

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

801 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

rkoss@adamsbroadwell.com

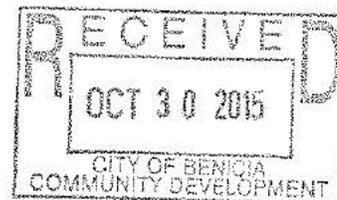
SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
LAURA E. HORTON
MARC D. JOSEPH
RACHAEL E. KOSS
JAMIE L. MAULDIN
ELLEN L. WEHR

October 30, 2015



BY EMAIL AND OVERNIGHT MAIL

Amy Million, Principal Planner
City of Benicia Community Development Department
250 East L Street
Benicia, CA 94510
Email: amillion@ci.benicia.ca.us

Re: **Comments on the Revised Draft Environmental Impact Report
for the Valero Benicia Crude by Rail Project (SCH# 2013052074)**

Dear Ms. Million:

We are writing on behalf of **Safe Fuel and Energy Resources California ("SAFER California")** and individuals who reside and work in the City of Benicia, to provide preliminary comments on the Valero Benicia Crude by Rail Project ("Project") Revised Draft Environmental Impact Report ("RDEIR") prepared by the City of Benicia ("City"), pursuant to the California Environmental Quality Act ("CEQA").¹ SAFER CA provided comments on the original DEIR on September 15, 2014, identifying many fatal defects in the document. The City then revised and recirculated portions of the document with (1) new analyses of potential impacts that could occur uprail of Roseville (i.e., between a crude oil train's point of origin and the California border, and from the border to Roseville), and (2) supplemental analysis of the potential accidents involving crude trains based on new information that became available after the original DEIR was published. Although the RDEIR addresses some of the errors we identified in our previous comments, most of the issues remain and there are issues in the RDEIR's new analyses that must be addressed. These comments address only the revised and recirculated portions of the DEIR. Our September 15, 2014 comments are, by and large, still applicable to the City's CEQA analysis of the Project and we incorporate them herein by reference.

¹ Pub. Resources Code, §§ 21000 et seq.

3111-008rc

October 30, 2015

Page 2

The Project includes the construction of facilities to allow the Valero Refining Company ("Applicant") to receive up to 70,000 barrels per day of North American crude oil by rail (two 50-car trains per day). The facilities include 8,880 feet of new track, a new tank car unloading rack capable of unloading two parallel rows of tank cars simultaneously, and 4,000 feet of 16-inch diameter crude oil pipeline and associated fugitive components connecting the offloading rack with an existing crude supply pipeline.

Based upon our review of the RDEIR, appendices and other relevant records, we conclude that, like the original DEIR, the RDEIR fails to meet the requirements of CEQA. The RDEIR fails to adequately disclose, analyze and mitigate the Project's potentially significant impacts related to air quality, public health and hazards. These defects render the RDEIR inadequate as an informational document. The numerous defects in the City's analyses, set forth in greater detail in these comments, are fatal errors. The City must withdraw the RDEIR and prepare a revised EIR which fully complies with CEQA.

We prepared these comments with the assistance of experts Petra Pless, Ph.D. and Phyllis Fox, Ph.D. Dr. Pless' and Dr. Fox's technical comments are attached hereto and are incorporated by reference. Dr. Pless and Dr. Fox's comments are submitted in addition to the comments in this letter. Accordingly, the City must address and respond to the comments of Dr. Pless and Dr. Fox separately.

I. INTEREST OF COMMENTORS

SAFER California advocates for safe processes at California refineries to protect the health, safety, the standard of life and the economic interests of its members. For this reason, SAFER California has a strong interest in enforcing environmental laws, such as CEQA, which require the disclosure of potential environmental impacts of, and ensure safe operations and processes for, California oil refineries. Failure to adequately address the environmental impacts of crude oil transport and refining processes poses a substantial threat to the environment, worker health, surrounding communities, and the local economy.

Refineries are uniquely dangerous and capable of generating significant fires and the emission of hazardous and toxic substances that adversely impact air

October 30, 2015

Page 3

quality, water quality, biological resources and public health and safety. These risks were recognized by the Legislature and Governor when enacting SB 54 (Hancock). Absent adequate disclosure and mitigation of hazardous materials and processes, refinery workers and surrounding communities may be subject to chronic health problems and the risk of bodily injury and death. Additionally, rail transport of crude oil has been involved in major explosions, causing vast economic damage, significant emissions of air contaminants and carcinogens and, in some cases, severe injuries and fatalities.

