STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY GAVIN NEWSOM, *GOVERNOR*

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VIA EMAIL to alarocca@steptoe.com
AND FEDERAL EXPRESS

Anthony LaRocca
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1130 Connecticut Avenue, NW
Washington, DC 20036-1795

RE: California Coastal Commission jurisdiction over a land division on the Georgia-Pacific Mill Site for the purpose of expanding Mendocino Railway's rail operations; Mendocino Railway's plans to develop rail facilities on land located adjacent to its existing rail yard.

Dear Mr. LaRocca:

This letter follows up on your February 11, 2019 correspondence[1] with John Ainsworth, Executive Director of the California Coastal Commission ("Commission"), and questions your[2] assertion that a coastal development permit ("CDP") is not required for a land division on the former Georgia Pacific Mill Site by virtue of the ICCTA. [3] In addition, this letter questions your assertion that a CDP also is not required for Mendocino Railway's plans to develop for railway purposes the land adjacent to its existing rail yard.[4] Therefore, as explained below, this letter requests information in support of your position that a CDP is not required for any railway development, including both information about the nature, extent and purpose of the railway development that is contemplated as well as information about the relationship between the land division and the contemplated railway development. Finally, this letter addresses the Commission's additional review authority under the federal Coastal Zone Management Act and requests that Mendocino Railway coordinate early on with Coastal Commission federal consistency staff and all potentially relevant federal agencies to clarify the nature and extent of any Commission CZMA review authority.

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[1] **See Attachment 1**.

[2] This letter also responds, in part, to similar points made by the City Attorney for the City of Fort Bragg in the Russell Hildebrand letter to the Coastal Commission dated January 17, 2019. **See Attachment 3**. See also Commission December 21, 2018 response to the City Attorney's letter proffering the Subdivision Map Act as a basis to avoid CDP authority. **See Attachment 4**.

[3] The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") is codified at 49 U.S.C. Subtitle IV (§§ 10101 *et seq.*)

[4] Your letter does not specify the nature, extent and purpose of the railway development that is contemplated.

The City's Attorney's opinion on preemption expressly states that it is confined to the land purchase and does not extend to other railway development, which he indicates the City would independently analyze when a development proposal comes forward.

According to your February 11, 2019 letter, the land at issue was previously used for rail operations and would be sold to Mendocino Railway so that Mendocino Railway can "restore railroad operations on the land." It is our understanding that the land division at issue would facilitate Mendocino Railway's ability to acquire approximately 70 acres of land at the northernmost portion of the 419-acre Georgia Pacific Mill Site. As adjusted by the land division, the new parcel would contain the entirety of a structure known as Dry Shed 4.[5] It is also our understanding that Mendocino Railway is interested in constructing rail facilities, including side tracks, on the parcel it wishes to acquire.[6] We are also informed that Mendocino Railway wishes to "extend the tourist railroad west to the headlands and then north along a half-mile of coastline"[7] for a "trees to seas"[8] train experience. However, to our knowledge: (a) no specific rail facilities are currently proposed; (b) the Mendocino Railway is no longer linked to, and a part of, the interstate rail network; and (c) no timeline to institute expanded passenger excursion service is in place. It is therefore unsurprising that the City Attorney's letter does not actually address whether "restoration of rail services is preempted by federal law," as your letter claims at the top of page 2.[9]

Most of your February 11, 2019 letter and email correspondence asserts that the City of Fort Bragg does not believe a CDP is needed for "the project"[10] and that the Coastal Commission is preventing Mendocino Railway and the City from moving forward. However, we note the City's Attorney's opinion on preemption expressly states that it is confined to the land purchase and does not extend to future railway development, which he indicates the City would independently analyze when a development proposal comes forward.[11] In addition, although the City of Fort Bragg staff report for a September 5, 2018 Joint Planning Commission and City Council workshop provided an overview of Mendocino Railway's vision for reuse of the parcel they plan to purchase, we remain unclear about the exact nature, scope and purpose of Mendocino Railway's contemplated railway development. The City of Fort Bragg staff report states that:

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[5] At a September 5, 2018 hearing before the City of Fort Bragg, Skunk Train representative indicated that a shed that straddles the property line that the current proposal would adjust is targeted for multiple uses, including train storage, brewery storage and artist studios. Note that PRC section 30106 of the Coastal Act expressly identifies a "change in the density or intensity of use of land" as "development" requiring a CDP.

