[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 15-71780, 15-72570

STB No. FD 35861

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KINGS COUNTY; KINGS COUNTY FARM BUREAU; CALIFORNIA CITIZENS FOR HIGH-SPEED RAIL ACCOUNTABILITY; COMMUNITY COALITION ON HIGH-SPEED RAIL; CALIFORNIA RAIL FOUNDATION; TRANSPORTATION SOLUTIONS DEFENSE AND EDUCATION FUND; and DIGNITY HEALTH

Petitioners

v.

UNITED STATES OF AMERICA AND
SURFACE TRANSPORTATION BOARD

Respondents

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

Intervenor and Respondent

PETITION FOR REVIEW OF FINAL ORDER OF THE UNITED STATES SURFACE TRANSPORTATION BOARD

PETITIONERS' SUPPLEMENTAL MOTION FOR JUDICIAL NOTICE

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Pursuant to Federal Rules of Evidence, Rule 201, Petitioners Kings County et al. hereby move the Court to take judicial notice of the following facts or documents relevant to the issues in this case:

1. 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, a true and correct copy of which is attached hereto as Exhibit A.

2. Application of the South Coast Air Quality Management District and Bay Area Air Quality Management District for Leave to File Brief of Amici Curiae in Support of Appellant Friends of Eel River, et al. And [Proposed] Brief of Amici Curiae, a true and correct copy of which is attached hereto as Exhibit B.

Dated: May 18, 2016

Respectfully submitted.

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By /S/ Stuart M. Flashman

SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

I. THE SUBMITTED DOCUMENTS ARE SUBJECT TO JUDICIAL NOTICE.

Rule 201 of the Federal Rules of Evidence allows the court to take judicial notice of facts not reasonably subject to dispute. This includes facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The two documents for which judicial notice is requested are papers file in the California Supreme Court in the case Friends of the Eel River et al. v. North Coast Rail Authority et al., case S222472. The copies of the document that are attached were served on counsel for Petitioners herein by the parties filing those papers, and those papers have been accepted for filing by the court. All of these facts are readily and accurately ascertainable from the office of the clerk of the California Supreme Court. Thus the documents are subject to judicial notice.

II. THE SUBMITTED DOCUMENTS ARE RELEVANT TO ISSUES BEFORE THE COURT IN THIS CASE.

In addition to being subject to judicial notice, judicial notice requires that the fact or document of which notice is requested be relevant to one or more issues pending before the court. Here, Petitioners' Reply Brief, being submitted herewith, points to the submitted documents to show: 1) that

several public agencies used a brief of amici curiae to present their opinions to the California Supreme Court in the *Friends of the Eel River* case, demonstrating that the option was available to Respondent Surface Transportation Board if it had chosen to do so; and 2) to show that the State of California did not unambiguously support the position presented herein by Intervenor/Respondent California High-Speed Rail Authority ("CHSRA") in that other state agencies, including the California Natural Resources Agency, submitted an amicus brief in the *Friends of the Eel River* case that presented a very different position on CEQA preemption from that precented by CHSRA, both here and in an amicus brief filed in that case. Both these arguments are integral to the issues before the Court in this case.

Dated: May 18, 2016

Respectfully submitted.

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SUPPORTING DECLARATION OF AUTHENTICITY OF STUART M. FLASHMAN

I, Stuart M. Flashman, hereby declare as follows:

1. I am an attorney licensed to practice in California and before the Ninth Circuit Court of Appeal. I am one of the attorneys representing the Petitioners in this action. I have personal knowledge of the facts stated in this declaration and am competent to testify to them if called as a witness.

2. The documents attached hereto as Exhibits A and B are true and correct copies of the documents described in this motion, which documents have been filed in the California Supreme Court in the case Friends of the Eel River et al. v. North Coast Rail Authority et al., Case No. S222472. I personally obtained these documents by electronic service from counsel representing the parties that filed the documents.

I declare under penalty of perjury under the laws of the State of California that the above statements are true and correct. Executed this Eighteenth day of May, 2016 at Oakland, CA.

/S/ Stuart M. Flashman

Exhibit A

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

[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

[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.

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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

KAMALA D. HARRIS
Attorney General of California

MYUNG J. PARK
Deputy Attorney General
Attorneys for Environmental Agency Amici Curiae the California Environmental Protection Agency, the California Natural Resources Agency, and certain of their Departments and Boards

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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(Case Nos. A139222 and A139235)	Clerk of the Court California First District Court of Appeal, Division Five 350 McAllister Street San Francisco, CA 94102

(Case Nos. CIV11-03605 and CIV11-03591)	Clerk of the Superior Court Superior Court of California, County of Marin P.O. Box 4988 San Rafael, CA 94913

Exhibit B

S222472

IN THE SUPREME COURT 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,

and,

Northwestern Pacific Railroad Company,

Real Party in Interest and Respondent.

After a Decision by the Court of Appeal,
Fifth Appellate District, Division One
Case Nos. A139222, A139235

Appeal from the Superior Court of California, County of Marin
Case No. CIV11-3605, CIV11-03591
Honorable Roy Chernus, Judge

APPLICATION OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT AND BAY AREA AIR QUALITY MANAGEMENT DISTRICT FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT FRIENDS OF EEL RIVER, ET AL. AND *[PROPOSED]* BRIEF OF *AMICI CURIAE*

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

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the South Coast Air Quality Management District (SCAQMD) and Bay Area Air Quality Management District (BAAQMD) respectfully requests leave to file the attached *amici curiae* brief in support of Appellants Friends of the Eel River and Californians for Alternatives to Toxics.

HOW THIS BRIEF WILL ASSIST THE COURT

SCAQMD's proposed *amicu*s brief will assist the Court by discussing how the California Environmental Quality Act (CEQA) as well as actions taken under the market participant doctrine have helped reduce air pollution in the past and are important to the State's efforts to achieve and maintain federal ambient air quality standards in the future. Since the decision below casts doubt on the principle that a railroad's voluntary actions are not preempted under the Interstate Commerce Commission Termination Act (ICCTA), the brief will show how such commitments have been important to reducing air pollution in the past and should be upheld. Finally, the brief will highlight the importance of third-party enforcement of actions taken under the market participant doctrine, especially in cases where a government agency attempts to abrogate its commitments made as a condition of receiving state funding or approvals.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The SCAQMD is the regional agency primarily responsible for air pollution control in the South Coast Air Basin, which consists of all of Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino Counties. (Health & Saf. Code § 40410; Cal. Code Regs. tit. 17, § 60104; 40 C.F.R. § 81.305.) It is home to about 16 million people,

nearly half of the population of California, and has a wide variety of passenger and freight rail activities occurring within its borders. (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan (follow "Chapter 1" hyperlink, p. 1-5).) As the regional air pollution control agency, SCAQMD is acutely aware of the pollution emissions resulting from rail operations and their effects on human health.

The Bay Area Air Quality Management District, established by statute in 1955, was the first regional air pollution control agency and is currently responsible for managing air pollution in the San Francisco Bay Area, with a jurisdiction covering all of San Francisco, San Mateo, Santa Clara, Alameda, Contra Costa, Napa and Marin Counties, and portions of Sonoma and Solano Counties. (Health & Saf. Code §§ 40200, et seq.) The San Francisco Bay Area has a population of more than 7.5 million people and also has a wide variety of passenger and freight rail operations.