Poorly planned refinery projects also adversely impact the economic wellbeing of people who perform construction and maintenance work in the refinery and the surrounding communities. Plant shutdowns in the event of accidental release and infrastructure breakdown have caused prolonged work stoppages. Such nuisance conditions and catastrophic events impact local communities and can jeopardize future jobs by making it more difficult and more expensive for businesses to locate and people to live in the area. The participants in SAFER California are also concerned about projects that carry serious environmental risks and public service infrastructure demands without providing countervailing employment and economic benefits to local workers and communities.

The members represented by the participants in SAFER California live, work, recreate and raise their families in Solano County, including the City of Benicia. Accordingly, these people would be directly affected by the Project's adverse environmental impacts. **The members of SAFER California's participating unions may also work on the Project itself.** They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants, and other health and safety hazards, that exist onsite.

These comments are also submitted on behalf of individuals who reside and work in the Project area, including, for example, Mark Sloan, who lives in the City of Benicia.

II. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT ITS CONCLUSIONS IN THE RDEIR REGARDING THE PROJECT'S SIGNIFICANT IMPACTS AND FAILS TO INCORPORATE ALL FEASIBLE MITIGATION MEASURES NECESSARY TO REDUCE SUCH IMPACTS TO A LESS THAN SIGNIFICANT LEVEL

CEQA has two basic purposes, neither of which the RDEIR satisfies. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a Project before harm is done to the environment.² The EIR is the “heart” of this requirement.³ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁴

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”⁵ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.⁶ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.⁷

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.⁸ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.⁹ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁰ Without an adequate analysis and

² CEQA Guidelines § 15002(a)(1); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

³ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁴ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁵ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

⁶ See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

⁷ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

⁸ CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

⁹ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹⁰ *Id.*, §§ 21002-21002.1.

description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹¹ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹² This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹³

In this case, the RDEIR fails to satisfy the basic purposes of CEQA. The RDEIR’s conclusions regarding air quality, public health and hazards impacts are not supported by substantial evidence. In preparing the RDEIR, the City: (1) failed to provide sufficient information to inform the public and decision-makers about potential environmental impacts; (2) failed to accurately identify and adequately analyze all potentially significant environmental impacts; and (3) failed to incorporate feasible measures to mitigate environmental impacts to a less than significant level; and (4) failed to analyze all feasible alternatives to reduce impacts to a less than significant level. The City must correct these shortcomings and recirculate a revised EIR for public review and comment.

A. The RDEIR Fails To Identify, Analyze And Mitigate Potentially Significant Air Quality, Public Health And Hazards Impacts From The Southern Crude Import Route

The RDEIR describes four routes that may be used to import crude oil for the Project -- three northern routes ((1) Oregon to Roseville, (2) Nevada to Roseville (northern) and (3) Nevada to Roseville (southern)), and one southern route through Sacramento.¹⁴ However, the RDEIR only analyzes impacts along the three

¹¹ CEQA Guidelines, § 15126.4(a)(2).

¹² *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹³ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁴ RDEIR, pp. 1-2 - 1-4.

northern routes; the RDEIR fails to analyze impacts along the southern route. Rather, the RDEIR claims that “it is less likely that Project trains would use the southern route because they first would have to travel through Sacramento to Roseville, and then back through Sacramento to reach the refinery.”¹⁵ The RDEIR’s statement is unsupported for two reasons.

First, the southern route would add only 13 miles round trip to the route.¹⁶ There is no evidence that adding 13 miles to a 1,500-mile route would be cost or time prohibitive.¹⁷ On the contrary, refinery engineer expert Dr. Fox explains that “an additional 26 miles is much less than the increase in mileage that would result from routing trains carrying crude from Texas, Oklahoma or New Mexico via the northern route.”¹⁸

Second, Union Pacific Railroad (“UPRR”) can choose any route at its sole discretion.¹⁹ The RDEIR itself admits that “UPRR retains unfettered flexibility in selecting the routes that trains could travel from the crude oil origination sites to Roseville...it is theoretically possible, due to track sharing agreements for Project-related crude to be provided to the Refinery via any of the North American freight railroad tracks...”²⁰ Dr. Fox explains that for crudes sourced from Texas, Oklahoma or New Mexico, for example, the southern route would be the shortest and most economic route.²¹

There is simply no evidence that Project crude trains would not travel the southern route. Thus, CEQA requires the City to analyze the Project’s potentially significant impacts associated with the southern route.

Oddly, the RDEIR claims (without any analysis whatsoever) that, even if trains carried Project crude along the southern route, “potential direct, indirect, and

¹⁵ *Id.*, p. 1-5.

