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Via U.S. and Electronic Mail

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

RE: **Attorney General's Comments on the Draft Environmental Impact Report for the Valero Benicia Crude-By-Rail Project**

Dear Ms. Million:

Attorney General Kamala D. Harris submits the following comments on the Draft Environmental Impact Report (DEIR) for the Valero Benicia Crude-By-Rail Project (Project).[1] The Project proposes improvements to Valero's Benicia Refinery (Refinery) that, if approved, will allow Valero to receive and process up to 100 tank cars of crude oil by railway per day from North American sources.

With this and other projects like it, California is faced with a dramatic increase in the amount of highly-flammable crude oils proposed to be transported by rail throughout the State, the result of a recent oil boom from North American sources, including the Bakken shale in North Dakota and Canadian tar sands. According to the federal government, rail shipments of certain crude feedstocks, including Bakken shale, represent an "*imminent hazard*," such that a "substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur."[2] Indeed, accidents involving these trains have already resulted in catastrophic consequences, including one recent calamity that killed 47 people, incinerated an entire downtown area, and is expected to require the

[1] The Attorney General submits these comments pursuant to her independent power and duty to protect the environment and natural resources of the State. See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 1415. This letter is not intended, and should not be construed, as an exhaustive discussion of the DEIR's compliance with the California Environmental Quality Act.

[2] See U.S. Dept. of Transportation (DOT), Emergency Order: Petroleum Crude Oil Railroad Carriers, Docket No. DOT-OST-2014-0067 (May 7, 2014).

expenditure of $400 million in taxpayer funds to remediate its disastrous environmental impacts.[3]

In the face of this unprecedented risk, it is important that the infrastructure and facilities transporting and processing these feedstocks are specifically designed to present minimal risk to life, public and private property, and the environment. In particular, officials entrusted with protecting public health and safety must ensure that the hazards from these projects are fully and accurately assessed, and the identified risks are mitigated to the fullest extent possible by law.

Unfortunately, the DEIR for this Project fails to properly account for many of the Project's potentially significant impacts pursuant to the California Environmental Quality Act (CEQA). Specifically, the DEIR:

1. Underestimates the probability of an accidental release from the Project by considering only a fraction of the rail miles travelled when calculating the risk of derailment, by relying on a currently unenforceable assumption that newer, safer tank cars will be used, by failing to adequately describe the potential consequences of an accident resulting in a release of crude oil, and by improperly minimizing the risk to public safety from increased rail-use;

2. Improperly asserts that the proper baseline for the Project's impact on air emissions is determined by the Refinery's maximum permitted emissions;

3. Fails to analyze the impacts on air quality from the foreseeable change in the mix of crude oils processed at the Refinery;

4. Ignores reasonably foreseeable Project impacts by impermissibly limiting the scope of the affected environment analyzed to only the 69-mile stretch from Benicia to Roseville;

5. Fails to consider the cumulative impacts on public safety and the environment from the proliferation of crude-by-rail projects proposed in California; and

6. Employs an overly broad determination of trade secrets, which results in the nondisclosure of the types of crude oil to be shipped by rail and refined onsite. As a result, the DEIR fails to provide sufficient information for an adequate analysis of the safety risks from transportation or the air quality impacts from refining the new crude.

These issues must be addressed and corrected before the City Council of Benicia takes action pursuant to CEQA on the DEIR or the Project.

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[3] Fishell, "Quebec government seeking $400 million for Lac-Mégantic rail disaster cleanup," Bangor Daily News (September 19, 2014).

Background

Crude-by-Rail in California

From 2012 to 2013, crude-by-rail in California increased from one million barrels imported to 6.3 million barrels imported, a rise of 506%.[4] This surge in the amount of crude-by-rail imports is replacing crude oil previously transported by ship or pipeline. The trend shows no sign of abatement, and the California Energy Commission projects that by 2016, the State will import up to 150 million barrels of crude-by-rail.[5]

Crude feedstocks from North American sources such as the Bakken shale in North Dakota and tar sands in Canada have only recently been introduced to refineries, made available by a combination of new extraction techniques and higher energy prices. Bakken crude is unlike other crude being produced or shipped in this country, and it presents an "imminent hazard" because it is more ignitable and flammable and thus more likely to cause large, potentially catastrophic impacts from a train crash or derailment.[6] On the other end of the spectrum, crude oil extracted from Canadian tar sands is a low-grade, high sulfur feedstock that is not as volatile as light crudes like Bakken but contains chemical properties that make it particularly damaging to the environment when spilled and/or burned.[7]