Simply put, rail operations can create significant cancer risks to surrounding communities due to their emissions of diesel particulates, a toxic air contaminant under California's program for regulation of toxic air contaminants. (Health & Saf. Code §§ 39650 et seq.) Also, locomotives emit large quantities of nitrogen oxides (NO_x), which react in the atmosphere to form both particulate matter and ozone. These are pollutants regulated under the federal Clean Air Act. The South Coast Air Basin has not yet attained all applicable national ambient air quality standards for these air pollutants, and so needs all feasible emission reductions from their precursors, such as NO_x. Finally, large railyards emit or contribute to the local formation of large quantities of a third pollutant regulated under the Clean Air Act, nitrogen dioxide or NO^2. In some cases, the railyard emissions alone are sufficient to create a localized exceedance of the

national ambient air quality standards for NO^2, thus posing a health risk to local residents.

Based on the foregoing, the SCAQMD and BAAQMD have a strong interest in upholding the use of the California Environmental Quality Act to reduce or mitigate adverse air quality and health effects resulting from rail operations where such action is not preempted by ICCTA, such as where the market participant doctrine applies. California should be allowed to condition its funding and approval for public entities to enter the market for providing rail operations in compliance with CEQA or other environmental requirements.

CERTIFICATE REGARDING AUTHORSHIP AND FUNDING

No party or counsel in the pending case authored the proposed s curiae brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the proposed *Amici Curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

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Respectfully submitted,

DATED: May 28, 2015

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
KURT R. WIESE, GENERAL COUNSEL
BARBARA BAIRD, CHIEF DEPUTY COUNSEL

By: *s/Barbara Baird*
Barbara Baird, Chief Deputy Counsel

Attorneys for [proposed] Amicus Curiae SOUTH COAST AIR QUALITY MANAGEMENT DISTICT

DATED: May 28, 2015

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
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BRIEF OF AMICI CURIAE

STATEMENT OF FACTS

A. Air Quality Regulatory Background

The South Coast Air Quality Management District (SCAQMD) is the regional air pollution agency for the South Coast Air Basin, which consists of all of Orange County and the non-desert portions of Los Angeles, Riverside, and San Bernardino Counties. (Health & Saf. Code § 40410, 17 Cal. Code Reg. § 60104.) The SCAQMD also includes the Coachella Valley in Riverside County (Palm Springs area to the Salton Sea). (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan, (follow "chapter 7" hyperlink, pp. 7-1, 7-3).) The SCAQMD's jurisdiction includes over 16 million residents, and it has the worst or nearly the worst air pollution levels in the country for ozone and fine particulate matter. (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan, (follow "Executive Summary" hyperlink, p. ES-1) (last visited May 12, 2015).)

The Bay Area Air Quality Management District, established by statute in 1955, was the first regional air pollution control agency and is currently responsible for managing air pollution in the San Francisco Bay Area, with a jurisdiction covering all of San Francisco, San Mateo, Santa Clara, Alameda, Contra Costa, Napa and Marin Counties, and portions of Sonoma and Solano Counties. (Health & Saf. Code §§ 40200, et seq.) The San Francisco Bay Area has a population of more than 7.5 million people and also has a wide variety of passenger and freight rail operations.

The federal Clean Air Act (CAA) requires the United States Environmental Protection Agency (EPA) to identify pollutants that are

widely distributed and pose a threat to human health, developing a so-called "criteria" document. (42 U.S.C. § 7408; CAA § 108.) These pollutants are frequently called "criteria pollutants." EPA must then establish "national ambient air quality standards" at levels "requisite to protect public health," allowing "an adequate margin of safety." (42 U.S.C. § 7409; CAA § 109.) EPA has set standards for six identified pollutants: ozone, nitrogen dioxide, sulfur dioxide, carbon monoxide, particulate matter (PM), and lead. (U.S. EPA, National Ambient Air Quality Standards (NAAQS), http://www.epa.gov/air/criteria.html, (last updated Oct. 21, 2014).)[1]

Under the Clean Air Act, EPA sets emission standards for motor vehicles and "nonroad engines" (mobile farm and construction equipment, marine vessels, locomotives, aircraft, etc.). (42 U.S.C. §§ 7521, 7547; CAA §§ 202, 213.) California is the only state allowed to establish emission standards for motor vehicles and most nonroad sources; however, it may only do so with EPA's approval. (42 U.S.C. §§ 7543(b), 7543(e); CAA §§ 209(b), 209(c).) Sources such as manufacturing facilities, power plants and refineries that are not mobile are often referred to as "stationary sources." These sources are primarily regulated by state and local agencies, like SCAQMD. The Clean Air Act charges state and local agencies with the primary responsibility to attain the national ambient air quality standards. (42 U.S.C. § 7401(a)(3); CAA § 101(a)(3).) Each state must adopt and implement a plan including enforceable measures to achieve and maintain the national ambient air quality standards. (42 U.S.C. § 7410; CAA § 110.)

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[1] Particulate matter (PM) is further divided into two categories: fine particulate or $PM_{2.5}$ (particles with a diameter of less than or equal to 2.5 microns) and coarse particulate (PM_{10}) (particles with a diameter of 10 microns or less). (U.S. EPA, Particulate Matter (PM), http://www.epa.gov/airquality/particlepollution/, (last visited May 14, 2015).)

The SCAQMD and CARB jointly prepare the portions of the state implementation plan for the South Coast Air Basin and submit the plan for approval by EPA. (Health & Saf. Code §§ 40460, et seq.) The California Environmental Quality Act (CEQA) is also an important tool for reducing air pollution because a large project attracting many mobile sources of emissions may create significant adverse air quality impacts due to the sheer scale of the project, even though each individual mobile source complies with emission limits applicable when it was manufactured. The ability to require feasible mitigation measures under CEQA is vital to reduce these adverse impacts.

Because the SCAQMD is charged with achieving the health-based national ambient air quality standards, (Health & Saf. Code § 40001), it supports efforts by affected entities to reduce air pollution including through market participation and by voluntary agreements, which apply CEQA or implement other pollution-reducing measures.

B. Air Pollution Impacts of Rail Operations

Rail operations create large amounts of diesel particulate pollution and nitrogen oxides, both of which are especially concentrated in the area surrounding large railyards. The California Air Resources Board (CARB) has declared diesel particulate to be a toxic air contaminant based on causing cancer. (California Air Resources Board, Agenda Item 98-8-1, August 27, 1998, www.arb.ca.gov/regact/diesltac/res98-35.pdf , Resolution 98-35, (last visited May 15, 2015).) The SCAQMD has discovered through its "Multiple Air Toxics Studies" (MATES) that despite significant emission reductions in recent years, diesel emissions still contribute about 70% of the total cancer risk in the region resulting from toxic air contaminants. (SCAQMD, Draft Final MATES IV Report, April 1, 2015, available at http://www.aqmd.gov/home/library/air-quality-data-

studies/health-studies/mates-iv, (follow "Draft Multiple Air Toxics Exposure Study IV," p. ES-2).)