[6] See your letter in **Attachment 1.**

[7] Mary Callahan, (September 17, 2018) Skunk Train deal for bluff property could spur Fort Bragg's remodel, Press Democrat.

[8] See the Staff report for the September 5, 2018 City Council & Planning Commission Joint Workshop regarding Agenda Item 1A. "Receive report and provide direction to staff regarding: 1) the final land use plan and the Hart's alternative land use plan; 2) Mill Site policies regarding public facilities requirements, phasing, and financing; and 3) the local coastal program (LCP) amendment."

[9] **See Attachment 1.**

[10] We are unclear about your use of the term "project."

[11] City of Fort Bragg City Attorney, Russell Hildebrand, letter to the Coastal Commission dated January 17, 2019. **See Attachment 3.**

> *The Harts' are seeking zoning for an extension of the Skunk Train's track along the eastern edge of the Coastal Trail property (for a "trees to seas" train experience) and the addition of a train depot at Glass Beach. Staff's recommendation is that this be illustrated on the plans as a potential Right of Way (ROW) located within the urban reserve, rather than be rezoned for this specific use at this specific time. This would allow the Skunk train to more easily revise the route (around potential coastal resources, if necessary). It would also allow the City to hold a public hearing to determine if this use is compatible adjacent to the Coastal Trail at a future time when a specific RR line extension and Use Permit/CDP[12] is considered by the Planning Commission.*
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> *If escrow closes, the Harts will retain and would like to reuse Dry Shed 4 for train storage /maintenance, brewery storage, and possibly for industrial art studios. The reuse of this shed for these purposes will need a CDP/UP approval and would require the approval of the LCP amendment to rezone the Dry Shed to Light Industrial zoning.* [Emphasis added.]

Based on the language above, it appears our disagreement with the City of Fort Bragg regarding CDP requirements is confined to the land purchase and does not now extend to other railway development. Note also that the City of Fort Bragg predominantly bases its opinion that no CDP is required on California Government Code section 66428(a)(2), not on the *Eel River* opinion or the federal preemption provisions of the ICCTA, stating that Eel River only bolstered its opinion. **See Attachment 3.**[13]

Additional information is needed to determine whether the ICCTA preempts Coastal Act requirements.

While we have not concluded that a CDP is required for: (1) the subject land division[14], (2) the development of the shed that would be facilitated by the land division, or (3) other contemplated railway development, including a depot; and we have not initiated an enforcement investigation[15] of Mendocino Railway's land division or other development plans, we are also unable to conclude that the ICCTA results in preemption of Coastal Act permitting requirements, including for a land division that does not appear to be undertaken as a part of the interstate rail network. Federal regulation of railroads is not limitless.

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[12] The California Coastal Act is codified in California Public Resources Code (PRC) sections 30000 *et seq.*

[13] See the Coastal Commission's response to the City of Fort Bragg's opinion regarding California Government Code section 66428(a)(2) in **Attachment 4.**

[14] PRC section 30106 of the Coastal Act defines development to include this "change in the density or intensity of use of land."

[15] The enforcement provisions of the Coastal Act (and specifically PRC section 30810) authorizes the Commission to enforce any requirements of the Coastal Act which are subject to the jurisdiction of a certified local coastal program if, among other things, the Commission requests the local government to take enforcement action and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources.

