

**Exhibit J – Correspondence from the Applicant and UPRR
Regarding Federal Preemption**

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November 24, 2014

Via E-mail

Mr. Murry Wilson
San Luis Obispo County
Department of Planning and Building
976 Osos Street, Room 200
San Luis Obispo, CA 93408-2040

Re: Phillips 66 Company Rail Spur Extension Project
SCH#2013071028

Dear Mr. Wilson:

On behalf of Phillips 66 Company, I am submitting these supplemental comments regarding federal preemption of the regulation of railroads and railroad operations.

The Revised DEIR for the Phillips 66 Company Rail Spur Extension Project explains that UPRR will operate the unit and manifest trains to and from the SMR on UPRR property and on trains operated by UPRR employees. Executive Summary, p. ES-6, ¶ 1. The Revised DEIR further states “[t]he movements of those trains to and from the Project Site may be preempted from local and state environmental regulations by federal law under the Interstate Commerce Commission Termination Act of 1995 and the Commerce Clause of the United States Constitution.” *Id.* Federal law indeed preempts state and local regulation of the railroads, and there is no doubt that the federal preemption extends to state and local environmental regulation such as the mitigation measures discussed in this comment. For a summary of federal preemption and how it affects this Project, see my letter commenting on the first DEIR for the Project dated January 17, 2014. A copy of that letter is attached hereto.

Subsequent to the January 17, 2014 letter, another California state appellate court answered any outstanding questions concerning the extent of federal preemption of California state and local environmental regulation of railroad activities. In *Friends of the Eel River v. North Coast Railroad Authority*, 230 Cal.App.4th 85 (Cal. Ct. App. 2014) (“*Friends of the Eel River*”) the Court held that the Interstate Commerce Commission Termination Act (“ICCTA”) “expressly preempts CEQA review of proposed railroad operations.” *Id.* at p. 108. In that case, the public agency North Coast

Mr. Murry Wilson
November 24, 2014
Page 2

Railroad Authority (“NCRA”) had received state funds to repair and upgrade railroad tracks that are located on California’s north coast and connected to the national railroad system. The NCRA entered a contract with a private railway company to operate on the rails and certified an EIR that analyzed the environmental impacts of resuming rail operations on part of the tracks. Two groups challenged the adequacy of the EIR, but the Court held federal law preempted the CEQA challenges.

Citing to *People v. Burlington Northern Santa Fe Railroad*, 209 Cal.App.4th 1513 (Cal. Ct. App. 2012), the *Friends of the Eel River* Court stressed, “the ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation.” *Id.* at p. 105. One category of state and local action that is categorically preempted is “any form of permitting or preclearance that, by its nature, could be used to deny a railroad the opportunity to conduct operations or proceed with other activities the [Surface Transportation Board] has authorized.” *Id.* The Court held CEQA review falls squarely within the category of required preclearance that could deny a railroad the opportunity to proceed with its operations or activities: An “EIR’s disclosure of such effects could significantly delay or even halt a project in some circumstances, and in the context of railroad operations, CEQA is not simply a health and safety regulation imposing an incidental burden on interstate commerce.” *Id.* at p. 107.

The *Friends of the Eel River* Court distinguished another recent California appellate case, *Town of Atherton v. California High-Speed Rail Authority*, 228 Cal.App.4th 314 (Cal. Ct. App. 2014) (“*Atherton*”). The *Friends of the Eel River* Court noted that the *Atherton* Court never actually decided whether the ICCTA preempted CEQA because the *Atherton* Court held the market participant doctrine served as an exception to preemption in that case. *Id.* at p. 108. The market participant doctrine concerns the special situation where the government is involved in business and commerce, and the doctrine is not relevant to a privately proposed project such as the Phillips 66 Rail Spur Project. Thus, on the issue of whether federal law preempts CEQA review of rail operations, *Friends of the Eel River* is the most recent and definitive word, and it unequivocally held that CEQA review of rail operations is preempted.

Subjecting the rail component of the Phillips 66 project to CEQA review and the related mitigation measures could deny UPRR the opportunity to conduct its operations or proceed with its rail activities that are already authorized by and subject to federal law. At worst, the mitigation measures discussed in this comment attempt to dictate the design, equipment and operations of a railroad company’s activities on the mainline. At the least, the mitigation measures described in this comment impose a high price on the use of rail to transport goods in interstate commerce. These costs or “equivalent” measures were not envisioned by the federal government and are directly counter to Congress’ objectives in adopting the ICCTA. The County has already analyzed the impacts from the mainline rail operations in the Revised Draft EIR. Without waiving any preemption arguments, Phillips 66 does not request that the County remove that

Mr. Murry Wilson
November 24, 2014
Page 3

information from the Final EIR. However, the County may not rely on the EIR and CEQA to impose mitigation measures aimed at reducing impacts of mainline rail activity.

Below is more detail regarding the specific mitigation measures that are improper and violate federal preemption. The Final EIR should state unequivocally that these mitigation measures are preempted and therefore legally infeasible. Imposing regulatory burdens or costs on the Project tied to its use of rail transportation is directly counter to the ICCTA's purpose of lifting regulatory burdens from such transportation. To avoid repetition, this list refers to the mitigation measures as summarized in the Impact Summary Tables, starting on page IST-1. However, appropriate revisions should be made to all references to these mitigation measures throughout the Revised Draft EIR and Final EIR.

AR-5 (Revised DEIR, p. IST-1.) – This mitigation measure is aimed exclusively at potential impacts to adjacent agricultural uses along the UPRR mainline. It would require implementation of measures PS-4a through PS-4e and BIO-11. This mitigation measure is preempted for the reasons summarized below under those respective mitigation measures.

AQ-2a (Revised DEIR, p. IST-1.) – This mitigation measure addresses both emissions onsite at the refinery, and off-site emissions from UPRR locomotives using the mainline rail route. With respect to the latter, the condition would require Phillips 66 to contract with UPRR for the use of specific locomotive classes in delivering crude to the refinery, or to secure other emissions reductions to offset the ROG+NO_x and DPM emissions from locomotives operating on the mainline within San Luis Obispo County. The County does not have the legal authority to impose either of these requirements.

The County cannot require the use of specific locomotives because locomotives are inherently part of an extensive interstate network, and dispatch of the equipment affects the wider rail system. Dedication of specific engines to the Phillips 66 project, or to the San Luis Obispo portion of the route, would impose serious burdens on interstate commerce. California has previously recognized the implications of restricting locomotive fleets in this manner. As far back as 1998, the California Air Resources Board acknowledged:

The interconnected nature of the rail network and the ability of locomotives to travel freely throughout the country allow for efficient deployment of locomotives to meet customer needs. Segmentation of the national locomotive fleets into multiple geographic areas would be very burdensome for the railroads because of the very high capital costs of the additional locomotives needed to establish area-specific locomotive fleets, creation of inefficient operations, and delay of time-sensitive customer

Mr. Murry Wilson
November 24, 2014
Page 4

shipments. A patchwork of different state and local programs would be an inefficient, costly and time consuming disruption of interstate commerce.

Memorandum of Mutual Understandings and Agreements, South Coast Locomotive Fleet Average Emissions Program, July 2, 1998, pp. 4-5.¹ The federal Environmental Protection Agency has reached similar conclusions:

Class I railroads operate regionally. This is why railroad companies and the Federal Railroad Administration (FRA) have stressed the importance of unhindered rail access across all state boundaries. If states regulated locomotives differently, a railroad could conceivably be forced to change locomotives at state boundaries, and/or have state-specified locomotive fleets. Currently, facilities for such changes do not exist, and even if switching areas were available at state boundaries, it would be a costly and time consuming disruption of interstate commerce. Any disruption in the efficient interstate movement of trains throughout the U.S. would have an impact on the health and well-being of not only the rail industry but the entire U.S. economy as well.

62 Fed.Reg. 6366, 6368 (Feb. 11, 1997).² The consequences of requiring a specific locomotive fleet within just San Luis Obispo County are even more extreme, and preempted for the same reasons.

