In the Supreme Court of the State of California

Friends of the Eel River and Californians for Alternatives to Toxics, **Plaintiffs and Appellants,** **v.** **North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority,** **Defendants and Respondents.**	Case No. S222472
Northwestern Pacific Railroad Co., **Real Party in Interest and Respondents.**	

First Appellate District, Division One, Case Nos. A139222 ; A139235
Marin County Superior Court, Case Nos. CIV11-03605; CIV11-03591
Honorable Roy Chernus, Judge

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, THE CALIFORNIA NATURAL RESOURCES AGENCY AND CERTAIN OF THEIR DEPARTMENTS AND BOARDS FOR LEAVE TO FILE BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE AND [*PROPOSED*] BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Environmental Protection Agency (CalEPA), the California Natural Resources Agency (Resources Agency), and some of their departments and boards (collectively, the Environmental Agencies) respectfully request leave to file the attached amici curiae brief. [1] The Environmental Agencies do not file this brief in support of any parties to this case. Instead, they file purely as a friend of the Court.

HOW THIS BRIEF WILL ASSIST THE COURT

This proposed amici curiae brief, which presents the Environmental Agencies' views and interests, will assist the Court by focusing on specific issues of statewide importance that could be potentially and incorrectly swept up in this case. This case poses the narrow question whether the Interstate Commerce Commission Termination Act (ICCTA) (49 U.S.C. § 10101 et seq.) preempts judicial remedies under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) against a public agency that owns and operates a federally-licensed railroad line. In ruling on this matter, however, the Court of Appeal made a more sweeping pronouncement that "CEQA is preempted by federal law when the project to be approved involves railroad operations." (*Friends of Eel River v. North Coast Railroad Authority* (Oct. 17, 2014, A139222, A139235) Slip Opn. at p. 26.) Taken out of context, this statement is overbroad. This brief explains the nuances involved in that preemption

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[1] The specific departments and boards of CalEPA and the Resources Agency that have an interest in this case are the California Air Resources Board, the State Water Resources Control Board, the North Coast Regional Water Quality Control Board, the Department of Fish and Wildlife, and the Office of Spill Prevention and Response.

inquiry and the limits on the scope of preemption under ICCTA. This brief also explains why such sweeping statements of federal preemption under ICCTA are not necessary and should not be allowed to impair the reserved legal authority of the State of California to exercise its general police powers and federally-authorized regulatory powers to protect the health and safety of its citizens.

STATEMENT OF INTEREST OF ENVIRONMENTAL AGENCY AMICI CURIAE

CalEPA has led California in creating and implementing some of the most progressive environmental policies in the nation. Within CalEPA are various departments and boards tasked with making, implementing, and enforcing state and federal environmental and health and safety laws and regulations. The departments and boards with particular interest in this case include the California Air Resources Board (CARB), which historically has entered into voluntary agreements with railroads to address locomotive emission issues and has proposed regulations addressing locomotive emission issues under the Clean Air Act; and the State Water Resources Control Board (State Water Board) and the North Coast Regional Water Quality Control Board (North Coast Regional Water Board), which enforce federal and state water quality rights and pollution laws.

The Resources Agency works to protect and sustain the scarce natural resources that make California unique for future generations, while balancing and respecting the needs of complex social and economic interests that rely upon them. Relevant here, the Resources Agency regulates CEQA so that land use decisions are transparent, consistent with that law's primary purpose as an information statute designed to help local and state entities understand and avoid significant impacts where such avoidance is feasible. The Resources Agency's mission is to restore, protect, and manage the State's natural, historical, and cultural resources for

current and future generations using creative approaches and solutions based on science, collaboration, and respect for all the communities and interests involved.

Within the Resources Agency, the Department of Fish and Wildlife (DFW) and the Office of Spill Prevention and Response (OSPR) have particular interest in this case. DFW is California's designated trustee agency for fish and wildlife resources, and it exercises jurisdiction by statute to conserve, protect, and manage fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (Fish & G. Code, §§ 1801, 1802.) To fulfill this mandate, DFW frequently works and is directed by statute specifically to collaborate with other federal, state, and local agencies with related natural resource management responsibilities. (Fish & G. Code, § 703.5.) OSPR's mission is to protect the State's natural resources by preventing, preparing for, and responding to spills of oil and other deleterious materials and through restoring and enhancing affected resources. OSPR is responsible for implementing Senate Bill 861 (S.B. 861), which expanded the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act to protect all waters of the state, not just marine waters. As amended, the act requires facilities, including railroads, located where an oil spill could impact state waters to prepare oil spill contingency plans, among other things.[2]

CalEPA, the Resources Agency, and their departments and boards face frequent challenges to the exercise of their police powers and regulatory authority on the ground of federal preemption. They therefore

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[2] In October 2014, the Association of American Railroads, Union Pacific Railroad Company, and BNSF Railway Company initiated litigation in federal court, alleging the requirements of the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, as amended, are preempted by ICCTA. On June 18, 2015, the United States District Court for the Eastern District of California issued an order dismissing the railroads' case on the ground that it is not ripe for adjudication.

have an interest in ensuring that as the Court considers the issues of federal preemption in this case, it is fully apprised of their regulatory interests and the unintended potential impacts to these interests of any ruling that might go beyond the particular facts and circumstances of this case.

STATEMENT REGARDING PREPARATION OF THE BRIEF

No party or counsel for any party in the pending case authored any portion of the proposed Environmental Agencies' amici curiae brief, and no party or counsel for any party contributed financially to the preparation of the brief in any way. No person or entity other than the proposed Environmental Agency Amici Curiae made any monetary contribution intended to fund the preparation or submission of this brief.

