

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

239628

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STB Docket No. FD35977

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November 25, 2015  
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Public Record

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**FRIENDS OF THE EEL RIVER'S REPLY TO NORTHWESTERN  
PACIFIC RAILROAD COMPANY'S PETITION FOR DECLARATORY  
ORDER**

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Dated: November 25, 2015

## **I. Introduction**

The Northwestern Pacific Railroad Company (“NWPCo.”) has filed a Petition requesting that the Surface Transportation Board (“Board”) issue a “Declaratory Order that the Interstate Commerce [Commission] Termination Act (ICCTA) preempts application of CEQA to NWPCo.’s ongoing rail operations.” Petition at p. 1. Friends of the Eel River (“FOER”) respectfully submits this reply to the Petition pursuant to 49 CFR section 1104.13.

The Petition is a transparent attempt to gain a procedural advantage in lawsuits filed by FOER and Californians for Alternatives to Toxics (“CATS”) on July 20, 2011, and now pending before the California Supreme Court. *See* Petition at p. 2. Those lawsuits challenge the adequacy of an environmental impact report (“EIR”) certified by the North Coast Railroad Authority (“NCRA”) for the reopening of its rail line. The Petition requests “expedited consideration,” but provides no explanation as to why NWPCo. did not or could not file the Petition at any point within the last four and a half years, and presents no good cause for expedited review.

The Petition also offers no valid rationale as to why a declaratory order is needed in this matter. NWPCo. is, and has been, operating a limited number of freight trains on a portion of the Russian River Division line. The pending CEQA litigation has not affected, and might never affect, those operations. Moreover, the Board has already directly addressed the Court of Appeal decision being reviewed by the Supreme Court in its declaratory order in the High Speed Rail Authority matter. The parties have fully briefed that order before the Supreme Court. The Board need not institute a new proceeding merely to “affirm” its HSRA decision, as requested by NWPCo. Petition at pp. 19, 24.

Because additional Board proceedings are unnecessary, FOER respectfully requests that the Board deny the Petition. However, should the Board determine that further proceedings are

necessary, FOER requests that the Board deny the request for expedited review and provide FOER and other interested parties adequate time to respond to the substantive arguments in the Petition, and to submit any necessary exhibits, pursuant to the Board's modified procedures.

## **II. The Board Should Deny NWPCo.'s Petition for Declaratory Order**

The Board may institute proceedings for a “declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e); 49 U.S.C. § 721. The Board has consistently declined to institute proceedings for a declaratory order where the moving party has failed to demonstrate that this standard has been met. *See, e.g., SEA-3, Inc.—Petition for Declaratory Order*, STB Finance Docket No. 35853 (March 17, 2015) (declining to institute a declaratory order proceeding regarding a preemption question raised in on-going state litigation); *James Riffin—Petition for Declaratory Order*, STB Finance Docket No. 34997 (May 2, 2008) (same); *Union Pacific Railroad Company—Petition for Declaratory Order*, STB Finance Docket No. 35021 (May 15, 2007) (denying a declaratory order where precedent was already established and no facts or evidence were presented to justify a declaratory order). Here, NWPCo. has failed to demonstrate that a declaratory order in this matter would change the status quo in any way.

As the Petition explains, the current “controversy” revolves around whether NCRA properly conducted environmental review as required by California law, a matter that is currently pending before the California Supreme Court. Petition at p. 2. The Court has jurisdiction to hear the matter, and any declaratory order by the Board would not “terminate” that controversy. *See, e.g., Brown v. Pitchess*, 13 Cal.3d 518, 521 (1975) (state courts have concurrent jurisdiction to address federal law questions like preemption); *Californians for Alternatives to Toxics v. N. Coast R.R. Auth.* (N.D. Cal. May 8, 2012) 2012 WL 1610756 at \*8-10 (holding ICCTA does not provide a cause of action for FOER and CATS' CEQA claims and remanding case for state court adjudication).

Nor would another declaratory order “remove uncertainty” in the litigation before the Supreme Court. The Board has already directly addressed the pending the Supreme Court case in its declaratory order for the High Speed Rail project. *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Finance Docket No. 35861, 2014 WL 7149612 (STB Served Dec. 12, 2014) (“HSRA Order”). The parties heavily briefed the HSRA Order before the Supreme Court; thus, the Court has ample guidance on the Board’s views on the matter.