For example, federal preemption under section 49 U.S.C. § 10501(b) does not apply to activities over which Surface Transportation Board ("STB") jurisdiction does not extend pursuant to section 49 U.S.C. § 10501(a).[16] Thus, "Board jurisdiction under 49 U.S.C § 10501(a) is a threshold question and STB's jurisdiction "applies only to transportation in the United States between a place in a State and a place in the same or another State *as part of the interstate rail network.*" *Id.* The ICCTA does not grant the Board jurisdiction over rail lines located entirely in one state and that are not operated as part of the interstate rail network. *Id.* The STB decides whether an intrastate passenger rail project is part of the interstate rail network based on the particular facts of each case.[17]

As discussed below, both caselaw and STB decisions support the continuing application of Coastal Act requirements prior to engaging in development[18] in situations where the ICCTA does not preempt the Coastal Act, including the expansion of intrastate transportation that is not a part of the interstate rail network and the implementation of federal law that preserves state power.

Though we question the accuracy of your assertion about the breadth of ICCTA preemption, we invite Mendocino Railway to provide the Commission with either any salient or missing facts or any other information that supports the positions you take and work with us to ensure compliance with applicable provisions of the California Coastal Act[19] and the federal Coastal Zone Management Act ("CZMA").[20] In particular, we are interested in information that clarifies the purpose of the railway development and the relationship between the land division and the railway development. The Commission also requests that you provide us with any STB status letters, certificates, or other determinations regarding Mendocino Railway's contemplated railway development if any such documents exist.

We request this information because it will provide us with a better understanding of both the basis for your positions and the scope of your future development activities. In turn, we hope

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[16] 49 USC General Jurisdiction 10501. **(a)** (1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—(A) only by railroad; or (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment. (2) Jurisdiction under paragraph (1) **applies only to transportation in the United States between a place in— (A) a State and a place in the same or another State as part of the interstate rail network;** ... **(b)** The jurisdiction of the Board over— (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), 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. [Emphasis added.]

[17] Courts in the Ninth Circuit find "guidance on the scope of ICCTA preemption from the decisions of the [Board], to which we owe *Chevron* deference." *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622F.3d 1094, 1097 (9th Cir. 2010)

[18] PRC section 30106 defines "development" to include land divisions and other changes in the intensity of use of land in addition to physical development.

[19] PRC sections 30000 *et seq;* PRC section 30330.

[20] The Commission is the designated state coastal zone planning and management agency authorized to implement the federal Coastal Zone Management Act ("CZMA").Under the CZMA, the Commission reviews federal consistency determinations made by federal agencies conducting federal activities or development projects as well as federal consistency certifications made by federal agency applicants. The CZMA is codified in 16 U.S.C. Chap. 33 (§§1451-64) and the rules for implementing the CZMA are established in federal regulations at 15 CFR Part 930.

this letter provides you with a better understanding of why we seek the requested information, including whether a consistency determination or certification will be required.[21]

The STB's jurisdiction "applies only to transportation in the United States between a place in a State and a place in the same or another State *as part of the interstate rail network.*"

STB jurisdiction over transportation by a rail carrier is governed by 49 U.S.C. § 10501(a), enacted under the ICCTA. In order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the STB [*Oregon Coast Scenic R.R., LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016) (*citing* 49 U.S.C. § 10501(a)]. "If the Board has jurisdiction under 49 U.S.C. § 10501(a), the question whether jurisdiction is exclusive—i.e., whether state regulation is preempted—is a separate question governed by 49 U.S.C. § 10501(b)" (*Oregon Coast* at 1073). Under the ICCTA, Congress specifically granted the STB authority over intrastate rail transportation[22] as part of the interstate rail network [49 U.S.C. § 10501(a)(2)(A)]. The ICCTA does not grant the Board jurisdiction over rail lines located entirely in one state and that are not operated as part of the interstate rail network. *Id.*

The phrase "as part of the interstate rail network" is not defined by statute, but the STB has emphasized that "transportation between places in the same state would be within the Board's jurisdiction as long as that transportation was performed or carried out as part of the interstate rail network. See *All Aboard Florida – Operations LLC and All Aboard Florida – Stations Construction and Operation Exemption – In Miami, Fla. And Orlando, Fla.*, FD 35680, (STB served Dec. 21, 2012); *DesertXpress Enters., LLC, Petition for Declaratory Order*, FD No. 34914 (STB served May 7, 2010). As stated in *All Aboard*:

