Amy Million, Principal Planner
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sent via electronic mail

September 15, 2014

Re: Valero Crude by Rail Draft Environmental Impact Report

Dear Ms. Million:

On behalf of San Francisco Baykeeper and our over 2,000 members who use and enjoy the environmental, recreational, and aesthetic qualities of San Francisco Bay and its surrounding tributaries and ecosystems, we submit these comments in strong opposition to the proposed project, and the Draft Environmental Impact Report ("DEIR") prepared for the project. There can be no dispute that a significant increase in local oil refining would also cause air, water and ground pollution, leading to a greater public health threat for local residents. Not only are Bay Area refineries, including Valero, proposing an increase in production, but new throughputs will use dirtier crude oil from sources that include the Canadian tar sands; the same dirty crude slated for the Keystone XL pipeline. At the same time, increases in the shipment of crude oil by rail have routinely led to irreparable environmental destruction. We therefore urge the City of Benicia to correct this seriously deficient DEIR so that an accurate assessment of the proposed project's environmental impacts is made public, providing all sensible municipal and agency decision-makers with the information needed to disapprove any and all applications for this project.

I. The Project Description is Inadequate.

The DEIR fails to assess impacts associated with expanding the refinery's production. Instead, the DEIR asserts that the receipt of 70,000 bbls/day could be offset by an equal decrease in receipts from marine shipment. This project description is severely flawed, as the DEIR provides no guarantee that the new railroad infrastructure will not ultimately increase refinery production.

First, the DEIR states that "proposed Project *could* reduce marine vessel delivery of crude oil by as much as 25,550,000 barrels in a 365 day year," an amount roughly equal to the proposed increased imports by rail. (DEIR 3-2, emphasis added.) This vague project description does not suffice to support informed decision-making. Will all such marine terminal import contracts be canceled? When? Is a cap on marine terminal imports a binding condition of this project? Increased oil production in the United States and Canada suggests that Valero could profit from increased marine terminal receipts. For example, the proposed Tesoro oil export terminal in

Vancouver, WA, will send 380,000 barrels per day of new crude to unidentified West Coast facilities, which could include Valero. Given these market forces, the DEIR fails to provide any basis or promise for its assertion that shipment to the refinery by marine vessels will decrease by any amount, much less an amount equal to the new oil shipments received by rail.

Although the proposed project plainly increases the refinery's ability to process more crude oil than ever before, no net increase in production is evaluated. The sole limiting factor referenced in the DEIR for capping facility production is Valero's Bay Area Air Quality Management District ("BAAQMD") operating permit. (DEIR 3-2.) This approach illegally segments the project description and the DEIR's impacts analysis. (*See, Laurel Heights Improvement Association v. Regents of the University of California*, (1988) 47 Cal.3d 376, 397-398.) Future regulatory approvals must always be included within the "whole of the project." The fact that Valero may not yet have precisely committed to additional refinery changes to increase production is beside the point; the mere fact that it is reasonably foreseeable that Valero would use the new rail capacity to increase production is sufficient to trigger the need to consider the future activity in the current EIR.

Moreover, the DEIR should explain what additional changes to the rail offloading infrastructure would be needed to accept additional 50-car trains within any 24 hour period. The 2013 Union Pacific Investment Report projects further increases of Canadian crude oil shipments to West Coast refineries as a major market force for 2014.[1]

The DEIR fails to describe rail car hold times, outside of the facility, as a part of the project. The DEIR provides no mandates that the project must process cars without delay, thereby avoiding any storage or residence times off site. Yet, the DEIR does not describe as part of the project the short- or long-term storage of rail cars destined for Valero, outside of the refinery.

The DEIR also fails to indicate whether Valero will receive and process dilbit (heavy tar sands oil with 30% volatile diluent) or railbit (heavy tar sands oil with 17% diluent). The risk of explosion, safety of first responders, and environmental risks from spills vary significantly depending on this formulation.

II. The DEIR's Environmental Setting is Incomplete.

The DEIR must adequately describe the environmental setting for the project to sufficiently allow a project's significant impacts to be considered. (CEQA Guidelines § 15125(a), (c).) Here, the potentially affected environment stretches from Benicia to Roseville, and beyond, yet the DEIR only describes the existing environmental conditions outside of Benicia in the most cursory of fashion. What are the conditions of tracks that will be used? Will Union Pacific meet the December 31, 2015 deadline for Positive Train Control on all segments used to serve Valero (The Government Accounting Office alerted the US Senate last year that most railroads have

[1] www.up.com/investors/attachments/factbooks/2013/fact_book.pdf

indicated they will not make the deadline.[2] Where will rail cars pass through populated areas, sensitive environmental sites, hazards, etc.? The DEIR admits that the proposed project would result in an increased shipment of crude by rail across much of Northern California, yet completely fails to evaluate and disclose potentially significant impacts throughout the affected area. There is no discussion in the DEIR of the risks to and from Amtrak passenger trains, which care upwards of 1.7 million people per year along the Capitol Corridor on Union Pacific's tracks. The project description indicates the shipments will be made outside of commute hours, but this is not a binding condition of the project, and no monitoring for this project component is provided. The DEIR must be revised and recirculated to meaningfully describe the existing environmental setting along all foreseeable railroad routes that will carry increased crude to Valero as part of this project.

III. The DEIR's Impact Analysis is Inadequate.

a. The DEIR's evaluation of oil spills and fires lacks substantial evidence, misleads the public, and ignores common sense.