The alternative requirement of securing equivalent emission reductions is also preempted. Air emissions offsets are a valuable asset, if already owned by a company, and can be costly to acquire if not. Here, the magnitude of that cost would be directly related to the number of additional train trips operated by UPRR on the mainline. Regardless whether

¹ The 1998 Railroad Memorandum of Mutual Understandings reveals a second basis of federal preemption that precludes County imposition of proposed Mitigation Measure AQ-2a. Specifically, the federal Clean Air Act gives the federal Environmental Protection Agency exclusive authority to adopt emissions standards applicable to new locomotives and locomotive engines; states and local governments are prohibited from adopting or enforcing "any standard or other requirement relating to the control of emissions from ... new locomotives or new engines used in locomotives." 42 U.S.C. §§ 209, 213. To implement the statutory preemption provision, EPA adopted a regulation specifically declaring a state or local requirement to reduce a local locomotive fleet emissions average to be preempted as an impermissible "other requirement relating to the control of emissions". See 40 C.F.R. § 85.1603(c) as promulgated in 63 Fed.Reg. 18978 (April 16, 1998), and currently embodied in 40 C.F.R. § 1074.12. In the same vein, a mitigation measure intended to require dedication of Tier 1 and above locomotives to San Luis Obispo County is preempted by Section 209.

² The federal Environmental Protection Agency also explained how fragmented regulation of locomotives can cause modal shift (i.e., a shift from one mode of transportation such as rail to another such as trucks) that results in greater emissions per ton of freight transported. *Id.* See, for example, the analysis of the air quality impacts associated with the No Project Alternative in Section 5 of the Revised Draft EIR.

Mr. Murry Wilson
November 24, 2014
Page 5

this cost is imposed on UPRR and passed through to Phillips 66 or imposed directly on Phillips 66, it is a burden on rail transportation that can influence decisions whether to transport by rail or the number of unit trains to receive at the refinery.

The two requirements in this mitigation measure would also interfere with interstate commerce by affecting the cost of rail transportation. As CARB also acknowledged in 1998: "Price is usually the significant determinant in a shipper's choice of modes or routes, with the result that railroad traffic levels and patterns are very sensitive to increases in costs. Overly stringent regulation can severely impact railroad traffic . . ." 1998 Railroad Memorandum of Mutual Understandings, *supra*, p. 5.

AQ-3 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential air quality impacts of operational activities of UPRR's locomotives traveling along the mainline rail route. It would require that Phillips 66 either contract with UPRR for the use of specific locomotive classes in delivering crude to the refinery, or secure equivalent emissions reductions to offset the emissions from locomotives operating on the mainline in every air district, presumably as far as the Canadian border. This mitigation measure is preempted for the same reasons summarized above under AQ-2a.

AQ-4 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential toxic air contaminants emitted both onsite at the refinery and off-site by UPRR's locomotives travelling along the mainline rail route. It would require implementation of measures AQ-2a and AQ-2b. To the extent this mitigation measure applies Mitigation Measure AQ-2a to the off-site locomotive emissions, this mitigation measure is preempted for the reasons summarized above under AQ-2a.

AQ-5 (Revised DEIR, p. IST-2.) – This mitigation measure is aimed at addressing potential toxic air contaminants emitted by UPRR's locomotives travelling along the mainline rail route by requiring implementation of Mitigation Measure AQ-3. This mitigation measure is preempted for the same reasons summarized above under AQ-3.

AQ-6 (Revised DEIR, pp. IST-2-3.) – This mitigation measure would require Phillips 66 to provide GHG emission reduction credits for GHG emissions from on-site operations as well as for GHG emissions from UPRR's locomotives travelling on the mainline routes, presumably to the Canadian border. This mitigation measure would impose substantial costs on Phillips 66 for UPRR's mainline rail activities. For the reasons summarized above regarding off-site emissions under AQ-2, this mitigation measure is preempted.

AQ-8 (Revised DEIR, p. IST-15.) – This mitigation measure is aimed at addressing cumulative emissions, and would require Phillips 66 to investigate methods to bring GHG emissions "at the refinery" to zero "for the entire project," including both onsite and off-site measures. The scope of this mitigation measure is not clear. To the extent it

Mr. Murry Wilson
November 24, 2014
Page 6

would require mitigation for off-site criteria pollutants or GHGs emitted by UPRR's mainline rail activities, this mitigation measure is preempted for the reasons summarized above under AQ-2 and AQ-6.

BIO-11 (Revised DEIR, p. IST-3.) – This mitigation measure is aimed at addressing potential impacts associated with transportation along the UPRR mainline by requiring Applicant to enter into a contract with UPRR that contains specified conditions. The County does not have legal authority to require Phillips 66 to enter into a contract with UPRR, or to specify the conditions of a contract to move goods via rail in interstate commerce. This is an indirect way of regulating UPRR, and neither Phillips 66 nor the County has the authority to control UPRR's conduct on the mainline. Under the preemption principles described above, UPRR cannot be subject to such conditions imposed by local agencies.

Moreover, the Revised Draft EIR fails to identify any benefits that would result from Mitigation Measure BIO-11. The Revised DEIR discusses recently adopted SB 861 at pages 4.4-17 to -18 and pages 4.4-47 to -48, as well as other regulatory programs that require preparation and implementation of oil spill prevention and response programs. The mitigation measure would require Phillips 66 to require UPRR to obtain a letter from the California Department of Fish and Game stating that UPRR is in compliance with all aspects of SB 861. The law does not require the Department to provide such a letter, and neither UPRR or Phillips 66 has a means to compel it to do so. The provisions of SB 861 are independently enforceable, backed up with substantial penalty provisions, and the Revised DEIR has not articulated any additional environmental benefit associated with the requirement to obtain a letter from the Department. Likewise, the Revised DEIR has not articulated any environmental benefit associated with the requirement that Phillips 66 require UPRR to provide copies of its spill contingency plan to first responders in the State. SB 861 independently requires the preparation of such plans, and requires that they be submitted to the State's oil spill response administrator for review. Thus the benefits of the plan will be obtained without the impermissible, preempted mitigation measure.³

In addition, UPRR is already subject to and complies with many federal statutes and regulations aimed at reducing the hazards and potential impacts of UPRR's mainline activities. See, e.g., Revised DEIR at pages 4.4-46, 4.7-18 to -31, and 4.7-45 to -46.

CR-6 (Revised DEIR, p. IST-3.) – This mitigation measure is focused exclusively at the potential impacts to cultural resources from train traffic along the mainline rail routes.

³ SB 861 itself acknowledges that some aspects of contingency planning may be preempted by federal law. See Gov't Code § 8670.29(e). If these provisions are preempted when adopted by the California Legislature, certainty they are preempted as well when required by a local jurisdiction.

Mr. Murry Wilson
November 24, 2014
Page 7

Again, it would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including requiring UPRR to prepare an “Emergency Contingency and Treatment Plan for Cultural and Historic Resources along the rail routes.” The County does not have legal authority to require a contract or specify the terms for movement of goods in interstate commerce along the mainline rail routes. This is an indirect way of regulating UPRR’s activities, and such regulation is federally preempted.

HM-2a (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR’s mainline. As a means of dictating which train cars can travel the mainline track, the mitigation measure would prohibit the unloading of any cars other than the so-called “Option 1” cars. For the reasons described above under AQ-2a, the County does not have the legal authority to require the use of specific rail cars. Therefore, this mitigation measure is preempted. As discussed in Phillips 66’s comments of today’s date, the mitigation measure also is infeasible, as the Option 1 cars are not currently available in quantities sufficient to supply the refinery.

HM-2b (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR’s mainline. It would require an annual route analysis for rail transportation to the SMR. While this measure references 49 CFR 172.820, it does not simply duplicate the federal code. As written, it could require Phillips 66 to perform the analysis, when Phillips 66 has no access to the information necessary to the analysis. In addition, it would require selection of the route with the lowest level of safety and security risk, without regard to the other selection criteria contained in the federal regulations. This mitigation measure attempts to regulate UPRR’s rail routes, which is expressly preempted by federal law as described above. UPRR’s rail routes are a part of an extensive interstate network, and use of specific rail routes affects the wider rail system. Local regulation of routing within California would impose serious burdens on interstate commerce, and the County does not have the legal authority to require this mitigation measure. In addition to being preempted, the measure is infeasible, as Phillips 66 has no ability to direct the route for trains operated by UPRR. Finally, the Revised DEIR does not describe any environmental benefit associated with this impermissible condition beyond the benefits achieved from the federal regulatory program already in place, and the routing technology described at page 4.7-22 of the Revised DEIR.