Locomotives, along with other sources associated with railyards, emit large quantities of diesel particulates and can present a threat to public health. For example, CARB conducted health risk assessments based on year 2005 diesel emissions from a number of railyards throughout the state. These health risk assessments considered emissions from locomotives, trucks and cargo – handling equipment associated with the railyards. The railyard posing the highest cancer risk was the San Bernardino yard. The cancer risk from that railyard to the maximally exposed individual was about 2500 in a million. (Railyard Health Risk Assessment, www.arb.ca.gov/railyard/hra/hra.htm/, click on "HRA for the BNSF San Bernardino Railyard, p. 13 (last reviewed Apr. 8, 2013).) This cancer risk is *100 times* the level allowed for stationary sources (such as refineries, power plants, chemical factories, and chrome platers). (See SCAQMD Rule 1402(c)(2); 1402(e)(1) (limiting stationary sources to 25 in a million) http://bit.ly/1A4emo9 [2] (last visited May 13, 2015) .) Other railyards were also found to have high levels of risk (up to 1200 in a million). (CARB, Health Risk Assessment for UP Intermodal Container Transfer Facility (ICTF) and Dolores Railyards, Stationary Source Division, April 22, 2008, p. 14 http://www.arb.ca.gov/railyard/hra/up_ictf_hra.pdf, (last visited May 14, 2015).)

Moreover, locomotives emit nitrogen oxides, which react in the atmosphere to form ozone and particulate matter. (73 Fed.Reg. 37,096, 37,099 (Jun. 30, 2008.) EPA has set health-based national ambient air

[2] (Full URL) http://www.aqmd.gov/docs/default-source/rule-book/reg-xiv/rule-1402.pdf?sfvrsn=4

quality standards under the federal Clean Air Act for both of these pollutants. (U.S. EPA, National Ambient Air Quality Standards (NAAQS), http://www.epa.gov/air/criteria.html, (last updated Oct. 21, 2014).) The South Coast Air Basin is currently in nonattainment for both of these pollutants. (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan, (follow "Executive Summary" hyperlink, pp. ES-4, ES-5).) Locomotives will need to reduce pollution in order for SCAQMD to achieve these standards. Locomotives will be the fifth largest category of emissions of nitrogen oxides (NO_x) in the year 2023, if no further regulations are adopted. At that time, locomotives will contribute almost as much NO_x pollution as all of the highest-emitting stationary sources in the Basin (referred to as "RECLAIM sources.") (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan, (follow "Chapter 3" hyperlink, 3-38, figure 3-10A).) There are more than 250 RECLAIM sources. *Id*. This is important because the year 2023 is the deadline for attaining the 1997 national ambient air quality standard for ozone, and the SCAQMD must reduce NO_x by 65% beyond 2023 baseline levels to attain the standard. (SCAQMD, Final 2012 AQMP (Feb. 2013), available at http://www.aqmd.gov/home/library/clean-air-plans/air-quality-mgt-plan/final-2012-air-quality-management-plan, (follow "Executive Summary, p. ES-5).)

In addition, large railyards can create "hot spots" of nitrogen dioxide (NO^2), a third pollutant for which there is a health-based national ambient air quality standard. (U.S. EPA, National Ambient Air Quality Standards (NAAQS), http://www.epa.gov/air/criteria.html, (last updated Oct. 21, 2014).) For example, the environmental impact report for the Southern

California International Gateway, planned a new railyard recently approved by the Port of Los Angeles, demonstrates that emissions from the railyard alone will exceed the new national ambient air quality standard for NO^2 by as much as *five times*. (SCIG Recirculated Draft EIR, Air Quality, September 2012, Chapter 3.2 Table 3.2-17, p 3.2-52, 53 (1,171 ÷189) http://bit-.ly/1RL1Srf [3] (last visited May 14, 2015).) The SCAQMD has a strong interest in upholding the use of the California Environmental Quality Act to reduce or mitigate adverse air quality and health effects resulting from rail operations where such action is not preempted by the Interstate Commerce Commission Act (ICCTA), such as where the market participant doctrine applies.

SUMMARY OF ARGUMENT

This case presents the fundamental question of whether a public agency may hide behind federal preemption to repudiate its commitment to the state to comply with CEQA as a condition for receiving state funds and for entering into the market for providing rail services. The answer is no, because preemption under ICCTA applies only to regulation, not proprietary action. Nor may a public agency avoid those obligations by contracting with a private rail operator, since ICCTA does not preempt a railroad's voluntary agreements. Third party enforcement does not render these conditions and agreements "regulatory"; and must be allowed where the State has not itself taken action to enforce these obligations. Finally, proprietary actions and voluntary agreements are important in the effort to clean the air, so the Court should be aware of possible adverse effects of upholding the decision of the Court of Appeal.

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[3] (Full URL) http://www.portoflosangeles.org/EIR/SCIG/RDEIR/03.02_SCIG_RDEIR_AirQuality.pdf

ARGUMENT

I. ICCTA DOES NOT PREEMPT ACTIONS TAKEN BY A STATE OR LOCAL AGENCY AS A MARKET PARTICIPANT

A. Introduction

The trial court and Court of Appeal decisions in this case would allow the North Coast Railroad Authority (NCRA) and its lessee, the Northwestern Pacific Railroad Company (NWPCo), to repudiate their obligations undertaken as a condition of obtaining substantial state funding and in violation of the State's directive to its own political subdivision, NCRA, as well as the terms of NWPCo's agreement with NCRA. This "bait and switch" tactic betrays the public, who were entitled to have their money spent only on projects that eliminate or mitigate any environmental harms caused by the project. It threatens to encourage other entities that have undertaken similar obligations to repudiate their market participant role and abandon environmental protections.

While the respondents NCRA and NWPCo (sometimes collectively "NCRA") argue that there never was any obligation to comply with CEQA, Appellants Friends of the Eel River and Californians for Alternatives to Toxics (collectively, "Friends") demonstrate that NCRA agreed to comply with CEQA in return for $60 million in state money. (See e.g., AR:9:4638.) Moreover, NWPCo freely agreed to CEQA compliance as a condition precedent to operations. (AR:13:6731.) And its operation was over a publicly-owned rail line. Therefore, CEQA compliance was imposed as a part of NCRA's own decision-making process as a participant in the market for providing rail services.

This case presents three reasons why the market participant doctrine should apply to avoid preemption. Each reason is independently sufficient: (1) the case involves conditions on participation by a state and its legislatively-created state agency in the market for providing rail

transportation, (2) the particular project at issue received $60 million of state funds that were conditioned on compliance with CEQA, and (3) the project involved leasing state-owned property, conditioned on compliance with CEQA.

Besides contending that the NCRA was not acting as a market participant, Respondents make three additional arguments: First, they contend that this case involves California's ability to regulate the rail operations of a private entity, NWPCo, under CEQA. (Ans. Br. p. 31.) Second, they argue that even if this case involved the State's imposition of conditions on its political subdivision, NCRA, ICCTA would preempt any such activity. (*Id*.) Finally, they argue that the market participant doctrine can never apply in the context of ICCTA—arguing that "ICCTA expressly preempts unreasonable interference with rail operations, whether by regulation or proprietary action." (Ans. Br. p. 34.) The following sections of this brief will address these arguments.