Dated: July 1, 2015

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BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE

INTRODUCTION

This case poses the narrow question whether the Interstate Commerce Commission Termination Act (ICCTA) (49 U.S.C. § 10101 et seq.) preempts judicial remedies under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) against a public agency that owns and operates a federally-licensed railroad line. In this brief, the Environmental Agencies, and the High-Speed Rail Authority in its concurrently filed brief, address ICCTA preemption of CEQA under the circumstances of this case, where a public agency railroad is subject to federal Surface Transportation Board (STB) regulation. In ruling on this matter, however, the Court of Appeal broadly stated, "CEQA is preempted by federal law when the project to be approved involves railroad operations." (*Friends of Eel River v. North Coast Railroad Authority* (Oct. 17, 2014, A139222, A139235) Slip Opn. at p. 26.)

Out of context, the Court of Appeal's blanket pronouncement is overbroad and sweeps in application of CEQA to public agency approvals not directly regulating or interfering with federally-licensed railroad construction or operations. Moreover, railroads could seize on this overstatement to argue that, by extension, other state environmental and health and safety laws and regulations that have a remote or incidental effect on rail transportation in the State of California are categorically preempted. It is therefore important to understand how ICCTA preemption applies to CEQA review outside the context of this case – a public agency created expressly to construct and operate a railroad under federal regulation.

In the case at hand, CEQA applies directly to the public agency carrying out its statutory mandate to act as railroad operator and CEQA remedies could have the effect of interfering with rail transportation regulated and authorized by the STB. In other situations, the analytical

inquiry will be different. First, is the public agency subject to CEQA acting in a permitting role? If so, the agency's permitting authority over a private railroad could be preempted by ICCTA, and CEQA review is not triggered. Second, where that is not the case, are particular actions imposed under CEQA (such as substantive mitigation measures) preempted under the circumstances? In other words, outside the circumstances presented by this case, the inquiry is not one of categorical preemption.

ICCTA's preemption provision should not be read to "sweep away" other state environmental police power laws that happen to merely touch upon railroads in interstate commerce – interference with rail transportation must always be demonstrated. Federal courts have carefully noted that in 49 U.S.C. section 10501, Congress narrowly tailored the ICCTA preemption provision to displace only "regulation" that has the effect of managing or governing "rail transportation" while preserving state laws that have "a more remote or incidental effect on rail transportation." (*Fla. E. Coast Ry. Co. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1331.) For those state laws, Congress intended to retain for the states "the police powers reserved by the Constitution." (See H.R. Rep. No. 104–311, p. 96 (Nov. 6, 1995) *reprinted in* 1995 U.S.C.C.A.N. 793, 808.) For example, untouched by ICCTA's preemptive reach would be those state laws enacted under general police powers, such as those requiring oil spill contingency planning for inland oil facilities. (Gov. Code, § 8670.28 et seq.) An appropriately narrow holding in this case would also avoid unintended interference with California's regulations authorized by federal environmental statutes, which courts harmonize with ICCTA. Important examples are the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, and state actions taken to implement the mandates of those laws.

CEQA OVERVIEW

To the end of providing "a suitable living environment for every Californian," the California legislature enacted CEQA to ensure that the State's public entities consider environmental factors when making discretionary decisions. (Pub. Resources Code, §§ 21000, 21001, subd. (d); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) As this Court recently explained, CEQA achieves its goal of "provid[ing] long-term protection to the environment by prescribing review procedures a public agency must follow before approving or carrying out certain projects." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1091-92.) To comply with CEQA, a public agency tasked with a discretionary decision vis-à-vis a "project" must essentially do two things. First, the agency must publicly disclose the potentially significant environmental impacts that may result from its project-related decision or action. (Pub. Resources Code, § 21002.1.) In this regard, CEQA is similar to the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) – the federal law upon which CEQA is modeled. Second, CEQA provides that the agency must implement feasible mitigation measures or feasible alternatives which would substantially lessen the project's significant environmental impacts (Pub. Resources Code, § 21002), a requirement that goes further than NEPA.

CEQA applies exclusively to "discretionary projects proposed to be carried out or approved by public agencies" that may cause a direct physical change (or a reasonably foreseeable indirect change) to the environment. (Pub. Resources Code, § 21080, subd. (a).) CEQA specifies three types of actions that qualify as "projects" under the statute. (Pub. Resources Code, § 21065.) First, CEQA applies to activities that a public agency undertakes directly. An example of this type of activity is the case presently at issue, where the North Coast Railroad Authority (NCRA), a public entity formed to operate a railroad, is proposing and developing a

public project that could also be undertaken by a private entity. Second, CEQA applies to activities supported with public monies through contracts, grants, subsidies, loans, or other forms of public assistance. Third, CEQA applies to activities for which a public agency issues a lease, permit, license, certificate, or other entitlement. Examples of this third category include when a public agency leases publicly-owned land to a private party, or when a public agency grants a discretionary approval (e.g., a permit) to a private entity to develop property. Significantly, the defining characteristic common to each of the three types of "projects" is that they all require a discretionary approval. It is to that decision or action by the *agency* that CEQA applies.

CEQA does not purport to authorize a public agency to do anything it is not otherwise authorized to do; any action the agency takes under color of CEQA must be entirely derivative of powers it already possesses. (Pub. Resources Code, §§ 21002.1, 21004; CEQA Guidelines, Cal. Code Regs., tit. 14, ch. 3, §§ 15040, 15041, 15042.)[3] Similarly, CEQA does not grant any new, independent powers to impose mitigation measures. Rather, an agency must rely only on its existing discretionary powers to mitigate or avoid significant environmental effects. These powers often lie in an agency's enabling statute, or a local government may rely on its police power or specific authority in a local ordinance. (Pub. Resources Code, § 21004; CEQA Guidelines, Cal. Code Regs., tit. 14, ch. 3, § 15040.) "If the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly explain the reasons underlying

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[3] Similarly, CEQA also authorizes an agency to approve a project even with major environmental impacts, on the basis that the project's benefits outweigh its significant environmental impacts. (Pub. Resources Code, § 21002.1; CEQA Guidelines, Cal. Code Regs., tit. 14, ch. 3, § 15043.)

the lead agency's determination." (Cal. Code Regs., tit. 14, ch. 3, § 15126.4, subd. (a)(5).) But the fact that an agency lacks authority to impose a measure to mitigate an identified environmental impact does not relieve the agency of its duty to analyze and disclose that impact. (Cal. Code Regs., tit. 4, ch. 3, § 15126.4(a)(5).)