HM-2c (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR’s mainline tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including specification of track and equipment design. Specifically, the mitigation measure would require “Positive Train Control (PTC) be in place for all mainline rail routes in California that could be used for transporting crude oil to the

Mr. Murry Wilson
November 24, 2014
Page 8

SMR.” The County does not have legal authority to impose design and equipment specification on UPRR. Nor can the County regulate UPRR indirectly by imposing a contracting requirement on Phillips 66. This is an indirect way of regulating UPRR’s activities, and the measure is federally preempted. Under the preemption principles described above, UPRR cannot be subject to railroad design and equipment conditions imposed by local agencies.

In addition, the Revised DEIR does not describe any environmental benefits that would result from the impermissible condition. UPRR is already subject to and complies with many federal statutes and regulations aimed at reducing the hazards and potential impacts of UPRR’s activities. The Revised DEIR explains that Positive Train Control is already required by federal law, and that UPRR has already been installing it within California. See Revised DEIR at page 4.7-46. The Revised DEIR states that the mainline routes between Roseville and the refinery and Colton and the refinery have already been upgraded.

HM-2d (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts associated with train movements on UPRR’s mainline tracks. It would require implementation of measures PS-4a through PS4e. This mitigation measure is preempted for the reasons summarized below under measures PS-4a through PS4e.

PS-4a (Revised DEIR, p. IST-4.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including a requirement that quarterly hazardous community flow information documents be provided to all first response agencies along the mainline rail routes within California. The County does not have legal authority to require a contract or specify the terms for movement of goods in interstate commerce along the mainline rail routes. Federal law specifies certain information that the railroads must collect and provide to first responders. AB 861 imposes further requirements in this regard. UPRR’s rail routes are a part of an extensive interstate network. Local regulation would impose serious burdens on interstate commerce, and is preempted.

PS-4b (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at operations on the mainline UPRR tracks. As a means of dictating which rail cars can travel the mainline track, the mitigation measure would prohibit the unloading of any cars other than the so-called “Option 1” cars. For the reasons described above under AQ-2a, the County does not have the legal authority to require the use of specific rail cars. Therefore, this mitigation measure is preempted.

PS-4c (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract,

Mr. Murry Wilson
November 24, 2014
Page 9

including requiring “annual funding for first response agencies along the mainline rail routes within California that could be used by the trains carrying crude oil to the Santa Maria Refinery to attend certified offsite training for emergency responders to railcar emergencies” This mitigation measure is preempted for the reasons summarized above under PS-4a. Moreover, both federal law and SB 861 establish training requirements. Existing law imposes fees on the railroads and the owner of the oil to fund the training. The Revised DEIR does not describe these existing (and for SB 861, newly amended) training programs and fees as in any way inadequate, and does not describe any environmental benefits of the mitigation measure that will not already be accomplished by the existing (and newly amended) regulatory programs.

PS-4d (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including requiring “annual emergency responses scenario/field based training” This mitigation measure is preempted for the reasons summarized above under PS-4a.

PS-4e (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require Phillips 66 to enter into a contract with UPRR, and would specify the terms of that contract, including that “all first response agencies along the mainline rail routes within California that could be used by trains carrying crude oil traveling to the Santa Maria Refinery be provided with a contact number that can provide real-time information” This mitigation measure is preempted for the reasons summarized above in PS-4a.

WR-3 (Revised DEIR, p. IST-5.) – This mitigation measure is aimed exclusively at potential impacts of operations on the mainline UPRR tracks. It would require implementation of mitigation measures BIO-11 and PS-4a through PS-4e. This mitigation measure is preempted for the reasons summarized above under those respective mitigation measures.

TR-4 (Revised DEIR, p. IST-40.) – This mitigation measure is aimed exclusively at potential impacts of operations associated with train movements on the mainline UPRR tracks. The measure would require Phillips 66 to work with UPRR to schedule train deliveries so as not to interfere with passenger trains traveling on the Coast Rail Route. The County does not have the legal authority to regulate UPRR’s delivery schedules, as that condition may have a direct impact on UPRR’s mainline rail traffic far beyond the borders of the County. For the reasons described above, any indirect or direct regulation by the County of UPRR’s mainline rail traffic is expressly preempted by federal law. Impacts on UPRR’s mainline rail traffic will also impose serious burdens on interstate commerce. And CEQA does not justify the imposition of this impermissible condition: The Revised DEIR indicates that there is no significant impact even without mitigation.

Mr. Murry Wilson
November 24, 2014
Page 10

Reduced Rail Deliveries Alternative (Revised DEIR, p. ES-15, ¶ 2; p. 5-11, ¶ 4.) – In addition to the mitigation measures listed above, the Revised DEIR describes a project alternative to reduce rail deliveries that is also preempted. This alternative would limit train deliveries to the Santa Maria Refinery to a maximum of three unit trains per week (instead of the proposed deliveries five times per week) and an annual maximum of 150 trains. The Revised DEIR states, “if the County is preempted from applying mitigation to the UPRR mainline air emissions, then this alternative would serve to reduce the severity of the significant and unavoidable air quality impact.” Revised DEIR, p. 5-15. Elsewhere the Revised DEIR states the “primary source of emissions of ROG+NOx and diesel particulate is the diesel powered train locomotives while operating on the refinery site and along the mainline.” Revised Draft EIR, p. 4.3-46. Thus, this alternative is designed to restrict train traffic on the mainline in order to limit emissions from trains travelling on the mainline. This alternative cannot be advanced as a replacement for mitigation measures that are federally preempted because the alternative itself is preempted. Local governments do not have the authority to regulate or limit the volume of traffic on the mainline. Moreover, a local government cannot impose limitations on a local unloading facility in order to limit the mainline activity that is beyond its direct jurisdiction. *See Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150, 159 (4th Cir. 2010).

Please do not hesitate to contact me if you have questions or require any additional information related to preemption.

Very truly yours,



Jocelyn Thompson
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JT:amm
Attachment

cc: Whitney McDonald (w/attachment)

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January 17, 2014

Via E-mail and U.S. mail

Whitney McDonald
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Re: Phillips 66 Company Rail Spur Extension Project, SCH # 2013071028
Federal Preemption of State and Local Regulation of Railroads

Dear Whitney:

The objective of the Phillips 66 Rail Project is to facilitate delivery of crude oil to the Santa Maria Refinery via rail from various points of origin across North America. The Project includes extension of the existing rail spur in order to facilitate feedstock delivery by rail. The draft environmental impact report for the project quantifies the impacts of rail activity outside of the refinery site, but states that the train movements "may be preempted from local and state environmental regulations by federal law under the Interstate Commerce Commission Termination Act of 1995." In fact, there is no uncertainty regarding federal preemption of state and local regulation of the railroads, and there is no doubt that federal preemption extends to state and local environmental regulation. The Final EIR should be definitive on this point.

In light of federal preemption, CEQA and its significance thresholds should not be applied to impacts resulting from mainline rail activities, and those impacts may not be considered by state and local agencies in reaching their decisions to grant, deny or condition discretionary permits. As a corollary, the impacts from mainline rail operations may not be used in determining mitigation under CEQA, either for the mainline rail operations themselves, or for the remaining components of the project.

Whitney McDonald
January 17, 2014
Page 2

I. **The Interstate Commerce Commission Termination Act Preempts State Regulation of Operations of Railroads.**

The federal government has long exercised near-exclusive regulatory power over the railroads, beginning with the Interstate Commerce Act of 1887 (ch. 104, 24 Stat. 379). Nearly 100 years later, as that law continued to govern many railroad operations, the United States Supreme Court characterized it as “among the most pervasive and comprehensive of federal regulatory schemes.” *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Congress has a sustained history of regulating the railroads to the exclusion of the states, and courts have repeatedly upheld Congress’s power to do so.¹

Federal preemption of regulation of the railroads was strengthened in 1995 with passage of the Interstate Commerce Commission Termination Act (“ICCTA”). The Act was intended to reenergize a moribund railroad industry and promote competition. The Interstate Commerce Commission was eliminated. In its place, the Surface Transportation Board was given exclusive authority to regulate the construction, operation and abandonment of railroads, together with a mandate to reduce regulatory barriers (49 U.S.C. § 10101) and apply exemptions whenever regulation is not necessary to carrying out Congress’s stated policy objectives (49 U.S.C. § 10502(a)).

Section 15051(b) provides in relevant part:

The jurisdiction of the [Surface Transportation] Board over—

- (1) **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; **and**
- (2) the construction, acquisition, **operation**, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, **is exclusive**. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and **preempt the remedies provided under Federal or State law**.