The catastrophic impacts of oil car derailments, explosions, and oil spills as a result of recent increases in quantities, and changes in types, of crude shipment by rail, are well documented, yet remain unaddressed by this DEIR. In the face of this evidence, the DEIR asserts that the railroad's "accident rate has been *declining* for decades" (DEIR4.7-18, emphasis added), despite the fact that analysis of government data shows that more oil was spilled from rail cars in 2013 than in every year between 1975 and 2012 *combined*.[3] Misleading and uninformative statements such as these and others evince a biased approach in this environmental document that should not be relied upon by the City or any responsible or trustee agency as sufficient to support informed environmental planning and decision-making. Based on the errors and omissions, below, the DEIR's conclusion that any risk of spill or explosion is "extremely low" must be revised.

The DEIR repeatedly downplays the project's inherent and unavoidable risks, without relying on any evidence to support its conclusions. For example, the DEIR concludes that the risk of any spill from Roseville to Benicia of greater than 100 gallons is approximately 0.009 per year. (DEIR 4.7-17.) Yet, the DEIR admits that it did not assess the on-the-ground characteristics of the rail lines from Roseville to Benicia, including, for example, an evaluation of environmental risks existing through the railway corridor, such as proximity to populated areas, crossings, adjacent facilities, railway operational components, or any expected increases in rail traffic, like

[2] Gov't Accountability Office, *Positive Train Control: Additional Authorities Could Benefit Implementation*, GAO Rpt. No. GAO-13-720 (August 2013), *available at* http://www.gao.gov/assets/660/656975.pdf.

[3] http://www.huffingtonpost.com/2014/01/22/oil-train-spills_n_4645339.html

the planned addition of 10 commuter trains per day connecting Roseville to the Capitol Corridor line.[4] Without reviewing the existing and reasonably foreseeable conditions of the rail lines carrying the project's rail cars, any estimation of accident rate is unsupported by fact.

Similarly, the DEIR relies heavily on the presence of federal and state regulations and protocol to avoid or mitigate the significant impacts from rail car accidents, but fails to actually assess the capability and capacity of emergency responders (for fire or a spill) on the remote sections of UPRR's high-risk corridors, and assumes, without factual support, that the FRA has conducted all local track inspections necessary to ensure track safety, even where FRA inspections have a history of being inadequate. In addition, the recent joint announcement from USDOT and AAR on voluntary changes in railway operations indicates some important deficiencies in track safety and response preparedness, with recommendations that should be used to help inform the risks posed by this project, and/or incorporated into the terms of any project approval:[5]

- Increased track inspections;
- Upgrades to brake systems;
- Applying route planning and route selection requirements in 49 C.F.R. 172.820 to crude oil trains;
- New 40 mph speed limit through high-threat urban areas;
- Increased emergency response training; and,
- Inventory of emergency response capability and increased coordinated planning.[6]

The DEIR simply fails to assess the extent to which such measures are already in place, and, where lacking, consider them as feasible mitigation measures for the project. The DEIR also fails to discuss risks associated with human error along hazardous rail corridors where Positive Train Control is not utilized.

The DEIR's review of recent crude-by-rail catastrophes is also inadequate to support the DEIR's finding of no significant impact. For example, the DEIR relies almost exclusively on new "1232" train cars to mitigate the significant impacts caused by derailment, spill, and/or explosion. At the same time, the DEIR admits that even where these cars have been used, spills have still occurred. (DEIR 4.7-19.)[7]

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[4] http://www.dot.ca.gov/hq/tpp/offices/owd/horizons_files/pph_2013/09-10-2013_Planning_Horizons-CSRP_Pax_Final.pdf

[5] https://www.aar.org/newsandevents/Press-Releases/Pages/Freight-Railroads-Join-U-S-Transportation-Secretary-Foxx-in-Announcing-Industry-Crude-By-Rail-Safety-Initiative.aspx#.VA-CmaOK19Z

[6] See Attachment 1. Recent communication between Union Pacific and the California Department of Fish and Wildlife Office of Spill Prevention and Response reflects UP's position that it is not beholden to state requirements for contingency planning, sensitive species site analysis, and coordination with the designated State On-Scene Coordinator in response to oil spills. The risk from this gap in preparedness is not addressed in the DEIR where Valero defers to UP for all off-site spill response.

[7] The DEIR fails to provide any discussion of why 1232 cars were insufficient to prevent significant impacts in this spill.

Indeed, the American Association of Railroads in 2012 commented to the PHMSA that even the CPC-1232 compliant cars should be further retrofitted to remain in service. Specifically, high-flow capacity pressure relief devices and reconfigured bottom outlets must be required for these tanks. The DEIR does not contain any binding commitment to use the highest safety standards recommended at this time. Potential impacts from using unmodified CPC-1232 tank cars must be analyzed in the DEIR.[8] Moreover, the DEIR admits that, with a crash of the severity of Lac-Megantic, where human error is the cause, the 1232 car would also likely not prevent any release. (Id.) Are humans living and working between Roseville and Benicia immune to error? The DEIR further offers pure speculation that, "[h]ad the trains in Aliceville or Casselton been using 1232 Tank Cars, it is possible that crude oil might not have been released." (Id.) An assertion that "it is possible" that 1232 cars will prevent spills from this project is insufficient to support the DEIR's conclusion that impacts from release will be less than significant.

Importantly, the DEIR should require that as a condition of project approval that all rail cars used at the facility are 1232 cars, including appropriate monitoring and reporting mechanisms to determine compliance. Without including this as a mandatory project condition, the DEIR's entire impact analysis is undermined. And even if 1232 cars are mandated, the additional AAR recommendations should be put in place,[9] requiring:

- Outer steel jacket and thermal protection;
- Full-height head shields;
- High flow capacity pressure relief valves; and,
- Design changes to prevent bottom outlets from opening in an accident.