This dramatic increase in crude-by-rail represents a new potential hazard to public safety and the environment in part because the crude oil is regularly transported by "high hazard flammable trains" (HHFT), which are trains comprising 20 or more carloads of flammable liquids such as crude oil.[8] The DOT has determined that derailments of HHFTs will continue to be more severe, "involve[ing] more cars than derailments of other types of trains" because HHFTs are uniquely heavier and longer and therefore harder to control and less stable than other rail traffic.[9]

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[4] Interagency Rail Safety Working Group, Oil by Rail Safety in California (June 10, 2014) p.1.
[5] *Id.*
[6] See Pipeline and Hazardous Materials Safety Administration, Dept. of Transportation, Operation Safe Delivery Update (2014) p. 1. See also U.S. DOT Emergency Order, Petroleum Crude Oil Railroad Carriers, Docket No. DOT-OST-2014-0067 (May 7, 2014).
[7] U.S. Dept. of Transportation, Draft Regulatory Impact Analysis, "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains; Notice of Proposed Rulemaking." July 2014 [Docket No. PHMSA-2012-0082] (HM-251), p.81.
[8] DOT proposed regulations define a "high hazard flammable train" as a train comprised of 20 or more carloads of Class 3 flammable liquids such as crude oil. 79 Fed.Reg. 45017 (August 1, 2014).
[9] U.S. Dept. of Transportation, Draft Regulatory Impact Analysis, "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains; Notice of Proposed Rulemaking." July 2014 [Docket No. PHMSA-2012-0082] (HM-251), p.24.

This boom in crude oil being transported by rail has corresponded with a major increase in the number of accidents involving such trains. In 2013 alone, trains spilled 1.1 million gallons of crude oil, a 72% increase over the total amount of oil spilled by rail *in the nearly four previous decades combined.*[10] Since the beginning of 2013, at least nine major accidents related to crude-by-rail have occurred. Among the most notorious include:

- **Lac Mégantic, Quebec**—On July 5, 2013, a train loaded with 72 tank cars of crude oil being transported from North Dakota to New Brunswick stopped on a track with a descending grade. The train later began rolling downhill toward the town of Lac-Mégantic, about 30 miles from the U.S. border. Near the center of town, 63 tank cars derailed, resulting in multiple explosions and subsequent fires. The accident killed 47 people and destroyed substantial sections of the town, causing the evacuation of 2,000 people. It was later determined that the crude oil released was more volatile than the transporter had originally reported to Canadian authorities.

- **Aliceville, Alabama**—On November 8, 2013, a train hauling 90 cars of crude oil from North Dakota to a refinery near Mobile derailed on a section of track through a wetland near Aliceville. Thirty tank cars derailed and a dozen of these burned. The derailment occurred on a shortline railroad's track that had been inspected and cleared only a few days earlier. The train was travelling under the speed limit for this track.

- **Casselton, North Dakota**—On December 30, 2013, an eastbound BNSF Railway train hauling 106 tank cars of crude oil struck a westbound train carrying grain that shortly before had derailed onto the eastbound track. Some 34 cars from both trains derailed, including 20 cars carrying crude, which exploded and burned for over 24 hours. About 1,400 residents of Casselton were evacuated.

- **Lynchburg, Virginia**—On April 30, 2014, 15 cars in a crude oil train derailed in Lynchburg's downtown area. Three cars caught fire, and some cars derailed into a river along the tracks. The immediate area surrounding the derailment was evacuated.[11]

Crude-by-rail projects employing HHFTs continue to profligate in California, and economic factors suggest that this trend will continue for the foreseeable future. This Project in Benicia is but one of *at least twelve* other crude-by-rail related projects that are either already

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[10] Tate, "More oil spilled from trains in 2013 than in previous 4 decades, federal data show," McClatchyDC (January 20, 2014).

