Case No. S222472

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Friends of Eel River, Californians for Alternatives to Toxics,

Appellant,

vs.

North Coast Railroad Authority, Board of Directors of North Coast Railroad Authority,

Respondents,

Northwestern Pacific Railroad Company

Respondent and Real Party in Interest.

Court of Appeal of the State of California
First Appellate District, Division Five
Case Nos. No.A139222, A139235

Superior Court of the State of California, County of Marin
Honorable Faye D'Opal; Honorable Roy Chernus
Case Nos. CIV11-3605, CIV11-03591

JOINT ANSWER TO PETITION FOR REVIEW

Cox, Castle & Nicholson LLP
Andrew B. Sabey (SBN 160416)
Linda C. Klein (SBN 270016)
555 California Street, 10th Floor
San Francisco, California 94104

Attorneys for Real Party in Interest
Northwestern Pacific Railroad Company

Neary & O'Brien
Christopher J. Neary (Bar No. 69220)

110 South Main St., Suite C
Willits, California 95490

Attorneys for Respondent
North Coast Railroad Authority

Case No. S222472

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Friends of Eel River, Californians for Alternatives to Toxics,

Appellant,

vs.

North Coast Railroad Authority, Board of Directors of North Coast Railroad Authority,

Respondents,

Northwestern Pacific Railroad Company

Respondent and Real Party in Interest.

Court of Appeal of the State of California
First Appellate District, Division Five
Case Nos. No.A139222, A139235

Superior Court of the State of California, County of Marin
Honorable Faye D'Opal; Honorable Roy Chernus
Case Nos. CIV11-3605, CIV11-03591

JOINT ANSWER TO PETITION FOR REVIEW

Cox, Castle & Nicholson LLP
Andrew B. Sabey (SBN 160416)
Linda C. Klein (SBN 270016)
555 California Street, 10th Floor
San Francisco, California 94104

Attorneys for Real Party in Interest
Northwestern Pacific Railroad Company

Neary & O'Brien
Christopher J. Neary (Bar No. 69220)

110 South Main St., Suite C
Willits, California 95490

Attorneys for Respondent
North Coast Railroad Authority

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Federal Statutes

TABLE OF AUTHORITIES
(continued)

Page

State Statutes

Federal Regulations

Other Authorities

I.

INTRODUCTION

Supreme Court review is not required to secure uniformity of the law or address an important legal issue. Appellants Friends of Eel River ("FOER") and Californians for Alternatives to Toxics ("CATS") (together "Appellants") are wrong when they argue that *Friends of Eel River v. North Coast Railroad Authority* (the "Opinion") and *Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314 ("*Atherton*") "directly conflict" and that the Opinion "wipes away" state rail agencies' discretion to comply with CEQA.

Atherton and the Opinion overlap on two narrow issues that do not present important issues of law justifying this Court's time and effort: (1) federal preemption of CEQA for rail under the Interstate Commerce Commission Termination Act (the "ICCTA") and (2) the applicability of the market participation exception to federal preemption.

On the first issue, *Atherton* and the Opinion are congruent. *Atherton* assumed without deciding that the ICCTA preempts CEQA as applied to rail activities. The Opinion reached the issue and expressly held that the ICCTA preempts CEQA as applied to rail activities. No conflict here.

Further, contrary to Appellant's claim, the Opinion does nothing to "wipe away" a state rail agency's discretion to conduct environmental review pursuant to CEQA. The Opinion does not concern or reach that

question; it holds only that a state rail agency cannot use CEQA to delay or impose restrictions on a private railroad's operations, specifically those of Respondent and Real Party in Interest Northwestern Pacific Railroad Company ("NWPCo"). Indeed, Appellants' presentation of the issues should be discounted because they fail to lay out the relevant facts, including that Appellants seek to use CEQA as a state permitting or preclearance law to shut down a privately operated railroad that is currently transporting goods in interstate commerce. This is a classic scenario where Appellants seek to use state law to step in as local regulators and delay or halt interstate rail operations—regulatory action that is clearly preempted.

Atherton and the Opinion also agree on the underlying law related to the second issue, the market participation doctrine. But that issue is fact specific, and the differing facts in *Atherton* and the Opinion led to different conclusions. *Atherton* concluded that the market participation exception to preemption applied based on a few key facts, including the High Speed Rail Authority's ("HSRA") voluntary promise to state voters in Proposition 1A to perform CEQA, and the absence of a private rail operator. In *Atherton*, CEQA was being used to inform the state's decision regarding the proposed alignment of a purely state owned and operated rail line.

By contrast, the rail line at issue in the Opinion has been in place for more than a century, and was simply resuming private, interstate operations after repairs the state helped fund. Unlike *Atherton*, no contract with the

public was at issue and application of CEQA threatened to halt ongoing, federally permitted interstate rail operations by private rail operator NWPCo. Tellingly, even though NWPCo is the party most affected by the outcome of the Opinion, Appellants almost completely ignore NWPCo in their Petition. They misleadingly recast the case as though NCRA was acting on its own as a state operator. But NWPCo would be the entity regulated by CEQA if it applied. Appellants seek to employ CEQA to ask the state courts to halt the operations of a federally authorized rail carrier. The basic differences between these cases explain why the courts of appeal reached different results.

Another fact-specific reason this case is a poor candidate for Supreme Court review involves Appellants' own pleadings. Here, as the Opinion explains, Appellants failed to plead a contract claim, or even any basic facts to support a contract claim. But they need a contract claim to have a basis to argue they are enforcing a contract as opposed to acting in a regulatory fashion enforcing CEQA. Thus, the Opinion properly rejects Appellants' attempt to invoke the market participant doctrine because they failed to plead or preserve the elements of the claim. This Court should await a case that actually presents this legal issue, as opposed to raising it as an academic exercise.

Once the factual distinctions are fairly presented, this Petition can be discounted as presenting neither a direct conflict among the courts of

appeal, nor an important question of law for this Court to resolve. Courts routinely apply the same law to different facts to reach different conclusions. Given that *Atherton* and the Opinion can be harmonized and the Opinion does not undermine state rail agencies' discretion to conduct proprietary environmental review for their own, internal decision-making purposes, this Court should deny the Petition.

II.