ARGUMENT

I. BASIC PRESUMPTIONS AFFECTING FEDERAL PREEMPTION ANALYSIS

Although the parties in this case have explained in their briefs the general framework for a federal preemption analysis, the Environmental Agencies wish to emphasize a few key principles integral to every preemption analysis.

Even when presented with an express preemption provision, as in this case, courts are "reluctant to infer preemption." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.) A statutory provision may expressly preempt state law, but a court "must nonetheless 'identify the domain expressly pre-empted' by that language." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 484, quoting *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 517.) That domain is bounded by two recognized "cornerstones" of preemption analysis: (1) congressional intent; and (2) the presumption against preemption. (*Medtronic, supra*, 518 U.S. at p. 485; *Wyeth v. Levine* (2009) 555 U.S. 555, 565; *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1059-60.)

A. Clear Congressional Intent to Preempt State Law Must Exist

"'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" (*Wyeth, supra*, 555 U.S. at p. 565, quoting *Medtronic, supra*, 518 U.S. at p. 485; see also *Brown, supra*, 51 Cal.4th at pp. 1059-60.) This is because "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional*

purpose.'" (*Medtronic, supra*, 518 U.S. at pp. 485-486, quoting *Cipollone, supra*, 505 U.S. at p. 530 fn. 27.) "Congress' intent, of course, primarily is discerned from the language of the preemption statute and the 'statutory framework' surrounding it." (*Medtronic, supra*, 518 U.S. at p. 486.) But also relevant is the "structure and purpose of the statute as a whole," which is determined from a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." (*Ibid.*; see also *People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778.)

B. The Presumption Against Preemption Requires Courts to Narrowly Interpret the Scope of Congress' Intended Preemption of State Law

The second "cornerstone" in preemption analysis is the presumption against preemption. "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." (*Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.* (1993) 507 U.S. 218, 224 ("*Boston Harbor*"), quoting *Maryland v. Louisiana* (1981) 451 U.S. 725, 746.) Thus, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*People ex rel. Harris v. Pac Anchor Transp., Inc.* (2014) 59 Cal.4th 772, 778, quoting *Brown v. Mortensen, supra,* 51 Cal.4th at p. 1060.) This "provides assurance that the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 957, quoting *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525, internal quotation marks omitted.)

Read together, these principles advise a cautious approach to preemption.

II. WITH ICCTA, CONGRESS INTENDED TO PREEMPT ONLY THOSE STATE LAWS THAT MAY HAVE THE EFFECT OF MANAGING OR GOVERNING RAIL TRANSPORTATION, NOT THE STATES' EXERCISE OF HISTORIC POLICE POWERS

A. ICCTA's Preemption Provision Is Limited to the Rail Transportation Activities Regulated Under That Law

A preemption analysis begins with determining Congress' intent regarding the scope of ICCTA's preemptive reach. Both the statutory language and legislative history demonstrate that Congress intended ICCTA to preempt state law remedies that would have the effect of managing or governing rail transportation regulated and authorized by the STB, and not the states' traditional exercise of police power.

ICCTA was passed in 1995 in an effort to deregulate the railroad industry. (*N.Y. Susquehanna & Western Ry. Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, 252.) ICCTA regulates rail carriers' rates, terms of service, accounting practices, ability to merge with one another, and authority to acquire and construct rail lines. (*Ibid.*, citing 49 U.S.C. §§ 10101–11908.) "Thus it regulates the economics and finances of the rail carriage industry—and provides a panoply of remedies when carriers break the rules." (*Ibid.*, citing 49 U.S.C. §§ 11701–11707.)

49 U.S.C. section 10501(b) states the scope of the ICCTA's express preemption of state law:

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

Section 10501(b) is not expressly limited to preemption of economic regulation, but it does make clear that ICCTA preempts state law remedies "with respect to *regulation of rail transportation.*" (*N. Y. Susquehanna, supra*, 500 F.3d at p. 252; 49 U.S.C. § 10501(b), emph. added.) Thus, "Congress narrowly tailored the ICCTA pre-emption provision to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation." (*Fla. E. Coast Ry. Co., supra*, 266 F.3d at p. 1331.)[4]

ICCTA defines the term "transportation" as, essentially, the physical aspects of railroads and the services related to the movement of property and passengers. (49 U.S.C. § 10102(9).) ICCTA's definition of "transportation" is consistent with the first part of 49 U.S.C. section 10501(b), defining the jurisdiction of the STB. The phrase, "with respect to regulation of rail transportation" is particularly important to the preemption analysis because express preemption is fundamentally a question of congressional intent achieved by examining the *actual words* used by Congress to determine "whether the ordinary meanings of state and federal

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[4] The legislative history of 49 U.S.C. § 10501 is relatively sparse. (H.R. Conf. Rep. 104-422, p. 167 (Dec. 18, 1995), *reprinted in* 1995 U.S.C.C.A.N. 850, 852.) The conference committee report stated that it wanted to preempt "State economic regulation of railroads" and "to assure uniform administration of the regulatory standards of the Staggers Act." (*Ibid.*) But it also wanted to "clarify[] that the exclusivity [of federal law] is limited to remedies with respect to rail regulation – not State and Federal law generally." (H.R. Conf. Rep. 104-422, p. 167, *reprinted in* 1995 U.S.C.C.A.N. at p. 852.) As for the definitional section, 49 U.S.C. § 10102, the bill "reflect[ed] reductions in [federal] regulatory jurisdiction." (*Id.*, at p. 166, *reprinted in* 1995 U.S.C.C.A.N. at p. 851.) It also made clear that Congress intended to preserve the states' police powers reserved by the Constitution. (See H.R. Rep. No. 104–311, p. 96, *reprinted in* 1995 U.S.C.C.A.N. 793, 808.)

law conflict." (*Viva! Intern. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 939-40 [internal quotation marks and citations omitted].)