In fact, the Petition asks only that the Board “affirm” its HSRA Order and other prior orders on preemption. Petition at pp. 19, 24. However, the Board has already declined to reconsider the HSRA Order. *California High-Speed Rail Authority—Petition for Declaratory Order*, STB Finance Docket No. 35861 (STB Served May 5, 2015). Further affirmation of that order is unnecessary. Moreover, as a general matter, the Board has recognized that “court and agency precedent addressing the scope of 49 U.S.C. 10501(b)” is clear; “[t]hus, there is no need for the Board to issue additional guidance through a declaratory order proceeding.” *Union Pacific Railroad Company—Petition for Declaratory Order*, STB Finance Docket No. 34090 (November 9, 2001) at p. 5. The Petition fails to cite a single legal issue that needs further clarification by the Board.

The Petition also asserts that FOER and CATS’ lawsuits are barred by the CEQA statute of limitations and California’s requirements for contract standing. *See, e.g.*, Petition at pp. 4, 28-29, 31. These are clearly state law issues that must be resolved by the California courts. The Board has consistently declined to hear such state law matters. *See, e.g., The Town of Woodbridge v. Consolidated Rail Corp, Inc.*, STB Finance Docket No. 42053, 2000 WL 1771044 at \*11 (Nov. 28, 2000).

NWPCo.’s nearly four and a half year delay in filing the Petition underscores that a

proceeding for declaratory order is unnecessary here. The Petition claims “[t]he need for a declaratory order is ripe because 1) there is an actual controversy; 2) the remedy CEQA litigants seek could suspend Board authorized rail operations; and 3) the remedy would result in the state regulating railroad operations that are exclusively within the Board’s jurisdiction.” Petition at pp. 2-3. Even assuming these allegations were true, they would have been true since FOER filed its CEQA litigation in July 2011. NWPCo. offers no justification for its extreme delay in filing this Petition. NWPCo. is clearly attempting to use the Board’s petition process to influence ongoing state court litigation, effectively giving the company a sur-reply in that matter after merits briefing has concluded.<sup>1</sup>

Moreover, despite its assertions, NWPCo.’s flawed Petition even fails to demonstrate that there is a “ripe” controversy that requires resolution by the Board. As the Petition concedes, NWPCo. is operating, and has been operating, a limited number of freight trains on a segment of the Russian River Division rail line.<sup>2</sup> Petition at p. 14. The pending CEQA litigation has not affected, and might never affect, those operations. *See* Cal. Pub. Resources Code § 21168.9 (court has discretion to formulate CEQA remedy); *id.* at § 21081(a)(3) (CEQA mitigation need not be imposed if it is infeasible); *Peninsula Corridor Joint Powers Board—Petition for Declaratory Order*, STB Finance Docket No. 35929 (July 2, 2015) at p. 5, note 6 (premature for Board to institute declaratory order proceedings to address CEQA conditions that may interfere

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<sup>1</sup> The Supreme Court’s online docket in this matter is available at [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2092374&doc\\_no=S222472](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2092374&doc_no=S222472)

<sup>2</sup> The Board has exempted these operations from its oversight, noting that they are so limited as to not implicate “rail transportation policy.” *Northwestern Pacific Railroad Company—Change in Operators Exemption—North Coast Railroad Authority, Sonoma-Marin Area Rail Transit District and Northwestern Pacific Railway Co., LLC*, STB Finance Docket No. 35073 (STB Served Feb. 1, 2008) at pp. 2-3.

with rail operations before any such conditions have actually been imposed).<sup>3</sup> With rail operations continuing, there is no need now, as there has been no need for the last four and a half years, for the Board to institute proceedings in this matter.

For each of the reasons set forth above, NWPCo. has failed to demonstrate that a proceeding for declaratory order is necessary. The Board should therefore deny the Petition.

### **III. The Board Should Deny the Request for Expedited Review**

Should the Board determine that further proceedings on this matter are necessary, FOER respectfully requests that the Board deny NWPCo.'s request for expedited review, and grant FOER and other interested parties a full and fair opportunity to submit a detailed reply with accompanying exhibits in order to address NWPCo.'s substantive arguments.