REVIEW OF THE ICCTA AND STATEMENT OF THE CASE

A. Overview Of Federal Regulation Of Railroad Service And The STB's Exclusive Jurisdiction Over Railroad Operations

In 1887, the U.S. Congress passed the Interstate Commerce Act ("ICA") (*see* 24 Stat. 379 (1887)), which created the Interstate Commerce Commission ("ICC") to regulate railroads. (*See* S. Rep. No. 176, 104th Cong., 1st Sess. (Nov. 21, 1995).) The Supreme Court has noted that the ICA "[was] among the most pervasive and comprehensive of federal regulatory schemes." (*Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 318, 325–326.)

In 1995, Congress passed the ICCTA, which broadened the ICA's federal preemption over interstate railroad operations, and replaced the ICC with the STB. (49 U.S.C. §§ 10101, *et seq.*) "The purpose of the ICCTA was to 'eliminate many outdated, unnecessary, and burdensome regulatory requirements and restrictions on the rail industry.'" (*People v. Burlington*

Northern Santa Fe R.R. (2012) 209 Cal.App.4th 1513, 1517 ("*BNSF*") [citation omitted].) Congress gave the STB authority to interpret and enforce the ICCTA (49 U.S.C. § 11101(f)) and to directly regulate rail carriers (49 U.S.C. §§ 10102(1); 10501 (b); 11101(f); 11321(a)). The STB also investigates and enforces the laws and regulations applicable to rail carriers. (49 U.S.C. §§ 11701–11707.) The STB's jurisdiction over these activities is exclusive:

> The jurisdiction of the [STB] 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.

(49 U.S.C. § 10501(b) [emphasis added].)[1]

Before a rail carrier can operate, it must obtain permission—a certificate—from the STB. (49 U.S.C. §§ 10901, 10902.) The STB has

---

[1] Prior to the ICCTA, the preemption provision applied only if the state law was "inconsistent with an order of the Commission issued under this subtitle or is prohibited by this subtitle." (49 U.S.C. § 10501(c) (1978).) The completely revised section 10501 that was enacted as part of the ICCTA broadened preemption to cover "construction, acquisition, operation, abandonment, or discontinuance" of railroad operations regardless of whether there was a direct conflict with an order or statute.

regulations and procedures for obtaining certification (49 C.F.R. § 1150), and depending on the nature of the proposed activity, the applicant may need to perform environmental review pursuant to federal law. (49 C.F.R. § 1105.6.) The ICCTA gives the STB the exclusive right to enjoin a rail carrier for violation of its certificate to operate. (49 U.S.C. § 11702(1).)

Because the certification process can be lengthy, the ICCTA authorizes the STB to exempt a carrier's application from the normal review procedures. (49 U.S.C. § 10502; 49 C.F.R. §§ 1121.1, *et seq.*; 49 C.F.R. § 1150.31 *et seq.*) If a carrier's proposed operation qualifies for an exemption, a carrier may obtain the STB's approval more expeditiously.

STB rules and regulations establish a process for the STB to hear and resolve complaints arising from a carrier's operations or its compliance with applicable laws. (FOER filed just such a case, which is discussed below.) For example, a person "may file with the [STB] a complaint about a violation of [49 U.S.C. § 10101 *et seq.*] by a rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part." (49 U.S.C. § 11701(b).) If the STB finds that a violation has occurred, it "shall take appropriate action to compel compliance." (49 U.S.C. § 11701(a).) The STB may enter a declaratory order pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721(a). STB orders are subject to judicial review in the federal court of appeals. (*See* 28 U.S.C. § 2321(a).) The court of appeals "has exclusive jurisdiction to enjoin, set aside, suspend . . . or to

determine the validity of . . . (5) all rules, regulations, or final orders of the Surface Transportation Board." (28 U.S.C. § 2342(5).)

B. NCRA And NWPCO Obtain STB's Approval To Operate The Line

NWPCo's operation of the "Line"—a 142-mile stretch between Lombard and Willits (referred to as the "Russian River Division")—is regulated by the ICCTA and the STB.

In 1989, California formed the NCRA for the purpose of ensuring continued freight rail service to the north coast area, and on September 18, 1996, NCRA acquired the right to operate the Line through an exemption approved by the STB. (Administrative Record ("AR") 4584–4585.) NCRA thus became, and remains today, a "rail carrier" under the ICCTA (49 U.S.C. §10102 (5)) and as such has a duty imposed by federal law to provide common carrier freight rail service. (49 U.S.C. § 11101.) NCRA did not perform any CEQA review for this approval.

Several years of severe weather in the region damaged portions of the Line. In 1998, the Federal Railroad Administration ("FRA") (primarily responsible for the safety of railroad operations) issued Emergency Order No. 21, which prohibited operations on certain portions of the Line until damaged areas were repaired. (AR 4592–4596.)

In anticipation that the Line would eventually be repaired, NCRA searched for a private operator. (*See* Cal. Gov. Code § 93020(a) [NCRA

has authority to "lease real and personal property" reasonably related to the operation of the Line]; Cal. Gov. Code § 93023(d) [NCRA has authority to select franchisee to "operate the railroad system"].) After the first private rail operator chosen by NCRA filed bankruptcy (Petitioners' Consolidated Appendix In Lieu of Clerk's Transcripts ("App.") 1:8 [Writ Petition, ¶ 24]), NCRA selected NWPCo to be the operator. In September 2006, NCRA and NWPCo entered into an agreement entitled "Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Lease" (the "Operations Agreement"). (AR 6725–6786.) The Operations Agreement gave NWPCo the right to operate on the Line, subject only to NWPCo obtaining STB's approval. (AR 6735 [Operations Agreement, ¶ VII.B.1].) The Operations Agreement also stated that it was conditioned upon NCRA "having complied with the California Environmental Quality Control Act ("CEQA") as it may apply to this transaction." (AR 6731 [emphasis added].) This clause refers to the potential application of CEQA to the NCRA's entry into the Operations Agreement itself. Whether CEQA applied to NCRA's entry into the Operations Agreement is now irrelevant. NCRA did not perform CEQA review for the transaction, and no party challenged NCRA's approval of the Operations Agreement in 2006.

NWPCo obtained STB approval to become the operator by filing a notice of an exemption with the STB. (AR 8206–8207.) NWPCo noted that

the resumption of rail service was exempt from environmental review under 49 C.F.R. 11506(b)(4) and (c)(1). Under this exemption, which the STB affirmed, NWPCo became a rail carrier under the ICCTA (49 U.S.C. §10102(5)) and accepted the mandatory duty to provide common carrier freight rail service on the Line. (49 U.S.C. § 11101.)