The DEIR plainly attempts to hide the severity of the impact caused by any spill or explosion by only discussing the impacts of spills "greater than 100 gallons." The DEIR states that, "[a]lthough the consequences of a release are potentially severe, the likelihood of such a release is very low. The probability of an accidental release of crude oil from a tank car traveling to the Refinery involving more than 100 gallons of crude oil is just 0.009 per year." (DEIR 4.7-20.) This analysis and conclusion simply fail to assess the true *magnitude* of harm that could occur as a result of a spill and/or explosion, by instead placing a greater focus on frequency. Never does the DEIR answer exactly *how much* "greater than 100 gallons" might be spilled, and what the impacts of that spill could be. The focus on a 100 year timeline simply misses the point. For example, impacts related to flooding may be considered significant if only in a 100 year flood plain. In comparison, impacts resulting from oil spills may have even farther reaching effects.[10, 11, 12, 13] The DEIR does reference several high profile crude by rail spills over the last few years,

[8] http://earthjustice.org/sites/default/files/files/PetitionforEmergencyOrderReBakkenCrudeRailCars.pdf
[9] https://www.federalregister.gov/articles/2014/08/01/2014-17764/hazardous-materials-enhanced-tank-car-standards-and-operational-controls-for-high-hazard-flammable
[10] http://response.restoration.noaa.gov/about/media/oil-sands-production-rises-what-should-we-expect-diluted-bitumen-dilbit-spills.html
[11] http://insideclimatenews.org/news/20130725/dilbit-disaster-3-years-later-sunken-oil-looming-threat-kalamazoo-river

but conspicuously fails to disclose approximately how much oil was spilled at each. For reference:

- Lac Megantic, Quebec, July 2013, 1,580,000 gallons.[14]
- Pickens County, Alabama, November 2013, up to 750,000 gallons.[15]
- Casselton, ND, December 2013, 400,000 gallons.[16]
- Winona, MN, February 2014, 12,000 gallons.[17]

Given that each rail car would carry approximately 30,000 gallons of crude, the DEIR's use of a 100 gallon spill for its environmental analysis is patently misleading, and fails to provide the public and agency decision-makers with an accurate assessment of the proposed project's likely environmental impacts.

The DEIR fails to explain why it uses a worst case scenario spill quantity of 30,000 for an accident during train maneuver at the unloading station. (DEIR 4.7-20.) If one car is derailed, could more than one car not be derailed during such operations?

Environmental damage wrought by rail car explosion could be devastating. The Association of American Railroads estimates that a catastrophic train accident in an urban area could generate liabilities exceeding one billion dollars.[18] Yet, despite the national attention focused on these accidents, the DEIR downplays the risk of fire and explosion from additional shipment of crude by rail, by only considering whether the project would result in the "release of hazardous materials into the environment." (DEIR 4.7-13.) This inadequately captures the additional harms resulting from fire and explosion, including the obvious concerns of loss of life and property, but also further harm caused by any actual release where response and containment efforts are compromised by safety concerns.

The DEIR also fails to assess increased risk of train derailment resulting from seismic activity, including subsidence and liquefaction of the soft Bay mud underlying the tracks that cross the Suisun marshes. Indeed, the DEIR's entire evaluation of seismic risk is once again limited to the refinery and its immediate vicinity.

The DEIR attempts to offset any harm from spill by rail in an equal amount to the supposed reduction in marine shipping Valero will receive as a part of the project. (DEIR 4.7-18.)

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[12] http://insideclimatenews.org/news/20120626/dilbit-diluted-bitumen-enbridge-kalamazoo-river-marshall-michigan-oil-spill-6b-pipeline-epa
[13] http://insideclimatenews.org/news/20130327/cleanup-2010-mich-dilbit-spill-aims-stop-spread-submerged-oil
[14] http://www.huffingtonpost.com/2014/01/22/oil-train-spills_n_4645339.html
[15] http://articles.latimes.com/2013/nov/09/nation/la-na-nn-train-crash-alabama-oil-20131109
[16] http://www.latimes.com/nation/nationnow/la-na-nn-north-dakota-oil-train-crash-investigation-20140113-story.html#axzz2qfnvXmS1
[17] http://thinkprogress.org/climate/2014/02/05/3255791/crude-rail-oil-spill-minnesota/
[18] https://www.otc-cta.gc.ca/sites/all/files/consultations/AAR.pdf

Again, however, the project contains no binding commitments that Valero will, in fact, reduce its marine terminal shipments. For this reason, all instances in which the EIR relies on this shipping reduction are misleading and should be revised.

The DEIR's preemption arguments are a red-herring. There is no dispute that the City could disapprove of the project, or require mitigation measures or alternatives to the project before agreeing to any project approval. Such action by the City would not constitute regulation of rail activity.

b. The DEIR inadequately evaluates biological impacts.

As noted, above, the DEIR repeatedly fails to assess the project's impacts to areas adjacent to rail lines outside of the DEIR's overly-narrow "project area." The DEIR's biological resources section does, however, extend the DEIR's analysis of biological impacts to Suisun Marsh regarding "potential indirect impacts of accidental releases related to this proposed new transport." (DEIR 4.2-31.) The DEIR then goes on to admit that "these impacts also may apply to other sensitive areas anywhere along the railroad tracks used to transport crude feedstocks," but completely fails to evaluate these impacts. (Id.) This disclosure, while admitting that significant impacts are possible, is not a substitute for actual evaluation of impacts to biological resources along the project corridor.