[11] Crude-by-rail accidents have also occurred in Philadelphia, PA, Vandergrift, PA, and LaSalle, CO, in addition to the Canadian provinces of Alberta and New Brunswick. Congressional Research Service, "U.S. Rail Transportation of Crude Oil: Background and Issues for Congress" (May 5, 2014); Associated Press, "Colorado derailment: Six crude oil tankers jump track" (May 10, 2014).

operational or being considered in California. In addition to Benicia, crude-by-rail projects exist in Richmond, Pittsburg,[12] Martinez, Santa Maria, Stockton, Los Angeles, Bakersfield (two projects), Wilmington (two projects), and Sacramento (two projects).[13] If approved, these projects would cumulatively result in billions of gallons of crude oil being transported by HHFTs annually throughout California.

The Valero Benicia Crude-by-Rail Project

Valero has applied to the City of Benicia for a Use Permit to construct improvements and install equipment that would allow the existing Refinery to begin receiving and refining crude feedstocks by rail, at a level of 100 tank cars daily. The crude-by-rail would be delivered in two, 50 car trains each day to the Refinery, totaling 70,000 barrels of North American crudes. The crude-by-rail deliveries would purportedly replace crude oil feedstocks currently arriving by ship. The significant components of the Project, as presented in the DEIR, include construction of offloading racks, rail spurs and new track, and additional supply piping from the rail spur to the Refinery. (DEIR 3-5).

Comments on the DEIR

The DEIR fails to adequately analyze the Project's impacts to up-rail communities.

The DEIR employs improper standards of significance, unenforceable mitigation measures, and inadequate analyses to conclude that the Project will not have a significant impact on "up-rail" communities, including those communities located between Roseville and Benicia through which HHFTs will pass if the Project is approved. This analysis, broken up in the DEIR into five subsections, is defective in the following areas:

(1) The probability of an accidental release of crude oil from a train

The DEIR employs a flawed quantitative analysis to conclude that the probability of an accidental release of crude oil from a train is only one in 111 years. (DEIR App. F). First, because the DEIR limits its analysis to only the 69 mile rail stretch from the Union Pacific Railroad ("UPRR") Roseville Terminal to Benicia, it severely underestimates the risk of an accident related to the Project. The tank cars containing crude oil do not originate in Roseville, they are delivered by rail from particular sources, including North Dakota and Canada. While the precise route from these sources throughout North America to the Refinery may be somewhat indeterminate, the potential rail routes from within the California borders to the Roseville terminal are limited to a handful of options, and an assessment of these foreseeable impacts using

[12] The Attorney General submitted a CEQA comment letter on the Recirculated DEIR for the WesPac Pittsburg Energy Infrastructure Project on January 15, 2014.
[13] Hays, Kristen, "Factbox – California crude slates and oil-by-rail projects," Reuters (September 10, 2014).

reasonable assumptions of future crude oil sources should have been performed. This is particularly true given that, despite claiming that the routes are too speculative to analyze for purposes of public safety, the DEIR does, in fact, analyze these very routes in its discussion of both air quality impacts (DEIR 4.1-22) and greenhouse gas emissions (GHG) (DEIR 4.6-9).

Second, the DEIR's risk analysis assumes that Valero will only transport crude oil in newer model "1232" tank cars, which reduces the estimate of public health risks to up-rail communities. These newer, presumptively safer tank cars, however, are not required by current federal regulations.[14] The DEIR presents no evidence to support the assumption that only the newer tank cars will be used, because Valero only makes a voluntary commitment to upgrade its tank cars, a commitment that appears to be unenforceable as the Project is now proposed. Such an unenforceable mitigation measure and/or condition of Project approval is a violation of CEQA's requirement that these commitments be "fully enforceable through permit conditions, agreements, or other legally binding instruments."[15] The City of Benicia itself asserts that it is preempted from enforcing Valero's obligation to use the newer and safer rail cars and states that it "must rely on the federal authorities to ensure that any such risks are mitigated as appropriate."[16] (DEIR 4.7-20). But, since DOT regulations currently allow use of DOT-111

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[14] 49 C.F.R. 179. On August 1, 2014, the DOT published a Notice of Proposed Rulemaking seeking comments on new tank car standards for the transport of materials such as crude oil and ethanol. The proposed rules include a variety of options for phasing out the currently-used DOT-111 tank cars in favor of safer tank cars such as the 1232 tank car, or other improved designs. It is unclear when these new regulations might take effect, but the earliest proposal for the elimination of DOT-111 tank cars to transport crude oil is 2017, and oil corporations are advocating for additional delay due to the increased costs associated with upgraded tank cars and a shortage of supply of 1232 tank cars. See 79 Fed.Reg. 45016 (August 1, 2014).

