent in the absence of
consistent statutory language or legislative history).

1 of facilities must submit the plans to the Administrator for review and approval, which will be
2 based on the standards in the regulations; the review must be completed within 30 days. *Id.* §§
3 8670.31, 8670.29(b)(9).

4 **B. Certificates of Financial Responsibility**

5 As amended, the Act also requires an owner or operator of a facility where a spill could
6 impact waters of the state to apply for and obtain a certificate of financial responsibility. *Id.*
7 § 8670.37.51(d). To receive a certificate of financial responsibility, the applicant must
8 demonstrate the ability to pay for any damage that might arise from an oil spill. *Id.* §
9 8670.37.53(c)(1). Financial responsibility may be demonstrated several ways: “by evidence of
10 insurance, surety bond, letter of credit, qualifications as a self insurer, or any combination thereof
11 or other evidence.” *Id.* § 8670.37.54(a).

12 **C. Enforcement Provisions**

13 Certain types of knowing, intentional, and negligent violations of the requirements to have
14 an approved spill plan and a certificate of financial responsibility may lead to criminal, civil, and
15 administrative penalties. *Id.* §§ 8670.64(c)(2)(C), 8670.65, 8670.66(b), 8670.67.5. In addition, the
16 Administrator *may* issue a cease and desist order of up to 90 days for noncompliance, subject to
17 terms and conditions the Administrator may determine are necessary to ensure compliance. *Id.* §
18 8670.69.4(a)-(c). However, a cease and desist order need not require a stoppage of operations;
19 rather, an order could narrowly require compliance with the law (e.g., requiring a railroad to
20 submit a spill plan). The Railroads are already aware that the Administrator has no intention of
21 using this provision to stop railroad operations, Br. in Supp. of Mot. for Prelim. Inj. (Pls.’ Br.) 12
22 n.13, ECF No. 6-1, and the forthcoming regulations will likely confirm this position.

23 **III. THE ADMINISTRATOR HAS NOT YET ADOPTED REGULATIONS IMPLEMENTING THE**
24 **S.B. 861 AMENDMENTS.**

25 The Railroads concede that the Administrator has not adopted regulations implementing
26 S.B. 861. Compl. ¶ 39 & n.3, ECF No. 1; Pls.’ Br. 12 n.12. Although the Administrator has been
27 meeting with stakeholders, including railroads, regarding the regulations, so far drafts are only
28

1 preliminary. Defs.’ Mem. P. & A. in Supp. of Mot. to Dismiss (Mot. to Dismiss) 6:16-17, ECF
2 No. 18-1.

3 Nor has the State threatened to enforce the challenged provisions against the Railroads in
4 the absence of the regulations. While the Railroads allege that anonymous “State regulators []
5 persist in threatening enforcement of the statute,” Pls.’ Br. 3:22-23, they do not allege that the
6 State has threatened to enforce any of the challenged provisions in the absence of final regulations.
7 Indeed, such an allegation would be contradicted by other statements recognizing that S.B. 861
8 will not be enforced until after the Administrator adopts the implementing regulations. *See, e.g.*,
9 Compl. ¶ 46; Pls.’ Br. 12 n.12. It would also be contradicted by letters sent from the
10 Administrator to “Rail, inland production, pipeline and mobile unit transfer operators,” which
11 expressly informed rail operators that “OSPR will not enforce the provisions of Government
12 Code section 8670.64 through 8670.67 as they relate to contingency plans and certificates of
13 financial responsibility until *after* the emergency regulations have been promulgated.” Mot. to
14 Dismiss 6:26–7:6 (emphasis added).

15 **PROCEDURAL BACKGROUND**

16 Despite the absence of regulations implementing the S.B. 861 amendments, the Railroads
17 filed this suit seeking to enjoin the amendments’ enforcement on October 7, 2014. Compl. ¶ 1.
18 On October 30, 2014, the State filed a Motion to Dismiss the Complaint for lack of ripeness and
19 because the Railroads’ claims against OSPR are barred by the doctrine of sovereign immunity.
20 The parties stipulated for the Motion to Dismiss to be heard on the same day as the Motion for
21 Preliminary Injunction. Because the Motion to Dismiss identified a jurisdictional defect, the
22 Court should not reach the merits of the Railroads’ Motion for Preliminary Injunction. However,
23 if the Court nevertheless does reach the merits, the Motion for Preliminary Injunction should be
24 denied for the reasons stated below.

25 **ARGUMENT**

26 The Railroads’ Motion for Preliminary Injunction should be denied because a preliminary
27 injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the
28 plaintiff is entitled to relief.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008). The

1 moving parties “face a difficult task in proving that they are entitled to this extraordinary
2 remedy.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Here, the Railroads
3 cannot establish *any* of the prerequisites to the relief sought: (1) they are not likely to suffer
4 irreparable harm; (2) they are not likely to succeed on the merits; and (3) an injunction would not
5 be in the public interest and the equities weigh against an injunction. *See Winter*, 555 U.S. at 20.

6 **I. THE COURT SHOULD DENY THE RAILROADS’ MOTION BECAUSE THEY WILL NOT**
7 **SUFFER IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT ISSUED.**

8 Without the promulgation of S.B. 861 implementing regulations or any threat of
9 enforcement, the Railroads invite this Court into the foggy realm of speculation about whether,
10 and if so when, they will suffer irreparable injury. A plaintiff seeking a preliminary injunction
11 must establish irreparable harm is likely and not merely possible in the absence of an injunction.
12 *Winter*, 555 U.S. at 22; *Earth Island*, 626 F.3d at 474 (“a showing of a mere possibility of
13 irreparable harm is not sufficient”). A plaintiff must also show “immediate threatened injury.”
14 *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Speculative
15 injury is not enough to constitute irreparable harm for purposes of issuing injunctive relief. *Id.*
16 Where a party sues to enjoin enforcement of an allegedly unconstitutional state law, the threat of
17 enforcement must be imminent and the injury must not be conjectural:

18 In suits such as this one, which the plaintiff intends as a “first strike” to prevent a
19 State from initiating a suit of its own, the prospect of state suit must be imminent, for
20 it is the prospect of that suit which supplies the necessary irreparable injury. *Ex Parte*
21 *Young* thus speaks of enjoining state officers “*who threaten and are about to*
commence proceedings,” and we have recognized in a related context that a
conjectural injury cannot warrant equitable relief.