¹ See, generally, more than 100 years of cases summarized in *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998).

Whitney McDonald
January 17, 2014
Page 3

(Emphasis added.)

Federal preemption of the regulation of railroads is exceedingly broad. Indeed, as noted by one court, "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Congress made a number of changes to federal law to eliminate a state regulatory role over railroad operations. The ICCTA removed prior statements of regulatory cooperation between federal and state governments, and removed sections providing for joint federal and state regulatory bodies. *Id.* at 1583-84. The ICCTA also removed state jurisdiction over wholly intrastate railroad tracks, because even intrastate operations ultimately affect the flow of interstate commerce. *Id.* and at 1585. Accordingly, courts have repeatedly found that there are no regulatory gaps for states to fill. In other words, states may not regulate railroad operations even in the absence of federal regulation:

By preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulation and reviving the railroad industry.

Id. at 1583.²

II. The ICCTA Preempts State and Local Environmental Pre-clearances such as Environmental Review Under the California Environmental Quality Act.

Federal preemption under the ICCTA is not limited to economic regulation. Preemption extends as well to state and local laws establishing pre-construction review or requiring environmental pre-clearances.

This question was considered by the Ninth Circuit Court of Appeals in *City of Auburn v. United States*, 154 F.3d 1025 (1998). The case involved a proposal from Burlington Northern and Santa Fe Railway (BNSF) to reacquire a segment of rail line, make repairs and improvements (including replacement of track sidings and snow sheds, tunnel improvements, and communication towers), and reinstitute service. BNSF initially submitted applications to the local authorities, but during the permit review process the

² In addition to the express statements of intent in ICCTA itself, the court found additional support in the legislative history, citing S. Rep. No. 176, 104th Cong., 1st Sess. 14 (1995), "explaining that ICC Termination Act 'should not be construed to authorize states to regulate railroads in areas where federal regulation has been repealed by the bill'." *Id.* at 1581.

Whitney McDonald
January 17, 2014
Page 4

railroad contended that local environmental review was precluded by federal regulation. The Surface Transportation Board and the Ninth Circuit agreed that the ICCTA preempted local environmental review of the reopening of the railroad.

The City of Auburn had argued that the ICCTA preempted only economic regulation by the states, and did not preempt application of state and local *environmental* laws. The Ninth Circuit rejected this argument:

In fact, there is nothing in the case law that supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads. All the cases cited by the parties find a broad reading of Congress preemption intent, not a narrow one.

Auburn attempts to distinguish its permitting requirements as environmental rather than economic regulation, claiming this is a 'traditional state police power' that Congress did not intend to preempt. It correctly points out that courts have declined to preempt state environmental regulation in some other contexts However, the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.

Id. at 1031, 1032. In addition to the broad language of express preemption, the Ninth Circuit noted the difficulty in distinguishing between economic and environmental regulation

[G]iven the broad language of § 10501(b)(2) . . . the distinction between 'economic' and 'environmental' regulation begins to blur. For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

Id.

CEQA in particular has been found to be preempted by the ICCTA. For example, in *DesertXpress Enterprises, LLC*, STB Finance Docket No. 34914, the Surface Transportation Board considered the company's request for a declaratory order that its proposed project to construct a 200-mile high speed passenger rail line between Southern California and Las Vegas was not subject to state and local permitting laws in Nevada or California, including CEQA. The Board confirmed that the project qualified for Board

Whitney McDonald
January 17, 2014
Page 5

jurisdiction in that it involved transportation by a rail carrier. As such, "State permitting and land use requirements that would apply to non-rail projects, such as the California Environmental Quality Action, will be preempted." Decision on Petition for Declaratory Order, June 25, 2007, at 5.

Even the information disclosure aspect of CEQA may be preempted by ICCTA. See, e.g., *Ass'n of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1096 (9th Cir. 2010) holding that a South Coast Air Quality Management District rule requiring railroads to report emissions from idling trains was preempted by the ICCTA.

Although Congress intended states to retain traditional "police power reserved by the Constitution",³ this has proven to be a very small exception to the ICCTA's preemptive effect. States and local governments may apply regulations designed to protect public health and safety where such regulations "are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." *Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 643 (2nd Cir. 2005). Environmental pre-clearances do not meet this test where "the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary ruling of a state or local agency." *Id.* By definition, CEQA does not meet this test because CEQA attaches only where an agency faces a discretionary decision to approve or disapprove a project. 14 C.C.R. §§ 15002(i)(2), 15357, 15378. Therefore, application of CEQA to railroads and rail operations is preempted by the ICCTA, and cannot be saved by the retention of traditional police power.

III. ICCTA Preemption Applies to Continued and Expanded Use of Existing Rail Lines.

ICCTA preempted more than the regulation of new lines and abandonment of existing lines. Section 10501 gives the Surface Transportation Board exclusive authority over "transportation by rail carriers" as well as the "operation" of tracks and facilities. Accordingly, state and local laws that would burden the use of existing rail lines also are preempted.

³ H.R. Rep. No. 104-311, 104th Cong., 1st Sess., at 95-96 (1995) reprinted in 1995 U.S.C.C.A.N. 793, 807-08.

Whitney McDonald
January 17, 2014
Page 6

Preemption applies even where a state or local government regulation is not directed expressly at the mainline rail transportation of cargo, but at local facilities used to move the cargo from the railroad to the next step in the chain of commerce. For example, in *Norfolk Southern Railway Company v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010), the railroad began operating an ethanol transloading facility to transfer bulk shipments of ethanol from railcars onto surface tanker trucks for local distribution and delivery. No new rail lines were required as part of the project. The city objected to the increase in ethanol movement, and adopted a new ordinance regulating transportation of bulk materials, including ethanol, within the city. The city also unilaterally issued a permit to Norfolk that purported to limit the materials that could be hauled, the routes, times of day, etc. The city attempted to avoid preemption by focusing the ordinance and permit on the trucks that would distribute the cargo, rather than on the trains or the transloading operation.

Even so, the ordinance and permit were preempted because they “directly impact Norfolk Southern’s ability to move goods shipped by rail.” As explained by Norfolk’s trainmaster, a limit on the number of trucks leaving the facility directly affects the number of railcars that can be unloaded, which in turn could affect the movement of trains in Norfolk’s yard and throughout its rail system. Thus, the court concluded that the conditions restricting ethanol distribution by truck “necessarily regulate the transloading operations”. 608 F.3d. 150, 159. In addition, the court found the ordinance and permit imposed an unreasonable burden on rail transportation because “the City has the power to halt or significantly diminish the transloading operations by declining to issue haul permits or by increasing the restrictions specified therein.”

Clearly, restrictions on unloading operations are preempted where they have the effect of imposing burdens on interstate rail transportation.

IV. California Recognizes That Federal Law Preempts Its Regulation of Railroad Operation.

The State of California has long accepted that federal law preempts its authority to apply its environmental regulations to rail carriers and rail operations.

For example, in 1998, when the California Air Resources Board sought to reduce emissions from locomotive engines, it negotiated with the railroads for voluntary reductions rather than applying California law. *See*, Memorandum of Mutual Understandings and Agreements, South Coast Locomotive Fleet Average Emissions Program, July 2, 1998. In 2005, the Air Resources Board again negotiated for voluntary actions to reduce emissions from activities at rail yards within the state. *See*, ARB/Railroad Statewide Agreement, Particulate Emissions Reduction Program at

Whitney McDonald
January 17, 2014
Page 7

California Rail Yards, June 2005. The 2005 agreement summarizes federal preemption as follows:

It has been widely recognized that railroads need consistent and uniform regulation and treatment to operate effectively. A typical line-haul locomotive is not confined to a single air basin and travels throughout California and into different states. The U.S. Congress has recognized the importance of interstate rail transportation for many years. The Federal Clean Air Act, the Federal Railroad Safety Act, the Federal Interstate Commerce Commission Termination Act and many other laws establish a uniform federal system of equipment and operational requirements. The parties recognize that the courts have determined that a relatively broad federal preemption exists to ensure consistent and uniform regulation. Federal agencies have adopted major, broad railroad and locomotive regulatory programs under controlling federal legislation.