C. The STB Has Directly Regulated The Line By Approving Operations And Rejecting All Challenges To NWPCo's Certificate To Operate

FOER challenged NWPCo's August 2007 approval from the STB. (AR 8281-8347.) FOER's stated concern was "the environmental impacts associated with NWPCo's plans to restart operation of the North Coast Railway" (precisely what Appellants profess concern over in this case). (AR 8282.) FOER asked the STB to revoke NWPCo's approval and require full environmental review before the resumption of rail services because the Line was going from zero operations to actual operations. (AR 8283–8284.) FOER argued that the transfer of operation "cannot be approved without environmental review." (*Id.*)

FOER submitted a copy of NCRA's publication of a Notice of Preparation of an Environmental Impact Report ("NOP") regarding resumed operations on a portion of the line and included in its petition a copy of NCRA's initial study prepared pursuant to CEQA. (AR 8292–8344.) FOER argued that the NOP showed that environmental review was required, and that NWPCo's exemption was flawed for failing to note the

"significant environmental impacts" that a resumption of "nonexistent current operations" would allegedly cause. (AR 8283–8284.)

The STB rejected FOER's challenges (AR 8539–8542), including the argument that additional environmental review was required:

> [T]he 100 percent [increase in railroad traffic] threshold [to trigger environmental review] does not apply where there recently have been no operations over a rail line. [Citations omitted.] Thus, the 100 percent threshold does not apply in this case, in which there have been no operations over the line in recent years . . . . And, because only three round-trip trains will be operated per week, NWPCo's operations will not exceed the eight trains per day threshold for environmental review, which is the applicable threshold when there have been no operations over a rail line. 49 C.F.R. 1105.7(e)(5)(i)(C).

(*See Northwestern Pacific Railroad Company – Change in Operators Exemption*, 2008 WL 275698, *2 (STB 2008); *see also* AR 8540–8541.) As discussed, FOER could have challenged the STB's decision by appeal to the federal court of appeals. (*See* 8 U.S.C. § 2321.) It did not, and the decision is now final.

D. NCRA Obtained TCRA Funding Based On Categorical Exemptions, Not Based Upon The Purported Promise To Prepare An EIR Some Time In The Future

After NWPCo obtained STB's certification, it was legally authorized to operate the Line. NWPCo did not need, and did not apply for, further approval from the NCRA to operate the line. The track, however, still needed to be repaired.

To accomplish the repairs, the NCRA obtained release of the

funding the State Legislature had allocated to the NCRA back in the year 2000. (*See* Cal. Gov. Code §§ 14556.40(32), 14556.50.) The funds were made available through the Traffic Congestion Relief Program administered by the California Transportation Commission ("CTC"). (AR 6789–6810; *see also* App. 9:2365-84 [TCRP Guidelines].) During the presentation of NCRA's strategic plan to the CTC, the CTC expressed its hope that NCRA could proceed with the TCRP funded repair projects based on categorical exemptions so that the TCRP funds could be used for the project. (App. 13:3450.) NCRA fully complied with any CEQA obligations for the repair work funding by preparing a series of categorical exemptions, on which the CTC relied to release repair funds. (*E.g.*, AR 6905–6926; 7996–8041.)

Appellants never challenged a categorical exemption, but the City of Novato did (the "*Novato*" case). (AR 8900 [Consent Decree, ¶ I.A].) That case was settled in 2008, by the parties entering into a Consent Decree. (AR 8899–8951.)

NCRA and the CTC relied on categorical exemptions for the repair work funded by the TRCA grants. In its construction funding approvals, the CTC expressly acknowledged that the repair work was proceeding on NCRA's categorical exemptions (not upon the promise that an environmental impact report ("EIR") would be prepared). (AR 6905–6926; 7996–8041.) The CTC thus did not require an EIR in advance of disbursing

the funds for track repair.

The repair money was appropriated and earmarked for NCRA in the TCRA in 2000. Cal. Gov. Code § 14556.40(a)(32). In April 2006, CTC adopted guidelines acknowledging its obligation to fund NCRA. (App. 9:2365–84 [TCRP Guidelines at pp. 14–15].) These precluded the CTC from releasing money dependent upon an EIR until the EIR was complete. (*Id.* [TCRP Guidelines at § 5.5].) In November 2006, many years before NCRA would certify an EIR, the CTC authorized the payment of $6.8 million to NCRA for rail repair activities. (AR 6801–6810.) The repair work was substantially completed by mid-2010 (AR 10644), nearly a year before NCRA certified its EIR in June 2011 (AR 18).

E. NCRA's "Approval" Of NWPCo's Operations And Certification Of The EIR

Although the NCRA had no application for a discretionary approval before it, the NCRA proceeded in good faith to prepare an EIR, including responses to comments following circulation of a draft EIR. In June 2011, NCRA adopted Resolution No. 2011-02. (AR 18–74.) This resolution purports to do two things: (i) certify the EIR for a "project" loosely described as "resuming freight rail service from Willits to Lombard in the Russian River Division" (AR 18); and (ii) "approve" this project, even though NCRA (and the STB) had years earlier authorized NWPCo's operations on the Line (*id.*).

F. NWPCo Resumed Operations On The Line In June 2011 And Operations Have Been Ongoing Since

The Federal Rail Administration lifted Emergency Order No. 21 in May 2011. (AR 10695–96.) NWPCo resumed operations on the Line on June 11, 2011; operations have been ongoing since. (App. 13:3452 [NCRA Resolution 2013, ¶ VIII].)

G. Appellants Challenge Rail Operations and NCRA and NWPCo Demur

On July 20, 2011, Appellants filed their writ petitions alleging CEQA violations. (App. 1:1–16 [FOER Writ Petition]; App 1:35–115 [CATS Writ Petition].) Appellants seek to halt railroad operations pending additional environmental review under CEQA. (App. 1:15 [FOER Writ Petition, p. 14]; App. 1:63–64 [CATS Writ Petition, pp. 29–30].)

NWPCo demurred to, and moved to strike, the petitions on grounds that Appellants' CEQA claims are preempted by the ICCTA. The trial court (Judge D'Opal) overruled the demurrers. She found that Appellants' CEQA claims were, in fact, preempted by the ICCTA (App. 7:1862), but NCRA was judicially estopped from raising the preemption defense because of certain statements NCRA allegedly made in connection with obtaining state funding for repair projects. (App. 7:1864.)