Based on the conclusion that Congress narrowly tailored the ICCTA preemption provision to displace only those state laws that may have the effect of "managing" or "governing" rail transportation, courts have applied a three-step preemption analysis to determine whether a state law is preempted under ICCTA. (See *Franks Inv. Co. LLC v. Union Pacific Railroad Co.* (5th Cir. 2010) 593 F.3d 404, 410-11 (en banc).) The first step is to determine whether the state or local law at issue (a) is a permitting or preclearance requirement that could be used to deny a railroad the ability to conduct or proceed with activities the STB has authorized, or (b) regulates matters directly regulated by the STB, such as construction and operation of lines, railroad mergers and consolidations, and railroad rates and service. (*Franks Inv., supra*, 593 F.3d at pp. 410-11; accord *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314, 330.) If the law falls into one of these categories, the law is determined to be "categorically preempted" by ICCTA "because such actions 'would directly conflict with the exclusive federal regulation of railroads.'" (*Franks Inv., supra*, 593 F.3d at p. 410, quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332.) If the state or local law does not fall into one of these two categories, then the second step is to factually assess whether the law, as *applied*, prevents or unreasonably interferes with rail transportation. (*Franks Inv., supra*, 593 F.3d at p. 413; *Adrian & Blissfield R. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 540, quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332 [for state actions "'that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation'"].)

Finally, in circumstances where a public agency is not itself engaging in STB-authorized actions and its proposed actions are not within STB-regulated areas, a court may apply a third step to analyze whether a public agency is acting in a proprietary capacity, rather than as a regulator, to determine that preemption may not apply.

B. ICCTA's Preemption Provision Can Reasonably Be Interpreted to Reach Only Regulations That Prevent or Unreasonably Interfere With Rail Transportation

Courts have not hesitated to find state regulation was preserved when it did not fall within the circumscribed areas of ICCTA preemption. For example, in *Adrian & Blissfield R. Co. v. Village of Blissfield, supra*, 550 F.3d 533, the Sixth Circuit found that for state actions "'that are not facially preempted, the section 10501(b) preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.'" (*Id.* at p. 540, quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois* (5th Cir. 2008) 533 F.3d 321, 332.) Applying this rule, the Sixth Circuit concluded that the state law requiring a railroad to pay for the installation and upkeep of sidewalks that abut and cross the railroad's property is not preempted under ICCTA "because it is not unreasonably burdensome and does not discriminate against railroads." (*Village of Blissfield, supra*, 550 F.3d at p. 541.)

In *Franks Inv., supra*, 593 F.3d 404, the en banc Fifth Circuit found that a state law regulating rail crossings is not preempted. (*Id.* at p. 413.) The Fifth Circuit relied on the decision of the Eleventh Circuit in *Fla. E. Coast Ry. Co. v. City of W. Palm Beach, supra*, which held that "'Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those state laws that may reasonably be said to have the effect of "manag[ing]" or "govern[ing]" rail transportation, ... while permitting the continued application of laws having a more remote or

incidental effect on rail transportation.'" (*Franks, supra*, 593 F.3d at p. 410, quoting *Fla. E. Coast Ry. Co., supra*, 266 F.3d at p. 1331.) The *Franks* court noted that other federal circuit courts have "explicitly adopted this position as well," citing to *Blissfield, PCS Phosphate Co. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 218, and *N.Y. Susquehanna & Western Ry. Corp. v. Jackson* (3d Cir. 2007) 500 F.3d 238, 252, 254. (*Franks Inv., supra*, 593 F.3d at p. 410 fn. 2.)[5]

Thus, a state law is not preempted under ICCTA if the law does not prevent or unreasonably interfere with railroad transportation, construction, or other rail services. A state law that has a remote or incidental effect on rail activities, or does not manage or govern rail activities the STB has authorized, is outside the scope of ICCTA's preemption provision.

III. ICCTA DOES NOT PREEMPT ALL APPLICATIONS OF CEQA

Applying this preemption analysis to CEQA, it becomes clear that to say "CEQA is preempted ... when the project to be approved involves railroad operations" is overbroad. As emphasized earlier, CEQA is largely *procedural*, and its directives apply to *public agencies*. To comply with CEQA, a public agency tasked with a discretionary decision vis-à-vis a "project" must publicly disclose the potentially significant environmental impacts that may result from its project-related decision or action (Pub. Resources Code, § 21002.1), and *if feasible*, the agency must implement measures to mitigate or lessen the project's significant environmental impacts. (Pub. Resources Code, § 21002.) CEQA does not apply directly

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[5] Other courts have followed suit. (See, e.g., *Haynes v. Nat'l Ry. Passenger Corp.* (C.D. Cal. 2006) 423 F.Supp.2d 1073, 1084 [no preemption in a tort action for injury due to seating]; *Jeffers v. BNSF Ry. Co.* (W.D. La. 2014) 2014 WL 1773532, *2-*3; *Faulk v. Union P. Ry. Co.* (W.D. La 2011) 2011 WL 777905, *7-*9 [no preemption of a state statute regarding railroad crossings]; *People v. Burlington N. Santa Fe Ry.* (2012) 209 Cal.App.4th 1513, 1528 [quoting this standard and citing to *Franks Inv.* and other cases].)

to or impose overall compliance liability directly on a private project proponent, as do many of the laws that are the focus of the preemption analyses in cases on which the lower court relied.