22 *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (quoting *Ex Parte Young*, 209
23 U.S. 123, 156 (1908)) (citations omitted). “Any other rule (assuming it would meet Article III
24 case-or-controversy requirements) would require federal courts to determine the constitutionality
25 of state laws in hypothetical situations where it is not even clear the State itself would consider its
26 law applicable.” *Id.*

27 *Morales* provides an example of the kind of imminence necessary for injunctive relief
28 based on a threat of state suit. *Id.* at 379-80. Because the state officials threatened enforcement of

1 the challenged state laws and guidelines, as evidenced by multiple advisory memoranda and
2 formal letters of intent to sue major airlines, the *Morales* court found irreparable harm and
3 granted injunctive relief. *Id.* at 382.

4 The State's Eleventh Amendment protection from damages claims does not absolve the
5 Railroads from their burden of proving *likely, imminent* irreparable injury. The Railroads'
6 erroneously rely on *Cal. Hosp. Ass'n v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1140 (E.D. Cal.
7 2011), for the proposition that they will suffer irreparable harm without an injunction because
8 they cannot recover their costs of complying with S.B. 861 against the State due to sovereign
9 immunity. In *Maxwell-Jolly*, the plaintiff sought to enjoin the state from *continuing to implement*
10 *legislation* freezing the rates at which California reimbursed hospitals providing inpatient Medi-
11 Cal services. The rate freeze was already in force and plaintiff's member hospitals would receive
12 lesser frozen rates absent an injunction. *Id.* at 1134.

13 The Railroads' pre-enforcement claims, however, are distinct from those in *Morales* and
14 *Maxwell-Jolly* because the enactment of S.B. 861 did not impose any affirmative obligations on
15 the Railroads. S.B. 861's implementing regulations have not yet been issued. Compl. ¶ 39; *see*
16 *also* Mot. to Dismiss 6:14-16. Absent implementing regulations, the State cannot assess whether
17 the Railroads violate the law or whether, when and how the State will enforce such requirements
18 against the Railroads. The State has certainly not threatened enforcement of the unissued
19 regulations against the Railroads. In fact, the Administrator informed the Railroads that there
20 would be no enforcement until after implementing regulations have been promulgated. Compl. ¶
21 39; *see also* Mot. to Dismiss 6:27-7:6. Accordingly, the Railroads have not shown even a scintilla
22 of evidence of an imminent state suit against them arising out of S.B. 861.⁴

23 The Railroads' claimed harm amounts to nothing more than conjectural injury. The
24 Railroads submit only the Declarations of John Lovenburg and Robert Grimaila⁵ (Declarants) as

25 ⁴ The issues of ripeness raised in the State's Motion to Dismiss and irreparable injury are
26 interrelated because this matter involves a pre-enforcement challenge and there is no threat of
27 imminent prosecution. As such, the State hereby incorporates by reference the factual and legal
28 basis set forth in the Motion to Dismiss, which establishes that the Railroads' Complaint is
unripe.

⁵ *See* Defendants' Objections to Evidence Offered in Support of Plaintiffs' Motion for

(continued...)

1 evidence in support of their request for emergency relief; however, these Declarations actually
2 illustrate the lack of imminent and actual harm. Neither Declarant attests to the Railroads
3 presently incurring costs or losing business as a result of S.B. 861. Rather, Declarants surmise
4 ways in which S.B. 861 may impact five areas: 1) location-specific environmental planning, 2)
5 response training and logistics, 3) response practice drilling, 4) “best achievable technology,” and
6 5) financial certification. Grimaila Decl. ¶¶ 10-23; Lovenburg Decl., ¶¶ 8-22. Declarants merely
7 guess at possible costs and lost business at some unknown time.

8 Similarly, Declarants’ contention that S.B. 861 will open the door to a multiplicity of
9 regional requirements is sheer speculation. Declarants cite no evidence that any other states or
10 local governments have enacted, or will imminently enact, legislation similar to S.B. 861. *See*
11 *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960) (no evidence of conflicting
12 local regulations so ordinance not preempted). Thus, neither Declaration suffices to establish
13 imminent, concrete loss or threat of actual injury. These Declarations should be disregarded as
14 based on pure conjecture.

15 In this pre-enforcement case, the record shows, at best, a “dubious and speculative”
16 possibility of harm.” *Col. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir.
17 1985). This Court should decline the Railroads’ invitation to speculate as to whether they will
18 suffer any harm at all, let alone harm that is irreparable, at some indefinite point in the future.

19 **II. THE COURT SHOULD DENY THE RAILROADS’ MOTION BECAUSE THEY ARE NOT**
20 **LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.**

21 That the Railroads’ preemption claims are unlikely to succeed provides another basis for
22 denying their Motion. *See Winter*, 555 U.S. at 20. They are unlikely to succeed because S.B. 861
23 does not regulate rail safety, rail transportation, locomotive parts, or safety components on rail
24 cars. In fact, none of the federal statutes cited by the Railroads preempt a state law like the
25 Lempert-Keene Act, i.e., a generally applicable law designed to protect water quality by
26 preparing for and facilitating cleanup in the event of an oil spill into waters of the state.

27 _____
(...continued)

28 Preliminary Injunction, filed concurrently with this Opposition.

1 **A. The Presumption Against Preemption Applies, so the Express Preemption**
2 **Clauses Must Be Read Narrowly.**

3 The starting point for preemption analysis is the presumption that a state's historic police
4 powers to protect the health and safety of its citizenry are not superseded unless that is Congress'
5 clear and manifest purpose. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947);
6 *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003). "States traditionally have
7 had great latitude under their police powers to legislate as to the protection of the lives, limbs,
8 health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)
9 (internal quotation marks and citation omitted).

10 Courts have applied this presumption in cases involving railroads. For instance, a court
11 applied the presumption to ICCTA in a railroad's suit that challenged a city's zoning and
12 occupational licensing laws. *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324,
13 1328-29 & nn.1-2 (11th Cir. 2001); *see also Union Pac. R.R. Co. v. Cal. Pub. Util. Comm'n*, 346
14 F.3d 851, n. 17 (9th Cir. 2003) (presumption applied to FRSA claim); *S. Pac. Transp. Co. v. Pub.*
15 *Util. Comm'n*, 9 F.3d 807, 810 (9th Cir. 1993) (presumption applied to FRSA and LIA claims).

16 The proper focus for determining whether the presumption applies is the purpose of the
17 state law. *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). The purpose of S.B. 861 is to protect
18 water quality, an area within the state's traditional police powers. *Askew v. Am. Waterways*
19 *Operators, Inc.*, 411 U.S. 325, 328-29 (1973) (state police power over oil spills); *Pac. Merch.*
20 *Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir. 2011) (environmental regulation
21 traditionally within state authority). Therefore, the Court must apply the presumption against
22 preemption to S.B. 861. In doing so, the Court must read the express preemption clauses that the
23 Railroads rely upon "narrowly," and it can find preemption only if it determines that such was
24 Congress' clear and manifest intent. *Del Real, LLC v. Harris*, 966 F. Supp. 2d 1047, 1055 (E.D.
25 Cal. 2013).