¹⁶ **Attachment A:** Letter from Phyllis Fox to Rachael Koss re Review of Revised Draft Environmental Impact Report for Valero Benicia Crude by Rail Project, October 30, 2015, p. 2 (“Fox Comments”).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ RDEIR, p. 1-5 (“...on the basis of federal preemption, neither the Refinery nor the City has any authority to dictate or limit routes selected by UPRR...”).

²⁰ *Id.*, pp. 2-23 – 24 (internal citations omitted).

²¹ Fox Comments, p. 2.

cumulative impacts of crude oil transport by rail approaching the Refinery from the south are expected to be substantially similar to the type and severity of impacts that could result between the Refinery and the State border via any of the northern routes.”²² The RDEIR’s conclusion is unsupported.

Dr. Fox shows in her comments that some Project impacts would be *more* severe via the southern route.²³ The distance travelled within California on the southern route, from Arizona to Roseville, is approximately 700 miles. The in-California distance on the longest northern route is 297 miles. Therefore, the southern route would be approximately 2.3 times longer than the longest northern route.²⁴ Dr. Fox explains that the probability of accidents increases as routes get longer.²⁵ In addition, the longer the route, the greater the emissions from locomotives and, consequently, the greater the air quality and public health impacts.²⁶ According to Dr. Fox, the southern route would result in “highly significant increases in both ROG and NOx, ozone precursors, compared to the shorter northern routes.”²⁷ Importantly, more than 90 percent of the southern route passes through areas with extreme to severe ozone nonattainment issues. In fact, the majority of the southern route passes through the heart of the San Joaquin Valley Air Basin, which is in extreme nonattainment with the federal 8-hour ozone standard and has the distinction, along with the South Coast Air Basin, of having the worst ozone nonattainment problem in the United States. The ozone concentrations in “extreme” areas are more than double the current 8-hour standard (75 ppb) and three times EPA’s proposed update to that standard (65 ppb). While the entire southern route passes through areas that are in nonattainment with both federal and state ozone standards, the northern routes pass through areas with much better air quality.²⁸ Thus, there is no support for the RDEIR’s statement that impacts of crude oil transport by rail from the south are substantially similar to the impacts from travel on the northern routes.²⁹

²² RDEIR, p. 1-5.

²³ Fox Comments, pp. 2-4.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ RDEIR, p. 1-5.

B. The RDEIR Underestimates Fugitive Volatile Organic Compound Emissions From Railcars

The original DEIR did not include any reactive organic gas (“ROG”) or toxic air contaminant (“TAC”) emissions from rail cars from their point of origin through unloading. In her comments on the original DEIR, Dr. Fox estimated that these emissions would be approximately 53 ton/day along the 1,500 mile route from the shipping point to the Terminal.³⁰ The RDEIR revised the emission inventory to include ROG emissions from rail cars in transit everywhere but in the Bay Area Air Quality Management District (“BAAQMD”).³¹ However, Dr. Fox determined that the RDEIR grossly underestimates the emissions.

First, the RDEIR relies on the Applicant’s unsupported emission calculation.³² The RDEIR provides no citations or supporting calculations for the emission calculation.

Second, the RDEIR’s emissions estimate is incorrectly based on emission factors for “average marketing terminals” in kilograms per hour per source (where a source is a valve or connector). Dr. Fox explains that rail car fittings are different from fittings on the loading rack of stationary marketing terminals.³³ This is because a unit train is not stationary; it travels at a speed of up to 50 miles per hour.³⁴ Also, a unit train passes through areas with high winds, such as the area between Roseville and Benicia.³⁵ Dr. Fox explains that “the winds coupled with the speed of the train create suction across the face of fugitive components, which sucks volatile organic compounds (“VOC”) emissions out of the tanks. Thus, the substitution of ‘average marketing terminal’ factors for actual measurements of transit losses grossly underestimates VOC emissions from in-transit rail cars.”³⁶

Dr. Fox calculated VOC emissions using the lower end of the range of actual measurements of product loss enroute. She found that this results in total VOC emissions of 53 ton/day of ROG (assuming a loss of 0.5 percent, 50 cars per train

³⁰ Fox DEIR Comments, Comment II.E.

³¹ RDEIR, Appx. A.

³² *Id.*, Appx. A, p. A-11.

³³ Fox Comments, p. 5.

³⁴ RDEIR, pp. 2-80, 81, 92, 98.

³⁵ Fox Comments, p. 5.