It is important to distinguish how CEQA applies to a public agency authorized to issue approvals for a project that might involve rail from the statute's application to a public agency that has the sole mission of owning and providing freight operations over a federally-licensed railroad line, as NCRA does here. In the former situation, the project being approved (and hence reviewed under CEQA) may not be solely the operation of a railroad, but rather a broader project or some action collateral to the actual railroad operations, such as a lease of public land. (As noted, if the approval is a direct state or local permit for the railroad operations, the permitting itself may well be preempted by ICCTA, and therefore CEQA will not be triggered.) Where CEQA is triggered and an agency decides to impose a certain mitigation measure on a private railroad as a condition of any necessary permit or authorization, it is that measure that is the proper subject of any preemption analysis, not the entirety of CEQA. The fact that the mitigation measure may be identified through the process of CEQA review is incidental; as discussed above, in imposing the measure, the agency is not exercising any authority it did not already have independent of CEQA.

In fact, CEQA clearly recognizes that an agency may lack authority to mitigate an identified impact. One of CEQA's "general concepts" is that an agency can only require "changes" in projects when the agency finds such changes to be "feasible." (CEQA Guidelines, Cal. Code Regs., tit. 14, ch. 3, § 15002.) Where a change or mitigation measure is not "feasible," CEQA does not (and cannot) require the agency to require or impose it. (*Id.* § 15126.4(a)(5) ["If the Lead Agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly

explain the reasons underlying the Lead Agency's determination."].) A mitigation measure may be "not feasible" for any number of reasons, including that the agency simply lacks authority or jurisdiction to impose it, or that its authority is preempted under the particular circumstances.

When an agency cannot legally impose a mitigation measure, for whatever reason, the agency will not be required to do so. Again, CEQA does not and cannot "require" the agency to do what it otherwise lacks authority to do. In these instances, it would be technically incorrect to say that CEQA is "preempted," even "as applied." More accurately, CEQA applies, but the proposed mitigation measure is simply not feasible, and therefore not required.

The preemption analysis applies to determine whether a proposed mitigation measure is preempted and cannot be legally imposed. The question is, does the specific mitigation measure present an unreasonable burden on railroad transportation? The STB has stated on several occasions that, outside the case of categorical preemption, whether ICCTA preempts a specific regulatory requirement is to be determined on the basis of a fact-specific, as-applied preemption analysis. (See, e.g., *King County, WA - Petition for Declaratory Order* (S.T.B. Sept. 25, 1996) 1996 WL 545598, *4 ["[I]t is difficult to draw the line between what type of regulation is, and is not, preempted without a thorough analysis of the particular ordinance at issue."]; see also *Joint Petition for Declaratory Order – Boston & Maine Corp. and Town of Ayer, MA* (S.T.B. Apr. 30, 2001) 2001 WL 458685, at *6 ["[W]hether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce ... ."].) So, too, where the "local regulation" is a mitigation measure that flows from CEQA review,

there is no bright line rule regarding whether and when such measures might be preempted; the analysis is fact-bound, and the sole focus of the inquiry is the measure itself, not CEQA generally.

IV. THE MARKET PARTICIPANT DOCTRINE CONFERS FLEXIBILITY TO PUBLIC AGENCIES, BUT THE DOCTRINE CANNOT AUTHORIZE A PUBLIC AGENCY RAILROAD TO OPERATE IN CONFLICT WITH ICCTA REQUIREMENTS

Where preemption applies, the market participant doctrine may provide an exception to preemption if the public agency "action" is a proprietary act. (See *Engine Mfrs. Assoc. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1040.) "The market participant doctrine distinguishes between a state's role as a regulator, on the one hand, and its role as a market participant, on the other. Actions taken by a state or its subdivision as a market participant are generally protected from federal preemption." (*Ibid.*) "Even-handedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." (*Reeves, Inc. v. Stake* (1980) 447 U.S. 429, 439.)

The market participant doctrine is based on the proposition that "pre-emption doctrines apply only to state regulation." (*Boston Harbor, supra*, 507 U.S. at p. 227.) "Not all actions by state or local government entities ... constitute regulation, for such an entity, like a private person, may buy and sell or own and manage property in the marketplace." (*Sprint Spectrum L.P. v. Mills* (2d Cir. 2002) 283 F.3d 404, 417.) "Thus, even where a federal statute pre-empts state regulation in an area, state action in that area is not preempted so long as it is proprietary rather than regulatory." (*Engine Mfrs., supra*, 498 F.3d at p. 1041.) "In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction." (*Boston Harbor, supra*, 507 U.S. at pp. 231-32.)

The market participant doctrine may provide an exception to preemption as-applied on a case-by-case basis, as where an agency imposes a mitigation measure and takes resulting action in its proprietary capacity. (See *Engine Mfrs., supra*, 498 F.3d at p. 1040.) For example, a public agency proposing to lease publicly-owned land for construction of a project will typically be subject to CEQA, including environmental review and mitigation. (Pub. Resources Code, §§ 21002, 21002.1.) And the public agency can enact specific restrictions on leasing public land, including environmental requirements and measures. Should such a project somehow involve a railroad and a party argues that certain measures are preempted by ICCTA, the market participant doctrine may come into play to permit that agency, like a private property owner, to impose environmental measures.

However, "the market participation doctrine is not a wholly freestanding doctrine, but rather a *presumption* about congressional intent." (*Engine Mfrs., supra*, 498 F.3d at p. 1042, emphasis added). That presumption is rebuttable. "Because congressional intent is the key to preemption analysis, we must consider whether [a federal law] contains 'any express or implied indication by Congress' that the presumption embodied by the market participant doctrine should not apply to preemption under the Act." (*Ibid.*, citing *Boston Harbor, supra*, 507 U.S. at p. 231.)