2005 ARB/Railroad Statewide Agreement, p. 25, Attachment C, ¶ 8.

Recently, the California Attorney General has asserted that the Interstate Commerce Commission Termination Act preempts application of the California Environmental Quality Act to the California High Speed Rail train system. As the Attorney General explained:

Courts and the STB [Surface Transportation Board] uniformly hold that the ICCTA preempts state environmental pre-clearance requirements, such as those in the California Environmental Quality Act (CEQA). The ICCTA preempts these requirements because they can be used to prevent or delay construction of new portions of the interstate rail network, which is exactly the sort of piecemeal regulation Congress intended to eliminate.

Supplemental Letter Brief filed August 9, 2013, in the matter of *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, No. C070877, at p. 3. After an extensive review of statutory and case authority, the Attorney General concluded:

Railroads under the jurisdiction of the STB are therefore not subject to remedies imposing state or local environmental pre-clearance requirements because such regulation represents, “per se unreasonable interference with interstate commerce”.

Id. at 12. Although the High Speed Rail Authority case concerns the proposed construction of a new rail line, ICCTA preemption is not limited to that context. As the

Whitney McDonald
January 17, 2014
Page 8

Attorney General noted, ICCTA preemption applies to railroad operations as well as to new construction:

There are two types of facially preempted state regulation:

- (1) any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to **conduct some part of its operations** or to proceed with activities that the Board has authorized, and
- (2) state or local regulation of matters directly regulated by the Board such as construction, **operation**, and abandonment **of rail lines**; railroad mergers, line acquisitions, and other forms of consolidation; and railroad rates and service.

Id. at pp. 9-10 (emphasis added; citations omitted). Accordingly, CEQA is preempted regardless whether the project is construction of a new rail line or increased traffic on a line already in operation.⁴

V. ICCTA Implications for the Phillips 66 Rail Project.

Unlike the situations in *DesertXpress* and *Norfolk Southern Railway v. City of Alexandria*, Phillips 66 accepts state and local regulation of construction and operation within the refinery site based on the specific facts of this project. Even so, the environmental review and permitting of the project must be conducted in a manner that does not infringe on federal preemption of the regulation of railroad operations. Federal preemption affects the review and permitting in three important ways. First, the impacts from mainline rail operations should not be subject to CEQA conclusions regarding significant impacts. Likewise, the impacts of operations on the mainline may not be considered in deciding whether to approve or disapprove the proposed project. Finally, project approval may not be conditioned on implementation of mitigation measures or alternatives aimed at reducing impacts of mainline operations, or that would otherwise burden such transportation.

The first point is moot. The Draft EIR has already quantified impacts from additional trains on the mainline track based on operation of the locomotives over a several thousand mile journey from one possible point of origin to the refinery. Further, the Draft EIR concludes that the project will have significant adverse environmental

⁴ Even where not facially preempted, state and local regulation is preempted where the facts demonstrate that the particular action would have the effect of preventing or unreasonably interfering with railroad transportation. See *DesertXpress, supra*, STB Decision at p. 3, n.4.

Whitney McDonald
January 17, 2014
Page 9

consequences if these impacts are not mitigated. It is impossible to un-ring the bell; therefore—without waiving any preemption arguments—Phillips 66 does not request that the information be removed from the Final EIR. However, the County must carefully avoid impermissible uses of this information.

Mitigation measures aimed at reducing impacts of mainline rail activity are impermissible burdens on transportation by rail carriers engaged in interstate commerce. It would not be appropriate for the County to define the mitigation obligation of the project based on the impacts from operation of the railroad on the mainline tracks. In particular, proposed mitigation measures AQ-2a and AQ-3 would violate ICCTA preemption. These measures would require Phillips 66 to either contract with Union Pacific for the use of specific locomotive classes in delivering crude to the refinery, or provide off-site emissions reductions to offset the emissions from locomotives operating on the mainline within San Luis Obispo County. The County does not have the legal authority to impose either of these alternative requirements.

The first alternative seeks to influence which railroad equipment operates within San Luis Obispo County. Locomotives are inherently part of an extensive interstate network, and dispatch of the equipment affects the wider rail system. Dedication of specific engines to the Phillips 66 project, or to the San Luis Obispo portion of the route, would impose serious burdens on interstate commerce. California has previously recognized the implications of restricting locomotive fleets in this manner. As far back as 1998, the California Air Resources Board acknowledged:

The interconnected nature of the rail network and the ability of locomotives to travel freely throughout the country allow for efficient deployment of locomotives to meet customer needs. Segmentation of the national locomotive fleets into multiple geographic areas would be very burdensome for the railroads because of the very high capital costs of the additional locomotives needed to establish area-specific locomotive fleets, creation of inefficient operations, and delay of time-sensitive customer shipments. A patchwork of different state and local programs would be an inefficient, costly and time consuming disruption of interstate commerce.

1998 Railroad Memorandum of Mutual Understandings, *supra*, pp. 4-5.⁵ The federal Environmental Protection Agency has reached similar conclusions:

⁵ The 1998 Railroad Memorandum of Mutual Understandings reveals a second basis of federal preemption that precludes County imposition of proposed Mitigation Measure AQ-2a. Specifically, the federal Clean Air Act gives the federal Environmental Protection Agency exclusive authority to adopt emissions standards applicable to new locomotives and locomotive engines; states and local governments are prohibited from adopting or enforcing “any standard or other requirement relating to the control of

Whitney McDonald
January 17, 2014
Page 10

Class I railroads operate regionally. This is why railroad companies and the Federal Railroad Administration (FRA) have stressed the importance of unhindered rail access across all state boundaries. If states regulated locomotives differently, a railroad could conceivably be forced to change locomotives at state boundaries, and/or have state-specified locomotive fleets. Currently, facilities for such changes do not exist, and even if switching areas were available at state boundaries, it would be a costly and time consuming disruption of interstate commerce. Any disruption in the efficient interstate movement of trains throughout the U.S. would have an impact on the health and well-being of not only the rail industry but the entire U.S. economy as well.

62 Fed.Reg. 6366, 6368 (Feb. 11, 1997).⁶

The second alternative of off-site emission reductions also is preempted. Air emissions offsets are a valuable asset, if already owned by a company, and can be costly to acquire if not. Here, the magnitude of that cost would be directly related to the number of additional train trips operated by Union Pacific on the mainline. Regardless whether this cost is imposed on Union Pacific and passed through to Phillips 66 or imposed directly on Phillips 66, it is a burden on rail transportation that can influence decisions whether to transport by rail or the number of unit trains to receive at the refinery. The County is preempted from imposing this burden, directly or indirectly, just as the City of Alexandria was preempted from regulating local truck distribution of ethanol as a means of addressing concerns relating to rail transport and transloading.

Both options in AQ-2a and AQ-3 also would likely interfere with interstate commerce by affecting the cost of rail transportation. As CARB also acknowledged in 1998: "Price is usually the significant determinant in a shipper's choice of modes or routes, with the result that railroad traffic levels and patterns are very sensitive to increases in costs.

emissions from ... new locomotives or new engines used in locomotives." 42 U.S.C. §§ 209, 213. To implement the statutory preemption provision, EPA adopted a regulation specifically declaring a state or local requirement to reduce a local locomotive fleet emissions average to be preempted as an impermissible "other requirement relating to the control of emissions". See 40 C.F.R. § 85.1603(c) as promulgated in 63 Fed.Reg. 18978 (April 16, 1998), and currently embodied in 40 C.F.R. § 1074.12. In the same vein, a mitigation measure intended to require dedication of Tier 1 and above locomotives to San Luis Obispo County is preempted by Section 209.

⁶ The federal EPA also explained how fragmented regulation of locomotives can cause modal shift (i.e., a shift from one mode of transportation such as rail to another such as trucks) that results in greater emissions per ton of freight transported. *Id.*

Whitney McDonald

January 17, 2014

Page 11

Overly stringent regulation can severely impact railroad traffic . . ." 1998 Railroad Memorandum of Mutual Understandings, p. 5.

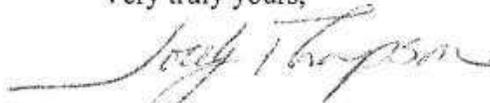
The Reduced Rail Deliveries alternative also is preempted. This alternative would limit train deliveries to the Santa Maria Refinery to a maximum of three per week (as opposed to five per week for the proposed project) and an annual maximum of 150. The Draft EIR states, "If the County is preempted from applying mitigation to the UPRR mainline air emissions, then this alternative would serve to reduce the severity of the significant and unavoidable air quality impacts." Draft EIR, page 5-14. As noted elsewhere in the Draft EIR, more than 99% of the ROG and NOx emissions attributed to the project come from operation of the locomotives on the mainline. Draft EIR, page 4.3-4.3. Thus, this alternative is designed to restrict train traffic on the mainline in order to limit emissions from trains travelling on the mainline. This alternative cannot be advanced as a replacement for mitigation measures that are federally preempted because the alternative itself is preempted. Local governments do not have the authority to regulate or limit the volume of traffic on the mainline. Moreover, as shown in the *City of Alexandria* case, it may not impose limitations on a local unloading facility in order to limit the mainline activity that is beyond its direct jurisdiction.