> *"to be part of the interstate rail network, rail facilities must be both 'part of the general system of rail transportation' and 'related to the movement of passengers or freight in interstate commerce.' The test is a functional one – an intrastate rail line does not become part of the 'interstate rail network' simply because it is connected physically to a rail line that is used to provide interstate rail service. Rather, an intrastate rail line (or service) is subject to the Board's jurisdiction only if the 'rail transportation' provided by the line is 'performed' or 'carried out' as part of the interstate rail network.* [23]

The Board's decisions emphasize that this question is a "case-by-case, fact-specific determination based on the totality of circumstances but no one factor is controlling. *Id.* For

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[21] This June 11, 2019 letter more specifically identifies the information being requested than did our two previous letters. **See Attachments 2 and 4.**

[22] Rail "transportation" is defined in 49 USC section 10102(9) to include **(A)** a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and **(B)** services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

[23] See *All Aboard Florida – Operations LLC and All Aboard Florida – Stations Construction and Operation Exemption – In Miami, Fla. And Orlando, Fla.*, FD 35680, (STB served Dec. 21, 2012).

example, in *All Aboard*, the STB determined that the subject rails, located entirely in one state, were not operated as part of the interstate rail network because the All Aboard Florida line did not offer interstate rail service for either passengers or freight. *Id.* The Board relied on several factors that weighed against asserting its jurisdiction, including that: (1) the project would conduct operations entirely within the state of Florida; and (2) all passengers would board and deboard at local stations. The fact that the project would serve local airports did not weigh toward a determination that it was part of the interstate rail network. Additionally, the fact that the line was to be constructed within the freight corridor of an STB regulated freight railroad did not render the line "a part of the interstate rail network." *Id.*

Thus, as stated in *All Aboard*, "when considering whether an intrastate passenger line is part of the interstate rail network, the agency's inquiry typically focuses on whether or not the intrastate operations are used for interstate movements." *Id.* citing to *State of Maine—Petition for Declaratory Order,* STB Fin. Docket No. 35440, at 2 (Dec. 31, 2010) [finding that the exercise of intrastate passenger rail operating rights were not within the Board's jurisdiction over transportation even though they were operating their rights over the lines of a freight railroad that is part of the interstate rail network]; *Napa Valley Wine Train, Inc. - Petition for Declaratory Order,* 7 I.C.C.2d 954, 964 (1991) ("Napa Valley") [finding that intrastate carrier was outside ICC jurisdiction despite the existence of potential through ticketing with Amtrak, where the through ticketing arrangement was cumbersome and would require passengers to connect via an intervening bus service].

Further, "multimodal passenger travel does not give the Board jurisdiction because 49 USC 10502(a)(2)(A) requires intrastate rail service to be performed or carried out as "part of the interstate rail network" to trigger STB jurisdiction."[24] Thus, "a hypothetical nexus to potential interstate travel via non-rail modes is not sufficient."[25]

Mendocino Railway's Skunk Train is not operated as part of the interstate rail network.

The language quoted above from the City's September 5, 2018 staff report suggests that the purpose of the contemplated land division and railway facilities is to expand and improve Mendocino Railway's Skunk Train passenger excursion experience.[26] According to its website, the Skunk Train primarily provides sightseeing services for its passengers and the passenger excursion trains are Mendocino Railway's sole source of revenue. Special train excursions include a Christmas train, an Easter train, and a Mother's Day excursion. Because of a tunnel collapse,[27] the Skunk Train is unable to carry passengers between Fort Bragg

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[24] *All Aboard Florida – Operations LLC and All Aboard Florida – Stations Construction and Operation Exemption – In Miami, Fla. And Orlando, Fla.*, STB Finance Docket 35680 (STB served Dec. 21, 2012).

[25] *Id.*

[26] As discussed above, it is our understanding that the purpose of the railway development is to "extend the tourist railroad west to the headlands and then north along a half-mile of coastline" for a "trees to seas" train experience.