Thus, the market participant doctrine is yet another reason why it is overbroad to simply state that CEQA is preempted by ICCTA when a project involves railroad operations. In some cases (direct application of CEQA remedies to a public agency's STB-regulated rail activities), the market participant doctrine will not be relevant because Congress intended exclusive federal regulation of that area. However, in many other contexts, CEQA would simply apply. And the market participant doctrine may come into play if there is a question whether a public agency is undertaking

environmental review or imposing mitigation in a proprietary context. That inquiry will be a case-specific analysis whether particular measures conflict with federal regulation. Similar reasoning will apply to any CEQA remedies. Those that enjoin a public agency railroad from engaging in activities directly regulated by the STB are categorically preempted, as would be efforts to enjoin private projects already in progress and regulated by the STB when a factual assessment shows that an injunction would have the effect of preventing or unreasonably interfering with railroad transportation. Other cases involving proprietary actions by public agencies, however, will require a more detailed inquiry.

V. THE STATE OF CALIFORNIA PLAYS AN IMPORTANT ROLE IN IMPLEMENTING ENVIRONMENTAL STATUTES AND REGULATIONS THAT FALL OUTSIDE OF ICCTA PREEMPTION

An unduly broad holding with respect to ICCTA preemption in this case could inadvertently undermine a multitude of state environmental regulations, including those that implement federal environmental laws. The federal courts have consistently recognized that states may exercise their police powers and their authority to implement environmental statutes despite ICCTA's express preemption clause. (See, e.g., *Assn. of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094; *U. S. v. St. Mary's Ry. West, LLC* (S.D. Ga. 2013) 989 F. Supp. 2d 1357, 1361; *Humboldt Baykeeper v. Union Pacific Railroad Co.* (N.D. Cal. May 27, 2010) 2010 WL 2179900, *3.) Moreover, "nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the [Clean Water Act], and the [Safe Drinking Water Act]." (*Assn. of American Railroads, supra*, 622 F.3d at p. 1098, citing *Boston & Maine Corp. & Town of Ayer, supra*, 2001 WL 458685, at *5.)

A. ICCTA Does Not Generally Preempt Laws of General Applicability Promulgated Pursuant to State and Local Police Powers

As stated above, in a preemption analysis, courts begin with the presumption that a state's historic police powers to protect the health and safety of its citizenry are not superseded by federal law unless that is Congress' clear and manifest purpose. (*Rice v. Santa Fe Elevator Corp.* (1914) 331 U.S. 218, 230; *Oxygenated Fuels Assn. v. Davis* (9th Cir. 2003) 331 F.3d 665, 673.) "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." (*Medtronic, supra*, 518 U.S. at p. 475, internal quotation marks and citations omitted.) Courts have long observed that state laws aimed at pollution prevention and environmental protection fall within a state's traditional exercise of its broad police powers. (See *Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325, 328-29 [upholding exercise of state police power over oil spillage]; *Exxon Mobil Corp. v. U.S. EPA* (9th Cir. 2000) 217 F.3d 1246, 1255, citing *Massachusetts v. U.S. Dep't of Transp.* (D.C. Cir. 1996) 93 F.3d 890, 894 [stating environmental regulation traditionally a matter of state authority and broad police powers of states include power to protect health of citizens in state].) Thus, as environmental protection "falls under the historic police powers of the state, the authority of the states is assumed not to have been preempted unless it was the clear and manifest purpose of Congress to do so." (*Exxon Mobil Corp., supra*, 217 F.3d at p. 1256.)

Despite ICCTA's preemption language, certain areas of railroad activity remain within state and local authorities' jurisdiction pursuant to their police powers. (*Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line* (S.T.B. July 1, 1997) STB Finance Docket No. 33200, 1997 WL 362017, at *6.) As articulated in ICCTA's legislative history, Congress intended that the "States retain the

police powers reserved by the Constitution." (See H.R. Rep. No. 104–311, p. 96, *reprinted in* 1995 U.S.C.C.A.N. 793, 808.)

Courts have found that ICCTA generally allows the exercise of local police power to protect the health and safety of the local community so long as the local regulation does not (1) unreasonably burden rail carriage, or (2) discriminate against rail carriage. (*Norfolk Southern Ry. Co. v. City Of Alexandria* (4th Cir. 2010) 608 F.3d 150, 160; *N.Y. Susquehanna & W. Ry. v. Jackson* (3d Cir. 2007) 500 F.3d 238, 254, citing *Green Mtn. R.R. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 642.) As the STB itself has further articulated, local laws that, for example, prohibit a railroad from dumping excavated earth into local waterways are reasonable exercises of local police power, and local or state entities could seek damages from a railroad for such unlawful actions even if done while constructing a railroad line subject to the STB's jurisdiction. (*Cities of Auburn & Kent, Wa-Petition for Declaratory Order-Burlington N. R.R. Co.-Stampede Pass Line, supra*, 1997 WL 362017, at *6.) A state or local entity could also require a railroad to be financially responsible for disposing of waste from construction of a railroad line in a way that did not harm the health or well-being of the local community. (*Ibid.*) Such a requirement that neither imposes an unreasonable burden nor interferes with interstate commerce is a valid exercise of state and local police powers and is not preempted by ICCTA.

Pursuant to their police powers, the Environmental Agencies have made, implemented, and enforced countless environmental and health and safety laws and regulations. Many of those laws and regulations affect railroads to some degree, but that effect may be remote and incidental. Thus, it does not necessarily follow that those state laws and regulations are preempted. With ICCTA, Congress intentionally preserved the Environmental Agencies' right to exercise their police powers so long as doing so does not unreasonably burden or discriminate against rail

transportation; a remote or incidental effect on railroads is not enough to trigger ICCTA preemption. Accordingly, whether ICCTA preempts any particular exercise of police powers by the Environmental Agencies must be determined on a case-by-case basis.