B. A Political Subdivision Cannot Avoid Obligations Imposed by State Law by Subcontracting with a Private Entity

In arguing that this case involves regulation of a private entity, Respondents ignore the fact that NWPCo is subject to CEQA *not* because it is seeking an approval from a California local government but because it is a subcontractor and lessee of NCRA, a political subdivision of the State that has been made subject to CEQA as a condition of receiving substantial sums of State money and of entering the market for providing rail services. As such, much of NCRA's argument that it s a private entity is irrelevant. Whether CEQA is preempted by ICCTA when it is being imposed by a State or local agency in a purely regulatory capacity is irrelevant here.

This Court should not hold that NCRA can escape its CEQA obligations merely by subcontracting with a private entity. To do so would

make a mockery of the State's legitimate control over its own subdivisions and over how it spends its money. Both of these principles have been fully acknowledged by the courts. For example, under the market participant doctrine, a State can validly direct its subdivisions to spend public money only on cleaner-fueled vehicles. (*Engine Manufacturers Assn. v. South Coast Air Quality Management Dist.* (9th Cir. 2007) 498 F.3d 1031, 1043.) And a State can spend its money to achieve environmental goals. (*Hughes v. Alexandria Scrap Corp*. (1976) 426 U.S. 794.)

If a political subdivision could escape such obligations merely by subcontracting, then a city could avoid complying with the fleet rules upheld in *Engine Manufacturers* merely by hiring a contractor to operate its fleet. The Ninth Circuit held to the contrary, stating that "the Fleet Rule provisions governing purchasing, procuring, leasing, *and contracting* for the use of vehicles by state and local government entities fall squarely within…proprietary action." (Emphasis added.) (*Engine Mfrs. Assn.,* 498 F.3d 1031, 1045.)

Under Respondents' theory, a public agency could circumvent every legitimate condition imposed by the State in return for accepting multiple millions of dollars, merely by contracting with a private operator. This Court should not allow such a result.

C. A State May Direct the Activities of Its Political Subdivisions Acting as Market Participants

Respondents also argue that whether a rail carrier is a subdivision of state government is irrelevant to preemption analysis because the jurisdiction of the Surface Transportation Board (STB) over activities involved in this case is exclusive. (Ans. Br. P. 25.) Respondents rely on *N. San Diego County Transit Dev. Bd.—Petition for Declaratory Order*

(August 21, 2002) STB Finance Docket No. 34111, 2002 WL 1924265 at *6, ("*North San Diego County Transit*").[4]

This case is easily distinguishable. No party ever argued that the North San Diego County Transit District was acting as a market participant and had agreed to comply with CEQA as part of its *own* decision-making process in return for substantial state funding—as is the case here. Instead, the City of Encinitas a local government authority—was seeking to apply CEQA and permitting requirements to a rail carrier's construction of a portion of a line. No one argued that the fact that this rail carrier was a political subdivision of the State made any difference to the case. And no one argued that the City of Encinitas was acting as a market participant rather than as a regulator. The STB had no occasion to consider the scope of the market participant doctrine as it applies to ICCTA.

In any event, it has been held that a state may direct the activities of its political subdivisions as market participants, despite the alleged "regulatory effect" on local governments. (*Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel,* (4th Cir. 1994) 20 F.3d 1311, 1319.) There the court held:

> "State rules that 'regulate' the market actions of a state's constituent agencies, departments and other state-level organizational manifestations are conceded not to be considered 'market regulating' for negative Commerce Clause purposes….This having been stated, we cannot discern a valid distinction to explain why state regulations that bind local governmental units should not be considered equally as innocuous, constitutionally speaking, as state regulations that bind state-wide governmental units."

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[4] Respondents also cite *Cal. High-Speed Rail Authority—Petition for Declaratory Order* (Dec. 12, 2014) STB Finance Docket No. 35861, 2014 WL 7149612 (HSRA), which is currently on appeal, *King County et al. v. Surface Transportation Board*, 9th Cir. No. 15-70386, and therefore should not be given deference.

(*Smith Setzer, supra*, 20 F.3d at 1319. *See also Trojan Technologies, Inc. v. Pennsylvania* (3d. Cir. 1990) 916 F.2d. 903, 911, *cert. denied* 501 U.S. 1212 (1991).) Therefore, the State can direct the activities of its political subdivisions when acting as market participants.

In this case, the State required NCRA to comply with CEQA as part of its own decision-making process, as a condition of receiving state funding. Therefore, the *North San Diego County Transit* case is simply irrelevant to the facts here.

D. ICCTA Preempts Only State Regulation, Not Proprietary Activity

Respondents argue that ICCTA preempts both regulation and proprietary activity. (Ans. Br. p. 34.) But they ignore key language in ICCTA, which preempts state "r*egulation of* rail transportation." (Emphasis added) (49 U.S.C. § 10501(b).) The Fourth Circuit has clearly held that ICCTA expressly preempts only "regulation," not, for example, contractual actions. (*PCS Phosphate Co. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d. 212, 218-219 (citing numerous cases discussing "regulation" language of statute).)

Since proprietary action is not "regulation," it is not preempted by ICCTA. The Court of Appeal properly held as much in *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314. First, the court noted that ICCTA does not even preempt all types of regulations, only those which unreasonably interfere with interstate commerce. (*Town of Atherton,* 228 Cal.App.4th 314, 330.) The court then observed that when a state is acting as a market participant, it is not acting as a regulator. (*Town of Atherton*, 228 Cal.App.4th 314, 334.) Citing *Engine Manufacturers,* the court concluded that a state's interest in efficient procurement may include serving purposes other than saving money, such as environmental goals. (*Town of Atherton,* 228 Cal.App.4th 314, 335-

336.) The court concluded that ICCTA did not preempt a state's actions as a market participant.

The test for whether a statute prohibits an exception for proprietary action was established by the U.S. Supreme Court: "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." (*Building Trades v. Associated Bldrs.* (1993) 507 U.S. 218, 231-232.) The court in *Engine Manufacturers* concluded that no part of the Clean Air Act contained an "express or implied" Congressional intent to preclude proprietary action. (*Engine Manufacturers,* 498 F.3d 1031, 1044.)[5]

The only existing authority holds that ICCTA expressly preempts only *regulatory* action. (*PCS Phosphates,* 559 F.3d 212, 218-219; *Town of Atherton*, 228 Cal.App.4th 314, 330.) Respondents do not argue that ICCTA "impliedly" shows Congressional intent to preempt proprietary action, but rather state that ICCTA "expressly" preempts "unreasonable interference" with rail transportation, even if the action is proprietary. (Ans. Br. p. 34.) But the brief fails to cite any authority for this proposition; thus it is waived. (*Fireman's Fund In. Co. v. Maryland Casualty Co.* (1994) 21 Cal.App.4th 1586, 1593 n.5.)