26 **B. The FRSA Does Not Preempt S.B. 861 Spill Plan Requirements.**

27 The Railroads' assertion that the FRSA preempts S.B. 861's spill plan requirements is not
28 likely to succeed for two reasons. First, the FRSA preempts state laws that relate to rail safety or

1 security; since spill plans do not affect either of these, the FRSA does not preempt S.B. 861.
2 Second, the DOT regulations that the Railroads claim preempt S.B. 861 were issued pursuant to
3 FWPCA authority, so not even DOT asserts that they preempt state laws.

4 **1. The Spill Plan Requirements Relate to Protecting California’s Water**
5 **Quality, Not Railroad Safety.**

6 The FRSA’s preemption provision states that laws, regulations, and orders “related to
7 railroad safety and ... railroad security shall be nationally uniform to the extent practicable.” 49
8 U.S.C. § 20106(a)(1). The purpose of the FRSA is to “promote safety in every area of railroad
9 operations and reduce railroad-related accidents.” 49 U.S.C. § 20101. The Railroads assume that
10 the State will assert that S.B. 861’s spill plan requirements are valid simply because they address
11 “environmental concerns.” Pls.’ Br. 17:14-16. But their assumption is mistaken.

12 The reason S.B. 861 is unrelated to railroad safety and security is not because it addresses
13 environmental concerns, but because it has *nothing to do* with either rail operations or reducing
14 rail accidents. It will not change how the Railroads operate, and it does not require them to
15 change the type of tank cars they use, their routes, the amount or types of oil they transport, or the
16 speeds they travel. Instead, S.B. 861 relates to what happens *after* an accident occurs. It requires a
17 railroad (and other facilities) to have a plan for how it will clean up the oil *after* the oil has spilled
18 into waters of the state. Because S.B. 861’s spill plan requirements relate to water quality after an
19 accident, not rail safety or security, the FRSA does not preempt them.

20 **a. The Railroads’ Authorities Fail to Demonstrate a Connection**
21 **Between Spill Plans and Rail Safety.**

22 The Railroads’ assertion that spill plan requirements are “related to railroad safety” is
23 unsupported. They first rely on a DOT amicus curiae brief, which asserted that the FRSA
24 preempted a state’s requirement that railroads carry emergency response information onboard
25 their trains. Pls.’ Br. 18:2-7 (citing App. of Unreported and Uncodified Auth. (Pls.’ App.), Ex. 3,
26 ECF No. 6-4, at 12). But this emergency response information, required pursuant to the
27 Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101-5128, should not be
28 confused with spill plans. The purpose of emergency response information is to aid first

1 responders during the first minutes after a hazardous materials accident and to keep them and the
2 public safe from explosions, fires, and toxic gases. *See* 49 C.F.R. § 172.602(a). Unlike a spill plan,
3 the HMTA’s emergency response information does not address how to clean up an oil spill. *See*
4 *People v. Union Pac. R.R. Co.*, 47 Cal. Rptr. 3d 92, 114 (2006) (“FRSA addresses a number of
5 particular safety aspects of railroad activity (49 U.S.C. §§ 20131-20153), but it does not speak to
6 the transportation of dangerous materials or to the discharge of such materials into the
7 environment.”). Therefore, the amicus brief does not demonstrate that spill plans relate to rail
8 safety or security.

9 The Railroads attempt to force a connection between spill plans and rail safety by
10 emphasizing the breadth of the phrase “related to” in the FRSA. Pls.’ Br. 18 n.18. But they go too
11 far. While it is a broad phrase, both the Ninth Circuit and the Supreme Court have cautioned that
12 it does not draw in everything. After all, “[e]verything is related to everything else.” *Air*
13 *Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*, 410 F.3d 492,
14 502 (9th Cir. 2005) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*,
15 *N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring)). Simply because the source of the oil
16 of which S.B. 861 is concerned may be a rail accident does not mean that S.B. 861 is “related to”
17 rail safety – S.B. 861 affects neither the frequency nor the magnitude of rail accidents so it does
18 not fall within the scope of the FRSA’s preemption provision.

19 The Railroads next rely on the legislative findings and declarations in S.B. 861, as if the bill
20 itself admits to being “related to” rail safety. Pls.’ Br. 18:7-9 (quoting Cal. Gov’t Code §
21 8670.2(k)). But the emphasis of the Legislature’s declaration is on cleaning up oil spills, not rail
22 safety. *E.g.*, Cal. Gov’t Code § 8670.2(j) (“California government should improve its response
23 and management of oil spills that occur in state waters.”). And there is nothing remarkable about
24 the declaration that the Railroads quote: “Those who transport oil through or near the waters of
25 the state must meet minimum safety standards and demonstrate financial responsibility.” *Id.* §
26 8670.2(k). This statement does not specify whether the referenced safety standards are federal or
27 state standards, and it does not specify whether they apply to railroads, pipelines, or some other
28 type of facility – it is just a general declaration. In fact, S.B. 861 neither contains rail safety

1 standards nor mandates that the Administrator promulgate them. Therefore, the declaration in
2 section 8670.2(k) cannot support a claim of preemption.

3 Lastly, the Railroads rely on a case in which a railroad challenged a state law that limited
4 the use of train whistles in order to reduce noise pollution. Pls. Br. 18:12-16. The Ninth Circuit
5 concluded that the state law was not preempted because, while the FRSA regulates how loud train
6 whistles must be, it does not regulate where they must be sounded. *S. Pac.*, 9 F.3d at 813. Before
7 reaching that conclusion, however, the court found that the state law was related to rail safety,
8 despite that its purpose was to reduce noise, because the law affected train whistles, the purpose
9 of which is to prevent rail accidents. *Id.* at 812-13 & n.6. But that analysis has no application here,
10 since, unlike train whistles, spill plans do not prevent accidents and are unrelated to rail safety,
11 not only in purpose but also in effect. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88,
12 105-106 (1992) (“In assessing the impact of a state law on the federal scheme, we have refused to
13 rely solely on the legislature’s professed purpose and have looked as well to the effects of the
14 law.”). Therefore, none of the Railroads’ authority demonstrates that spill plans relate to rail
15 safety or that they are within the scope of the FRSA.

16 **b. Congress Addressed Spill Plans in the Federal Water Pollution**
17 **Control Act, Which Does Not Preempt State Authority.**

18 Congress itself did not address spill planning in either the FRSA or the HMTA. Rather,
19 Congress addressed this subject in the FWPCA, which directly addresses the issue of spill plans
20 for vessels, railroads, and other facilities:

21 The President shall issue regulations which require an owner or operator of a tank
22 vessel or facility described in subparagraph (C) to prepare and submit to the President
23 a plan for responding, to the maximum extent practicable, to a worst case discharge,
and to a substantial threat of such a discharge, of oil or a hazardous substance.