[15] CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(2).

[16] We do not express an opinion regarding whether Benicia's legal analysis is correct. The extent that federal law, including the Interstate Commerce Termination Act (ICCTA), preempts a state or local jurisdiction's ability to minimize impacts associated with rail transportation projects has not been definitely determined by the courts. "The circuits appear generally, for example, to find preemption of environmental regulations, or similar exercises of police powers relating to public health and safety, only when the state regulations are either discriminatory or unduly burdensome." *Fayus Enters. v. BNSF Ry.* (D.C. Cir. 2010) 602 F.3d 444, 451. The Ninth Circuit has most recently determined that, "Generally speaking, ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." *Association of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097-1098. Nonetheless, California law on rail preemption issues is currently in flux. See *Town of Atherton, et al., v California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 (request for depublication filed September 22, 2014); see also *Friends of Eel River v. North Coast Railroad Railroad Authority, et al.*, (September 29, 2014) First Appellate District, Case No. CIV1103605. Factors relevant to Benicia's ability to exercise its police powers to lessen the Project's significant impacts would likely hinge upon,

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tank cars for these purposes, there is no reasonable expectation that DOT (or any entity other than Benicia) would enforce Valero's commitment to use the 1232 cars. Furthermore, the DEIR provides no evidence that Valero has enough stock of the upgraded 1232 tank cars (a scarce commodity) to completely avoid use of the older DOT-111 legacy cars.[17]

Finally, the analysis is flawed because it only considers crude oil releases of over 100 gallons as significant, despite the potential for significant impacts due to a crude oil spill of less than 100 gallons. (App. F-2). Given the volatility and flammability of the crude feedstocks to be imported, combined with the potential ignition sources during a derailment, the DEIR's decision to ignore the impacts associated with a release of less than 100 gallons is unsupportable.

(2) The consequences of a release

The DEIR's analysis recognizes that serious, even catastrophic, consequences may occur from a release (and conflagration) of crude oil during a train accident. Among the potential impacts, the DEIR acknowledges that: (1) a release in any area could require a significant hazardous materials cleanup; (2) a release in an urban area that were to ignite and/or explode could result in property damage and/or injury and/or loss of life; and (3) a release into the Suisun Marsh could result in significant damage to biological resources. The costs borne by the California taxpayer from such a calamity could be substantial, given the DOT's recent acknowledgment that the insurance policies currently carried by crude-by-rail transporters are typically insufficient to cover even a moderate crude-by-rail accident, much less a major disaster involving significant releases.[18] Nevertheless, the DEIR declares these potential consequences to be insignificant under the flawed quantitative risk assessment discussed above.

Even if the risk analysis were supportable, the DEIR provides no explanation for why the potential for a major catastrophe involving crude-by-rail, even once every 111 years, is an insignificant impact. The DEIR, other than a brief mention, gives little consideration to the potentially serious, even catastrophic, impacts that a release of highly volatile and flammable crude oil would have on communities and the environment. The DEIR also gives no consideration to the public health and safety risks presented by the proximity of 27 schools located within ¼ mile of the UPRR rail line between Roseville and Benicia along which HHFTs

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amongst other things: (1) whether any proposed condition unreasonably burdens rail transportation, (2) whether the condition is one of general applicability, and (3) whether the project proponent is a "rail carrier" subject to federal law.

[17] Despite Benicia's assertion that it is preempted from enforcing such a mitigation measure, nothing precludes Benicia and Valero from executing an agreement to convert Valero's voluntary commitment to one that is enforceable under CEQA. Should Benicia and Valero come to such an agreement, the assumption of use of exclusively 1232 tank cars could become supportable.

[18] Wolfe, "DOT: Rail insurance inadequate for oil train accidents," PoliticoPro (August 6, 2014).

will travel. (DEIR 4.7-23-24). The federal government has declared that the shipment of Bakken crude represents an "imminent hazard" because it is unlike other materials being shipped by rail. These particular high-risk characteristics must be considered to adequately support a determination of no significant impact.

