

MEMORANDUM

TO: Hon. Mayor and Members of the City Council
City of Benicia

FROM: Bradley R. Hogin, Esq.

DATE: April 18, 2016

RE: Attorney General Letter of April 14, 2016

This memorandum responds to the Attorney General’s letter of April 14, 2016.

As I have explained, the City cannot apply CEQA or the City’s zoning ordinance directly to Union Pacific’s railroad operations.¹ In other words, the City cannot require Union Pacific to obtain a use permit, or undergo CEQA review, before conducting rail operations in the City. Any such attempt would be “categorically” preempted by the Interstate Commerce Commission Termination Act (“ICCTA”).² The Attorney General does not dispute this conclusion.

It is true that the City can, and indeed must, require Valero to obtain a use permit and undergo CEQA review before constructing and operating the proposed crude oil unloading rack. The Attorney General errs, however, in concluding that the City can deny Valero’s application based on a finding that impacts from Union Pacific’s rail operations are unacceptable. ICCTA does not allow cities to regulate rail operations *indirectly* by imposing requirements on shippers that are designed to reduce or avoid impacts from rail operations.

¹ ICCTA preempts the application of CEQA to the construction and/or operation of a rail line. *See, e.g., City of Encinitas v North San Diego County Transit Development Bd*, 2002 WL 34681621 (CCTA preempts CEQA and the California Coastal Act as applied to construction and operation of a rail line by transit agencies); *Desertxpress Enterprises LLC--Petition for Declaratory Order* Fed. Carr. Cas. P 37238 (S.T.B.), 2007 WL 1833521 (ICCTA preempts CEQA as applied to the construction of a high-speed rail line between Victorville and Las Vegas).

² ICCTA categorically preempts any form of permitting or “preclearance” requirements that “could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the [STB] has authorized.” *Town of Atherton v. California High-Speed Rail Auth.*, 228 Cal. App. 4th 314, 330 (2014). Courts have struck down preclearance requirements in a variety of contexts. *See, e.g., City of Auburn v United States Government*, 134 F.3d 1025 (9th Cir. 1998), as amended (Oct. 20, 1998) (the ICCTA preempts the local permitting requirements as applied to the re-opening and operation of a rail line); *Green Mountain Railroad Corp. v Vermont*, 404 F.3d 638 (2nd Cir. 2005), (the ICCTA preempts state permitting requirements as applied to construction and operation of a railroad’s transloading facility).

In the *Winchester* case, for example, a private party owned and operated a warehouse adjacent to a rail line. The warehouse was connected to the main rail line by a short track owned by the warehouse operator. Nearby residents complained about the noise from the operation of locomotives and rail cars on the track. Ultimately, the town Zoning Board determined that the area was “being used as a freight yard,” which was not a permitted use under the town zoning ordinance. The Board issued a cease and desist order that purported to prohibit trains on the private track.

When the matter came before the STB, the town of Winchester argued that the private track was not subject to STB jurisdiction because (1) the track was owned by the warehouse operator rather than the railroad, and (2) the track was only used to move freight to the warehouse. The STB rejected this argument, explaining that cities cannot regulate rail transportation indirectly “under the guise of local regulations directed at the shippers who would use the network.”³

Similarly, in the *Alexandria* case,⁴ the court held that a haul ordinance was preempted because of its indirect effect on rail operations. The *Alexandria* case involved a railroad’s ethanol transloading facility in Alexandria, Virginia. The railroad used the facility to transfer ethanol from rail cars to trucks operated by private parties. The city adopted an ordinance regulating the hauling of bulk materials, including ethanol, within the city limits. The ordinance required private truckers to obtain permits and comply with a variety of conditions. In defense of the ordinance, the city argued that the ordinance did not regulate “transportation by rail carrier” because its requirements applied only to the *hauling* of ethanol by truck, and did not attempt to regulate in any way the railroad’s *transloading* of ethanol from rail cars to trucks. The city emphasized that the ordinance “do[es] not regulate any aspect of the movement of trains, the unloading or transloading of trains, the time of day during which transloading can occur, or the number of trucks that can be filled with ethanol in any day.”⁵

The court in *Alexandria* squarely rejected this argument. The court emphasized that the limitations on hauling would “directly impact [the railroad’s] ability to move goods shipped by rail.”⁶ The court cited testimony from railroad employees, who explained that limiting the number of trucks leaving the transloading facility “directly affects how many railcars can be unloaded,” resulting in a “ripple” effect on the availability of track for other customers.⁷ Thus, the court found that the haul ordinance was preempted, even though it purported to regulate hauling rather than rail operations, because of the indirect effect of the ordinance on the railroad’s facility.