H. The Trial Court's Ruling On The Merits Reaffirmed Preemption And Declined To Apply Judicial Estoppel

After Judge D'Opal's interlocutory order, the cases were reassigned to the Honorable Roy O. Chernus. (App. 7:1874.)

While the cases were moving toward briefing on the merits, including preemption, the NCRA decided to clarify the fact that it recognized the preemptive effect of the ICCTA and acknowledged that its June "approval" of resumed rail operations was unnecessary. Thus, on April 10, 2013, NCRA rescinded Resolution No. 2011-02, the purported approval that gave rise to Appellants' lawsuits. (App. 13:3448–3455.) No party challenged or otherwise sought to invalidate NCRA's rescission of Resolution No. 2011-02, and the time for doing so has now expired.

Thereafter, NWPCo and NCRA moved to dismiss Appellants' petitions on the additional ground that they were moot, both from the inception of the lawsuits and based on NCRA's rescission of the challenged approval. (App. 12:3432–13:3496.) The parties briefed both the motion to dismiss and the merits of Appellants' petitions. The trial court denied the petitions, concluding that the ICCTA preempted Appellants' CEQA claims and that the equitable doctrine of judicial estoppel did not apply. (App. 16:4391–4412.)

I. The Court of Appeal's Ruling On The Merits Reaffirmed Preemption, Declined To Apply The Market Participation Doctrine, And Found Preemption Did Not Violate The Tenth Amendment

The Opinion affirmed the trial court's ruling. To determine whether the ICCTA preempted CEQA's application to a private rail operator, the Opinion examined the text of ICCTA, *BNSF*, and the decisions of federal

courts and the STB. Consistent with ICCTA's plain language and the interpretation of that language by other courts and the STB, the Opinion held that the ICCTA preempted CEQA's application to NWPCo's operations. (Slip Op. at pp. 15–21.) In addition the Opinion rejected Appellants' claim that preemption is defeated by NCRA's voluntary agreement to comply with CEQA to receive TCRP funds. (*Id.* at p. 21.) According to the Opinion, even if NCRA's agreement with the CTC was "viewed as a contract requiring preparation of an EIR regarding resumed railroad operations, a claim based on a breach of that obligation may only be enforced by a party having standing." (*Id.* at p. 22.) Since Appellants had "not even alleged the existence of a contractual agreement by NCRA to prepare an EIR," Appellants had no standing to attempt to enforce the alleged contract. (*Id.* at p. 24.) The Opinion also found Appellants lacked standing to raise the market participation doctrine as a way to defeat the ICCTA's express preemption of CEQA. (*Id.* at pp. 26–32.) Finally, the Opinion rejected the claim that the ICCTA's preemption of CEQA violated the Tenth Amendment (*id.* at pp. 33–34), as well as Appellants' other claims.

III.

ARGUMENT

-The Opinion does not create a direct conflict with *Atherton.*

Nevertheless, Appellants claim that the cases have conflicting holdings on

preemption and the use of the market participation doctrine by the public to enforce CEQA. As further explained in Section III.A below, *Atherton* and the Opinion have consistent preemption holdings. Further, although the cases reached different conclusions about the applicability of the market participation doctrine, they generally agree on the underlying law. Their differing conclusions stem from the Opinion's careful application of law to its facts, which differ from *Atherton*. Thus, despite the Opinion's well-stated criticism of *Atherton*, the cases can be harmonized. Further, a central issue in the Opinion relates to Appellants' failure to plead a contract claim, which is necessary to invoke third party beneficiary status. *Atherton* did not address this issue, so the Opinion's careful analysis of the deficiencies in Appellants' pleadings creates no conflict with *Atherton*.

Appellants also claim that the Opinion is contrary to federal cases regarding federal interference with a state's governance of its subdivisions. As discussed in Section III.B below, this claim fails for several reasons, including that the Opinion has nothing to do with California's governance of its subdivisions, but rather addresses the rights of a private rail operator, NWPCo, to be free from state preclearance and permitting rules that halt or delay rail operations. Specifically, Appellants seek to enjoin a private, federally authorized rail carrier, NWPCo, from operating pending further CEQA review—this is precisely what federal preemption is designed to prevent.

A. The Opinion Does Not Directly Conflict With *Atherton*

According to Appellants, the Opinion conflicts with *Atherton* because, contrary to *Atherton*, the Opinion "determined that the Termination Act . . . preempted Petitioners' CEQA claims" (Petition at p. 2) and "rejects application of the market participation doctrine" (Petition at pp. 16–17). Contrary to Appellants' claim, *Atherton* and the Opinion agree on preemption. But the cases reach opposite conclusions regarding the applicability of the market participation doctrine. Determining whether the market participation doctrine applies and Appellants have standing to assert it is a factual inquiry, however, and Appellants ignore key factual differences between the Opinion and *Atherton* that led those courts to opposite conclusions. These factual distinctions concern: (1) the type of rail activities at issue, (2) who would be required to comply with CEQA, (3) to whom the state agency promised environmental review, and (4) whether Appellants here even preserved a contract claim on which to invoke the market participant exception to preemption. Once the factual differences are assessed, the cases can be harmonized without the need for Supreme Court review.

1. The Opinion and *Atherton* Do Not Conflict Regarding The ICCTA's Preemption Of CEQA

Contrary to Appellants claim (Petition at p. 4), *Atherton* and the Opinion do not directly conflict regarding whether the ICCTA preempts

CEQA. *Atherton* assumes without deciding that the ICCTA preempts CEQA.[2] (228 Cal.App.4th at p. 333.) The Opinion holds that the ICCTA preempts CEQA. (Slip Op. at pp. 20–21.) This holding is consistent with *Atherton*'s assumption.

The Opinion is also consistent with *Atherton*'s preemption dicta. *Atherton* observed it is "less clear and certainly subject to dispute whether requiring review under CEQA before deciding on the alignment of [a rail line] has a comparable potential effect to deny the railroad the ability to conduct its operations and activities," and thus less clear that activity would be preempted. (*Atherton, supra*, 228 Cal.App.4th at p. 333; see also *id.* at p. 341 [relying on fact that "application of the market participation doctrine will serve to regulate only the state's own behavior" as a reason preemption could be defeated].) Since the Opinion does not concern the proposed alignment of a future rail line, it does not contradict *Atherton*'s observation. Indeed, the Opinion agrees "that requiring a CEQA analysis as part of the process for determining *where* to place a rail line, which was the issue in

---

[2] Atherton in part assumed preemption without deciding the issue because "[t]he STB, as the agency authorized by Congress to administer the ICCTA" is "uniquely qualified to determine if state law is preempted." (228 Cal.App.4th at p. 332 fn. 4 [internal quotation marks omitted].) For this reason, *Atherton* advised the HSRA to request STB issue a declaratory order of preemption to determine whether the ICCTA preempts CEQA. (*Id.*) The HSRA has done so (Respondents can submit the request at this Court's request) and the STB's decision likely will resolve this issue for the pending rail litigation listed on page 25 of the Petition.