B. California Has Traditionally Played a Significant Role in Implementing and Enforcing Federal Environmental Laws, Which Are Generally Not Preempted by ICCTA

When a party claims ICCTA preempts a state's regulation implementing another federal statute, like the Clean Air Act (CAA; 42 U.S.C. § 7401 et seq.), Clean Water Act (CWA; 33 U.S.C. § 1251 et seq.), or the Safe Drinking Water Act (SDWA; 42 U.S.C. § 300f et seq.), the Court applies a different analysis than that described in Section II.A, above. "If an apparent conflict exists between ICCTA and a federal law, then the courts must strive to harmonize the two laws, giving effect to both laws if possible." (*Assn. of American Railroads, supra*, 622 F.3d at p. 1097, emph. added; see also *Cal. Dump Truck Owners Ass'n v. Nichols* (E.D.Cal. 2012) 924 F.Supp.2d 1126, 1143 fn.9.) This analysis is important to avoid conflicting decisions from different branches of the federal government on the same issue. (*Cal. Dump Truck Owners Ass'n, supra*, 924 F. Supp. 2d at p. 1143 fn.9.) "The Court should read federal statutes to give effect to each if [it] can do so while preserving their sense and purpose." (*St. Mary's Ry. West, LLC, supra*, 989 F. Supp. 2d at p. 1362.) "'[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective.'" (*Ibid.*) When a state regulation implements a federal statute, the court should apply the foregoing analysis and attempt to harmonize the federal statute with ICCTA. (*Assn. of American Railroads, supra*, 622 F.3d at p. 1097.)

1. California Has Been at the Forefront of Implementing Federal Environmental Statutes

Traditionally, California has played a significant role in implementing the CAA, the CWA, and the SDWA. The CAA recognizes that "air pollution prevention... is the primary responsibility of States and local governments," (42 U.S.C. § 7401(a)(3)), and accordingly the statute is "'heavily dependent upon state participation.'" (*Cal. Dump Truck Owners Ass'n, supra*, 924 F. Supp. 2d at p. 1137.) The CAA gives the United States Environmental Protection Agency (USEPA) authority to issue national ambient air quality standards (NAAQS) (42 U.S.C. § 7409(a)), but the states—including California—are required to implement those standards by submitting State Implementation Plans (SIPs) to the USEPA for review and approval. (*Cal. Dump Truck Owners Ass'n, supra*, 924 F. Supp. 2d at pp. 1136, 1137, citing *Safe Air for Everyone v. U.S. E.P.A.* (9th Cir. 2007) 488 F.3d 1088, 1091 & 42 U.S.C. § 7407(a).) The SIP is a comprehensive plan that describes how a state, and particular areas within the state, will attain and maintain the NAAQS. (*Safe Air for Everyone, supra*, 488 F.3d at p. 1091.) "Accordingly, the success of federal regulatory programs implemented by the EPA pursuant to the CAA directly depends on the enforceability of the underlying state emission control measures incorporated into the state implementation plans." (*Cal. Dump Truck Owners Ass'n, supra*, 924 F. Supp. 2d at pp. 1138.) Upon approval by USEPA, a SIP becomes enforceable as federal law. (*Assn. of American Railroads, supra*, 622 F.3d at p. 1096; *Cal. Dump Truck Owners Ass'n, supra*, 924 F. Supp. 2d at pp. 1136, 1137, 1138.) In California, the Air Resources Board is the lead agency for all purposes related to the SIP. (See Cal. Health & Saf. Code § 39602; *Assn. of American Railroads, supra*, 622 F.3d at p. 1096.)

States also play an important role in implementation of the CWA. The CWA expressly preserves broad state authority to adopt standards for

discharge of pollutants, requirements for the control or abatement of pollution, removal activities, and liability. (See 33 U.S.C. §§ 1370, 2718.) The CWA also prohibits the discharge of any pollutant from a point source into navigable waters of the United States without a National Pollution Discharge Elimination System (NPDES) permit. (See 33 U.S.C. § 1342.) While the USEPA is tasked with authority to administer the NPDES program, it authorizes certain individual states to carry out the program, at which time the state assumes primary responsibility for reviewing and approving NPDES permits. (*Ibid.*) The USEPA approved the State of California's request to administer its own NPDES permit program in 1973. (*E.P.A. v. California* (1976) 426 U.S. 200, 209.) That responsibility has been delegated to the State Water Board. (*San Francisco Baykeeper v. Levin Enterprises, Inc.* (N.D. Cal. 2013) 12 F. Supp. 2d 1208, 1211.)

In addition, under section 401 of the Clean Water Act, an applicant for a federal permit or license to conduct an activity that may result in a discharge into waters of the United States must obtain water quality certification from the state. (33 U.S.C § 1341(a).) In California, certification is issued by the State Water Board. (Wat. Code, § 13160.)

Through the SDWA, Congress authorizes states to implement the federal drinking water program. Under the SDWA, the USEPA sets national standards for levels of specific contaminants. (42 U.S.C. § 300g-1; *Natural Resources Defense Council v. E.P.A.* (D.D.C. 1992) 806 F. Supp. 275, 276.) The states may then establish their own drinking water programs, which must be no less stringent than the federal standards. (*Ibid.*) The states that enact drinking water programs are authorized to exercise the federal government's primary enforcement authority under the SDWA. (*Ibid.*) As of July 1, 2014, the State Water Board is responsible for enforcing the SDWA in California. (Health & Saf. Code, § 116271, 116287, subds. (a)–(c), 116350, subd. (b)(2).)