³⁶ *Id.*

and two unit trains per day).³⁷ Using the RDEIR's reported miles travelled for the longest route among the three options evaluated and ROG significance thresholds for each air district, Dr. Fox found that the increase in ROG emissions within all air districts except Sacramento Metropolitan Air Quality Management District are "highly significant, thousands of times higher than significance thresholds."³⁸ The results for each air district are as follows:

- BAAQMD: 336 lb/day (threshold = 54 lb/day)
- Siskiyou: 6,289 lb/day (threshold = 25 lb/day)
- Shasta: 5,512 lb/day (threshold = 25 lb/day)
- Tehama: 2,827 lb/day (threshold = 25 lb/day)
- Butte: 3,745 lb/day (threshold = 25 lb/day)
- Feather River: 1,837 lb/day (threshold = 25 lb/day)
- Placer: 6,572 lb/day (threshold = 24 lb/day)
- Sacramento: 21 lb/day (threshold = 65 lb/day).³⁹

These are significant impacts that the RDEIR fails to disclose or mitigate.

C. The RDEIR's Health Risk Assessments Are Substantially Flawed

The RDEIR includes revised health risk assessments for maximum cancer, acute and chronic non-cancer risks, and PM_{2.5} concentrations for Project impacts for the San Francisco Bay Area and Sacramento Valley air basins based on modeling of TAC emissions with AERMOD and OEHHA's 2015 Guidance Manual. The RDEIR finds that all results are below the applicable significance thresholds and, therefore, are less than significant. Air quality expert Dr. Petra Pless explains in her comments that the RDEIR's conclusions are unsupported for several reasons.

1. The RDEIR's Dispersion Modeling is Flawed

Pursuant to modeling guidance by the U.S. Environmental Protection Agency ("EPA"), if more than 50 percent of an area within a three-kilometer radius of the emission source is classified as rural, then rural dispersion coefficients should be

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, p. 6.

used in the dispersion modeling analysis. If more than 50 percent of the area is urban, urban dispersion coefficients should be used for modeling.⁴⁰ Here, Dr. Pless explains that urban dispersion coefficients should be used because more than 60 percent of the surfaces around the refinery are impervious.⁴¹ However, the RDEIR relies on two AERMOD files to determine revised health risks near the refinery, including one that incorrectly uses a rural dispersion coefficient. According to Dr. Pless, to achieve correct results, the model should be rerun using an urban dispersion coefficient.⁴²

2. *The RDEIR Fails to Provide Adequate Information for Health Risks*

The RDEIR's health risk assessments for impacts near the refinery and uprupal quantify chronic and acute health risks for the maximum exposed individual receptor ("MEIR"), the maximum exposed individual worker ("MEIW") and the maximum sensitive receptors ("MSR").⁴³ However, the RDEIR fails to provide isopleth maps which show the spatial extent of health risks and which support identification of the maximum exposed receptors by placing them within areas between isopleths (*i.e.*, lines drawn on a map through all points of equal value of some measurable quantity).⁴⁴

3. *The RDEIR Underestimates Health Risks Near the Refinery*

The RDEIR fails to accurately portray the Project's health risks near the refinery. The RDEIR's health risk assessment concludes that the Project poses cancer risks of 2.2 in one million at the MEIR, 7.4 in one million at the MEIW and 0.25 in one million at the MSR.⁴⁵ Dr. Pless reviewed the modeling files and spreadsheets used for the health risk assessments and found that the RDEIR's

⁴⁰ EPA, Permit Modeling Guidance, Appendix W, Section 7.2.3; http://www.epa.gov/ttn/scram/guidance/guide/appw_05.pdf.

⁴¹ Attachment B: Letter from Petra Pless to Rachael Koss re Review of Revised Draft Environmental Impact Report for Valero Benicia Crude by Rail Project, October 30, 2015, p. 32 ("Pless Comments").

⁴² *Id.*

⁴³ RDEIR, Appx. B, Table 4 and Figure 1.

⁴⁴ Pless Comments, p. 32.

⁴⁵ RDEIR, Appx. B, Tables 1 and 4.

analysis does not match the modeling files and spreadsheets and, as a result, the RDEIR underestimates health risks near the refinery from the Project.

For example, the RDEIR's health risk assessment for the MEIW identifies a dispersion factor for diesel particulate matter emissions from idling locomotives. However the dispersion factor does not match the AERMOD data.⁴⁶ Dr. Pless corrected this value in the RDEIR's health risk assessment and recalculated the health risks near the refinery. She found a total cancer risk of 11 in one million, which is greater than the 7.4 in one million identified in the RDEIR and exceeds the significance threshold of ten in a million.⁴⁷ Thus, the RDEIR fails to identify significant cancer risks.

The RDEIR also fails to identify residential receptors with the highest health risk. Dr. Pless identified several residential receptors with higher cancer risks closer to the refinery than identified in the RDEIR.⁴⁸ Dr. Pless corrected calculated chronic cancer risks for these receptors and found a risk of 2.8 in one million, which exceeds the significance threshold of one in a million.⁴⁹ Thus, the RDEIR fails to identify significant cancer risks.