The DEIR should evaluate impacts resulting from a spill or release to Suisun Marsh as direct impacts of the project, not indirect impacts. (DEIR 4.8-16.) Risk to federally listed species such as the endangered salt marsh harvest mouse, endangered California clapper rail must be analyzed. The brackish marsh assemblage of Suisun marsh – which includes endangered Soft bird's-beak and Suisun thistle, as well as pickleweed habitat – support these species. The internal network of sloughs in the marsh provides critical nursery habitat for the endangered Delta smelt. In 2004, there was a Kinder Morgan pipeline oil spill of approximately 124,000 gallons into Suisun marsh (along the Union Pacific rail line that would carry crude to Valero if this project is approved). The Natural Resource Damage Assessment for the spill, which took over six years to complete, documents injury to many small mammals, macroinvertebrates, birds, fish, insects, and vegetation in the marsh, including semipalmated plover, crayfish, Marsh wren, and stickleback. Restoration of the most-heavily impacted area reduced the area to a plowed field with a projected recovery time of 10-years from restoration.[19]

In addition, the DEIR completely sidesteps evaluating whether operational effects could disrupt nesting birds or dabbling migratory waterfowl, stating that "[d]uring operation, the noise, vibrations, visual disturbance, and increased human activity associated with the Project become part of the ambient environment, so any birds that subsequently nest nearby are presumed to be tolerant of the disturbance." (DEIR 4.2-28.) The DEIR simply fails to assess whether operational impacts would, in the first instance, disrupt any nesting, resting, or feeding patterns, instead only evaluating the project's construction-related activities.

[19] http://www.interior.gov/restoration/library/casedocs/upload/CA_Kinder_Morgan_Suisun_Marsh_RP_05-10.pdf

c. The DEIR inadequately evaluates impacts related to climate change.

This project may also increase the amount of heavy sour crude processed by Valero, which would produce substantially more petcoke for export. It is well documented that upgrading tar sands oil produces higher carbon emissions than conventional oil.[20, 21] The DEIR has failed to assess the impacts of shipping and burning additional petcoke, including impacts to water quality, and increased greenhouse gas emissions.

The DEIR also fails to assess potential effects from sea level rise and storm surge undermining railroad tracks along San Francisco Bay and Suisun marsh. As the DEIR admits, flooding can cause train derailment, leading to possible fires or spills. (See discussion of Cherry Valley derailment, DEIR 4.7.2.3.) The DEIR considers whether the new development at the Valero refinery itself could be affected by rising water levels and increased risk of flood (DEIR 4.8-19) but fails to conduct this analysis for railroad lines that would be carrying crude by rail for the proposed project.

d. The DEIR fails to analyze cumulative impacts.

The WesPac Pittsburg Energy project, the Phillips 66 Rail Spur project, and Chevron "Modernization" project, will all increase rail traffic, but the DEIR fails to evaluate the resulting effect on any operational controls and rail integrity along the railway. Similarly, the DEIR should have evaluated any projects that could reasonably and foreseeably increase rail traffic in general, such as the new commuter spur between Roseville and Sacramento, as any additional rail traffic could increase risk of collision. Further, the increase risk of derailment and/or explosion created by these other projects further increases the risk proposed by Valero's placement of more oil tank cars on these tracks.

IV. Conclusion

Thank you for your careful consideration of these comments, and of the growing public concern regarding the increased environmental and public safety risks that would be felt throughout Northern California as a result of this proposed project.

Sincerely,

Deb Self
Executive Director

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[20] Adam R. Brandt. *Variability and Uncertainty in Life Cycle Assessment Models for Greenhouse Gas Emissions from Canadian Oil Sands Production*. In *Environmental Science & Technology*. 2012, 46, pp. 1253-1261.
[21] http://priceofoil.org/content/uploads/2013/01/OCI.Petcoke.FINALSCREEN.pdf

ATTACHMENT 1

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July 3, 2014

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Re: Federal Preemption of S.B. 861

Dear Ms. Williamson,

At our meeting on June 18, 2014, Union Pacific and BNSF requested the State to consider amending S.B. 861 because federal law preempts the financial security and contingency plan requirements that this legislation would impose on the railroads. State officials at the meeting acknowledged that federal law would preempt oil spill prevention requirements but expressed the view that emergency response requirements are nonetheless saved from preemption by the Clean Water Act. We agreed to explain in further detail why we believe that view is wrong as a matter of federal law. We write now to do so.

I. EMERGENCY RESPONSE PLANNING

A. Preemption Under The Federal Rail Safety Act

As you know, 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).[1]

[1] The statute provides an exception for requirements "necessary to eliminate or reduce an essentially local safety or security hazard," *id.* § 20106(a)(2)(A), but the risk of a spill into California waterways "is not one that is fundamentally different from those of other locales" and therefore does not come within the exception, *Union Pacific R.R. Co. v. Cal. Pub. Util. Comm'n*,

The contingency response plans mandated by S.B. 861 are preempted by § 20106 for two reasons. First, the subject of oil spill contingency plans, including emergency response, has already been "cover[ed]" by Department of Transportation ("DOT") regulations and orders. Second, § 20106 applies to *any* regulation that DOT adopts related to rail safety. It does not matter whether the regulation is adopted under the FRSA, the Clean Water Act ("CWA"), or some other federal law. The CWA preemption provision accordingly does not govern the validity of the mandates imposed by S.B. 861. Section 20106 of the FRSA controls, foreclosing any state regulation of the railroads' oil spill contingency plans.