NWPCo.'s Petition fails to demonstrate good cause for expedited review. Indeed, as noted above, NWPCo. entirely fails to explain why it did not or could not file such a Petition four and a half years ago when FOER filed its CEQA litigation. To the extent that NWPCo. suggests that the Supreme Court's review of the matter increased the need for a declaratory order, the Supreme Court granted its review in the case nearly one year ago (on December 10, 2014). NWPCo. offers no explanation as to why it could not have filed its Petition at that time. NWPCo.'s request for expedited review exposes the Petition as yet another example of the cynical gamesmanship exhibited by the company throughout the administrative process and litigation.

In fact, there is no current urgency regarding the Petition. The Petition claims

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<sup>3</sup> The remainder of the rail line cannot be operated until the Federal Railroad Administration fully lifts Emergency Order No. 21; therefore, operations on other parts of the line are not at issue here. *Northwestern Pacific Railroad Co.; Notice of Partial Relief from Emergency Order No. 21*, 16 Fed. Reg. 90, 27171-72 (May 10, 2011) (only 62-mile portion of 316 mile rail line currently operable).

“[e]xpedited consideration is requested so that the Board’s decision on this matter can be presented to the California Supreme Court prior to the Court issuing its decision.” Petition at p. 34. However, a decision by the Supreme Court in this case is not expected at any point in the near future. The Court has yet to set the case for oral argument, and the Court’s docket has already been established for December of 2015. Thus, the earliest point that oral argument would be set is sometime in 2016. Given the Court’s current heavy docket, the case may not even be heard in 2016.<sup>4</sup> After oral argument, the Court typically takes 90 days to issue an opinion.

Thus, if the Board does not deny the Petition outright, as it should, there is ample time to allow FOER and other interested parties to submit a full reply, with accompanying exhibits, to the substantive issues identified in the Petition, as well as motion to intervene, should the Board deem that necessary. The entire purpose of the Petition is to influence on-going CEQA litigation filed against NCRA by FOER and CATS. The Supreme Court has also granted amici curiae status to several other organizations and governmental bodies in the case. These entities may similarly wish to weigh in on the Petition, and should be allowed the opportunity to do so. It would be a manifest injustice to deny these parties adequate time to present their side to the Board and to correct the record in the face of NWPCo.’s selective citation to facts and law.

Finally, counsel for FOER has previously scheduled vacations for the holidays and litigation in other matters throughout November and December. Therefore, FOER respectfully requests that the Board set, at the earliest, a reply deadline of January 31, 2016 should the Board

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<sup>4</sup> See, e.g., *Orange Citizens for Parks and Recreation v. Superior Court*, S212800, available at [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=2054025&doc\\_no=S212800](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2054025&doc_no=S212800) (Supreme Court petition for review granted October 30, 2013 and currently awaiting argument).

initiate proceedings in this matter. FOER also requests that, if the Board initiates further proceedings, the Board exercise its discretion to use the modified procedures set forth in 49 CFR Pt. 1112, as this matter may be determined on the papers.

**IV. Conclusion**

For the foregoing reasons, FOER respectfully requests that the Board deny the Petition for Declaratory Order. If the Board decides to institute proceedings, then FOER requests the Board deny the request for expedited review, and issue a schedule with ample time for FOER and other parties to respond under the Board's modified procedures.

DATED: November 25, 2015

Respectfully Submitted,

By:



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**CERTIFICATE OF SERVICE**  
**Docket No. FD35977**  
**SURFACE TRANSPORTATION BOARD**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On November 25, 2015, I served true copies of the following document(s) described as:

**FRIENDS OF THE EEL RIVER'S REPLY TO NORTHWESTERN PACIFIC  
RAILROAD COMPANY'S PETITION FOR DECLARATORY ORDER**

on the parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**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 Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address Larkin@smwlaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on November 25, 2015, at San Francisco, California.

  
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Patricia Larkin

**SERVICE LIST**  
**Docket No. FD35977**  
**SURFACE TRANSPORTATION BOARD**

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