4. *The RDEIR's Cumulative Health Risk Assessments Are Flawed*

The RDEIR contains new cumulative health risk assessments for uprail toxic air contaminant emissions.⁵⁰ In her comments, Dr. Pless provides substantial evidence that the cumulative health risk assessments are flawed. In short, the cumulative health risk assessments are flawed because they: (1) fail to adequately address cumulative health risks from construction DPM emissions; (2) fail to address chronic health hazards; (3) fail to include all cumulative projects; and (4) fails to follow the BAAQMD's guidance on how to conduct a cumulative health risk assessment.⁵¹

⁴⁶ Pless Comments, pp. 33-34

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ RDEIR, p. 2-40.

⁵¹ See Pless Comments, pp. 36-39 for an extensive discussion of these flaws.

D. The RDEIR Fails To Include All Feasible Mitigation Measures

CEQA requires agencies to impose all feasible mitigation measures to “substantially lessen or avoid” significant adverse environmental impacts.⁵² When an agency rejects mitigation measures as infeasible, the findings must reveal the agency’s reasons for reaching that conclusion. The agency’s findings must be supported by substantial evidence. Conclusory statements are inadequate.⁵³

The RDEIR concludes that the following impacts are significant and unavoidable:

- Impact 4.1-1: Conflict with implementation of applicable air quality plans;
- Impact 4.1-5: Contribute to an existing or project air quality violation uprail from the Roseville Yard;
- Impact 4.1-7: Result in cumulatively considerable net increases in ozone precursor emissions in uprail air districts; and
- Impact 4.7-2: Pose significant hazard to public or the environment via upset and accident conditions involving release of hazardous materials.

The RDEIR states that there are no feasible mitigation measures to reduce these impacts to a less than significant level. The RDEIR provides zero support for this conclusion. Substantial evidence shows that there are feasible measures to reduce these impacts to less than significant levels.

1. *The RDEIR Fails to Include Feasible Mitigation Measures for the Project’s Significant Air Quality Impacts 4.1-1, 4.1-5 and 4.1-7*

The RDEIR expands the air quality analysis in the original DEIR to include locomotive emissions in air districts outside of the BAAQMD through which the trains would travel, including:

- Yolo-Solano AQMD;

⁵² Pub. Resources Code § 21002.

⁵³ *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1034-1035.

- Sacramento Metropolitan AQMD;
- Placer County APCD;
- Tehama County APCD;
- Butte County APCD;
- Feather River AQMD;
- Siskiyou County APCD;
- Shasta County AQMD;
- Lassen County APCD; and
- Northern Sierra AQMD.

The RDEIR concludes that Project operation would result in a significant air quality impact because “[p]roject-related increases in locomotive exhaust emissions and fugitive emissions from tank cars would result in a net increase of air pollutant emissions within the air districts along the three [rail] routes.”⁵⁴ However, the RDEIR concludes that the significant impact is not mitigable because the City:

cannot regulate 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. Any such attempt would be preempted by federal law, which proscribes any mitigation measures that would have the effect of managing or governing rail operations.⁵⁵

Thus, according to the RDEIR, “mitigation measures requiring the use of ultra low-emitting switch locomotives, use of new Tier 4 interstate line haul locomotives, or compensation to reduce the significance of Project-related locomotive emissions in specific air districts are infeasible.”⁵⁶ The City’s argument is incorrect for two reasons.

First, once locomotives release emissions, the emissions are part of the ambient air and thus are part of the “commons” that are subject to regulation and control by local agencies.⁵⁷ Further, Project emissions are released as a result of Valero’s goal to change the source of its crude oil, which pollutes the commons.

⁵⁴ RDEIR, p. 2-30.

⁵⁵ *Id.*, p. 2-39.

⁵⁶ *Id.*

⁵⁷ Fox Comments, pp. 7-8.

October 30, 2015

Page 14

Thus, it is the City's obligation to require *Valero* – not UPRR – to mitigate the resulting impacts. Further, Dr. Fox explains that the majority of ROG emissions are released from the rail cars, which are either owned or leased by Valero. In other words, the rail cars and their emissions are under *Valero's* control.⁵⁸

Second, existing law does not preempt the City from requiring Valero to mitigate the impacts from its Project pursuant to CEQA. The RDEIR refers to the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) as the source of preemption. The ICCTA grants the Surface Transportation Board (“STB”) exclusive jurisdiction over interstate transportation by rail carrier and facilities that are an integral part of the railroad's interstate operations.⁵⁹ The STB lacks jurisdiction over activities proposed on non-railroad owned land and railroad activities that are not integral to a railroad's interstate operations, such as manufacturing facilities and truck transfer facilities.⁶⁰