24 33 U.S.C. § 1321(j)(5)(A)(i). S.B. 861 and section 1321 address the same subject: protection of
25 the waters and natural resources of the state and the United States, respectively. *Compare* Cal.
26 Gov’t Code § 8670.28(a) *with Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008). And both
27 S.B. 861 and section 1321 address spill plans, personnel, equipment, training, and drills. *Compare*
28 Cal. Gov’t Code §§ 8670.28(a), 8670.29(b) *with* 33 U.S.C. § 1321(j)(5)(D).

1 DOT acknowledged that when it issued regulations relating to spill plans applicable to
2 railroads, it was implementing section 1321(j)(5) of the FWPCA, not the FRSA: “This final rule
3 implements two separate mandates under the [FWPCA].” Oil Spill Prevention and Response
4 Plans, 61 Fed. Reg. 30533-01, 30533 (June 17, 1996) (codified at 49 C.F.R. pt. 130) (citing 33
5 U.S.C. § 1321(j)(1)(C), (j)(5)). This section of the FWPCA has a savings clause that expressly
6 preserves state authority within its scope, including spill plans:

7 Nothing in this section shall be construed as preempting any State or political
8 subdivision thereof from imposing any requirement or liability with respect to the
9 discharge of oil or hazardous substance into any waters within such State, or with
respect to any removal activities related to such discharge.

10 33 U.S.C. § 1321(o)(2); *see also id.* § 1370 (savings clause applicable to entire FWPCA). Rather
11 than preempt state authority, the FWPCA allows for cooperation between the federal and state
12 governments. *Askew*, 411 U.S. at 332; *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 491 (9th
13 Cir. 1984) (“Congress has indicated emphatically that there is no compelling need for uniformity
14 in the regulation of pollutant discharges—and that there is a positive value in encouraging the
15 development of local pollution control standards stricter than the federal minimums.”). DOT
16 recognized the application of this savings clause to its regulation of railroad spill plans:

17 This provision indicates that Federal regulation under 33 U.S.C. 1321 does not
18 preempt, but rather accommodates, regulation by States and political subdivisions
19 concerning the same subject matter. Thus, the establishment of oil spill prevention
and response plan requirements in this rule will affect neither existing State and local
regulation in the area, nor State and local authority to regulate in the future.

20 61 Fed. Reg. at 30539. Thus, S.B. 861’s spill plan requirements are not related to the FRSA;
21 instead, they are related to the FWPCA, which does not preempt states from regulating in this
22 area. Since spill plans do not affect rail safety or security, the FRSA does not preempt S.B. 861.

23 **2. Even if Spill Plans Did Relate to Rail Safety, the FRSA Does Not**
24 **Preempt S.B. 861 Because DOT’s Regulations Were Issued Pursuant**
to FWPCA Authority.

25 Even if S.B. 861’s spill plan requirements were related to rail safety, which they are not, the
26 FRSA does not preempt state laws until DOT “prescribes a regulation or issues an order covering
27 the subject matter of the State requirement.” 49 U.S.C. § 20106(a)(2). Here, the only regulations
28 or orders issued by DOT that cover the subject matter of S.B. 861’s spill plan requirements were

1 issued pursuant to DOT's FWPCA authority. As DOT itself has stated, such regulations do not
2 preempt state law. 61 Fed. Reg. at 30539.

3 **a. The Railroads' Burden to Establish that Federal Regulations**
4 **Cover the Subject Matter Is Extremely Difficult to Meet.**

5 "[P]reemption under the FRSA is extremely difficult to establish" *Glow v. Union Pac. R.*
6 *Co.*, 652 F. Supp. 2d 1135, 1145 (E.D. Cal. 2009). The Railroads must "establish more than that
7 they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which
8 indicates that pre-emption will lie only if the federal regulations substantially subsume the subject
9 matter of the relevant state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)
10 (citations omitted). "The term 'covering' is in turn employed within a provision that displays
11 considerable solicitude for state law in that its express pre-emption clause is both prefaced and
12 succeeded by express saving clauses." *Id.* at 665. "[T]his is not an easy standard to meet" *S.*
13 *Pac.*, 9 F.3d at 812. "FRSA preemption is even more disfavored than preemption generally." *Id.*
14 at 813.

15 **b. The Only Regulations that Address Spill Plans Were Issued**
16 **Pursuant to the FWPCA.**

17 The Railroads contend that DOT's regulations in 49 C.F.R. Parts 130, 172, and 174 meet
18 this high standard, covering "the subject matter of hazardous materials transportation, including
19 oil spill contingency planning." Pls.' Br. 14:23-15:4. A review of the subjects covered in two of
20 these three parts, Parts 172 and 174, reveals that they do not address spill plans at all. For instance,
21 the scope of Part 172 is as follows:

22 This part lists and classifies those materials which the Department has designated as
23 hazardous materials for purposes of transportation and prescribes the requirements for
24 shipping papers, package marking, labeling, and transport vehicle placarding
applicable to the shipment and transportation of those hazardous materials.

25 49 C.F.R. § 172.1. It contains nothing about cleaning up oil spills. As a result, despite the general
26 references to Parts 172 and 174, the Railroads' brief mostly just cites to regulations in Part 130.
27 Pls.' Br. 5:12-6:12.

1 The only regulations that the Railroads cite from Parts 172 and 174 have nothing to do with
2 spill plans. The Railroads reference emergency response information, *id.* 18:6, which is in Part
3 172, but which, as explained above, is entirely distinct from spill plans. And they cite to a Federal
4 Register notice that asserts federal preemption, Pls.’ Br. 19:3-7, but which applies to rail tank car
5 design and operation – again, nothing to do with spill plans. *See Hazardous Materials: Improving*
6 *the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 Fed. Reg. 1770-01,
7 1770, 1792-93 (Jan. 13, 2009) (to be codified at 49 C.F.R. pts. 171, 172, 173, 174 and 179).
8 Therefore, the DOT regulations that address spill plans are codified in 49 C.F.R. pt. 130. Those
9 regulations were all issued pursuant to the FWPCA. Pls.’ Br. 17 n.16 (citing 61 Fed. Reg. at
10 30533).

11 **c. Regulations Issued Pursuant to DOT’s FWPCA Authority Do**
12 **Not Preempt Because DOT Did Not Have This Authority When**
13 **Congress Enacted the FRSA.**

14 The Railroads contend that the FWPCA regulations in Part 130 cover the subject matter of
15 spill plans for purposes of FRSA preemption just like other DOT regulations. Pls.’ Br. 16:20-
16 17:13. However, neither the Railroads’ cited authority nor DOT’s own interpretation support this
17 conclusion.