Finally, the County should not consider the impacts of operation of the mainline railroad in reaching a decision on the proposed project. The significant impacts attributed to the proposed project are in fact consequences of rail operations in interstate commerce. It would be improper for the County to deny permits for extension of the existing rail spur and associated equipment as a means of preventing an increase in traffic on the mainline.

As noted, the Draft EIR already has analyzed the impacts of mainline rail operations. Therefore, at this juncture, we suggest that the Final EIR must unequivocally state that these impacts are beyond the reach of CEQA, and that any mitigation measures or alternatives aimed at these impacts are preempted and therefore legally infeasible. Imposing regulatory burdens or costs on the project tied to its use of rail transportation is directly counter to the ICCTA's purpose of lifting regulatory burdens from such transportation.

Please do not hesitate to contact me if you have questions, or require any additional information related to preemption.

Very truly yours,



Jocelyn Thompson

JT:amm

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November 24, 2014

By Email:

Docket for Comments (by email to p66-railspur-comments@co.slo.ca.us)

By Certified Mail Return Receipt Requested (7013 3020 0001 1992 5049) and Email:

Mr. Murry Wilson
San Luis Obispo County Department of Planning and Building
976 Osos Street, Room 200
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Re: Union Pacific Comments regarding the Draft Environment Impact Report for the Phillips 66 Crude by Rail Project—Santa Maria.

Dear Mr. Wilson:

Union Pacific Railroad Company (“UP”) appreciates this opportunity to comment regarding the Draft Environmental Impact Report (“DEIR”) for the Phillips 66 Crude by Rail Project. This letter is intended to respond in particular to issues raised by Mr. Steven Cohn of the Sacramento Area Council of Governments. We ask that this letter be included in the public comments on the DEIR.

UP understands the concern about the risks associated with crude-by-rail and we take our responsibility to ship crude oil, as mandated by federal law, very seriously. UP follows the strictest safety practices and in many cases, exceeds federal safety regulations. UP’s goal is to have zero derailments and we work closely with the federal Department of Transportation (“DOT”), the Federal Railroad Administration (“FRA”), the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), the Association of American Railroads (“AAR”) and our customers to ensure that UP operates the safest railroad possible.

Safety is UP’s top priority. The only effective way to ensure safety is through comprehensive federal regulation. A state-by-state, or town-by-town approach in which different rules apply to the beginning, middle, and end of a single rail journey would not be effective. Congress agrees. Federal regulations completely preempt the application of the California Environmental Quality Act (“CEQA”), and we encourage the Sacramento Area Council of Governments (“SACOG”) to participate in the multiple ongoing federal rulemaking processes concerning various aspects of DOT’s comprehensive regulatory regime governing safety procedures, equipment, and planning concerning crude-by-rail safety and related matters.

www.up.com



Mr. Murry Wilson
November 24, 2014
Page 2 of 11

I. UNION PACIFIC IS WORKING CLOSELY WITH OTHER STAKEHOLDERS TO ENSURE THE SAFETY OF CRUDE TRANSPORTATION.

UP is working diligently with federal, state and local authorities to prevent derailments or other accidents. UP spent more than \$21.6 billion in capital investments from 2007-2013 continuing to strengthen our infrastructure. By doing so, UP is continuously improving safety for our employees, our communities and our customers.

UP has decreased derailments 23% over the last 10 years, due in large part to our robust derailment prevention and risk reduction process. This process includes, among others, the following measures:

- UP uses lasers and ultrasound to identify rail imperfections.
- UP forecasts potential failures before they happen by tracking the acoustic vibration on wheels.
- UP performs a real-time analysis of every rail car moving on our system each time it passes a trackside sensor, equaling 20 million car evaluations per day.
- UP employees participate in rigorous safety training programs on a regular basis and are trained to identify and prevent potential derailments.

UP also reaches out to fire departments as well as other emergency responders along our lines to offer comprehensive training to hazmat first-responders in communities where we operate. UP annually trains approximately 2,500 local, state and federal first-responders on ways to minimize the impact of a derailment in their communities. UP has trained nearly 38,000 public responders and almost 7,500 private responders (shippers & contractors) since 2003. This includes classroom and hands-on training.

These efforts have paid off. The overall safety record of rail transportation, as measured by the FRA, has been trending in the right direction for decades. In fact, based on the three most common rail safety measures, recent years have been the safest in rail history: the train accident rate in 2013 was down seventy-nine percent from 1980 and down forty-two percent from 2000; the employee injury rate was down eighty-four percent from 1980 and down forty-seven percent from 2000; and the grade crossing collision rate was down eighty-one percent from 1980 and down forty-two percent from 2000.

II. THE FEDERAL GOVERNMENT IS IMPOSING MORE STRINGENT REQUIREMENTS FOR SAFE TRANSPORTATION OF CRUDE OIL.

As federal rail authorities recently explained, DOT, through the FRA and PHMSA, “continue[s] to pursue a *comprehensive, all-of-the-above approach* in minimizing risk and ensuring the safe transport of crude oil by rail.” Department of Transportation, *Federal Railroad Administration’s Action Plan for Hazardous Materials Safety* at 1 (May 20, 2014), available at <http://www.fra.dot.gov/eLib/details/L04721>. These efforts include not only scores of regulations

Mr. Murry Wilson
November 24, 2014
Page 3 of 11

governing the safe transportation of hazardous materials, including oil products, found in 49 C.F.R. Parts 171 to 180, but also a host of equipment and operating rules promulgated by FRA, as well as voluntary agreements and Emergency Orders issued over the past year in response to oil spills.

A. Voluntary Agreement.

On February 21, 2014, the nation's major freight railroads and the DOT agreed to a rail operations safety initiative that established new operating practices for moving crude oil by rail. Under the industry's voluntary efforts, railroads are:

- Increasing the frequency of track inspections using high-tech track geometry readers.
- Equipping crude trains 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.
- Using new rail traffic routing technology (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.
- Lowering speeds to no more than 40 miles per hour in the 46 federally-designated high-threat-urban areas and no more than 50 miles per hour in other areas.
- Working with communities to address location-specific concerns that communities may have.
- Increasing trackside safety technology by 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.
- Increasing emergency response training and tuition assistance.
- Enhancing emergency response capability planning.

These voluntary actions are already being implemented.

B. Emergency Orders.

In a February 25, 2014 Emergency Order, the DOT ordered certain changes in the way petroleum crude oil is classified and labeled during shipment, emphasizing that "with regard to emergency responders, sufficient knowledge about the hazards of the materials being transported [is needed] so that if an accident occurs, they can respond appropriately." February 25, 2014 Emergency Order at 13. And in its May 7, 2014 Emergency Order, the DOT ordered railroads transporting large quantities of crude oil to notify state authorities of the estimated number of trains traveling through each county of the State, provide certain emergency response information required by federal regulations (49 C.F.R. Part 172, subpart G) and identify the route over which the oil will be transported.

Mr. Murry Wilson
November 24, 2014
Page 4 of 11

C. Proposed Regulations.

On July 23, 2014, the PHMSA proposed enhanced tank car standards, a classification and testing program for crude oil and new operational requirements for trains transporting such crude that include braking controls and speed restrictions. PHMSA proposes the phase out of older DOT 111 tank cars for the shipment of flammable liquids, including most Bakken crude oil, unless the tank cars are retrofitted to comply with new tank car design standards. We encourage SACOG to participate in this rulemaking process.

The federal proposal includes:

- Better classification and characterization of mined gases and liquids
- Rail routing risk assessment
- Notification to State Emergency Response Commissions
- Reduced operating speeds
- Enhanced braking
- Enhanced standards for both new and existing tank cars

As the federal government's existing regulations, recent emergency orders, the voluntary agreements and the new regulatory proposals make abundantly clear, regulation of crude transportation is extremely detailed and complex. UP is actively participating in the efforts to finalize the new regulations and encourages SACOG to do the same, particularly with respect to its request that UP phase in new tank cars as early as possible. By jointly working to enhance safety we can ensure that the most effective regulations are adopted.