1. The Subject Of Oil Spill Contingency Plans Has Been Covered

As state officials at our meeting acknowledged, the Secretary of Transportation has adopted regulations that cover the subject of oil spill prevention. We accordingly do not address that issue further here. But the Secretary of Transportation has also prescribed regulations covering the subject matter of oil spill contingency planning, including *emergency response* to oil spills, in 49 C.F.R. Part 130 (titled "Oil Spill Prevention and Response Plans"). The purpose of these regulations is to adopt requirements for "spill *response* planning and response plan implementation intended to prevent *and contain* spills of oil during transportation." 61 Fed. Reg. 30533 (June 17, 1996) (emphasis added). Much like the contemplated California regulations, the federal regulations require covered parties (including railroads) to "[s]et[] forth the manner of response to discharges that may occur during transportation," identify "private personnel and equipment available to respond to a discharge," and identify the "appropriate persons and agencies (including their telephone numbers) to be contacted in regard to such a discharge." 49 C.F.R. § 130.31(a). Where a covered party transports oil in sufficiently high quantities, the regulations impose additional requirements, including the obligation to "ensure[] by contract or other means the availability of . . . private personnel . . . and the equipment necessary to remove, to the maximum extent practicable, a worst case discharge . . . and to mitigate or prevent a substantial threat of such a discharge." *Id.* § 130.31(b)(4).

Unlike the California legislation, however, the Part 130 regulations intentionally omit any location-specific spill planning for environmentally sensitive areas. *Compare* 61 Fed. Reg. 30538 (June 17, 1996) ("Neither the basic nor the comprehensive plan is required to address response on a vehicle- or location-specific basis."), *with* Cal. Gov. Code § 8670.29(d)(4) (requiring "[p]rovisions detailing site layout and locations of environmentally sensitive areas requiring special protection")). Instead, federal authorities determined that the railroads' contingency plans did *not* need to include "location specific" plans as long as the plan "covers the range of spill scenarios that the [railroad] foreseeably could encounter." 61 Fed. Reg. 30538. The agency reasoned that the required plans, including the "basic plans," represent a "complete and practical document that serves" the purpose of "ensur[ing]" that "personnel are trained and available and equipment is in place to respond to an oil spill" and that "procedures are established before a spill occurs so that required notifications and appropriate response actions will follow expeditiously." *Id.*

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346 F.3d 851, 862 (9th Cir. 2003) (noting the "more than 10,000 miles of track . . . adjacent to waterways in North America").

The Part 130 regulations supplement another set of federal regulations governing emergency response preparation for transportation of hazardous materials, including petroleum crude oil. In 49 C.F.R. Part 172 subpart G, the Secretary required "persons who . . . transfer or otherwise handle hazardous materials during transportation" to have "[e]mergency response information . . . immediately available for use at all times the hazardous material is present." 49 C.F.R. § 172.600(b), (c)(1). The required emergency response information includes the "[i]mmediate precautions to be taken in the event of an accident or incident," the "[i]mmediate methods for handling fires," the "[i]nitial methods for handling spills or leaks in the absence of fire," and "[p]reliminary first aid measures." *Id.* § 172.602(a). Moreover, the regulations require an emergency response telephone number "[m]onitored at all times the hazardous material is in transportation" by a person with "comprehensive emergency response and incident mitigation information for that material." *Id.* § 172.604(a). Given this "comprehensive regulatory framework," the Secretary determined in 1996 that "no additional spill prevention or containment requirements are necessary" beyond those imposed by Parts 172 and 130. 61 Fed. Reg. 30536 (June 17, 1996).

These DOT emergency response regulations are more than sufficient to "cover" the subject of oil spill contingency planning and to trigger complete preemption of any state requirements on this subject under the express terms of the FRSA preemption provision. In addition, where federal officials have affirmatively determined that certain requirements are unnecessary—as they did with respect to site-specific response planning—the "authoritative federal determination that the area is best left *un*regulated [has] as much pre-emptive force as a decision *to* regulate." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Ser. Comm'n*, 461 U.S. 375, 384 (1983)).

Even if federal authorities subsequently determine that greater protections may be warranted, States are not permitted to step in and adopt additional requirements of their own. *See Norfolk Southern R.R. Co. v. Shanklin*, 529 U.S. 344, 355-56 (2000) (holding federal regulations covering a subject preempted state tort law notwithstanding federal agency's view that additional safety regulation was appropriate). And in any event, here there is no need for State supplementation, because the federal government has demonstrated its commitment to updating its safety requirements as necessary. To that end, the Secretary recently issued orders that cover particular aspects of oil spill contingency planning in even greater depth than the earlier Part 130 and Part 172 regulations. Specifically, in his May 7, 2014 Emergency Order, the Secretary 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 49 C.F.R. Part 172, subpart G, and identify the route over which the oil will be transported. And in his February 25, 2014 Emergency Order, the Secretary 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.

Under 49 U.S.C. § 20106(a)(2), these DOT regulations and orders preempt California's distinct (though in many respects overlapping) requirements covering the same issues. California may not, for example, require railroads to provide the detailed information about oil

shipments described in Cal. Gov. Code § 8670.29(e), because the Secretary's May 7 Emergency Order has already covered the issue of what information a railroad must provide to state officials when transporting petroleum crude oil through the State. California may not require railroads to adopt "[p]rovisions for emergency medical treatment and first aid," Cal. Gov. Code § 8670.29(d)(2), because the Part 172 regulations already cover the issue of emergency medical care after a spill. And more generally, California may not require railroads to prepare California-specific oil spill contingency plans, *see* Cal. Gov. Code § 8670.29(a), because the Secretary has already determined precisely what sorts of planning the railroads are required to undertake in 49 C.F.R. Part 130. The subject of oil spill contingency plans is covered.