18 Courts have held that DOT regulations can preempt state laws whether the regulations were
19 issued under DOT’s FRSA authority or under some other enabling legislation. *Easterwood*, 507
20 U.S. at 663 n.4. For instance, in *Easterwood*, the preempting regulations were issued pursuant to
21 the Highway Safety Act. *Id.* (negligence claim based on train’s speed preempted). In other cases,
22 DOT’s regulations issued pursuant to the HMTA were likewise found to cover the subject matter
23 at issue for purposes of FRSA preemption. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 671 &
24 n.6 (D.C. Cir. 2005) (preempted law sought to restrict railroad’s route).

25 But not all DOT regulations preempt state laws. According to the Supreme Court and DOT,
26 FRSA preemption applies only to regulations that DOT issued pursuant to authority existing
27 when the FRSA was enacted or authority that is a direct outgrowth therefrom. *Easterwood*, 507
28 U.S. at 663 n.4; 61 Fed. Reg. at 30539; Pls.’ App., Ex. 4 at 11. In *Easterwood*, the Court
described the history of the FRSA and the Highway Safety Act. *Easterwood*, 507 U.S. at 661-62.

1 The FRSA had directed DOT to develop solutions to safety problems posed by grade crossings.
2 *Id.* DOT did so, which led to the Highway Safety Act of 1973. *Id.* at 662-63. In explaining why
3 DOT's Highway Safety Act regulations covered the subject matter of state law under the FRSA,
4 the Court stated the preempting regulations were issued pursuant to 23 U.S.C. § 130 of the
5 Highway Safety Act, which was a "direct outgrowth of FRSA." *Easterwood*, 507 U.S. at 663 n.4.

6 The Court's limitation on the scope of FRSA preemption is consistent with DOT's
7 interpretation, as set forth in a United States Supreme Court amicus curiae brief filed by the
8 United States, which the Railroads filed as authority in this case. Pls.' App., Ex. 4. The amicus
9 brief explains that when Congress enacted the FRSA, it intended uniformity to apply to
10 regulations issued pursuant to the FRSA and pursuant to DOT's *preexisting* authority:

11 When Congress enacted FRSA, it recognized that the Secretary had diverse sources
12 of statutory authority, enacted over many years, with which to address rail safety
13 issues, and it determined not to alter those sources of authority. Accordingly, in order
14 to achieve a nationally uniform regime for rail safety, preemption had to apply to
regulations issued, not only under the new authority provided by FRSA, but also
under the Secretary's preexisting statutory authority; otherwise the desired uniformity
could not be attained.

15 Pls.' App., Ex. 4 at 11.

16 The amicus brief also states that a House Committee Report collected these preexisting
17 authorities. *Id.* at 8 (citing H.R. Rep. No. 91-1194, App. B at pp. 40-65 (1970); Def's Request for
18 Judicial Notice (Def's RJN), Ex. 1). Among these authorities was the Explosives and Other
19 Dangerous Articles Act, a precursor to the HMTA. Pls.' App., Ex. 4 at 8-9, 12. The Explosives
20 Act is listed among the preexisting authorities in the House Committee Report. Def's RJN, Ex. 1
21 at 60. Thus, the limited scope of FRSA preemption is consistent with *Williams*, 406 F.3d at 671 &
22 n.6, in which the preempting DOT regulations were authorized by the HMTA.

23 What was not among DOT's preexisting authorities was the FWPCA. The FRSA was
24 enacted in 1970, two decades before Congress amended the FWPCA to include spill plans. *See* 61
25 Fed. Reg. at 30533. The FWPCA directs the President, not DOT, to issue regulations regarding
26 spill plans. *Id.* (citing 33 U.S.C. § 1321(j)(5)). The President, in turn, delegated this authority to
27 the Secretary of Transportation. *Id.* Neither the FWPCA nor its precursors were listed in the
28 House Committee Report that collected DOT's preexisting authorities. Def's RJN, Ex. 1 at pp.

1 40-65. Therefore, the FWPCA is not a preexisting DOT authority, and the Part 130 regulations,
2 issued pursuant to DOT's delegated FWPCA authority, do not preempt S.B. 861.

3 DOT has confirmed that regulations it issues pursuant to its FWPCA authority do not
4 preempt state spill plans. It stated: "the establishment of oil spill prevention and response plan
5 requirements in this rule will affect neither existing State and local regulation in the area, nor
6 State and local authority to regulate in the future." 61 Fed. Reg. at 30539.

7 Furthermore, in this final rule, DOT rejected a request from the American Trucking
8 Association to issue the rule under the "joint authority" of the FWPCA and the HMTA in order to
9 give the rule preemptive effect. *Id.* DOT concluded that its rule was issued solely under the
10 authority of the FWPCA, so the preemptive effect of the HMTA (and, therefore, the FRSA) did
11 not apply. *Id.* DOT's conclusion is consistent with the holdings in *Easterwood* and *Williams*, the
12 FRSA's legislative history expressing the intent of Congress, and the position of the United States
13 in its Supreme Court amicus brief.

14 Planning for how to clean up oil spills, whether from railroads or other sources, does not
15 affect rail operations or reduce rail accidents. That is why Congress addressed this subject in the
16 FWPCA, not the FRSA. Since S.B. 861's spill plan requirements do not relate to rail safety, the
17 FRSA does not preempt them. Furthermore, since DOT's spill plan regulations were issued
18 pursuant to its FWPCA authority, as opposed to any DOT authority existing at the time of the
19 FRSA's enactment, DOT's regulations do not cover the subject matter of spill plans and do not
20 preempt S.B. 861.

21 **C. ICCTA Does Not Preempt S.B. 861 Because S.B. 861 Does Not Regulate**
22 **Rail Transportation.**

23 The Railroads' ICCTA preemption argument also fails. ICCTA only preempts state laws
24 that regulate rail "transportation," as defined by statute. *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331
25 (quoting 49 U.S.C. § 10501(b)). S.B. 861 is not preempted since it neither manages nor governs
26 rail transportation in any manner. The Railroads contend that ICCTA preempts two of S.B. 861's
27 requirements: the requirement that railroads get their spill plans approved by the Administrator,
28 and the requirement that they obtain certificates of financial responsibility to show they could pay

1 the damages from a worst case oil spill. Pls.’ Br. 19:12-13. But neither requirement regulates rail
2 transportation.