Atherton, differs from requiring a CEQA analysis as a condition of resuming rail operations, at issue in the present case." (Slip Op. at p. 21.)

Even if the Opinion conflicted with *Atherton* regarding preemption, which it does not, that conflict could be explained by the difference in the rail projects at issue. The "*Atherton* court recognized a local government's denial of a permit to operate a rail line would be preempted [by the ICCTA] because it could be 'used to deny a railroad the ability to conduct some part of its operations or to proceed with activities the [STB] has authorized.'" (Slip Op. at pp. 20–21, quoting *Atherton*, *supra*, 228 Cal.App.4th at p. 333 [internal quotation marks omitted].) This recognition is consistent with the Opinion's conclusion that the ICCTA preempts CEQA because it could be used to deny NWPCo the ability to proceed with STB authorized activities. (Slip Op. at p. 20.)

Moreover, if the Opinion had found the ICCTA did not preempt CEQA, the state would be able to impose environmental regulation on NWPCo even though STB had exempted NWPCo from environmental review. (App. 13:3451, citing STB's rejection of FOER's challenge regarding an exemption of environmental review [STB Decision, Finance Docket 35073, Jan. 31, 2008].) This possibility of direct conflict between federal and state law was not present in *Atherton*, as the HSRA had not

(yet) sought a preemption decision from STB. (228 Cal.App.4th at p. 332 fn. 4.) The potential conflict supports the Opinion's preemption finding.[3]

In sum, the Opinion does not conflict with *Atherton* on the ICCTA's preemption of CEQA, particularly when the challenged action is related to resuming rail operations.

2. The Opinion And *Atherton* Do Not Conflict Regarding The Purpose Of The Market Participation Doctrine

Both *Atherton* and the Opinion agree on the test to determine whether the market participation exception applies to a state action that, if regulation, would be preempted: the market participation exception applies when "a class of government interactions with the market . . . are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." (*Atherton*, *supra*, 228 Cal.App.4th at p. 335; Slip Op. at p. 27; compare *Atherton*, *supra*, 228 Cal.App.4th at pp. 335–336 with Slip Op. at pp.27–28 [citing the same market participation cases as precedent].) To determine whether the action in question is market participation, "a state can affirmatively show that its

---

[3] Indeed, the STB, whose decisions are appealable to the federal circuit, may be the best qualified to resolve any outstanding questions regarding preemption and the use of the market participation doctrine to defeat it. The contours of exceptions to preemption should be as uniform as the preemptive law itself, so that federal policy is consistently enforced across state lines. Resolving preemption state-by-state is both burdensome on state courts and potentially burdensome on interstate commerce if resolved inconsistently among the states. Thus, to the extent this case presents an important issue of law, it is important federally, and best resolved by the STB and reviewing circuit courts.

action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services," or the state "can prove a negative—that the action is not regulatory—by pointing to the narrow scope of the challenged action." (*Atherton, supra*, 228 Cal.App.4th at p. 335, quoting *Johnson v. Rancho Santiago Community College Dist.* (9th Cir. 2010) 623 F.3d 1011, 1024 [summarizing the test articulated in *Cardinal Towing v. City of Bedford, Texas* (5th Cir. 1999) 180 F.3d 686, 693]; see Slip Op. at p. 27 [quoting *Cardinal Towing, supra*, 180 F.3d at p. 693].)

Although the cases agree on the test to determine if state action is market participation, Appellants claim that the Opinion ignores "the proprietary nature of NCRA's CEQA obligation," which creates a conflict with *Atherton*. (Petition at pp. 16–17.) In making this claim, Appellants ignore the Opinion, which does not reach the question whether NCRA's application of CEQA as part of its "interactions with the market . . . [were] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." (Slip Op. at p. 27.) Rather than reaching the issue, the Opinion finds "[e]ven if the project to reopen the line is viewed as 'proprietary' and the initial decision to prepare the EIR a component of this proprietary action, a writ proceeding by a private citizen's group challenging the adequacy of the review under CEQA is not part of this proprietary action." (Slip Op. at p. 29.) (Standing

to raise the market participation doctrine is addressed in Section III.A.3, below.) Thus, the Opinion does not conflict with *Atherton*'s market participation analysis.

Had the Opinion delved into the question whether NCRA's compliance with CEQA was so narrowly focused that a regulatory impulse could be ruled out, it would have to have concluded "no" based on *Atherton*'s reasoning. *Atherton* recognized that when a state action imposes a permitting or preclearance requirement that could be used to deny a railroad the ability to conduct its operations, the governmental action is "*per se* unreasonable interference with interstate commerce, and the preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the action of regulation itself." (Slip Op. at p. 32, quoting *Atherton, supra*, 228 Cal.App.4th at p. 330 [internal quotation marks and alteration omitted].) Here, CEQA review would have resulted in preclearance requirements used to condition NWPCo's operations, which is "*per se* unreasonable interference with interstate commerce" and thus preempted.