Even where the STB has jurisdiction, state and local regulation is not preempted where the regulation carries the force of federal law, such as a state regulation promulgated pursuant to the Clean Air Act or the Clean Water Act and which was approved by the EPA.⁶¹ State and local regulations are also not preempted where the regulation is one of general application, having a remote or incidental effect on rail transportation, and does not unreasonably burden rail transportation.⁶² Whether a state or local regulation unreasonably burdens interstate commerce is a question of fact.⁶³ “The ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation. What matters is the degree to which the challenged regulation burdens rail transportation”⁶⁴

⁵⁸ *Id.*

⁵⁹ See 49 U.S.C. § 10501(b); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.* (2010) 561 U.S. 89; *Flynn v. Burlington Northern Santa Fe Corp.*, (2000) 98 F.Supp.2d 1186, 1189.

⁶⁰ See *Nicholson v. I.C.C.* 711 F.2d 364, 367-68 (D.C. Cir. 1983).

⁶¹ *Association of American Railroads v. South Coast Air Quality Management District* (9th Cir. 2010) 622 F.3d 1094, 1098; *Flynn*, *supra*, 98 F.Supp.2d at 1189.

⁶² *Association of American Railroads*, *supra*, 622 F.3d 1094 at 1097.

⁶³ See *id.*

⁶⁴ *Id.* at 1097 (internal quotations omitted).

ICCTA's preemption of CEQA was recently visited in the First Circuit appellate court in *Friends of the Eel River v. North Coast Railroad Authority*. In *Friends of the Eel River*, the court found a condition on a contract between the North Coast Railroad Authority ("NCRA"), a public agency, and Northwestern Pacific Railroad Company ("NWPRC"), requiring the agency's completion of CEQA before a rail project could be funded was preempted by ICCTA. The court found that requiring the NCRA to complete a CEQA review "may reasonably be said to have the effect of managing or governing rail transportation."⁶⁵ However, the project in that case involved the reopening of a new line, including upgrades and repairs, solely to benefit rail travel with NWPRC intended as the line operator.

Here, the Project is intended solely to benefit Valero's business and refinery operations. The Project entails the installation, operation and maintenance of new equipment, pipelines and associated infrastructure, and new and realigned segments of existing railroad track within the refinery boundary to allow the Applicant to receive crude oil by tank car.⁶⁶ These Project activities are neither undertaken by UPRR, nor are they integral to UPRR's interstate operations. In addition, these activities are not subject to STB jurisdiction because they are proposed on land not owned by UPRR.

The City's authority to implement certain mitigation measures intended to reduce emissions both inside and outside of the refinery is not federally preempted in this case. The STB does not have jurisdiction over the Project. Moreover, a permit condition requiring Valero to source feedstock via Tier 4 locomotives does not regulate UPRR's interstate operations. State regulation of in-state actors, which may impact contractual arrangements in interstate commerce, does not burden interstate commerce.⁶⁷ Likewise, a condition requiring *Valero* to contribute to off-site mitigation fee programs in uprail communities in no way regulates UPRR's operations. Indeed, there is no evidence that it does.

For argument sake, even if certain mitigation for impacts along the rail route are preempted (which they are not), CEQA requires the City to endeavor to find alternative mitigation that would not fall within the zone of preemption. CEQA undoubtedly requires the City to incorporate all feasible mitigation measures into

⁶⁵ *Friends of the Eel River v. North Coast Railroad Authority* (2014), 230 Cal.App.4th 85.

⁶⁶ RDEIR, p. 2-3.

⁶⁷ *Rocky Mountain Farmers Union v. Corey* (2013 9th Cir.)730 F.3d 1070,1103.

the Project.⁶⁸ In her comments, Dr. Fox describes in detail three categories (with examples of each) of feasible mitigation measures that could be used to reduce the Project's significant NOx and ROG emissions to a less than significant level: (1) banked emission reduction credits ("ERCs"); (2) actual contemporaneous reductions at facilities under Valero's control; and (3) emission reduction agreements. In Dr. Fox's opinion, these feasible measures would fully mitigate the Project's significant impacts from NOx and ROG emissions.⁶⁹

2. *The RDEIR Fails to Include Feasible Mitigation Measures for the Project's Significant Hazard Impact 4.7-2*