3 Under ICCTA, the Surface Transportation Board (STB) has exclusive jurisdiction over rail
4 transportation. States are expressly preempted from regulating all of the following:

5 (1) transportation by rail carriers, and the remedies provided in this part with respect
6 to rates, classifications, rules (including car service, interchange, and other operating
7 rules), practices, routes, services, and facilities of such carriers; and

8 (2) the construction, acquisition, operation, abandonment, or discontinuance of spur,
9 industrial, team, switching, or side tracks, or facilities

10 49 U.S.C. § 10501(b). As a result, state laws that impede rail transportation are preempted.

11 ICCTA defines “transportation” as:

12 (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property,
13 facility, instrumentality, or equipment of any kind related to the movement of
14 passengers or property, or both, by rail, regardless of ownership or an agreement
15 concerning use; and

16 (B) services related to that movement, including receipt, delivery, elevation, transfer
17 in transit, refrigeration, icing, ventilation, storage, handling, and interchange of
18 passengers and property

19 49 U.S.C. § 10102(9). “While certainly expansive, this definition of ‘transportation’ does not
20 encompass everything touching on railroads. Subsection (A) focuses on physical instrumentalities
21 ‘related to the movement of passengers or property,’ and Subsection (B) on ‘services related to
22 that movement.’” *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007). For
23 instance, in *City of Auburn v. U.S.*, the city sought to require a railroad to comply with its
24 environmental permit review process prior to re-establishing a route for a main rail line. 154 F.3d
25 1025 (9th Cir. 1998). Since rail routes are part of rail transportation, the permit review process
26 interfered with rail transportation and was therefore preempted. *Id.* at 103; *see also Norfolk S. Ry.*
27 *Co. v. City of Alexandria*, 608 F.3d 150, 155 (4th Cir. 2010) (finding permit requirements that
28 limited the products a railroad could haul from its transloading facility and the haul route were
preempted).

Where state laws do not directly affect rail transportation – either the instrumentalities or
the related services – or the effect on rail transportation is merely remote or incidental, ICCTA
does not preempt them. *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094,
1097-98 (9th Cir. 2010); *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 808 (5th Cir. 2011) (ICCTA

1 preempts only when state law “directly” manages rail transportation, such as train speed, length,
2 and scheduling, but not a negligence claim that has an incidental effect). For instance, ICCTA
3 does not preempt a state law requiring railroads to pay for pedestrian crossings over their tracks.
4 *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008). And state
5 laws are not preempted “merely because they reduce the profits of a railroad” or have high
6 compliance costs. *Id.*

7 ICCTA also does not preempt generally applicable, non-discriminatory state laws,
8 including electrical, plumbing and fire codes, and direct environmental regulations enacted for the
9 protection of public health and safety, so long as such laws do not directly impede rail
10 transportation. *Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 643 (2d Cir. 2005). Under
11 ICCTA, “[s]tates retain their police powers, allowing them to create health and safety
12 measures” *Adrian & Blissfield*, 550 F.3d at 541; *see also Green Mountain R.R. Corp.*, 404
13 F.3d at 643. For example, ICCTA would not preempt a state law that prohibited railroads from
14 dumping harmful substances. *S. Coast Air Quality Mgmt. Dist.*, 622 F.3d at 1097.

15 S.B. 861, which requires railroads to have approved spill plans and certificates of financial
16 responsibility, does not impede rail transportation. It does not directly (or indirectly) affect rail
17 instrumentalities or rail services. It does not regulate train speed, length, or scheduling. Nor does
18 it require a railroad to change its routes, the designs of its locomotives or rail cars, or what it
19 transports. Instead, akin to a law prohibiting the dumping of harmful substances, S.B. 861 is a
20 valid exercise of California’s police power, designed to protect the health and safety of the state’s
21 waters after a spill occurs. S.B. 861, together with the Lempert-Keene Act, which it amends, is a
22 generally applicable law that applies not just to railroads but also to vessels, pipelines, refineries,
23 transfer facilities, and other inland and marine facilities that have the potential for spilling oil that
24 could impact state waters. *See Cal. Gov’t Code* § 8670.3(g)(1). While railroads will likely incur
25 some costs in preparing spill plans and meeting the financial responsibility requirement, the effect
26 of those costs on rail transportation is remote and incidental. *See Adrian & Blissfield*, 550 F.3d at
27 541.

28

1 The Railroads entirely ignore the foregoing, instead arguing that the spill plan approval and
2 certificate of financial responsibility requirements constitute “preclearance” requirements, and
3 that the financial responsibility requirement is preempted because the STB directly regulates the
4 subject. Pls.’ Br. 19:12-13. Both arguments fail.

5 **1. ICCTA Does Not Preempt Pre-Approvals as Long as They Do Not**
6 **Impede Rail Transportation.**

7 S.B. 861 requires oil spill contingency plans to be submitted to the Administrator for review
8 and approval. Cal. Gov’t Code § 8670.31(a). It also requires railroads to apply for and obtain a
9 certificate of financial responsibility. *Id.* § 8670.37.51(d). The Railroads argue these are both
10 “impermissible pre-clearance mandate[s]” because they could be used to deny them the ability to
11 proceed with activities that the STB has authorized. Pls.’ Br. 20:4-7, 21:8-21. But such a
12 requirement, whether it is called a pre-clearance mandate, a pre-approval, or a permit, is
13 preempted only if “by its nature, [it] could be used to deny a railroad the ability to conduct some
14 part of its operations or to proceed with activities that the [STB] has authorized” *Adrian &*
15 *Blissfield*, 550 F.3d at 540; *accord N.Y. Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d
16 238, 253 (3d Cir. 2007). S.B. 861’s requirements will not be used to deny the Railroads the ability
17 to conduct any part of their operations, so they are not preempted.

18 In *Green Mountain R.R. Corp.*, the state attempted to require the railroad to obtain a
19 preconstruction permit before building transloading facilities. 404 F.3d 638. This would have
20 delayed construction, so it was preempted. *Id.* at 643. Likewise, in *City of Auburn*, the city
21 attempted to require the railroad to get a permit before re-establishing a rail line. 154 F.3d 1025.
22 This, too, was preempted because the permit process could have delayed, altered, or prevented the
23 establishment of the line. *Id.* at 1031.