(3) The reduction in the risk of accidental releases from a marine vessel, based on the reduction in marine trips that would be caused by the Project

The risks associated with a release of crude oil in the ocean are fundamentally different than the risks associated with crude-by-rail travelling long distances through urban communities and environmentally sensitive lands. Nevertheless, the DEIR gives qualitative "credit" from the decrease in ship miles travelled and uses that "credit" to lower the Project's overall risk. Any benefit to up-rail communities from a reduction in ship use 50 to 100 miles away is tenuous at best and can not reasonably be factored into the risk equation for the Project.

(4) The recent history of accidents involving DOT-111 tank cars carrying crude oil

The DEIR implies that since the majority of previous major accidents involving crude-by-rail involved DOT-111 tank cars, those accidents are comparatively of little significance because Valero has committed to using only the newer, safer 1232 tank cars. (DEIR 4.7-19). Setting aside the issue of the enforceability of this "commitment," the DEIR provides no evidence to support a determination that these HHFT accidents would have been of a substantially smaller scope had 1232 tank cars been used. In fact, as the DEIR recognizes, just a few months ago, a 1232 tank car ruptured and released crude oil during an HHFT derailment at low speeds in Lynchburg, Virginia. (DEIR 4.7-19). The safety benefit of using 1232 tank cars for HHFTs is currently the subject of significant scientific and regulatory debate and should not be given substantial consideration in a qualitative risk analysis.

(5) The regulatory requirements designed to prevent releases and/or mitigate the consequences in the event of a release from trains

The DEIR unreasonably relies on both recently promulgated regulations as well as speculative future regulatory changes as a significant factor for determining that the Project will cause no significant impact. The efficacy of new DOT regulations is yet to be determined, and crude-by-rail accidents continue to occur. Furthermore, the DEIR's determination of no significance relies in part on *future* DOT HHFT tank car regulations possibly being "more stringent" than even the 1232 tank car standards, an uncertain result given that the regulatory changes are not final.[19] (DEIR 4.7-19). In short, future changes made by DOT to regulations for

[19] The DOT regulatory proposals are the subject of extensive industry group interest. See Vantuono, William C., "DOT crude oil NPRM: Will cooler heads prevail?" Railway Age (August 7, 2014) [During a recent crude-by-rail forum, one industry insider declared that he believed, "the final draft of the [Notice of Proposed Rulemaking on High-Hazard Flammable

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crude-by-rail are speculative, and their potential effectiveness is currently the subject of considerable disagreement amongst various stakeholders.

By employing an incorrect baseline, the DEIR minimizes potential impacts to air quality.

Under CEQA, the project baseline against which project emissions are measured is "normally" defined as the physical conditions of the environment as it exists at the time of publication of the Notice of Preparation ("NOP") of the project EIR or at the time the environmental analysis commenced.[20] Courts have held that an agency has discretion to select an alternative baseline, but only if its choice is supported by substantial evidence, such as when existing conditions are not representative of "generally existing" or "historic" conditions.[21] Thus, except in limited circumstances, CEQA does not allow an existing facility to define the project baseline by what it *could* emit, only what it actually *does* emit. As the Supreme Court found in *Communities for a Better Environment* (CBE) *v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 322, "[a]n approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent."[22]

Here, the DEIR concludes that the project will have no significant impact on air quality because, even if Refinery emissions were to increase under the Project, those increased emissions would not exceed the maximum emissions allowed under existing permit limits (or "maximum permitted emissions"). Rather than using a baseline describing "existing conditions," Benicia incorrectly uses the maximum permitted emissions as the baseline, asserting that this is proper because Valero holds permits for the Refinery's process equipment issued pursuant to a 2003 EIR for the Valero Improvement Project (VIP).[23] (DEIR C.1-3).

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Trains and DOT 111 tank cars] could be more friendly to shippers than the first proposal." Railway Age's Editor-in-Chief stated that this assertion, "helped affirm our view that the final version of the DOT's safety rules may include some changes to the ones proposed on July 23."]

[20] See CEQA Guidelines, Cal. Code Regs., tit. 14, § 15125, subd. (a).

[21] For example, in *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, the court approved a baseline that reflected maximum permitted use ("daily truck trips"), because there was record of actual daily truck trips meeting and even *exceeding* what was allowed under the current permit. The court reasoned that use of actual traffic counts would be "misleading and illusory." *Fairview Neighbors*, *supra*, at p. 243.

[22] *CBE*, *supra*, at p. 322, citing *Environmental Planning Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 358.