To overcome a finding of "per se unreasonable interference," *Atherton* relied on a fact not present in the Opinion: the HSRA's voluntary agreement to comply with CEQA, as evidenced by Proposition 1A. (228 Cal.App.4th at p. 340.) "Proposition 1A was presented to the voters with the expectation that CEQA would apply and the voters ratified the

proposition based on this expectation." (*Id.* at p. 338.) Proposition 1A, as "a voter approved bond measure is . . . either contractual or analogous to contract." (*Id.* at p. 339.) And "[t]he STB has held that a railroad's voluntary agreement can be enforced notwithstanding the express preemption provision of 49 United States Code section 10501, subdivision (b), because preemption should not be used to shield one from its commitments," and voluntary agreements reflect "the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." (*Id.* at p. 339.) HSRA's power was thus "circumscribed by the provisions of Proposition 1A," which required "compliance with CEQA" (*id.* at pp. 339–340) and transformed a quintessential California regulation into a proprietary act in the market for high-speed rail.[4]

NWPCo made no similar voluntary agreement, instead consistently asserting the ICCTA preempts state environmental review of its operations. (See, e.g., AR 8107 [NWPCo's Notice of Exemption to the STB, stating "[n]o environmental documentation is required"]; App. 13:3453 [NWPCo viewed Appellants' CEQA challenge as "preempted and moot"].) Accordingly, unlike the HSRA, NWPCo was not bound by a voluntary

[4] A future court of appeal, addressing one of the several HSRA cases pending in the trial courts, could fairly disagree with *Atherton's* assessment and could create a direct conflict that might merit review, but that issue is not presented here and thus review should await further developments. Further, the issue may never arise for the reason stated in footnote 2, *supra*.

agreement to comply with CEQA and instead, the typical preemption analysis applied. Under that analysis, since CEQA could be used to halt NWPCo's operations, as evidenced by Appellants' desired remedies, CEQA is *per se* unreasonable interference and thus preempted.

Appellants argue that the Opinion and *Atherton* conflict because NCRA made a voluntary agreement with the state to comply with CEQA, and thus the analysis in *Atherton* applied equally here. (Petition at pp. 17–18.) This argument ignores *Atherton*'s reasoning, which examines whether the party that would be regulated—not the party that would impose the regulation—made a voluntary agreement to comply. (*Atherton*, 228 Cal.App.4th at p. 339.) In *Atherton*, that party was HRSA; here it is NWPCo. As discussed above, NWPCo has consistently asserted the ICCTA preempts CEQA.

Even if the analysis turned on NCRA's agreements, no evidence exists that the NCRA voluntarily agreed to conduct CEQA. As Appellants note, "the state requires as part of its regulatory regime that agencies receiving state funding comply with CEQA." (Petition at p. 17 [emphasis added].) That NCRA believed it had to comply with this generally applicable regime to obtain state funding does not turn CEQA compliance into a voluntary, "proprietary" action related to obtaining rail service. (See *South-Central Timber Dev., Inc. v. Wunnicke* (1984) 467 U.S. 82, 97 ["Contrary to the [Appellants'] contention, the [market participation]

doctrine is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because the State imposes it upon someone with whom it is in contractual privity."].)

Appellants also claim the Opinion conflicts with *Atherton* by holding that a "third party may not invoke the voluntary commitment rule as part of a writ of mandate action brought pursuant to CEQA" (Petition at p. 24). But *Atherton* does not stand for the proposition that anyone can enforce a voluntary commitment by a railroad to defeat preemption. *Atherton* never needed to reach that question because the petitioners there, as California voters, were parties to the voluntary agreement of Proposition 1A. The STB decision *Atherton* relied to find the HRSA made a voluntary commitment enforceable by state voters, however, suggests that only parties to the agreement can sue to enforce it. (See *Atherton*, *supra*, 228 Cal.App.4th at pp. 339, quoting *Joint Petition for Declaratory Order—Boston and Main Corp. and Town of Ayer, MA* (STB, Apr. 30 2001, No. 33971) 2001 STB WL 458685, at p. *5 ("*Boston and Main Corp.*") ["[A] town may seek court enforcement of voluntary agreements that the town had entered into with a railroad, notwithstanding section 10501(b), because the preemption provisions should not be used to shield the carrier from its own commitments." (Emphasis added.)].)

The Opinion's conclusion that only parties with standing to enforce

a contract can in fact enforce it is consistent with the STB case *Atherton* cited. (See Slip Op. at p. 32.) Fundamental to the Opinion's holding is Appellants' failure to plead a contract claim that might have supported their argument they were enforcing a contract as opposed to acting in a regulatory capacity as private attorneys' general. (*Id.* at p. 24.) Instead, Appellants openly asserted they were acting in a traditionally regulatory fashion as typical CEQA petitioners, seeking to enforce CEQA on behalf of the public, until they needed to pivot to a contract theory to invoke an exception to preemption. (*Id.*) As discussed further below, the failure to plead a contract was fatal to their contract-based claim to avoid preemption. The issue of pleading a contract claim was not addressed in *Atherton*, so the cases do not conflict on that point.

In short, the cases do not directly contradict each other on the legal principles of the market participation doctrine or the voluntary commitment exception to preemption.

3. The Opinion And *Atherton*'s Differences Regarding Standing To Raise the Market Participation Doctrine Stem Primarily From Factual Not Legal Distinctions

As Appellants note (Petition at pp. 18–19), *Atherton* and the Opinion differ in their answer to the question whether public interest groups have standing to use the market participation doctrine to enforce state compliance with CEQA for rail activities governed by the ICCTA. The differing conclusions are explainable by looking at the different facts of

each case and therefore, although the Opinion is rightfully critical of *Atherton's* analysis, the cases can be harmonized, eliminating the need for Supreme Court review.

The Opinion itself offers the roadmap to harmonization:

> *Atherton* suggests the bond measure funding the [high-speed train] was akin to a contractual agreement between the public entity and the electorate [citation]. Assuming a member of the electorate could bring a breach of contract claim based on an entity's failure to comply with a bond measure under the circumstances of *Atherton* [citation], NCRA's alleged "voluntary" agreement to comply with CEQA arises from its contract with the state, not from its acceptance of funds from a bond measure. As we have previously explained, petitioners do not have standing to enforce that contract.

(Slip Op. at p. 32.) Thus, even if NCRA and NWPCo had agreed that NCRA would conduct environmental review of NWPCo's rail operations or NCRA had agreed to environmental review in exchange for obtaining funds from the CTC, those agreements are not with the public and would not allow an enforcement action by public interest groups. The difference between a bilateral contract and an agreement with entire electorate of the state explains the differing results in *Atherton* and the Opinion, and provides a way for *Atherton* to be limited and the cases to be harmonized.

None of Appellants' arguments demonstrate an irreconcilable conflict in the cases' standing analysis.