24 By contrast, S.B. 861’s plan approval and certificate requirements will not delay, alter, or
25 stop the Railroads’ operations. Once the Administrator issues regulations implementing S.B. 861,
26 facilities will be given sufficient time to comply with the new requirements. If they refuse to do
27 so, they may be subject to both criminal and civil penalties, but these penalties will not impede
28 their rail operations. *N.Y. Susquehanna and Western Ry.*, 500 F.3d at 255 (“Nothing prevents a

1 state from imposing a significant fine on months of noncompliance with valid regulations . . .”).
2 In addition, the Administrator could issue (though this is rare) a cease and desist order that would
3 require the noncompliant railroad to submit a spill plan or apply for a certificate of financial
4 responsibility. Cal. Gov’t Code § 8670.69.4(a)-(c). But such an order would not require the
5 railroad to cease operating or to alter its operations in any respect. Because S.B. 861’s
6 requirements will not impede rail transportation, they are not preempted.⁶

7 **2. The STB Does Not Regulate Financial Responsibility for Oil Spill**
8 **Response, so S.B. 861’s Financial Responsibility Requirement Is Not**
9 **Preempted.**

10 The Railroads also assert that S.B. 861’s financial responsibility requirement is preempted
11 because the STB directly regulates whether railroads are sufficiently capitalized to provide
12 common carrier services. Pls.’ Br. 20:16-22. However, S.B. 861 does not address whether a
13 railroad’s *business* is financially fit. Instead, it is concerned solely with whether the railroad has
14 the ability to pay *for spill cleanup*. The STB does not address oil spill damages whatsoever, so
15 S.B. 861’s financial responsibility requirement is not preempted.

16 Under ICCTA, the STB shall issue a certificate authorizing rail activities unless the Board
17 finds that such activities are inconsistent with public convenience and necessity. 49 U.S.C.
18 § 10901(c). When considering an application for a certificate, the STB determines “(1) whether
19 the applicant is fit, financially and otherwise, to undertake the construction and provide rail
20 service; (2) whether there is a public demand or need for the service; and (3) whether the
21 competition would be harmful to existing carriers.” *N. Plains Res. Council, Inc. v. Surface Transp.*
22 *Bd.*, 668 F.3d 1067, 1092 (9th Cir. 2011).

23 Certificates of financial responsibility under S.B. 861 serve an entirely different purpose.
24 The Administrator will certify a railroad has demonstrated the financial ability to pay for any

25 ⁶ The Railroads make a facial challenge to S.B. 861. As a result, they must demonstrate
26 that under no set of circumstances would S.B. 861 be valid. *U.S. v. Salerno*, 481 U.S. 739, 745
27 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount
28 successfully, since the challenger must establish that no set of circumstances exists under which
the Act would be valid.”). Here, this means that the Railroads must demonstrate that S.B. 861 is
preempted under any reasonable and lawful means of implementation in the forthcoming
regulations. One such reasonable and lawful means of implementation is that cease and desist
orders will not require railroads to cease or alter operations.

1 damages that might arise during an oil spill into waters of the state. Cal. Gov't Code
2 § 8670.37.53(c)(1). To obtain the certificate, the railroad has a number of options, including
3 providing the Administrator with evidence of insurance, a surety bond, a letter of credit, or
4 qualifications as a self-insurer. *Id.* § 8670.37.54(a). The Administrator has no interest in the
5 railroad's financial fitness – proof of insurance is all that is required; the Administrator would
6 examine the railroad's finances only if the railroad sought to qualify as self-insured and, even
7 then, the scope of examination would be extremely limited. Thus, since the STB does not regulate
8 a railroad's ability to pay for damages from an oil spill, ICCTA does not preempt S.B. 861's
9 financial responsibility requirement.

10 **D. The Locomotive Inspection Act and Safety Appliance Act Do Not Apply**
11 **and Do Not Preempt S.B. 861.**

12 The Railroads' claims under the LIA and SAA are also unlikely to succeed. Neither act
13 contains an express preemption clause, and neither implied field nor conflict preemption apply
14 because the LIA and SAA regulate different subject matters than S.B. 861.

15 “[T]he LIA applies only to aspects of the railroad that fit within the LIA's definition—the
16 locomotive, its parts, and appurtenances—and no more.” *Becraft v. Norfolk S. Ry. Co.*, No.1:08-
17 CV-80, 2009 WL 1605293, at *3 (N.D. Ind. June 5, 2009); *see also* 49 U.S.C. § 20701
18 (describing prerequisites for use of locomotives). The LIA impliedly preempts “the field of
19 locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers
20 in the course of their employment.” *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997)
21 (citing *Napier v. Atl. Coast Line R.R.*, 272 U.S. 605 (1926)). However, the LIA only regulates the
22 “design, construction, and material” of trains. *S. Pac.*, 9 F.3d at 811; *see also Glow*, 652 F. Supp.
23 2d at 1146.⁷ The LIA says nothing of oil spill response efforts, even if the spill occurs from a
24 train.

25 _____
26 ⁷ For example, pursuant to the LIA, the Secretary of Transportation has promulgated
27 regulations establishing various safety requirements for locomotives' brake systems, electrical
28 systems, and cab equipment, 49 C.F.R. § 229.41–229.140, locomotive crash worthiness design
requirements, 49 C.F.R. § 229.141–229.217, and locomotive electronics, 49 C.F.R. § 229.301–
229.319.

1 The SAA is similarly silent with respect to oil spill response. Rather, it requires specifically
2 enumerated safety components on rail cars. *Union Pac. R.R. Co.*, 346 F.3d at 869; *Milesco v.*
3 *Norfolk S. Co.*, 807 F. Supp. 2d 214, 223 (M.D. Pa. 2011). For example, locomotives and rail cars
4 must be equipped with automatic couplers, secure sill steps, efficient hand brakes, and secure
5 ladders and running boards. 49 U.S.C. § 20302(a)(1). The SAA “divests states of all authority to
6 regulate *on the devices enumerated therein.*” *Miller v. S. Pac. R.R.*, No. CIV. S-06-377, 2007 WL
7 266 9533, at *4 (E.D. Cal. 2007) (emphasis added) (“[C]ourts have consistently held that the
8 SAA ‘so far occupie[s] the field of legislation relating to the ‘equipment of [rail] cars with safety
9 appliances’”) (second and third alteration in original); *see also Union Pac. R.R.*, 346 F.3d at
10 869; *Garay v. Missouri Pac. R.R. Co.*, 38 F. Supp. 2d 892, 898 (D. Kan. 1999).