Finally, Respondents argue that CEQA is regulatory, not proprietary. (Ans. Br. p. 34.) They claim that other cases are distinguishable because "in those cases, the states were acting as other private actors in the same

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[5] Respondents argue that *Engine Manufacturers* is not precedent because there the petitioners conceded that the market participant doctrine could apply to the Clean Air Act. (Ans. Br. p. 37.) However, the court did conduct a full analysis because some amici challenged that conclusion. (*Engine Manufacturers,* 498 F.3d. 1031, 1044.)

marketplace were allowed to act. Private actors in the rail marketplace cannot subject rail operations to CEQA requirements." (Ans. Br. p. 36.) This argument entirely misses the point. Petitioners do not argue that a private person could compel a rail operator to comply with CEQA. Instead, Petitioners contend that the state may require its political subdivision to comply with CEQA as a condition of operating and leasing the line, and of receiving state funding, as a part of the political subdivision's *own* decision-making process. Respondents wholly fail to rebut the argument that a private rail operator could consider environmental factors before determining whether to operate a line. Therefore, under *Building Trades* (507 U.S. 218, 231-232), a state has the same privilege—and may require its political subdivisions to also consider environmental factors. Respondents' concern about third-party enforcement is a separate issue, discussed below.

II. THIRD-PARTY ENFORCEMENT OF MARKET PARTICIPANT REQUIREMENTS DOES NOT DEFEAT THE EXCEPTION FROM PREEMPTION

The position of Respondents and the court below is that the market participant doctrine may be used only defensively by the public agency whose action is argued to be preempted. This position unconscionably allows a renegade political subdivision of the state to abandon its obligations voluntarily agreed to or imposed as a condition of receiving state funds. In this case, for many years NCRA agreed to and did endeavor to comply with CEQA, only later changing its position.

In similar circumstances, the Court of Appeal in *Town of Atherton,* (228 Cal.App.4th 314, 328-329), came to a different and correct conclusion than the court below here on very similar facts. In *Town of Atherton,* the issue of ICCTA preemption was raised for the first time after briefing on appeal, following the STB's assumption of jurisdiction over the

High-Speed Rail Project. Third-party enforcement was essential for the High-Speed Rail Project because the Attorney General, representing the High Speed Rail Authority, decided not to "invoke" the market participant doctrine. (*Town of Atherton,* 228 Cal.App.4th 314, 339.) Thus, the public agency decided to ignore its obligations under Proposition 1A. (*Id*.) In the present case, NCRA also changed its position late in the game. Because NCRA no longer honors its obligations, private enforcement is necessary.The court below improperly relied on two theories to reject third-party enforcement in this case. The court did not disagree with Petitioners' claim that they qualified as third-party beneficiaries who could enforce NCRA's agreement under *Service Employees Inter. Union, Local 99 v. Options-A Child Care and Human Services Agency* (*SEIU*), (2011) 200 Cal.App.4th 869. But the court cited *SEIU* for the proposition that although Petitioners there could bring a breach of contract claim, they could not sue directly under the Brown Act, because the Brown Act did not apply to that private entity. (*Friends of Eel River v. North Coast Railroad Authority,* (2014) 178 Cal.Rptr.3d 752, 772, *opinion superseded by grant of review*.) The court concluded that the present case was analogous, so that the contract did not confer a direct right to sue under CEQA because CEQA is preempted by federal law. (*Id.*)

However, the court neglected the *reason* the *SEIU* court held that the Brown Act did not apply. The *SEIU* court explained that the defendant was not a legislative body within the meaning of the Brown Act, and "an agreement cannot alter legislative intent or expand the scope of a statute." (*SEIU,* 200 Cal.App.4th 869, 883.) In the present case, the literal language of CEQA *would* apply to the Respondents' challenged actions, and an agreement *can* alter the applicability of federal preemption. (*PCS Phosphate Co. v. Norfolk Southern Corp*., 559 F.3d 212.) Thus, the court improperly relied on *SEIU.*

Secondly, the court below relied on two cases which state that generally mandamus is not an appropriate remedy for enforcing a contractual obligation against a public entity. (*Friends of Eel River,* 178 Cal.Rptr.3d 752, 773, *opinion superseded by grant of review, citing Shaw v. Regents of University of California* (1997) 58 Cal.App.4th 44, 52, *and Wenzler v. Municipal Court* (1965) 235 Cal.App.2d 128, 132.) Neither case is on point. In *Shaw,* the defendant Regents argued that the plaintiff should have brought a writ of mandate to litigate his claims for royalties under an employment agreement with the University of California. The court rejected that claim, stating that the trial court had properly applied contract principles. (*Shaw,* 58 Cal.App.4th 44, 52.) In *Wenzler,* the court held that mandate was not a proper method of seeking recovery of money paid as a fine and items held as evidence in a criminal action because the plaintiff would have had to show some kind of mistake, rather than showing a violation of official duty as is involved in a writ of mandate. (*Wenzler,* 235 Cal. App. 2d 128, 133.) In contrast, in this case, in order to show that NCRA violated its agreements, Petitioners would need to show exactly the same thing as they needed to show under CEQA itself.

Instead, if indeed Petitioners were required to bring an action for breach of contract, the proper precedent is *California Teachers Association v. Governing Board* (1988) 161 Cal.App.3d 393, 399. In that case, despite stating that mandamus was not appropriate to enforce an agreement for arbitration, the court treated the petition as if it were one to compel arbitration under the proper statutory authority. (*Id*.) The Court in this case should construe the present petition as including an action for third-party beneficiary enforcement of an agreement, if that is deemed the appropriate remedy.

Finally, third-party enforcement of market participant decisions is important because of the risk that public agencies acting as market

participants or proprietors may require CEQA, or other environmental conditions, from their contractors and lessees, in order to placate the public, and allow their business interests to be pursued (e.g., accommodating growth). Later, they could repudiate their obligations during litigation. Or, contractors and lessees (who have agreed to CEQA compliance or other environmental conditions) may belatedly argue that such compliance is preempted. In such cases, the Court should allow third-party enforcement, otherwise the public entity and its contractors or lessees will be able to walk away from their agreements and obligations.

III. CEQA IS ROUTINELY USED BY AGENCIES TO APPROVE BETTER RAIL PROJECTS

CEQA review of rail projects has often occurred in California. Public entities have routinely relied on CEQA to approve rail projects that take into consideration their effects on the surrounding communities and reduce those impacts. This ultimately makes for better projects and does not undermine the purpose of ICCTA.

In 1993, the Alameda Corridor Transportation Authority prepared an EIR for the Alameda Corridor project, a 20-mile rail line streamlining the transport of goods from the Ports of Los Angeles and Long Beach to downtown Los Angeles. (Alameda Corridor Environmental Impact Report, January 1993, p. S-1, http://libraryarchives.metro.net/DPGTL/eirs/alameda_corridor/1993_eir.pdf (last visited May 26, 2015).) The corridor traversed numerous densely populated cities and the public entity was concerned about the corridor project's impacts on those communities. (*Id*. pp. S-1, S-2.) As a result, in approving the corridor project, the public entity imposed numerous useful mitigation measures that reduced and even eliminated entirely some otherwise significant impacts. Examples include requiring the proper abandonment of oil wells disturbed during construction to avoid the release

of hydrogen sulfide; the requirement to construct noise barriers to protect nearby residences from train noise; engineering and operational requirements to reduce vibration impacts; the reduction of many land use impacts associated with the taking of land through creative approaches such as requiring new buffer zones, relocation efforts, reconfiguration of existing land uses, and returning excess land to the local jurisdiction; and various traffic improvements to reduce transportation impacts, and other mitigation. (*Id*. pp. S-37, 40-41, 43-44, 48-49.) Through these mitigation measures, the public entity was able to balance its economic need to build a consolidated rail route from the Ports to downtown railyards with its desire to minimize harm to the existing residences, businesses and public infrastructure.