The RDEIR's Quantitative Risk Analysis compares the accident risks for various tank cars. The RDEIR concludes that the risk is significant for all of the tank car scenarios analyzed, but risks are highest for the non-jacketed CPC-1232s that Valero proposes to use, lower for DOT-117R (retrofitted CPC-1232s) and lower still for DOT-117 new builds. Despite this, according to the RDEIR, Valero will use non-jacketed CPC-1232s tank cars. Knowing that there are railcars that significantly reduce the risk of impacts from accidents, the City must require their use. The City does not. Instead, the RDEIR concludes that the Project's accident risks are significant and unavoidable because:

No reasonable, feasible mitigation measures have been identified that would, if implemented, reduce below established thresholds the potential significant hazard to the public or the environment that may result through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment. Further, as discussed in DEIR Section 3.7, DEIR Appendix L, and Revised DEIR Appendix G, the City cannot regulate UPRR's rail operations either directly or indirectly. Any such attempt would be preempted by federal law, which proscribes any mitigation measure that would have the effect of managing or governing rail operations. While the City can identify and disclose the risks posed by rail transport of crude oil, it must rely on the federal authorities to ensure that

⁶⁸ See Pub. Resources Code, § 21081(a)(1)-(3); CEQA Guidelines, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

⁶⁹ Fox Comments, pp. 8-14.

any such risks are mitigated as appropriate. Therefore, Impact 4.7-2 is considered significant and unavoidable.⁷⁰

The RDEIR is wrong for two reasons.

First, Valero has discretion to choose which tank cars it will own or lease to transport crude.⁷¹ Thus, the City would not be regulating UPRR's rail operations if it required Valero to choose the less dangerous tank cars.

Second, since the original DEIR was published, the United States Department of Transportation adopted its final rule on Enhanced Tank Car Standards. The rule requires legacy DOT-111 tank cars to be upgraded or phased out of unit train crude service. Non-jacketed CPC-1232 tank cars also must be upgraded or phased out of unit train crude service.⁷² Under the rule, new tank cars built after October 1, 2015 must meet the DOT-117 standard. Existing tank cars must be upgraded to meet the DOT-117R standard or phased out of unit train crude service. However, the date by which existing tank cars must be upgraded varies depending on the type of car and crude being transported. Unjacketed legacy DOT-111 tank cars transporting higher danger crudes must meet the DOT-117R standard by January 1, 2018. Non-Jacketed CPC-1232 tank cars transporting higher danger crudes (the tank cars proposed for use by Valero) are required to meet the DOT-117R standard by April 1, 2020.⁷³ To reduce accident risk, the City should require Valero to use DOT-117R tank cars now.

III. THE RDEIR FAILS TO ANALYZE ALL FEASIBLE ALTERNATIVES

A primary purpose of CEQA is to identify, through the evaluation of alternatives to the proposed project, ways in which the environmental effects of a project can be avoided or minimized. CEQA mandates that, "... it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would

⁷⁰ RDEIR, pp. 2-105-2-106.

⁷¹ Fox Comments, p. 15.

⁷² USDOT Final Rule: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, adopted May 1, 2015, see discussion in RDEIR, pp. 2-79-2-81.

⁷³ Fox Comments, pp. 15-16.

substantially lessen the significant environmental effects of such projects...”⁷⁴
Pursuant to CEQA’s implementing regulations,

[a]n EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible.⁷⁵

An EIR must evaluate the comparative merits of alternatives, including the “no project” alternative.⁷⁶ The reasoning behind the requirement to analyze the “no project” alternative is to allow the public and the decision-makers to assess the effects of approving the project versus the effects of not approving the project.⁷⁷ Alternatives that do not meet the project objectives and alternatives that are not reasonable or feasible may be eliminated from further consideration. Specifically, an alternative may be eliminated if: (1) the alternative fails to meet most of the basic project objectives; (2) the alternative is infeasible; (3) the alternative fails to avoid significant environmental impacts; or (4) an alternative for which the implementation is remote and speculative and for which the effects cannot be reasonably ascertained. With respect to feasibility, the CEQA Guidelines provide:

Among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the

⁷⁴ Pub. Resources Code § 21002.

⁷⁵ CEQA Guidelines, §15126.69(a)

⁷⁶ *Id.*, § 15126.6(d).

⁷⁷ *Id.* § 15126.6(e)(1).

alternative site (or the site is already owned by the proponent)...⁷⁸

Here, the RDEIR evaluated four alternatives to the Project:

- (1) Limiting Project to one 50-car train delivery per day;
- (2) Two 50-car trains delivered during nighttime;
- (3) Offsite unloading terminal; and
- (4) No project alternative.