³ *Boston & Maine Corp. & Springfield Terminal R.R. Company Petition for Declaratory Order*, FD 35749, 2013 WL 3788140, at *4 (July 19, 2013).

⁴ *Norfolk Southern Ry Co v City Of Alexandria*, 608 F.3d 150 (2010).

⁵ *Id.* at 159.

⁶ *Ibid.*

⁷ *Id.* at 158-9.

The Attorney General's letter simply ignores the *Winchester* and *Alexandria* cases, despite their obvious relevance, and despite the fact that I have discussed them on several occasions at meetings of the Planning Commission and City Council. Moreover, the cases that the Attorney General *does* cite are irrelevant because *none of those cases involved an attempt by a city to address impacts from rail operations*. In all of those cases, the city applied its zoning ordinance to local impacts that would result from operation of a privately owned transloading facility.

In the *Babylon* case,⁸ for example, a company called Coastal Distribution proposed to construct and operate a waste transfer facility on a rail yard leased by the railroad. The facility would have been used to handle the loading of construction debris onto rail cars. The city's zoning ordinance, however, prohibited waste transfer facilities. When the project was almost constructed, the city served a stop work order on the ground that the transloading facility was a prohibited use under the zoning ordinance.

The railroad and Coastal Distribution filed suit against the city, seeking to enjoin the city from enforcing the zoning ordinance against the waste transfer facility. The court ultimately held that the proposed waste transfer facility did not constitute "transportation by rail carrier" because the railroad did not own or operate the facility, and Coastal was not acting as an agent of the railroad. Therefore, the ICCTA did not preempt the application of the city's local zoning regulations to the local waste transfer facility.

The *Babylon* case does not apply here, however, because the city there did *not* attempt to address impacts from rail operations. Rather, by enforcing the city's zoning ordinance, the city was addressing the potential impacts of the waste transfer facility on the surrounding community.

In the *West Palm Beach* case,⁹ a railroad leased a rail yard property in the City of West Palm Beach to Rinker Materials Corporation. Rinker used the rail yard as a transloading facility for the distribution of aggregate, a material used to make cement. The city issued cease and desist orders to the railroad and Rinker because the transloading operation did not comply with the city's zoning, and Rinker failed to obtain a business license. The railroad sued the city, seeking a declaration that the ICCTA preempted the application of the city's zoning and business license ordinances to Rinker's private transloading operations.

The court in *West Palm Beach* case held that ICCTA did not preempt the application of the city's zoning ordinance to Rinker's facility. The court explained that "in no way does federal pre-emption under the ICCTA mandate that municipalities allow any private entity to operate in a residentially zoned area simply because the entity is under a lease from the

⁸ *New York And Atlantic Ry. Co. v Surface Transp. Bd.* 635 F.3d 66 (2nd Cir. 2011).

⁹ *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001).

railroad.”¹⁰ Again, the city’s zoning ordinance in *West Palm Beach* addressed impacts from a private transloading facility; it did not address impacts from operations of a rail carrier.

In fact, *all* of the other cases cited in the Attorney General’s letter are irrelevant for the same reason – they involved the regulation of impacts from privately owned transloading facilities.¹¹ None involved an attempt to regulate impacts from rail operations.

In summary, contrary to what the Attorney General’s letter states, the City cannot deny Valero’s permit application under CEQA and/or the City’s zoning ordinance based on impacts from Union Pacific’s rail operations. The fact that Valero is the permittee, rather than Union Pacific, is not the deciding factor. It is clear under ICCTA that the City cannot regulate rail impacts either *directly* -- by imposing requirements on Union Pacific -- or *indirectly*, by imposing requirements on Valero that are designed to reduce or avoid impacts of Union Pacific’s rail operations.

¹⁰ *Id.* at 1332.

¹¹ See, e.g., *Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, NJ*, 34192 (SUB 1), 2003 WL 21952136 (Aug. 14, 2003); *Sea-3, Inc. Petition for Declaratory Order*, FD 35853, 2015 WL 1215490 (Mar. 16, 2015).