Even further back, the Ports of Long Beach and Los Angeles jointly prepared an EIR, in 1982, for the Intermodal Container Transfer Facility (ICTF) Project, a new 260-acre near-dock railyard to transport containers from the Ports. (ICTF Environmental Impact Rep, Final Oct. 1982, p. ii, http://www.ictf-jpa.org/document_library/environmental_impact_report/ICTF%20FEIR%201982.pdf (last visited May 26, 2015).)

The Ports required that impacts of the project be minimized through mitigation such as watering to control fugitive dust during construction; phasing of construction activities to reduce air quality impacts; storage of hazardous materials to avoid water quality impacts; construction of noise barriers and use of silencers and enclosures on noisy equipment; and even requiring reduced train speeds and modifying certain onsite operations to minimize noise, among other mitigation. (pgs. v-vii). These measures served to minimize the impacts of the rail yard on the adjacent community of West Long Beach.

In a more recent example, in 2011, the Riverside County Transportation Commission approved the Perris Valley Line project to

extend commuter rail service by 24 miles from downtown Riverside to the City of Perris, relying on an EIR. A multitude of mitigation measures were required that reduced significant impacts to aesthetics, biological resources, cultural resources, hazards and hazardous materials, noise and vibration, and traffic and transportation to levels below significance. (Metro Extension of the 91, Library and Links http://perrisvalleyline.info/document-library?id=38 (follow "Resolution No. 11-013" hyperlink, pp. 7, 46-78; last visited May 26, 2015).) As a result, the public entity was able to approve a project that allowed for greater public mobility, job creation and increased safety while protecting the environment. (Metro Extension of the 91, Project Benefits, http://perrisalleyline.info/project-benefits, (last visited May 26, 2015).)

It is untenable that ICCTA would preempt a public entity from balancing competing legitimate state interests in improving the rail network with the need to protect its constituents from the environmental impacts of rail projects.

IV. DECISIONS OF STATE AND LOCAL GOVERNMENTS ACTING AS MARKET PARTICIPANTS AND VOLUNTARY AGREEMENTS ARE VITAL TO ATTAINING CLEAN AIR

The purpose of this section of the brief is to provide examples of the various ways that public entities have used market participant activities and voluntary agreements to achieve their business goals of sustainable development and to help attain clean air.

A. The SCAQMD Fleet Rules: Directing Political Subdivisions in Purchasing or Contracting for Cleaner Vehicles

The Ninth Circuit Court of Appeals and the U.S. Supreme Court have upheld the use of market participant powers to achieve environmental goals. (*Engine Mfrs. Assn. v. South Coast Air Quality Management Dist*. (9th Cir. 2007) 498 F.3d. 1031; *Hughes v. Alexandria Scrap Corp*. (1976)

426 U.S. 794.) The fleet rules upheld in *Engine Manufacturers* required governments and their contractors to use clean alternative fuel vehicles in lieu of diesel–fueled vehicles for sources such as street sweepers, garbage trucks, transit and school buses, and other government heavy-duty vehicles, where these vehicles were commercially available. (Elliot Henry, *Engine Manufacturer's Association v. South Coast Air Quality Management District: Using Market Participation to Achieve Environmental Goals,* 35 Ecology L. Q.651, 653 (2008), pp. 652, 655, available at: http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1884&context=elq.) The fleet rules resulted in significant emission reductions. By January 2004, almost nine thousand low-emission vehicles had been added to the various public fleets throughout the South Coast Air Basin, and the SCAQMD estimated that the rules would cause a yearly reduction of 4,870 tons of emissions each year starting in 2010. Assuming operations five days a week, this amounts to over 18 tons per day of emissions reductions. Moreover, the rules reduced diesel emissions, which the SCAQMD's studies had determined caused over 70% of the cancer risk from airborne toxics in the region. (*Henry, supra*, 35 Ecology L.Q. 652.) Reducing diesel emissions is particularly important for school buses and transit buses, which impact children and elderly passengers, and for garbage trucks and street sweepers, which operate in residential neighborhoods. Thus, it is important for states to retain the right to consider environmental goals in directing the market participation activities of their political subdivisions.

B. The Ports' Clean Air Action Plan: Proprietary Rights of Governmental Entities Acting as Landlords

It is also vital that public agencies retain their rights as landlords to exercise proprietary powers to further environmental goals, especially when achieving these goals is essential to achieving their business development goals.

The Ports of Los Angeles and Long Beach have adopted this approach. In 2005, the SCAQMD announced its "Clean Port Initiative," driven by the fact that the ports of Los Angeles and Long Beach, collectively the largest port in the nation, include various (mostly mobile) sources that were responsible for 100 tons per day of nitrogen oxides (NO_x) which contributes to ozone and fine particulates. This is more than the NO_x emissions from 6 million cars in the region. (SCAQMD Press Release, Nov. 4, 2005: "AQMD Chairman Announces Clean Port Initiative," http://www.aqmd.gov/home/library/public-information/2005-news-archives/clean-port-initiative-announced, (last visited May 14, 2015).) SCAQMD projected that NO_x emissions from port sources would increase by 40% by 2025 unless aggressive measures were taken. Moreover, the ports collectively were responsible for 25% of all the diesel emissions in the South Coast Air Basin, and nearby residents experienced among the highest levels of cancer risk from diesel emissions in the Basin. (*Id.*)

The two ports together support a large proportion of the nation's international trade, far more than would correspond to the local population's needs. The two ports support over 50% of all the containerized cargo imported into the United States. (The Southern California Transportation Coalition, "Southern California The Heart of America's Freight Movement System" http://www.rctc.org/uploads/media_items/southern-california-the-heart-of-america-s-freight-movement-system.original.pdf (created Mar. 5, 2010).) The population of the Southern California area is only about 5% of the nation's population. (http://bit.ly/1R7r9uA;[6]

[6] (Full URL) http://en.wikipedia.org/wiki/Greater_los_angeles_approximately_18_million_people, (last visited May 21, 2015)

http://www.census.gov/popclock, (last visited May 21, 2015) (18 million vs. over 320 million). The Ports are thus an important part of the economy, but this benefit comes at the cost of large amounts of air pollution.