[23] The baseline actually used in the DEIR is unclear, since the DEIR alternatively claims that the baseline is both maximum permitted operations and annual average emissions, depending on the section. (DEIR 4.1-10-11). This comment addresses the DEIR's assertion, made repeatedly on

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There is no evidence, however, that the Refinery has ever operated at maximum permitted emissions levels since the VIP was completed, and Benicia does not attempt to justify that the permitted capacity reflects existing physical conditions. Under well-established CEQA case law, this approach to baseline emissions is improper.

Further, the DEIR's discussion of the *CBE* decision mischaracterizes and misinterprets the California Supreme Court's holding. (DEIR C.1-2). The section to which Benicia cites merely allows a projected maximum baseline for projects that were *exempt from CEQA review entirely* either (1) as a modification of a previously analyzed project,[24] or (2) as the continued operation of an existing facility without significant expansion of use.[25]

Benicia has not, nor can it, claim that either of these two exemptions to CEQA apply here. To the contrary, the Project gives Valero the ability to process a crude feedstock with chemical properties never contemplated during previous project review that the Refinery, as currently constructed, cannot readily access. (DEIR 1-1). As in *CBE*, this qualifies as a new project subject to CEQA review for the first time. Similarly, Benicia cannot claim that the Project constitutes the continued operation of an existing facility without significant expansion. The 2003 VIP DEIR specifically excluded expansion of the refinery to use crude oil feedstocks delivered by rail from the impact analysis of the project.[26] Therefore, pursuant to the *CBE* holding, without any substantial evidence to support use of a baseline constituting maximum permitted emissions, the proper baseline from which to compare air quality emissions is the Refinery's existing conditions.

<u>The DEIR fails to adequately analyze the potential air quality impacts from new crude feedstocks.</u>

The DEIR fails to include supportable analysis that Refinery emissions will not increase upon Project completion. Although acknowledging that the North American crude feedstocks that could be delivered upon Project completion may be of higher gravity and sulfur content than the crudes currently processed, the DEIR nevertheless asserts that the Project will not result in air quality impacts, based on the assumption that – through blending – the average API gravity and sulfur levels of the crude slate that would be processed upon Project completion would remain within the same range as the crude slate previously processed at the Refinery. (DEIR 3-24, 4.1-

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DEIR 4.1-11 and in Attachments C.1 and C.2, that the proper baseline is maximum permitted operations and not existing conditions.

[24] CEQA Guidelines, Cal.Code Regs., tit. 14, § 15162.

[25] CEQA Guidelines, Cal.Code Regs., tit. 14, § 15301.

[26] See VIP DEIR 3-52 and 4.8-14. ("Transportation accidents related to railcar shipments of volatile hydrocarbon liquids can result in fires or explosions. However, the VIP will not increase the rail shipment of these materials.")

17). This conclusory assertion is not supported by substantial evidence or any analysis. Even if the crude-by-rail processed by the Refinery is blended to the existing range of gravity and sulfur content, studies show that certain North American crudes often contain higher levels of other pollution-causing chemicals that would persist at higher levels despite blending to meet existing gravity and sulfur limits.[27] The DEIR does not assess this possibility and its effects, nor does it disclose the composition of the expected crude slate to allow proper public scrutiny. (DEIR 3-14).

The Project as defined in the DEIR impermissibly limits the geographic scope and ignores foreseeable, significant impacts that will occur beyond the Project's arbitrary boundaries.

By limiting the analysis to only the 69-mile rail section from the UPRR Roseville Terminal to Benicia and excluding the thousand-plus mile rail trip from the crude source to Roseville, the DEIR violates CEQA by not analyzing the Project's foreseeable impacts, including impacts along hundreds of miles of track within California. In evaluating the significance of a Project's environmental effects, the lead agency must consider not only direct physical changes, but also reasonably foreseeable indirect physical changes to the environment.[28] CEQA further defines "environment" as "the physical conditions that exist within the area that will be affected by the proposed Project."[29]