2. The Terms Of § 20106 Govern The Preemptive Force Of All DOT Regulations And Orders Related To Rail Safety

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. At our meeting, State officials nevertheless expressed the view that the text of the FRSA preemption provision must be disregarded and that the preemption provision of the Clean Water Act, 33 U.S.C. § 1321(o)(2)—which would allegedly permit this legislation—should govern here. A State official reasoned that this was the correct outcome because the Part 130 regulations were adopted pursuant to authority granted under the Clean Water Act.[2]

Section 1321(o)(2) simply states that § 1321 does not *itself* preempt state law regarding removal activities. Thus, where no other preemption provision is applicable, the Part 130 regulations have no preemptive force. That is why, as DOT explained in response to a comment by the American Trucking Associations, the Part 130 regulations would not preempt state laws governing cleanup of oil spills from highway accidents. *See* 61 Fed. Reg. 30539 (June 17, 1996).

But railroads are different. Unlike § 1321(o)(2), § 20106 is not tied to a particular source of federal regulatory authority. Rather, it is directed to ensuring broad regulatory uniformity on the subject of railroad safety—whatever the source of federal authority may be.[3] As the Solicitor General has explained, Congress "recognized that the Secretary had diverse sources of statutory authority . . . with which to address rail safety issues," and therefore "preemption had to apply to regulations issued" under *any* of those sources, for "otherwise, the desired uniformity could not

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[2] Even if the CWA preemption provision governed the effect of DOT regulations adopted pursuant to the CWA—and, as we explain, it does not—that would not save all of the state requirements at issue. The Part 172 emergency response requirements and the Secretary's recent Emergency Orders, which by themselves cover much or all of the subject matter the State is now attempting to regulate under S.B. 861, were not promulgated pursuant to the CWA.

[3] Because the Department addressed the preemptive effect of the Part 130 regulations only with respect to the trucking industry, it had no occasion to discuss their preemptive force as to state rail safety requirements under § 20106. However, as we explain above, the Department has subsequently taken the position that *all* of its regulations have preemptive force in connection with overlapping state rail safety requirements. *See* 74 Fed. Reg. 1790-91 (Jan. 13, 2009).

be attained." Brief for United States as Amicus Curiae at 6, *Public Util. Comm'n of Ohio v. CSX Transp., Inc.*, 498 U.S. 1066 (1991) (No. 90-95), *available at* http://www.justice.gov/osg/briefs/1990/sg900560.txt; *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.").

In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), for example, DOT had adopted the relevant grade crossing provisions under the Highway Safety Act. As the Eleventh Circuit there noted, the Highway Safety Act—unlike FRSA—contains no preemption provision and reflects no Congressional intent to preempt a field. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1555 (11th Cir. 1991). Nevertheless, the Supreme Court held that regulations adopted solely pursuant to the Highway Safety Act would have preemptive effect under FRSA if they covered a subject matter related to railroad safety, because "the plain terms of [§ 20106] do not limit the application of its express pre-emption clause to regulations adopted by the Secretary pursuant to FRSA. Instead, they state that any regulation 'adopted' by the Secretary may have pre-emptive effect, regardless of the enabling legislation." 507 U.S. at 663 n.4; *see also* Brief for United States as Amicus Curiae Supporting Affirmance at 19 n.17, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (No. 91-790), 1992 WL 12012044 ("[R]egulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA's express preemption if a State regulation 'relate[s] to railroad safety' and the Secretary's regulations 'cover[] the subject matter' of the state law requirement at issue.").

Similarly, in *CSX Transp., Inc. v. Public Util. Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), the Sixth Circuit addressed regulations promulgated by the Secretary solely under authority conferred by the Hazardous Materials Transportation Act ("HMTA"). There, too, the preemption provision of the authorizing statute was more solicitous of state regulation than was § 20106. "[U]nlike the preemption provision of FRSA, . . . the HMTA allows state regulations which are consistent with federal regulation." *Id.* at 501. Nevertheless, the court concluded that "the language of the FRSA . . . applies to the HMTA as it relates to the transportation of hazardous material by rail," preempting state requirements that were otherwise permissible under the HMTA. *Id.* That approach, it said, "retains the essential character and purpose of both statutes," showing respect for "[t]he national character of railroad regulation" while also preserving "regulation of hazardous material transportation" in its different forms. *Id.* at 503.

Building on these decisions, 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). Thus, "with the exception of a provision directed at an essentially local safety or security hazard, § 20106 preempts any State statutory, regulatory, or common law standard covering the same subject matter as a DOT regulation or order." *Id.* at 1791. The Department has taken this position not only in its regulatory actions, but also in amicus briefs filed in response to state regulatory efforts that seek to supplement the uniform federal scheme. *See, e.g.*, Brief for Amicus Curiae United States of America at 6, *Union Pacific R.R. Co. v. Cal. Pub.*

Util. Comm'n, No. C-97-3660 (Sept. 14, 1998). California's apparent view to the contrary—that FRSA's preemption provision does not apply to regulations related to railroad safety adopted by the Secretary pursuant to some other authorization other than § 20106—is thus inconsistent with both binding legal precedent and the repeatedly expressed views of the Department itself.

State officials in attendance at our meeting also suggested that California's new contingency planning requirements would escape preemption under § 20106 because they are targeted toward protecting the environment rather than toward "rail safety." Again, this argument is contrary to controlling law. Section 20106(a)(2) covers any state law "*related to* railroad safety." The Supreme Court has recognized that phrases like "related to," "relating to," and "relate to" are intended to "express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387 (1992); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (phrase is "deliberately expansive"); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (phrase is "conspicuous for its breadth"). As the Solicitor General has observed, FRSA's "preemption provision covering all laws relating to railroad safety" should be "construed broadly." Brief for United States as Amicus Curiae at 8, *Pub. Util. Comm'n of Ohio v. CSX Transp., Inc.*, 498 U.S. 1066 (1991) (No. 90-95).