Contrary to Appellants' first claim, the Opinion does not directly contradict *Atherton* by holding "only an agency may invoke the market

participant doctrine." (Petition at pp. 19, 27.) Although the Opinion notes that the market participation doctrine has generally been used by states to defend against claims of federal preemption, the Opinion does not bar a non-state party from raising the doctrine. Instead, the Opinion finds that "the market participation doctrine may not be used to avoid federal preemption by the ICCTA in this case" by public interest appellants seeking to enforce a state regulation. (Slip Op. at p. 30 [emphasis added].) Had the facts been different—for example, there was no private railroad involved, petitioners had actually pled a contract and sought to enforce contractual rights, and the contract alleged included petitioners as third party beneficiaries empowered to enforce it—the Opinion may have reached the same conclusion as *Atherton*. (See Slip Op. at p. 32; see also *Atherton, supra*, 228 Cal.App.4th at p. 323 [finding the applicability of the market participation doctrine is based on "the specific circumstances" there].)

Appellants next claim the Opinion directly conflicts with *Atherton* because the two cases interpret a series of lawsuits about state contracts with DHL Express differently (the "*Grupp* cases"). (Petition at pp. 20–21.) Neither case relies exclusively on its analysis of the *Grupp* cases to reach its conclusion, however, which makes their differing thoughts on those cases dicta and not important enough to warrant Supreme Court review. (See generally *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163,

1168 [explaining dicta]).) Moreover, *Atherton*'s finding regarding the *Grupp* cases was based on facts not present in the Opinion. Specifically, *Atherton* found the *Grupp* cases distinguishable because "[w]hile plaintiffs in the Grupp cases sought to regulate the behavior of a third party, DHL, the remedy sought here would apply only to . . . the state's own behavior," which was circumscribed by its promise to the voters. (228 Cal.App.4th at p. 341.) Had *Atherton* concerned a remedy that would apply to a private rail operator, like this case, it may also have concluded that the facts at hand were "akin" to the *Grupp* cases and found them instructive as to who has standing to raise the market participation doctrine. (Slip Op. at p. 30.)

Finally, Appellants claim the Opinion directly conflicts with *Atherton*'s observation that since the petitioners there had standing to bring suits to enforce CEQA, they also have standing to raise the market participation doctrine as part of a CEQA challenge. (Petition at pp. 24–25.) At first blush, *Atherton* and the Opinion appear to conflict, as the Opinion finds that Appellants lack standing to raise the market participation doctrine as part of their CEQA challenge. (Slip Op. at p. 30.) But *Atherton*'s conclusion stems from the HSRA's voluntary agreement with the public to be regulated by CEQA, including CEQA's public interest standing provision. (228 Cal.App.4th at pp. 339–340.) *Atherton* never addressed whether parties would have standing to assert CEQA claims against an entity who did not voluntarily agree to regulation by those parties. As

Atherton notes, "[i]t is axiomatic that cases are not authority for propositions not considered." (*Id.* at p. 337 [internal quotation marks and citation omitted].) Accordingly, *Atherton* is not authority for the proposition that non-parties to an agreement can rely on CEQA's public interest standing to assert the market participation doctrine and thus does not directly conflict with the Opinion's conclusion. (Slip Op. at p. 30.)

Because the Opinion, unlike *Atherton*, had to address the standing issue for non-parties to an alleged contract, the Opinion includes an important discussion of pleading standards. The Opinion explains that while Appellants seek to apply a contract-enforcement exception to preemption, they never pled a breach of contract theory. (Slip Op. at 24 ["No such claim has been asserted by petitioners, who have not even alleged the existence of a contractual agreement by NCRA to prepare an EIR."].) As the Opinion points out, this is not just theoretical or "semantics," rather, the absence of contract allegations prevents Appellants from pretending to be enforcing a contract as opposed to invoking CEQA as a regulation. (Slip Op. at 25 ["[T]he only way [Appellants] can proceed is via an action to enforce that contract. [Appellants] have not brought an action to enforce the contract."].) This foundational pleading issue is central to the Opinion's conclusion, but it was not addressed in *Atherton*, so while there may be a hole in *Atherton's* analysis, there is no conflict between the decisions.

Rather than address the factual differences between *Atherton* and the Opinion, Appellants attempt to discredit the Opinion's standing analysis by claiming it undermines the market participation doctrine. (Petition at p. 19.) Not so. As the federal cases cited by both *Atherton* (228 Cal.App.4th at pp. 334–336) and the Opinion (Slip Op. at pp. 26–29) "make clear, the market participation doctrine gives governmental entities the freedom to engage in conduct that would be allowed to private market participants" (*Id.* at p. 29; see *Atherton, supra*, 228 Cal.App.4th at p. 334.) Both cases acknowledge that a foundational principle in the market participation doctrine is "evenhandedness" in the treatment of market participants, whether state or private entities. (*Atherton, supra*, at p. 334; Slip Op. at p. 26.)

The Opinion's holding is consistent with the foundational principle articulated in *Atherton*. As the Opinion notes, absent a contract with a private citizen's group, "[a] private railroad that conducted a voluntary environmental review as part of a project would not be subjected to a challenge to that review by a private citizen's group" relying on public interest standing, and therefore neither should the state if it is acting as a market participant rather than regulator. (Slip Op. at p. 29.) Indeed, Appellants' own argument that a state can grant citizens a right to enforce its regulations, as it did with CEQA (Petition at p. 20), highlights the regulatory nature of CEQA and belies a claim that in this case CEQA is "so

narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out."

In short, despite similarities (*Atherton* and the Opinion are both about rail, CEQA, and the ICCTA), the factual differences discussed above resulted in the Opinion reaching a different conclusion regarding a citizen group's ability to assert the market participation doctrine to defeat preemption. Because the conflicting holdings stem primarily from factual rather than irreconcilable legal differences, the cases can be harmonized without Supreme Court review. And because *Atherton* and the Opinion can be harmonized, the hypothetical parade of horribles cited by Appellants (Petition at pp. 25–27) will not occur.

B. The Opinion Does Not Raise An Issue Regarding Federal Interference In A State's Self-Governance

Contrary to Appellants' claim (Petition at pp. 12–13, 27–34), the Opinion does not conflict with the holdings of *Gregory v. Ashcroft* (1991) 501 U.S. 452, 467 or *Nixon v. Missouri Municipal League* (2004) 541 U.S. 125, 140–141, which require a federal statute altering the usual constitutional balance between the states and the federal government to have "unmistakably clear" language of that intent, for at least three reasons.

First, the Opinion does not concern California's control over its subdivisions, but instead concerns California's ability to regulate NWPCo's

rail operations. (Slip Op. at p. 20.) Thus *Gregory* and *Nixon* are irrelevant to the analysis here.