2. California's Implementing Regulations Can Be Harmonized with ICCTA

Federal courts have repeatedly stated that the Clean Air Act and Clean Water Act are capable of co-existing with ICCTA. This applies with equal force to state regulations implementing those statutes. For example, when a state agency promulgates a SIP under the CAA and the USEPA approves it, ICCTA generally does not preempt those regulations because it is possible to reconcile them with ICCTA. (*Assn. of American Railroads, supra*, 622 F.3d at p. 1098.)

Similarly, federal courts have held that ICCTA can be harmonized with the Clean Water Act:

> One purpose of the ICCTA, as found by the Eleventh Circuit, was to prevent "the balkanization and subversion of the Federal scheme of minimal regulation for [rail] transportation." . . . However, . . . laws that "do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation" remain fully applicable unless specifically displaced.
>
> The CWA's scheme for environmental protection is in no way a direct regulation on [a railroad's] activities. . . . The CWA's prohibition against pollutant discharges does not discriminate against those operating in the rail transportation industry, but instead applies generally to "any person." It is meant merely to "protect[ ] the quality of our Nation's waters for esthetic, health, recreational, and environmental uses." The Court does not construe this as entailing any conflict with the ICCTA's separate purpose in simplifying the regulatory regime over the railroad industry. . . . Given the lack of positive repugnancy between the CWA's and ICCTA's jurisdictional provisions, a statutory construction giving effect to both properly reflects Congress's purpose.

(*St. Mary's Ry. West, LLC, supra*, 989 F. Supp. 2d at p. 1362; see also *Natural Resources Defense Council v. E.P.A.* (D.D.C. 1992) 806 F. Supp. 275, 276 ["Congress enacted the [SDWA] to ensure the safety of the public drinking water supply"].)

Exercising their roles as implementers of the CAA, CWA, and the SDWA, the California Air Resources Board, the State Water Board, and the Office of Spill Prevention and Response have promulgated numerous regulations and water quality standards that apply to the railroad industry. Additionally, in recent cases, several state agencies, such as DFW and the North Coast Regional Water Board, and public agency railroads are parties to consent decrees for various cleanup activities, corrective actions, and hazardous waste management. The actions in these consent decrees are not preempted because they are both the exercise of state police powers that are remote and incidental to rail transportation and are part of California's implementation of federal environmental statutes such as the CWA and other federal laws. (*St. Mary's Ry. West, LLC, supra*, 989 F. Supp. 2d at pp. 1362-63 [state and local implementation of federal environmental statutes not unreasonable burden or interference with federal statute].) In addition, the consent decrees are voluntary agreements between the parties and should not be preempted by ICCTA.

The success of the federal regulatory programs depends on the enforceability of California's regulations and on California's continued enforcement role. Based on current case law, California's regulations and enforcement practices, which implement *federal* laws and serve important environmental protection goals, can be harmonized with ICCTA's scheme of economic regulation (and deregulation) of rail transportation.[6] However,

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[6] In addition, California has adopted countless regulations consistent with states' rights provisions in federal environmental statutes. For example, consistent with a CWA savings clause (33 U.S.C. §§ 1321(o)(2), 1370), OSPR is required to establish oil spill contingency planning and related requirements that also apply to railroads that carry oil as cargo. In a recent lawsuit that was dismissed as unripe by the U.S. District Court for the Eastern District of California, the railroad industry asserted that ICCTA completely preempts those requirements as to railroads. But OSPR's regulatory program is an exercise of state authority expressly preserved by

(continued...)

overbroad statements about the scope of ICCTA preemption could ultimately jeopardize those important environmental programs—despite the fact they are part of and consistent with the federal regulatory framework. Accordingly, this Court should take great care to avoid overstating the scope of ICCTA's preemption clause in this case.

CONCLUSION

As stated above, this case poses the narrow question whether ICCTA preempts judicial remedies under CEQA against a public agency that owns and operates a federally-licensed railroad line. In this brief, the Environmental Agencies, and the High-Speed Rail Authority in its concurrently filed brief, address ICCTA preemption of CEQA under the circumstances of this case, where a public agency railroad is subject to STB regulation.

CalEPA, the Resources Agency, and certain of their departments and boards face frequent challenges to the exercise of their police powers and regulatory authority on the ground of federal preemption. They therefore have an interest in ensuring that as the Court considers the issues of federal preemption in this case, it is fully apprised of their regulatory interests and the unintended potential impacts to these interests of any ruling that might go beyond the particular facts and circumstances of this case. For these reasons, Environmental Agency Amici Curiae respectfully request that the Court resist requests for sweeping or overbroad pronouncements on the law of preemption and in so doing, avoid a ruling that could inadvertently frustrate or prevent Environmental Agencies' exercise of the State's police

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(...continued)
the CWA and is not preempted by ICCTA because it does not regulate rail transportation. (See Section II.B, *supra*.)

powers through vigorous enforcement of its environmental and health and safety laws and regulations.

Dated: July 1, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **APPLICATION OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, THE CALIFORNIA NATURAL RESOURCES AGENCY AND CERTAIN OF THEIR DEPARTMENTS AND BOARDS FOR LEAVE TO FILE BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE AND [*PROPOSED*] BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE** uses a 13 point Times New Roman font and contains 9,665 words.

Dated: July 1, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***
Case No.: **S222472**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On July 1, 2015, I served the attached:

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, THE CALIFORNIA NATURAL RESOURCES AGENCY AND CERTAIN OF THEIR DEPARTMENTS AND BOARDS FOR LEAVE TO FILE BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE AND [PROPOSED] BRIEF OF ENVIRONMENTAL AGENCY AMICI CURIAE

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 1, 2015, at San Francisco, California.

Erika Y. Gomez
Declarant

Erika Gomez
Signature

SA2015300475

SERVICE LIST

Case Name: ***Friends of the Eel River and Californians for Alternatives to Toxics v. North Coast Railroad Authority and Board of Directors of North Coast Railroad Authority***

Case No.: **S222472**

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