During the early 2000's, environmental and community groups challenged various projects approved by the Ports of Los Angeles and Long Beach as causing adverse environmental impacts on the surrounding community.[7] As a result of these activities, the Ports of Los Angeles and Long Beach, in cooperation with the SCAQMD, CARB, and EPA, and with community input, developed the joint ports "Clean Air Action Plan" (CAAP) in 2006. The CAAP was updated in 2010. In the Executive Summary to the 2010 update, the ports state that they "recognize that their ability to accommodate the projected growth in trade will depend on their ability to address environmental impacts (and, in particular, air quality impacts), that result from such trade." (Port of Long Beach, "Final 2010 San Pedro Bay Ports Clean Air Action Plan Update, Executive Summary" p. ES-1 http://bit.ly/1A4fW9y,[8] (last visited May 14, 2015).) And the ports recognized their role in reducing emissions to meet national standards for ozone and fine particulates, as well as to reduce risks from diesel. Therefore the ports established emission reduction goals for DPM (diesel particulate matter), NO_x and SO_x (sulfur oxides). (*Id. at* p. ES-3.)

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[7] *See e.g.*, Harbor Community Benefits Foundation website, http://hcbf.org/about/, acknowledging origins as a result of a settlement in litigation challenging the TransPacific ("TraPac") terminal at the Port of Los Angeles. The purpose of that Foundation is to provide grants to address adverse impacts from port operations.

[8] (Full URL) http://www.cleanairactionplan.org/civica/filebank/blobdload.asp?BlobID=2476

The Clean Air Action Plan committed to use a variety of methods to attain these emission reductions, including regulatory measures, incentive programs, tariffs, and lease conditions. The ports explained that leases could be used as an implementation mechanism for renegotiated, amended, or new leases. In such cases, the ports would be acting in a proprietary capacity as landlords. The ports envisioned lease conditions that could include requirements for lessees to reduce emissions or to implement specific emission reduction measures. (Port of Long Beach, "Final 2010 San Pedro Bay Ports Clean Air Action Plan Update, Implementation Strategies" p. 55, http://bit.ly/1Hgn8iF,[9] (last visited May 14, 2015).)

By 2009, the ports reported significant progress in implementing the CAAP. DPM had been reduced by about 50%, and NO_x had been reduced by about 35%. (Port of Long Beach, "Final 2010 San Pedro Bay Ports Clean Air Action Plan Update, Executive Summary" p. ES-8, http://bit.ly/1A4fW9y,[10] (last visited May 14, 2015).)

Moreover, a central element of the CAAP is the Ports' Clean Truck Program, which was implemented through concession agreements, as well as providing incentive funding. This program required all trucks entering port property to meet EPA's 2007 emission standards by 2012.[11] (The Port of Los Angeles, Clean Truck Program, http://www.portoflosangeles.org/cleantrucks/,(last visited May 13, 2015).)

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[9] (Full URL) http://www.cleanairactionplan.org/civica/filebank/blobdload.asp?BlobID=2479

[10] (Full URL) http://www.cleanairactionplan.org/civica/filebank/blobdload.asp?BlobID=2476

[11] While both the Port of Long Beach and the Port of Los Angeles are implementing Clean Truck Programs, for simplicity's sake some references are to the Port of Los Angeles data only.

Compared to 2007 emissions, the two ports reduced emissions rates from drayage trucks by 80% as of 2012. (*Id*.) Nearly 10,000 trucks (100% of calls to the Port of LA) were compliant with the program by 2012. (*Id*., Click on CTP Newsroom then on Clean Truck Program Fact Sheet, Dec. 20. 2011.) The Clean Truck Program reduced DPM as much as would occur by removing nearly 300,000 automobiles from Southern California roads in a year.[12] (*Id*.)

The Ports' Clean Air Action Plan has been a useful tool to reduce air pollution from port tenants and concessionaires, and is likely to be even more necessary in the future, given that EPA has recently strengthened the annual PM2.5 standard (78 Fed.Reg. 3086 (Jan. 15, 2013)), and has adopted another, more stringent ozone standard since the original CAAP was adopted in 2006. (73 Fed.Reg. 16,436 (Mar. 27, 2008).) And EPA is now proposing an even more stringent standard, in the range of 65-70 ppb. (79 Fed.Reg. 75,233 (Dec. 17, 2014).) The Ports need to be able to

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[12] Portions of the Port of Los Angeles concession agreement were held to be preempted by the Federal Aviation Administration Authorization Act (FAAA), but the Clean Truck Program was not challenged. (*American Trucking Associations v. City of Los Angeles (ATA)* (2013) 133 S.Ct. 2096.) While acknowledging that the FAAA targets states acting as regulators, not as market participants, the Supreme Court held that the City's concession agreement had "the force and effect of law" within the preemptive language of the FAAA, based on its enforceability through criminal penalties. (*ATA,* 133 S.Ct. 2096, 2103.) Although the court accepted that the City was acting "to enhance goodwill and improve the odds of achieving its business plan—just as a private company might," its enforcement mechanism rendered the action preempted. (*ATA,* 133 S.Ct. 2096, 2103-2104.) The City of Los Angeles promptly responded by amending its concession agreements to remove the provisions that had been invalidated and removing any ability to apply criminal penalties. (The Port of Los Angeles August 14, 2013 amendment to Clean Truck Program Concession Agreement, (http://www.portoflosangeles.org/ctp/CTP_POLA_%20Concession_Agreement_Amendment.pdf, (last visited May 13, 2015).)

continue to reduce emissions to achieve their business plans in a sustainable manner.

Existing case law strongly supports the ports' ability as landlords to use lease conditions to achieve their proprietary goals. Thus for example, the Second Circuit upheld a school district's condition on a lease of its property for a cellular communications tower that limited radio-frequency emissions. The court held that the action of the school district in entering the lease was "plainly proprietary." *Sprint Spectrum L.P. v. Mills,* (2d Cir. 2002) 283 F.3d 404, 420. The court reasoned that since a private property owner would have the right to refuse to lease property to the cellular company, and would have the right to decline to lease the property except on agreed conditions, the school district could do the same. (*Sprint Spectrum*, 283 F.3d 404, 421.)

Analyzing the language of the federal Telecommunications Act, the court held that it "does not preempt non-regulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity." (*Id*.) Similarly, under the federal aviation statutes, a government agency acting as landowner may enact noise ordinances in its capacity as airport proprietor if it has a rational belief that an ordinance will reduce the possibility of liability or enhance the quality of the city's environment. (*Santa Monica Airport Assn. v. City of Santa Monica* (9th Cir. 1981) 659 F.2d 100, 102-104, 104 fn. 5.)[13] These precedents of local governments implementing pollution-reduction measures in their capacity as landlords can also be applied to rail operations. If this Court were to hold that ICCTA preempted the Ports' proprietary actions, many of the benefits of the Clean Truck Program would be lost.

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[13] The municipal proprietor doctrine, referred to in *Santa Monica,* is a type of market participant analysis. (*Tocher v. City of Santa Ana* (9th Cir. 2000) 219 F.3d 1040, 1049.)