The original DEIR considered (but dismissed from further consideration) four additional alternatives, including locating unloading racks at the Port of Benicia, at the AMPORTS property near the Benicia Marine Terminal, receiving crude from the proposed WesPac Energy Pittsburg Terminal, and an on-site Wye rail spur.⁷⁹ The City has not evaluated all feasible alternatives to the Project. In her comments, Dr. Fox describes two alternatives that were not identified in either the RDEIR or DEIR, but would reduce many of the Project's impacts to less than significant levels.

A. The RDEIR Fails To Consider The Bakersfield Crude Terminals As A Project Alternative

The RDEIR identifies two new crude terminals in the Bakersfield area: (1) the Alon Bakersfield Refinery Crude Flexibility Project ("Alon Terminal") that can accept up to two, 104-unit trains per day (168,000 bbl/day) and (2) the Plains All American Pipeline Bakersfield Crude Terminal ("Plains Terminal").⁸⁰ Plains Terminal is currently upgrading its pipeline system to deliver up to two unit trains per day of crude oil to the Los Angeles and San Francisco refining market.⁸¹

Both of these terminals underwent CEQA review. The Plains Terminal is operating and the Alon Terminal is under construction.⁸² While the RDEIR

⁷⁸ *Id.*, §15126.6(f)(1).

⁷⁹ DEIR, Section 6.3.

⁸⁰ RDEIR, p. 2-144.

⁸¹ Fox Comments, p. 19.

⁸² *Id.*, p. 20.

included these terminals in its cumulative impacts analysis, the RDEIR fails to evaluate these terminals as Project alternatives.

Dr. Fox explains that these terminals, individually or in combination, could supply Valero with 70,000 bbl/day of crude oil from the same sources that the Valero crude terminal would import.⁸³ According to Dr. Fox, the use of these terminals, rather than a new terminal at the Valero refinery, “would significantly reduce cumulative hazard, air quality, greenhouse gas, and all other cumulative impacts by reducing the number of trains using the same rail lines.”⁸⁴ Thus, CEQA requires the City to consider the Bakersfield crude terminals as Project alternatives.

B. The RDEIR Fails To Consider Increased Imports From The San Joaquin Valley As A Project Alternative

Historically, the Valero refinery has refined crudes imported by pipeline from the San Joaquin Valley and by marine vessel from the Alaska North Slope and various foreign sources.⁸⁵ The purpose of this Project is to replace declining Alaska North Slope crudes with crudes imported by rail from North American sources. The RDEIR completely overlooked the evidence showing that San Joaquin Valley oil production is projected to increase and is a viable alternative to the Project.

Dr. Fox explains in her comments that the United States Geological Survey recently estimated that 4 to 15.6 billion barrels of additional oil could be recovered from the San Joaquin and Los Angeles basins with current technology.⁸⁶ Indeed, the oil and gas industry intends to increase production from these reserves.⁸⁷ In 2012, representatives of the oil and gas industry (California Independent Petroleum Association, Independent Oil Producers Agency and Western States Petroleum Association) requested that Kern County modify its Zoning Ordinance to facilitate well permitting so that production could be increased.⁸⁸ In response, Kern County prepared a programmatic EIR to modify its Zoning Ordinance to allow up to 3,647 new wells to be permitted every year for the next 20 years, for a total of **84,503 new**

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*, p. 19.

⁸⁶ *Id.*, p. 20.

⁸⁷ *Id.*

⁸⁸ *Id.*

October 30, 2015

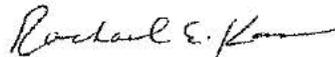
Page 21

wells.⁸⁹ This would allow oil and gas production in Kern County to double. In 2012, Kern County produced 141.690 million barrels of oil.⁹⁰ Moreover, the oil fields in Kern County are connected to refineries in the Bay Area, including Valero, by pipeline.⁹¹ Thus, it is feasible for Valero to import up to 70,000 bbl/yr (the Project's goal) from local sources, rather than importing it by rail from sites up to 1,500 miles away. Crude imports from Kern County by pipeline would eliminate all significant impacts associated with rail delivery. Thus, CEQA requires the City to consider imports from the San Joaquin Valley as a Project alternative.

IV. CONCLUSION

We thank the City for this opportunity to provide preliminary comments on the RDEIR. We continue to evaluate the data provided by the City and we look forward to receiving the outstanding information outlined in these comments. We reserve the right to file supplemental comments. We also urge the City to prepare and circulate a revised EIR which identifies the Project's potentially significant impacts, requires all feasible mitigation measures and analyzes all feasible alternatives to reduce impacts to a less than significant level.

Sincerely,



Rachael E. Koss

REK:ric
Attachments

⁸⁹ *Id.*, p. 21.

⁹⁰ *Id.*

⁹¹ *Id.*, p. 20.