11 In contrast, nothing in S.B. 861 purports to regulate the design, construction, and material
12 of locomotives parts or appurtenances. Nor does it attempt to regulate couplers, brakes, or any
13 other of the safety devices enumerated in the SAA. Rather, S.B. 861 is designed to minimize the
14 impacts of an oil spill in state waters by requiring spill plans and certificates of financial
15 responsibility. To that end, the Administrator’s implementing regulations are to provide for the
16 “best achievable protection of waters and natural resources of the state.” Cal. Gov’t Code §§
17 8670.28(a), 8670.29(h).⁸ While the Railroads appear to believe that the “best achievable
18 technology” requirement will be used to force railroads to make modifications to their trains, this
19 is pure speculation. As explained above, the emphasis of the Lempert-Keene Act and the S.B. 861
20 amendments is on cleaning up oil spills, and the implementing regulations will likely provide for
21 the best achievable protection of state waters through the use of best achievable technologies such
22 as specialized types of containment booms, skimmers, and dispersants, not locomotive parts or
23 safety appliances. Because S.B. 861, on its face, does not require changes in the design,
24 construction, and material of locomotive parts and appurtenances or the use of safety appliances
25

26 ⁸ “Best achievable protection” is defined as “the highest level of protection that can be
27 achieved through both the use of the best achievable technology and those manpower levels,
28 training procedures, and operational methods that provide the greatest degree of protection
achievable.” *Id.* § 8670.3(b)(1).

1 enumerated in the SAA, the Railroads’ argument that the LIA and SAA preempt the “best
2 achievable protection” requirement is not likely to succeed.

3 In sum, because the Lempert-Keene Act serves the purpose of promoting water quality and
4 does not attempt to regulate railroad safety or security, rail transportation, or the design of
5 locomotives or rail cars, the Railroads’ facial challenge is unlikely to succeed, and preliminary
6 injunctive relief is therefore not appropriate.

7 **III. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF DENYING INJUNCTIVE**
8 **RELIEF AND AN INJUNCTION IS NOT IN THE PUBLIC INTEREST.**

9 The balance of equities and public interest compel denial of the Railroads’ request for a
10 preliminary injunction. When ruling on a preliminary injunction, courts “must balance the
11 competing claims of injury and must consider the effect on each party of granting or withholding
12 the requested relief.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). In
13 exercising their sound discretion, courts should pay particular regard for the public consequences
14 in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S.
15 305, 312 (1982). Moreover, assessing the harm to the opposing party (balancing the equities) and
16 weighing the public interest “merge when the Government is the opposing party.” *Nken v. Holder*,
17 556 U.S. 418, 435 (2009).

18 The balance of the equities does not favor an injunction here because, as discussed in
19 Section I, above, the Railroads will not suffer *any* immediate harm if such extraordinary relief is
20 denied. The Railroads’ contention that an injunction is needed to avoid a patchwork of regional
21 requirements is speculative at best; while there may be an interest in “nationally uniform” rail
22 safety laws, S.B. 861 is not about rail safety or rail operations. S.B. 861 is about preparing for oil
23 spills in an effort to protect California’s invaluable natural resources and communities.

24 California’s interest in implementing the Lempert-Keene Act to protect the State’s waters is
25 indisputable and overwhelming. The fundamental purpose of the Act is to prevent harm to
26 California’s coastal and inland waters, “treasured environmental and economic resources that the
27 state cannot afford to place at undue risk from an oil spill.” Cal. Gov’t Code § 8670.2(e). Oil
28 spills present “an undeniable and patently apparent risk of harm” since such spills “could destroy

1 and disrupt ecosystems” critical to California’s interests. *Ocean Advocates v. U.S. Army Corps of*
2 *Eng’rs*, 402 F.3d 846, 868 (9th Cir. 2004). In addition to purely environmental harm, given
3 California’s growing population and its current, years-long drought, the State’s interest in
4 protecting inland freshwater sources is stronger than ever.

5 Unfortunately, damage to California’s waters from inland oil spills is not a new
6 phenomenon. From 2008 to 2012 alone, there were many thousands of inland oil spills reported to
7 OSPR. Def’s RJN, Ex. 2. Dramatically exacerbating this existing threat, a recent boom in North
8 American crude oil sources, including crude feedstocks from North Dakota’s Bakken shale and
9 Canadian tar sands, will increase the amount of oil being transported over California’s rivers,
10 lakes, and streams. In response to this boom, at least thirteen different crude oil refineries and
11 terminals in California are proposing major expansions. Kristen Hayes, FACTBOX- California
12 Crude Slates and Oil-by-Rail Projects, Reuters, Sept. 10, 2014, available at
13 <http://in.reuters.com/article/2014/09/10/crude-railways-california-factbox->
14 [idINL2N0QK2OA20140910](http://in.reuters.com/article/2014/09/10/crude-railways-california-factbox-idINL2N0QK2OA20140910). Many of these expanding refineries and terminals are located in
15 land-locked areas such as Sacramento and Bakersfield that are inaccessible by marine vessel,
16 meaning that the increased oil feedstocks will be delivered exclusively by inland transportation
17 methods including pipelines and rail. *Id.* In Bakersfield alone, the Alon Refinery and the Plains
18 All American Terminal expansion proposals will increase the amount of oil traveling through
19 inland California by 12.2 million gallons of oil per day. *Id.* Taking all current proposals into
20 account, the amount of crude oil flowing through inland California could soon increase by
21 billions of gallons per year, markedly increasing the threat to California’s inland waters. *Id.* This
22 intensified threat necessitates increased preparedness.

23 At the same time, there is a need to ensure adequate resources will be available for response
24 efforts in the event of a spill. STB regulations do not evaluate a railroad’s ability to pay for
25 damages resulting from an oil spill. The DOT has described this as a “market failure” where “rail
26 companies are not insured against the full liability of the consequences of incidents involving
27 hazardous materials.” Def’s RJN, Ex. 3. The certificate of financial responsibility will fill this
28 regulatory void and ensure that taxpayers are not left holding the bag. But it may accomplish

1 more. Requiring proof of insurance could mean the difference between cleanup and permanent
2 environmental damage.

3 Given the environmental threat to California's waters from the amount of crude oil being
4 transported through inland California and the resulting need for preparedness, an injunction
5 preventing enforcement of the Act against an entire category of facilities with the potential for
6 spilling oil into state waters would most certainly not be in the public interest. To the contrary, the
7 public interest demands enforcement of the Act against all vessels, pipelines, refineries, transfer
8 facilities, railroads, and other inland and marine facilities that have the potential for spilling oil
9 that could impact state waters.

10 **CONCLUSION**

11 Because the Railroads have not established any of the prerequisites to extraordinary,
12 preliminary injunctive relief, the Court should deny the Railroads' Motion for Preliminary
13 Injunction.

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Respectfully Submitted,

15 KAMALA D. HARRIS
16 Attorney General of California
17 RANDY L. BARROW
18 Supervising Deputy Attorney General

19 /s/ Carolyn Nelson Rowan
20 NICHOLAS C. STERN
21 CAROLYN NELSON ROWAN
22 Deputy Attorneys General
23 *Attorneys for Defendants*
24 *California Office of Spill Prevention and*
Response, Thomas M. Cullen, Jr.,
California Administrator for Oil Spill
Response, and Kamala D. Harris, Attorney
General of the State of California

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