C. Incentive Programs: Conditioning the Receipt of State Moneys on Compliance with Environmental Conditions

As noted above in Part III.B, the Port of Los Angeles Clean Truck Program relied on a combination of concession agreements and incentive payments. As of January 2012, the Port of Los Angeles had provided over $56 million in incentive funding to support cleaner trucks. (The Port of Los Angeles, Goods Movement Emission Reduction Funding Program (Proposition 1B), http://www.portoflosangeles.org/ctp/ctp_grants.asp, (last visited May 14, 2015).) The SCAQMD also provided over $70 million in incentives, and together the Ports and SCAQMD provided incentives not just for cleaner diesel trucks but also jointly provided an additional $26 million for 559 trucks operating on cleaner liquefied natural gas, as of 2012 (SCAQMD, *AQMD's Incentive Programs* slide 7, http://bit.ly/1HhVGnI[14] (last visited May 14, 2015).) No one would suppose that after taking these moneys, truck owners could refuse to buy clean fuel vehicles, even if direct regulation of their fleet by the Port and SCAQMD would be preempted. Yet that is exactly what the Court of Appeal decision allowed the NCRA and NWPCo to do: avoid an obligation undertaken in return for receiving significant state moneys.

D. The Freight Railroads' MOAs with The California Air Resources Board: Voluntary Agreements

Both judicial and Surface Transportation Board cases establish that ICCTA does not preempt actions to enforce voluntary agreements entered into by a railroad. This principle provides a wholly separate basis to hold Respondent Northwestern Pacific Railroad to its voluntary agreements with the public agency, NCRA*, even if that public agency was not acting as a*

[14] (Full URL) http://www.aqmd.gov/docs/default-source/technology-research/clean-fuels-program/clean-fuels-program-advisory-group---august-29-2012/welcome-and-overview-incentives-update.pdf

market participant. Clearly, an action to enforce a contractual obligation against a freight railroad is not preempted by ICCTA. (*PCS Phosphate Co. v. Norfolk Southern Corp.,* 559 F.3d. 212, 218-219.) This is so even if the contracting party is a public entity. For example, the STB held that a township could bring a court action to enforce a railroad's voluntary agreement to limit noise from idling trains. (*Township of Woodbridge, N.J. et al. v. Consolidated Rail Corp.* STB Docket No. 42053 (served Dec. 1, 2000), 2000 WL 1771044, clarified March 31, 2001, 2001 WL 283507.) The STB ruled that "these voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." (2000 WL 1771044 *3.) Therefore, ICCTA did not preempt a court action to enforce the agreements. The STB has reiterated that "the preemption provisions should not be used to shield the carrier from its own commitments." (*Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer,* STB Finance Docket 33971 (served May 1, 2001); 2001 WL 458685 *5.)

Moreover, the U.S. District Court has allowed the enforcement of a railroad's agreement with the plaintiffs to provide rail service, noting that the railroads "cannot hide behind the shield of section 10501(b) to avoid their commitments." (*Pejepscot Indus. Park v. Maine Cent. R. Co.* (D. Maine 2003) 297 F.Supp.2d 326, 333.) In that case, Plaintiffs also sought to enforce an agreement the railroads had made with the state, arguing that they were third-party beneficiaries. Significantly, the court recognized that plaintiffs could sue if they qualified as third-party beneficiaries, but ultimately concluded that the agreement in issue expressly precluded third party beneficiaries. (*Pejepscot Indus. Park,* 297 F. Supp. 2d. 326, 331.)

In the present case, there is no claim that NWPCo's agreement to comply with CEQA specifically precludes third-party enforcement. Since Petitioners qualify as third-party beneficiaries under *SEIU*, 200 Cal.App.4th 869, they can also enforce that agreement. Respondents never seriously contest the legal principle that a railroad can be held to its agreements without ICCTA preemption. The STB allowed the Township of Woodbridge to enforce its agreement with the railroads to reduce noise from idling locomotives without any showing that the Township was acting as a market participant. Thus, these cases and STB decisions provide a separate and independent theory for enforcing CEQA against NWPCo, which voluntarily agreed to comply with CEQA, even if the public agency was not acting as a market participant. Third-party enforcement can be important to obtain the full benefit of such an agreement if, for example, the public agency belatedly changes its position, as occurred in this case.

Voluntary agreements can be useful in helping to meet environmental goals. In California, the two freight railroads (BNSF and Union Pacific) have entered into two memoranda of agreement with the California Air Resources Board to assist in meeting air quality goals. The first agreement, executed in 1998, requires the railroads to accelerate the introduction of locomotives meeting (on average) what at the time was EPA's most stringent NO_x emission standard for new locomotives across the fleet that enters the South Coast Air Basin. This agreement was designed to help meet ozone standards, and was projected to result in about a 65% reduction in NO_x emissions between 2000 and 2010. This could amount to up to 24 tons per day of NO_x reductions. (CARB, *1998 Locomotive NO_x Fleet Average Emissions Agreement in the South Coast Air Basin,* http://www.arb.ca.gov/railyard/1998agree/1998agree.htm, (last reviewed July 1, 2014).)

In 2005, the two freight railroads entered into a second agreement with the Air Resources Board to limit diesel particulate emissions from their operations. The railroads agreed to phase out what they deemed "nonessential" locomotive idling and to install idling reduction devices on California-based locomotives. In addition, they agreed to take steps to reduce excessive smoke from their locomotives, and to take actions to reduce cancer risks from diesel particulates at major railyards in the state. (CARB, *Statewide Railyard Agreement,* (last reviewed October 18, 2011), http://www.arb.ca.gov/railyard/ryagreement/ryagreement.htm.) (Click on Fact Sheet on Railyard Agreement)

This Court should reiterate that ICCTA cannot be a "shield" allowing the railroads to escape their obligations under their voluntary agreements even if the state is not acting as a market participant. [15]

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[15] The SCAQMD strongly believes that the railroads can and should be doing far more to provide their "fair share" of emission reductions needed to attain the health-based federal standards. Nevertheless, the SCAQMD has a strong stake in ensuring that the Court does not render any decision that would cast doubt on these existing agreements.

CONCLUSION

ICCTA does not preempt the application of CEQA in this case. First, ICCTA preempts only regulation, and the State and its political subdivision were not acting as regulators in this case but rather as market participants in requiring NCRA and NWPCo to comply with CEQA. Second, ICCTA does not preempt the voluntary agreement of the railroad to comply with CEQA. Under these principles, the state may control the conditions upon which its political subdivisions enter the market for providing rail services and the private rail operator has also agreed to comply with CEQA. This agreement is enforceable even if the State and NCRA were not acting as market participants. Therefore, this Court should reverse the decision of the lower courts.

Respectfully submitted,

DATED: May 28, 2015

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 7,949 words, including footnotes, but excluding the Application, Table of Contents, Table of Authorities, Certificate of Service, this Certificate of Word Count, and signature blocks. I have relied on the word count of the Microsoft Word Vista program used to prepare this Certificate.

DATED: May 28, 2015

Respectfully submitted,

s/Barbara Baird
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PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 21865 Copley Drive, Diamond Bar, California 91765.

On May 28, 2015 I served true copies of the following document(s) described as **APPLICATION OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT AND BAY AREA AIR QUALITY MANAGEMENT DISTRICT FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT FRIENDS OF THE EEL RIVER ET AL. AND *[PROPOSED]* BRIEF OF *AMICI CURIAE*** by placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached service list as follows:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this District's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid at Diamond Bar, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on May 28, 2015 at Diamond Bar, California.

_____

Patricia Anderson, Declarant

SERVICE LIST

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