III. A UNIFORM FEDERAL REGULATORY PROGRAM IS ESSENTIAL TO ENSURE THE SAFE TRANSPORTATION OF CRUDE OIL.

As the complex regulatory program described above illustrates, clear and uniform federal regulation is needed to ensure that crude oil continues to be transported safely. With respect to rail transportation, federal law preempts most state and local regulation of rail activities. Uniform standards and rules for railroad operations allow the efficient movement of goods among the states. If each state or local community were allowed to impose its own regulations on railroad operations, rail transportation could grind to a halt, because train crews would need to apply different rules or perhaps use different equipment as they move from place to place.

As stated by the U.S. Senate:

Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the "seamless" service that is essential to its shippers and would weaken the industry's efficiency and competitive viability.

Mr. Murry Wilson
November 24, 2014
Page 5 of 11

S. Rep. No. 104-176 at 6 (1995). As the House of Representatives further explained, federal regulation of railroads

is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R. Rep. No. 104-311 at 96 (1995). *See also* H.R. Rep. No. 104-422 at 167 (1995) (U.S. Congress describing preemption in order to ensure “uniform administration of the regulatory standards” that apply to railroads). *See also*, H.R. Rep. No. 1194, 91st Cong., 2d Sess. 19 (1970) (“[S]uch a vital part of our interstate commerce as railroads should not be subject to [a] multiplicity of enforcement by various certifying States as well as the Federal Government.”) Congress has therefore established federal preemption under several statutes governing rail transportation.

A. Preemption under ICCTA.

1. Statutory background.

In 1995, Congress passed the Interstate Commerce Commission Termination Act (“ICCTA”), which broadened the preemptive effect of federal law and created the federal Surface Transportation Board (“STB”). The driving purpose behind ICCTA was to keep “bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate.” H.R. Rep. No. 104-331, at 93, reprinted in 1995 U.S.C.C.A.N. 793, 805.

Congress vested the STB with broad authority over railroad operations. Indeed, the STB has “exclusive” jurisdiction over “(1) transportation by rail carriers . . . and (2) the construction, acquisition, operation, abandonment, or discontinuance of . . . tracks, or facilities.” 49 U.S.C. § 10501(b).

“Transportation” by rail carriers broadly includes:

(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) (emphasis added).

Mr. Murry Wilson
November 24, 2014
Page 6 of 11

Further, ICCTA contains an express preemption clause: “the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law.” 49 U.S.C. § 10501(b). “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (CSX). This provision continues the historic extensive federal regulation of railroads. See, e.g., *Fayard v. Northeast Vehicle Services, LLC*, 533 F.3d 42, 46 (1st Cir. 2008); *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile* 450 U.S. 311, 318 (1981) (“The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes.”); *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (Courts have repeatedly recognized the propriety of “a broad reading of Congress’ preemption intent, not a narrow one.”).

2. *The cases uniformly support a broad application of federal preemption of railroad regulation.*

Over the years, many courts have addressed challenges by state and local authorities seeking to regulate some aspect of rail operations. The courts have consistently upheld Congress’s intention that no such regulation can be allowed. As one court stated, “freeing the railroads from state and federal regulatory authority was the principal purpose of Congress” in adopting ICCTA. *Wisconsin Central Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1015 (W.D.Wis. 2000).

The prohibition against state and local regulation of railroad operations extends beyond purely economic issues; it embraces regulations adopted under the auspices of environmental laws. In *City of Auburn*, the Ninth Circuit affirmed the STB’s ruling that local environmental review regulations could not be required for BNSF’s proposal to reacquire and reactivate a rail line. *Id.* The court found that the State of Washington’s environmental review statute—a statute that is similar to CEQA—could not be applied to a rail project. Similarly, the Second Circuit found that ICCTA preempted a state requirement for a railroad to obtain a pre-construction environmental permit for a transloading facility because it would give the local governmental body the ability to deny or delay the right to build the facility. See *Green Mountain Railroad Corporation v. State of Vermont*, 404 F.3d 638, 641-45 (2d Cir. 2005). In effect, the court found that if a permit allowed the state or local agency to exercise discretion over rail transportation, that permit requirement would be preempted.

Additional cases and STB decisions that have struck down state and local environmental and land use regulations include: *Grafton & Upton Railroad Company* 2014 WL 4658736, *3-5 (STB concluded that ICCTA preempts local regulation of liquefied petroleum gas transloading facility); *Boston and Maine Corp and Town of Ayer*, 2001 WL 458685, *5-7 (STB found that state and local permitting, environmental review, and a noisome trade ordinance were preempted when applied to an automobile unloading facility); *Borough of Riverdale*, 1999 WL 715272 (STB found that local zoning concerning a railroad’s construction and operation of a transloading facility was preempted); *Norfolk Southern Railway Company v. City of Austell*,

Mr. Murry Wilson
November 24, 2014
Page 7 of 11

1997 WL 1113647, *6 (N.D.Ga. 1997) (“ICCTA expresses Congress’s unambiguous and clear intent to preempt [city’s] authority to regulate and govern the construction, development, and operation of the plaintiff’s intermodal facility”); *Soo Line R.R. v. City of Minneapolis*, 38 F.Supp.2d 1096, 1101 (D. Minn. 1998) (“The Court concludes that the City’s demolition permitting process upon which Defendants have relied to prevent [the railroad] from demolishing five buildings . . . that are related to the movement of property by rail is expressly preempted by [ICCTA].”); *Association of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (local regulations limiting permissible amount of emissions from idling trains and imposing reporting requirements on rail yards were preempted by ICCTA because they “may reasonably be said to have the effect of managing or governing rail transportation”); *Village of Ridgefield Park v. New York, Susquehanna & W. Ry.*, 750 A.2d 57 (N.J. 2000) (complaints about rail operations under local nuisance law preempted); *Burlington Northern and Santa Fe Ry. v. City of Houston*, 171 S.W.3d 240, 248-49 (Tex. App. 2005) (interpretations of state condemnation law that would prevent condemnation of city land required for construction of rail line preempted); *Flynn v. Burlington Northern and Santa Fe Ry.*, 98 F.Supp. 2d 1186, 1189-90 (E.D. Wa. 2000) (court found that the STB’s exclusive jurisdiction over construction and operation of railroad fueling facilities preempts local environmental permitting requirements, even if the STB does not actually regulate such construction or operations).

In short, state and local regulation that seeks to “manage or govern rail transportation” is preempted by ICCTA. *Franks Inv. Co. LLC v. Union Pacific R.R. Co.*, 593 F.3d 404, 411 (5th Cir. 2010).

3. *The mitigation measures proposed by SACOG do not fall within the exception for exercise of state police powers.*

SACOG argues that the mitigation measures it proposes fall within an exception for state exercise of police power, citing *Assn. of American Railroads v. SCAQMD* (9th Cir. 2010) 622 F.3d 1094, 1097-98; *Green Mtn. Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643.) Neither case supports SACOG’s arguments, however.

In the *AAR* decision, the Ninth Circuit held that state requirements that railroads maintain certain records were preempted under ICCTA. While the court recognized that “laws having a more remote or incidental effect on rail transportation” might be allowed, the agency’s recordkeeping rules were preempted because they would “apply exclusively and directly to railroad activity.” As set forth more fully below, the mitigation measures proposed by SACOG would go well beyond the recordkeeping requirements struck down by the Ninth Circuit and are therefore clearly preempted.

Nor does the Second Circuit’s decision in *Green Mountain* support the kind of intrusive remedies proposed by SACOG. In that decision, the court described the kind of traditional and routine exercises of police power that are not preempted under ICCTA:

Mr. Murry Wilson
November 24, 2014
Page 8 of 11

It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.

Green Mountain R.R. Corp v. Vermont at 644. The court then offered illustrations, of “[e]lectrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.” *Id.*

These circumstances fail *all* the elements described in *Green Mountain*. SACOG urges the County of San Luis Obispo to exercise *its discretion to adopt* various mitigations measures—action which *Green Mountain* explicitly describes as being preempted. The proposed mitigation measures are easily distinguished from the types of potentially permissible exercises of state police power, such as the requirements of electrical codes, plumbing and fire codes etc. The vaguely described limitations on storage of crude oil tank cars, analysis of the potential rail alignments and imposing of specific requirements for railroad inspection equipment and protocols all involve *direct, discriminatory regulation* of railroad operations based on the *exercise of discretion* by a state or local agency and are *neither “settled” nor “defined.”* These requirements go well beyond routine and non-discriminatory exercise of police power described in *Green Mountain* and therefore fall squarely within the scope of ICCTA preemption.