The DEIR largely ignores the Project's impacts up-rail from Roseville, claiming that analyzing the potential impacts along these routes would be "speculative," because future crude oil feedstocks could originate from multiple North American sources. (DEIR 4.7-1). However, it is a *certainty*, not speculation, that the Project will result in HHFTs traveling long distances with the potential to create significant environmental impacts before reaching the Roseville Terminal, and, pursuant to CEQA, an analysis of these potential impacts is necessary. While the particular routes may not yet be determined, there are a limited number of potential paths for trains to travel by rail to the Refinery, and the DEIR elsewhere makes similar projections for the purposes of studying air quality and GHG impacts, approximating that HHFTs will travel 195 miles from the California border to the Refinery. (DEIR 4.6-9). Instead of limiting the analysis of impacts along these routes to only air quality impacts, the DEIR should have used comparable estimates to analyze all of the Project's potential impacts. By arbitrarily setting the Project boundary at the UPRR Roseville Terminal, the DEIR fails to analyze reasonably

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[27] For example, tar sands bitumens contains 102 times more copper, 21 times more vanadium, 11 times more sulfur, six times more nitrogen, 11 times more nickel, and 5 times more lead than conventional heavy crude oil. These pollutants contribute to smog, soot, acid rain, and odors that affect residents nearby. R.F. Meyer, E.D. Attanasi, and P.A. Freeman, "Heavy Oil and Natural Bitumen Resources in Geological Basins of the World," U.S. Geological Survey Open-File Report 2007-1084 (2007) p. 14, Table 1 (*available at*: http://pubs.usgs.gov/of/2007/1084/).
[28] CEQA Guidelines, Cal. Code of Regs., tit. 14, § 15064, subd. (d).
[29] Pub. Resources Code, § 21060.5.

foreseeable impacts related to the transport of crude oil by HHFTs over those significant distances.

The DEIR fails to consider foreseeable cumulative impacts and risks

The DEIR impermissibly narrows the scope of potential cumulative impacts analyzed. Under CEQA, a DEIR first considers whether the combined effects from both the proposed project and other projects would be cumulatively significant. If the answer is affirmative, the DEIR must consider whether the proposed project's incremental effects are cumulative considerable.[30] Absent this analysis, piecemeal approval of multiple projects with related impacts could lead to severe environmental harm.[31]

Despite the "imminent hazard" that the transport of certain crudes present and the substantial proliferation of crude-by-rail projects throughout California, the DEIR relies on its flawed analysis, discussed above, to determine that no significant cumulative impacts exist to up-rail communities from an increased risk of crude-by-rail accidents. The DEIR further declares that:

> [F]or the Project to make a cumulatively considerable contribution to the impact of hazards, two or more events (from the Project and another cumulative project) would have to occur at the same time and affect the same places. The likelihood of such a cumulative accident event would be even smaller than the estimated low probability of a Project-related accident and spill." (DEIR 5-17).

This limited analysis of only a so-called "cumulative impact event" involving the Project and "another cumulative project" ignores the entirety of the cumulative impacts caused by a large rise in the number of HHFTs traveling through both highly populated and environmentally sensitive areas and the corresponding increase in the risk of an accident. As the DEIR's own analysis demonstrates, the risk of a derailment and accident involving HHFTs escalates with a corresponding increase in the number of miles travelled and the number of train cars on the tracks. (DEIR App. F-3). Despite the substantial increase in both of these metrics, the DEIR dismisses any cumulative impact as irrelevant unless it also directly involves a derailment from one of the listed projects. But the potential cumulative impacts go far beyond these "cumulative impact events," to the combined higher safety risks from increases in other train cars (carrying crude oil or not) and increases in truck crossings. For example, the 2013 crude-by-rail derailment and fire in Casselton, ND, was caused when a train transporting grain derailed onto a second track into the path of an HHFT, which had too little time to stop before crashing into the grain train.[32] The possible impact of a similar accident is completely ignored in the DEIR's cumulative impacts analysis. Only by focusing exclusively on these "cumulative impact events"

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[30] CEQA Guidelines, Cal. Code Regs., tit. 14, § 15130, subd. (a).
[31] *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 720.
[32] 79 Fed.Reg. 45019 (August 1, 2014).

and not the larger cumulative increased risks to up-rail communities from a dramatic upsurge in HHFTs and other train traffic does the DEIR determine that the Project will have no significant cumulative impacts.

The cumulative impacts analysis is also deficient because it fails to consider the severity of the cumulative impacts, a necessary component of CEQA analysis.[33] Here, the extraordinary flammability and volatility of the crude oil feedstocks merits discussion given the serious, potentially catastrophic, impacts related to an HHFT accident. As a result, there is no basis for the DEIR's conclusion that the project will not cause any significant cumulative impacts.