One need venture nowhere near the limits of the phrase's logical meaning to conclude that "related to railroad safety" encompasses the statutory requirements at issue here. S.B. 861 embodies the State's conclusion that "the emphasis must be put on *prevention*, if the risk and consequences of oil spills are to be minimized." Cal. Gov. Code § 8670.2(f) (emphasis added). Preventing railroad accidents is, of course, the very heartland of "railroad safety." But even setting aside the core focus on prevention and looking to just those aspects of the statute targeted at post-accident response, the relation to railroad safety remains obvious. Just as an airbag is obviously "related to" automobile safety because it minimizes the injuries that result once a crash has already occurred, so too a response plan is "related to" railroad safety because it minimizes the harmful impact of a railroad accident.

That a response plan is *also* "related to" protection of the environment does not exempt it from the scope of § 20106. In *Union Pacific R.R. Co. v. California Public Utilities Comm'n*, for example, the challenged state regulations were directed toward reducing the "risk of severe environmental damage." 346 F.3d 851, 861 (9th Cir. 2003). It made no difference. Because federal regulations covered the same subject matter, the state regulations were preempted. *Id.* Indeed, Congress has directed that railroad safety regulations are appropriate for the express purpose of protecting the environment. *See* 49 U.S.C. § 20104(a) (authorizing Secretary to issue emergency orders to prevent "significant harm to the environment"). The Secretary's Emergency Orders reflect this concern, directing the railroads to take "steps to increase the safety of petroleum crude oil shipments by rail," and thereby "assist emergency responders in mitigating the effects of accidents," including "environmental damage." May 7, 2014 Emergency Order at 4, 7. The state requirements for oil spill contingency plans are "related to railroad safety" and the DOT regulations and orders covering that subject must be given full preemptive effect under the Supreme Court's decision in *Easterwood.*

B. Preemption under the Interstate Commerce Commission Termination Act

Along with being preempted under FRSA, the new state requirements also run afoul of a second federal railroad law. The Interstate Commerce Commission Termination Act ("ICCTA") confers exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the Surface Transportation Board ("STB"). Under 49 U.S.C. § 10901, the "Board has exclusive licensing authority for . . . operation of new railroad lines" and may certify rail line operation unless the STB finds the project to be "inconsistent with the public convenience and necessity." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1073 (9th Cir. 2011). To determine public convenience and necessity, the STB looks at a variety of circumstances surrounding the proposed action, "which can include consideration of the applicant's *financial fitness*, the public demand or need for the service, and the potential harm to competitors." *Alaska Survival v. STB*, 705 F.3d 1073, 1078 (9th Cir. 2013) (emphasis added).

The express preemption clause in ICCTA declares that the STB's jurisdiction over transportation by rail carriers "is exclusive." Specifically, Section 10501(b), provides:

> (b) The jurisdiction of the 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), . . . and facilities of such carriers; and
> >
> > (2) the . . . operation . . . of spur, industrial, team, switching, or side tracks, or facilities . . .
>
> 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.

The purpose of this preemption provision is to protect the railroad industry from a patchwork of state regulations that would balkanize the network. The STB has explained that § 10501(b) "is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *9 (STB served Mar. 14, 2005).

The federal courts have repeatedly recognized that these provisions broadly preempt state laws regulating transportation operations. *See, e.g.*, *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998) (describing language of § 10521(b)(2) as "broad" and giving Board "exclusive jurisdiction over . . . operation . . . of rail lines"); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority."). The STB observed that "[e]very court that has examined the statutory language has concluded that the preemptive effect of Section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that

would impinge on . . . a railroad's ability to conduct its rail operations." *CSX Transp., Inc.—Pet. for Declaratory Order*, 2005 WL 584026, at *6 (STB served Mar. 14, 2005).

Over the years, federal courts and the STB have found two types of state regulations of railroads to be so pernicious as to be "categorically" preempted, without any inquiry into the State's reason for the regulation or burden on the railroad industry. *First*, States are categorically prevented from intruding into matters that are directly regulated by the Board (e.g., railroad rates, services, and licensing). *See 14500 Limited LLC—Pet. For Declaratory Order*, FD 35788, slip op. at 4 (served June 5, 2014) (citing *City of Auburn*, 154 F.3d at 1029-31). Thus, ICCTA categorically precludes any form of state regulation in traditional areas of economic regulation, such as the parameters of the common carrier obligation or licensing of carriers (which may include a financial fitness inquiry).

Second, States cannot impose permitting or preclearance requirements. The STB has reasoned that these kinds of regulation, by their nature, can be used to deny a railroad's ability to conduct rail operations that the STB has authorized. *Id.* Thus, state permitting or preclearance requirements—including environmental and land use permitting requirements—are categorically preempted. *City of Auburn*, 154 F.3d at 1029-31. Otherwise, state authorities could deny a railroad the right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the STB's authorization of those facilities and operations. *14500 Limited* at 4 n.5 (*citing City of Auburn*, 154 F.3d at 1031; *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005)).

The California legislation implicates *both* of these categorical bans on state regulation. The legislation mandates that a railroad have an approved oil spill plan from California if it intends to transport crude oil in the state. Failure to do so exposes the railroad to criminal sanctions and massive fines. And the legislation permits the administrator to order the railroads to "cease and desist" any activity that "requires a permit, certificate, approval, or authorization under this chapter" if the railroad has not obtained such approval. Cal. Gov. Code § 8670.69.4.