4. States cannot circumvent federal preemption of railroad regulations by regulating customer access to rail transportation.

In the alternative, SACOG claims that the attempt to regulate interstate rail operations can be justified by directing the unlawful regulations at our customers rather than at Union Pacific. This argument is also incorrect.

States cannot circumvent the broad prohibition against local regulation of the interstate rail network simply by directing the regulations at the railroad’s customers. Indirect attempts to manage or govern railroad transportation are also preempted by ICCTA. In *Boston & Maine Corp. and Springfield Terminal R.R. Co.*, 2013 WL 3788140, *3, the STB found that ICCTA preemption “prevents states or localities from imposing requirements that, by their nature, could be used to deny a railroad’s ability to conduct rail operations,” even when a railroad is not being directly regulated. In that case, the local regulation was directed at a customer and the private tracks on the customer’s property. The STB held that a town cannot deprive a shipper of its “federal right to receive common carrier rail service over the track.” *Id.* at *4. When there is a conflict between local regulations and the rights of the shipper and carrier “to request and provide, respectively, common carrier rail service,” the “conflict must be resolved in favor of federal law.” *Id.* The STB cautioned that it would not allow “impermissible regulation of the

Mr. Murry Wilson
November 24, 2014
Page 9 of 11

interstate freight rail network under the guise of local regulations directed at the shippers who would use the network.” *Id.*

The Fourth Circuit reached a similar conclusion in *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010). In *City of Alexandria*, the city issued a permit for a transloading facility that placed several conditions on the truck deliveries to the site. *Id.* at 155, n.3. Even though the permit was targeted at the truck traffic and not the railroad, the Court found that the action “necessarily regulate[s] the transloading operations of Norfolk Southern” and “directly impact[s] Norfolk Southern’s ability to move goods shipped by rail.” *Id.* at 159.

The *Springfield Terminal* and *City of Alexandria* decisions are analogous to several court of appeals decisions interpreting Section 306 of the Railroad Revitalization and Regulatory Reform (4-R) Act, 49 U.S.C. § 11503. Section 306 forbids states and localities from imposing any tax that discriminates against a rail carrier. Courts have found that this provision applies not only to taxes levied directly on railroads, but also to taxes on non-rail carriers such as a company providing standardized railroad flat cars to railroads. See *Trailer Train Co. v. State Board of Equalization of the State of North Dakota*, 710 F.3d 468 (8th Cir. 1983). As Judge Posner on the Seventh Circuit has explained:

Who conducts the activity that is taxed is irrelevant. The tax will increase the cost of the activity, to the railroad’s detriment. The statute applies to taxes on rail transportation property and to other taxes if they discriminate against rail carriers; it thus is not limited to cases in which the railroad is the taxpayer.

Burlington Northern R.R. Co. v. City of Superior, Wisconsin, 932 F.2d 1185, 1186 (7th Cir. 1991).

Therefore, the relevant question is to what degree railroad operations are being managed or governed by a state or local regulation. Attempts by a local authority that would place conditions on the delivery of crude oil—even if the regulations are directed at a railroad customer instead of the railroad itself—that “necessarily regulate” the operations of Union Pacific and “directly impact [UP’s] ability to move goods shipped by rail” are preempted by ICCTA. *City of Alexandria*, 608 F.3d 159.

In the face of this precedent, SACOG nonetheless argues that “rail operations conducted by entities other than rail carriers are not preempted” and concludes that because the “proposed mitigation measures in the DEIR, and proposed [by SACOG], are directed to matters within the control of Phillips 66 and not the rail carrier, they are not preempted.” SACOG letter at p. 8, citing *Town of Milford*—Petition for Declaratory Order (Aug. 11, 2004) STB 34444 [2004 WL 1802301]. While SACOG’s position may or may not have merit as to activities conducted by Phillips 66 on Phillips 66’s own property, none of the proposed mitigation measures relates to activities conducted or controlled by Phillips 66; indeed all of these proposed measures would

Mr. Murry Wilson
November 24, 2014
Page 10 of 11

impose obligations on UP operations hundreds of miles from the Phillips 66 project. SACOG's own letter makes it clear that the measures it proposes are directed squarely at Union Pacific's operations on its tracks in Northern California and have little to do with Phillips 66's operations. SACOG letter at pp. 1-2.

Federal law does not permit local authorities to regulate interstate rail operations in this fashion, either directly by regulating Union Pacific or indirectly by regulating our customers. Such a patchwork of local regulations would "undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation." H.R. Rep. No. 104-311 at 96 (1995).

B. Preemption under the Federal Rail Safety Act.

Congress directed in the Federal Railroad Safety Act ("FRSA") that "[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To accomplish that objective, Congress provided that a State may no longer "adopt or continue in force a law, regulation, or order related to railroad safety" once the "Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2). State or local hazardous material railroad transportation requirements may be preempted under the FRSA without consideration of whether they might be consistent under the Federal hazmat law. *CSX Transportation, Inc. v. City of Tallahoma*, No. 4-87-47 (E.D. Tenn. 1988); *CSX Transportation, Inc. v. Public Utilities Comm'n of Ohio*, 701 F. Supp. 608 (D. Ohio 1988), affirmed, 901 F.2d 497 (6th Cir. 1990), cert. denied 111 S.Ct. 781 (1991).

Under Section 20106(a)(2), these DOT regulations and orders preempt state and local regulations relating to the same subject matter. The text of § 20106 is unambiguous. It plainly states that the terms of § 20106 govern the preemptive force of all DOT regulations and orders related to rail safety. DOT has recognized that "[t]hrough [the Federal Railroad Administration] and [the Pipeline and Hazardous Materials Safety Administration], DOT comprehensively and intentionally regulates the subject matter of the transportation of hazardous materials by rail These regulations leave no room for State . . . standards established by any means . . . dealing with the subject matter covered by the DOT regulations." 74 Fed. Reg. 1790 (Jan. 13, 2009). *See also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) *superseded by statute on other grounds* (FRSA preemption lies "if the federal regulations substantially subsume the subject matter of the relevant state law.").

C. Preemption under the Pipeline Safety Improvement Act.

The Pipeline Safety Improvement Act, which created the PHMSA, includes an express preemption provision prohibiting any state or local agency from regulating "the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or

Mr. Murry Wilson
November 24, 2014
Page 11 of 11

sold as qualified for use in transporting hazardous material in commerce.” 49 U.S.C. §5125. Thus, any mitigation measure restricting or specifying the type of equipment to be used in transporting crude by rail is expressly preempted.

IV. UNION PACIFIC WILL NOT ENTER INTO AGREEMENTS RESTRICTING RAILROAD OPERATIONS.

Some commenters have suggested that the City might be able to do an “end-run” around federal preemption by requiring Phillips 66 to enter into agreements with UP restricting UP’s operations. For all the same reasons that federal preemption is necessary to achieve a uniform system of regulation, UP will not enter into any such agreement. UP will not agree to any limitation on the volume of product it ships or the frequency, route or configuration of such shipments.

V. CONCLUSION.

SACOG urges the County of San Luis Obispo to exercise its discretion to adopt various mitigations measures—action which *Green Mountain* explicitly describes as being preempted. The proposed mitigation measures are easily distinguished from the types of potentially permissible police power regulation, such as electrical codes, plumbing and fire codes etc. The vaguely described limitations on storage of crude oil tank cars, analysis of the potential rail alignments and imposing of specific requirements for railroad inspection equipment and protocols all involve direct, discriminatory regulation of railroad operations based on the exercise of discretion by a state or local agency and are neither “settled” nor “defined.” SACOG’s letter also makes it clear that the measures it proposes are directed squarely at Union Pacific’s operations on its tracks in Northern California. These requirements go well beyond routine and non-discriminatory exercise of police power and are preempted.

UP supports the federal regulatory efforts to ensure that crude transportation is carried out safely. We encourage SACOG to participate in the rulemaking process. Neither SACOG nor the County of San Luis Obispo can go it alone—federal law and common sense demand that a uniform national approach be adopted and applied to ensure safety.

Regards,

UNION PACIFIC RAILROAD COMPANY



Melissa B. Hagan

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