An overly broad grant of trade secret protection prevents adequate public review of potential significant impacts.

The DEIR frustrates the purpose of CEQA by not disclosing information regarding the particular crude oil feedstocks expected to be delivered upon Project completion. Instead, the DEIR classifies *all* information regarding the characteristics of *past, present, and future* crude oil refined onsite as a "trade secret" exempt from disclosure under CEQA.[34] This missing information includes the weight, sulfur content, vapor pressure, and acidity of these crude oil feedstocks, information critical for an adequate analysis of the Project's impacts, particularly with regard to public safety and air quality.

This broad grant of trade secret protection directly conflicts with recent 2014 decisions by both the DOT and the California Governor's Office of Emergency Services (OES) that information about the specific characteristics of crude oil currently traveling by rail are not protected trade secrets and should be publicly released.[35] Indeed, OES has published disclosures of crude-by-rail shipments of Bakken crude oil by Burlington Northern Santa Fe Railroad (BNSF) associated with a different project.[36] This failure of transparency in the DEIR is particularly improper given that, under the same DOT Emergency Order that compelled BNSF's disclosure, Valero must submit to OES the withheld information regarding the properties of crude feedstocks imported by rail, and OES will then release it to the public. Benicia's

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[33] CEQA Guidelines, Cal. Code Regs., tit. 14, § 15130, subd. (b).
[34] See DEIR 1-5 and Appendix D: Discussion of Confidential Business Information. Trade secrets are exempt from disclosure pursuant to CEQA. (Pub. Resources Code, § 21160). California law defines a "trade secret" in the Government Code. (See Gov't Code, § 6254.7, subd. (d).)
[35] See OES website, "Public Records: Bakken Shipment Notices & Correspondence" (ava*ilable at:* www.caloes.ca.gov/HazardousMaterials/Pages/Oil-By-Rail.aspx); see also Tate, "Norfolk Southern sues to block disclosure of crude oil shipments," Miami Herald (July 27, 2014).
[36] *Id.*

nondisclosure of this information deprives both the public and Benicia officials of the informed decision making process that is the "heart" of CEQA.[37]

The DEIR's public disclosure of the crude oil as simply "Alaskan North Slope (ANS) look-alikes or sweeter" does not allow for an accurate public review of Benicia's analysis regarding the significance of the Project's impacts. (DEIR 3-24). The undisclosed properties of the Refinery's projected crude feedstocks are necessary to assess the volatility and flammability of the particular types of crude-by-rail, crucial factors in any determination that no significant impact exists. As the DEIR itself explicitly recognizes, "the consequences of a release of crude oil for a rail tank car depend on the properties of the crude oil…" (DEIR 4.7-13). In other words, potential releases associated with transporting and storing crude will vary based on the crude's chemical composition, including the contaminants it contains, its sulfur content, and whether it is blended with other chemicals. Nonetheless, and despite this acknowledgment, the DEIR includes no information regarding the characteristics of the crude oil that could be transported by rail upon Project approval, undermining CEQA's purpose by precluding any ability by the public or government officials to assess the true nature of the Project's risks and impacts.

Furthermore, the failure to disclose the characteristics of the crude oil to be processed at the Refinery infects the air quality analysis and subsequent determination that the crude-by-rail will cause no significant impacts to Refinery emissions. As only one example, the determination that any difference in crude feedstocks created by the Project will not cause a significant impact is based in part on a comparison of API gravity and sulfur content of "various specific crudes that Valero has purchased in the past three years." (DEIR Figure 3-8, 3-13). The DEIR discloses no information regarding the frequency that these "various" crudes were processed at the Refinery or how and why these particular crudes were chosen as representative of Refinery emissions. Without explanation that these particular crude feedstocks are an appropriate proxy for the crude oil to be processed after Project completion, the determination of no significant impact is not supported by substantial evidence.

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[37] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.

Conclusion

We urge the City of Benicia to revise the Project's DEIR to address the deficiencies explained in this letter so that the City Council and general public are provided a full and accurate accounting of the Project's environmental impacts.

We appreciate your consideration of these comments.

Sincerely,

SCOTT J. LICHTIG
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

cc: Paul King, California Public Utilities Commission
Alice Reynolds, California Environmental Protection Agency
Thomas Campbell, Governor's Office of Emergency Services