Second, even if *Gregory* and *Nixon* were relevant, historically, "railroads are instrumentalities of interstate commerce over which [the federal government's] authority to regulate even purely intrastate matters under the Commerce Clause has not been and cannot be doubted." (Slip Op. at p. 34 [alteration omitted], quoting *CSX Transportation, Inc. v. Georgia Public Serv. Com.* (N.D. Ga. 1996) 944 F. Supp. 1573, 1586 and citing *City of Auburn v. United States* (9th Cir. 1998) 154 F.3d 1025, 1031]; see *id.* at p. 16, quoting *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 481 ["'Railroads have been subject to comprehensive federal regulation for nearly a century. . . . There is no comparable history of longstanding state regulation . . . of the railroad industry.'"].) Accordingly, a finding that the ICCTA preempts CEQA review of rail construction and operation (particularly by a private rail operator) does not alter the usual constitutional balance between the states and the federal government. (See Slip Op. at p. 34, quoting *New York v. United States* (1992) 505 U.S. 144, 155–156 ["If Congress has authority under the Commerce Clause to act, that action does not invade 'the province of state sovereignty reserved by the Tenth Amendment.'"].)

This conclusion is consistent with *California v. Taylor* (1957) 353 U.S. 553, a case involving a state-owned railroad and the Railway Labor

Act. There, California argued the Railway Labor Act did not contain a sufficient expression of preemption to restrict California's sovereignty. (*Id.* at p. 563.) The Supreme Court disagreed, holding that even though California could engage in interstate commerce by being a common carrier of a railroad, the state must do so within the limitations of Congress' power to regulate interstate commerce by rail. (*Id.* at pp. 562, 568.) This power does not "interfere with the 'sovereign right' of the State." (*Id.* at p. 568.)

Third, the Opinion finds "unmistakably clear" language of Congress' intent to preempt state regulation of rail construction and operations. The Opinion looks carefully at the ICCTA's preemption clause and concludes it "expressly preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation," including CEQA. (Slip Op. at p. 34 [internal quotation marks omitted]; see *id.* at pp. 16–20 [analyzing the ICCTA's "broadly worded express preemption provision" and cases interpreting that provision to find the ICCTA "expressly preempts CEQA review of proposed railroad operations"].) Express preemption is as clear an indication of Congress' intent as one can find in a statute. (*South-Central Timber Dev.*, *supra*, 467 U.S. 82, 91 [equating a finding that preemption is "expressly stated" to a finding of "unmistakably clear" intent].)

Therefore, the Opinion does not conflict with *Gregory* or *Nixon*.

IV.

CONCLUSION

Because the Opinion can be harmonized with *Atherton*, does not conflict with *Gregory* and *Nixon*, and has holdings confined to its facts that do not raise an important, wide-ranging issues of State law, the Opinion does not meet the requirements for Supreme Court review. Accordingly, Appellants' Petition should be denied.

Dated: December 1, 2014

Cox, Castle & Nicholson LLP

By: _____

Andrew B. Sabey
Attorneys for Respondent and
Real Party in Interest
Northwestern Pacific Railroad
Company

CERTIFICATE OF SERVICE
DECLARATION OF SERVICE BY MAIL

CASE NAME: Friends of the Eel River, Californians for Alternatives to Toxics v. North Coast Railroad Authority, et al.

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 California Street, 10th Floor, San Francisco, California 94104.

On **December 1, 2014**, I served the foregoing documents described as:

1) JOINT OPPOSITION TO PETITION FOR REVIEW

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

On the above date:

☒ **BY U.S. MAIL:** The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

☒ **BY ELECTRONIC MAIL DELIVERY:** By causing a true copy of the within documents to be mailed electronically to the offices of the addressees set forth below, on the date set forth above.

I hereby certify that the above document was printed on recycled paper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **December 1, 2014**, at San Francisco, California.

Peggy Sanchez

SERVICE LIST

CASE NAME: Friends of the Eel River, Californians for Alternatives to Toxics v. North Coast Railroad Authority, et al.

Court of Appeal **First Appellate District, Division Five** 350 McAllister Street San Francisco, California 94102 *(Case Nos. A139222, A139235)* *(via mail only)*	**Superior Court – Marin County** P.O. Box 4988 San Rafael, California 94913 *(Case Nos. CIV11-3605, CIV11-03591)* *(via mail only)*
Attorneys for Petitioners & Appellants **Friends of the Eel River** Ellison Folk / Amy J. Bricker Edward T. Schexnayder Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, California 94102 *Telephone: 415-552-7272* *Facsimile: 415-552-5816* *E-mail:* folk@smwlaw.com bricker@smwlaw.com schexnayder@smwlaw.com	**Attorneys for Petitioners & Appellants** **Californians for Alternatives to Toxics** Sharon E. Duggan / Shanna Foley Law Offices of Sharon E. Duggan 336 Adeline Street Oakland, California 94607 *Telephone: 510-271-0825* *Facsimile: 510-271-0829* *E-mail:* foxsduggan@aol.com
Attorneys for Petitioners & Appellants **Californians for Alternatives to Toxics** Helen H. Kang Environment Law & Justice Clinic Golden Gate University School of Law 536 Mission Street San Francisco, California 94105 *Telephone: 415-442-6647* *Facsimile: 415-896-2450* *E-mail:* hkang@ggu.edu	**Attorneys for Petitioners & Appellants** **Californians for Alternatives to Toxics** William Leonard Verick 424 First Street Eureka, California 95501 *Telephone: 707-268-8900* *Facsimile: 707-268-8901* *E-mail:* wverick@igc.org
Attorneys for Petitioners & Appellants **Californians for Alternatives to Toxics** Deborah A. Sivas Environment Law Clinic Mills Legal Clinic at Stanford Law School 559 Nathan Abbott Way Stanford, California 94305 *Telephone: 650-723-0325* *Facsimile: 650-723-4426* *E-mail:* dsivas@stanford.edu	**Attorneys for Real Party in Interest** **Northwestern Pacific Railroad Company** Douglas H. Bosco Law Office of Douglas H. Bosco 37 Old Courthouse Square, Suite 200 Santa Rosa, California 95404 *E-mail:* dbosco@boscolaw.com

CERTIFICATE OF WORD COUNT

The text of this brief consists of 8,210 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

DATED: December 1, 2014

Respectfully submitted,

COX, CASTLE & NICHOLSON LLP

By: Andrew B. Sabey (ACK)
Andrew B. Sabey
Attorneys for Respondent and
Real Party in Interest
Northwestern Pacific Railroad Company