ICCTA flatly prohibits this kind of state preapproval requirement. It is now beyond dispute that any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct its licensed common carrier operations is preempted by ICCTA. *City of Auburn*, 154 F.3d at 1030-31 (environmental and land use permitting categorically preempted); *Green Mountain Ry. v. Vermont*, 404 F.3d 638, 642-43 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by § 10501(b)). For example, the District of Columbia sought to require railroads to obtain a permit before shipping certain hazardous material though the District. The STB invalidated that provision under ICCTA. It reasoned that, "[t]o the extent that the D.C. Act would require a permit to move certain rail traffic through protected parts of the City, it is directly covered by the categorical preemption against state and local permitting processes." *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005)).

Federal preemption of state permitting or preclearance regulations is not a new phenomenon. Since the turn of the last century, the Supreme Court of the United States has frequently invalidated attempts by states to impose obligations on common carriers that are

plainly inconsistent with the plenary authority of the STB. For example, in *Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77 (1958), the Court held that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers—an activity also subject to regulation under the Interstate Commerce Act—was facially invalid as applied to an interstate carrier. "[I]t would be inconsistent with [federal] policy," the Court observed, "if local authorities retained the power to decide" whether the carriers could do what the Act authorized them to do. *Id.* at 87.

Here, federal law *requires* rail carriers to transport crude oil upon reasonable request. The railroads cannot simply stop transporting crude oil through California. They have a federal common carrier obligation under 49 U.S.C. § 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. § 10502. Crude oil has not been exempted from this obligation. "The common carrier obligation," the Board thus explained, "requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations." *See Union Pacific R.R. Co.—Pet. for Decl. Order*, FD 35219 (STB served June 11, 2009). A system under which California (and other states) could preclude carriers from operating because the carriers do not have a state-approved oil spill response plan in place could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act. As the Ninth Circuit explained, "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 . . . operating . . . a line." *City of Auburn*, 154 F.3d at 1031.

In sum, the STB and federal courts have repeatedly rejected state and local regulations of rail transportation that "giv[e] the local body the ability to deny the carrier the right to . . . conduct operations." *Green Mountain*, 404 F.3d at 643 (quoting *Joint Pet. For Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971, 2001 WL 458685, at *5 (STB Apr. 30, 2001)). The same result can be expected with respect to the contingency planning requirements imposed here.

II. FINANCIAL RESPONSIBILITY CERTIFICATIONS

Along with the state-specific oil spill contingency planning requirements, S.B. 861 added a second new state requirement: the need to secure a certificate of financial responsibility to operate within the State. *See* Cal. Gov. Code § 8670.37.51(d). The legislation purports to give the Administrator authority to halt all transportation of oil by rail in the State until a railroad has complied with the still-to-be-developed state regulations. *See* Cal. Gov. Code §§ 8670.37.53(c)(1) (requiring railroads to "demonstrate to the satisfaction of the administrator the financial ability to pay for any damages that might arise during a reasonable worst case oil spill").

Here, too, the State has made its way into an area in which federal control is exclusive. Regulating financial fitness of rail carriers is quintessential economic regulation that is categorically preempted by ICCTA. The STB is the only regulator (at a state or federal level) with the authority to review the financial fitness of a railroad or otherwise license a railroad to provide common carrier service. *N. Plains Res. Council*, 668 F.3d at 1073; *Alaska Survival v.*

STB, 705 F.3d at 1078; *Tongue River R.R.—Rail Construction & Operation—Ashland to Decker, Montana*, STB Finance Docket No. 30186 (Sub-No. 2) (STB service date Nov. 8, 1996) (explaining the purpose of the STB's financial fitness test). Once the STB has granted a federal license to carriers to operate in interstate commerce, California cannot superimpose another layer of economic regulation by forcing carriers to obtain yet another certificate of financial responsibility before they can operate within California. *See R.R. Transfer Serv., Inc. v. City of Chicago*, 386 U.S. 351, 358-59 (1967) (city could not regulate the "financial ability" of a party to render safe service where the regulated service was an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act). As the Senate noted when it enacted ICCTA in 1995:

> The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. 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.

See S. Rep. No. 104–176, at 6 (1995), U.S. Code Cong. & Admin. News 1995, p. 793.

III. CONCLUSION

The railroads have been highly successful in challenging California regulations that seek to supplement the uniform federal safety program. *See, e.g.*, *Union Pacific R.R. Co.*, 346 F.3d at 858-62 (holding that the FRSA preempted the CPUC's attempt to regulate mountain grade rail operations as essentially local safety hazards pursuant to a California statutory mandate); *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (holding that ICCTA preempted the South Coast Air Quality Management District's rules imposing limits on the permissible amount of emissions from idling trains); *City of Auburn*, 154 F.3d at 1029-31 (BNSF Railway Co. intervening party; court rejecting the City of Auburn's arguments that ICCTA only preempted economic regulations, and holding that the scope of ICCTA's preemption was broad and encompassed environmental regulations as well); *Union Pacific R.R. Co. v. Cal. Pub. Util. Comm'n*, No. 1:07-CV-00001-OWW-TAG, ECF No. 37 at 13–14 (E.D. Cal. June 1, 2007) (consent judgment stipulating that Union Pacific's and BNSF's Federal Security Programs satisfy the mandates of a California statute requiring local security plans). We hope, however, that resort to litigation will not be necessary this time.

Union Pacific and BNSF are not opposed to working with the State to improve railroad safety near state waters—or elsewhere. No one likes railroad accidents less than railroads. But we *are* opposed to a state-by-state approach in which different rules apply to the beginning, middle, and end of a single rail journey. Congress is too. *See* 49 U.S.C. § 20106(a)(1) ("Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable."); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (Congress' assertion of federal authority over the railroad industry is "among the most pervasive and comprehensive of federal regulatory schemes").

We therefore hope that, through negotiation and voluntary agreements, we can arrive at a mutually agreeable solution that addresses our shared safety concerns without need for resort to litigation.

Sincerely,

/s/
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