[27] In 2013 and again in 2016, the collapse of a tunnel between Fort Bragg and Willits precluded full trip service between Willits and Fort Bragg. Both tunnel collapses were related to the hillside, which has a history of instability dating back to the tunnel's construction in 1893. The tunnel remains closed because although Mendocino Railway applied for a US Department of Transportation BUILD grant in 2018 to fund the tunnel repairs, this grant was denied in February 2019. Chris Calder, *Skunk*

and Willits. Shorter trips to intermediate points usually run year-round. Because the tunnel remains closed, and the Skunk Train is not operated as part of the interstate rail network, under any westerly extension of the tourist train, Mendocino Railway remains limited to localized service from each of the two starting points that do not connect with each other. Thus, any westerly expansion facilitated by the land division would be used by passengers only for intrastate, localized rail travel. Even if the tunnel opens and the acquisition of the adjusted 70-acre parcel facilitates an expanded "seas to trees" experience, Mendocino Railway's Skunk Train would provide only roundtrip, intrastate excursion service that is not being carried out as part of interstate rail network. We therefore question how the land division at issue can be considered transportation by a rail carrier as part of the interstate rail network because the Mendocino Railway line has been severed from, and is no longer linked to and part of, the interstate rail system. See 49U.S.C. § 10501(a)(2)(A).

Our position that the Skunk Train is not being operated as part of the interstate rail network is supported by a 2007 STB decision relating to the trackage now owned by Mendocino Railway.

In 2004, Mendocino Railway filed a verified notice of exemption under 49 CFR 1150.31 to acquire, through California Western Railroad's (CWR) trustee in bankruptcy and with the approval of the Bankruptcy Court for the Northern District of California, the rail assets of CWR. The assets consisted of 40 miles of rail lines owned by CWR between Fort Bragg (milepost 0) and Willits (milepost 40). [28] In 2007, the STB denied a complaint for damages filed by Michael H. Meyer, the trustee in bankruptcy for CWR, against "North Coast Railroad Authority (NCRA), d/b/a Northwestern Pacific Railroad (NWP)." *Meyer, Trustee in Bankruptcy for California Western Railroad, Inc v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 30, 2007). CWR, Mendocino Railway's predecessor in interest, had claimed that NWP was liable for damages that CWR sustained as a result of NWP's failure to provide service. In its decision, STB instead found that NCRA had not violated its common carrier obligation under 49 U.S.C. 11101(a).

STB's 2007 decision acknowledges that Mendocino Railway's predecessor in interest, CWR, operated the 40-mile line of railroad between Fort Bragg and Willits, CA, from August 1996 until November 25, 1998. [29] CWR's primary shipper on this line was Georgia Pacific Corporation (Georgia Pacific), which operated a lumber mill in Fort Bragg until 2002. CWR transported lumber for Georgia Pacific. CWR, a railroad, not a shipper, never generated any freight. At that time, CWR connected to the national rail system at Willits, where it joined a line operated by NWP pursuant to a lease from NCRA, the owner of the line. NCRA's line ran south

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Train's Mill Site Purchase Still on Hold, Fort Bragg Advocate News (February 7, 2019).

[28] CWR became a licensed carrier subject to the Board's jurisdiction pursuant to authority obtained in *CWRR, Inc. – Acquisition and Operation Exemption – Mendocino Coast Railway, Inc., d/b/a California Western Railroad*, STB Finance Docket No. 33005 (STB served Aug. 19, 1996). CWR's line was ultimately sold to Mendocino Railway pursuant to Board authorization in *Mendocino Railway– Acquisition Exemption – Assets of The California Western Railroad*, STB Finance Docket No. 34465 (STB served Apr. 9, 2004).

[29] *Meyer, Trustee in Bankruptcy for California Western Railroad, Inc v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 30, 2007).

to Schellville, CA, where it connected to the California North Coast Railroad Company, which, in turn, connected to the Union Pacific Railroad Company.

In its 2007 decision, the Board acknowledges that in 1998, the Federal Railroad Administration's Emergency Order No. 21"discontinued operations by anyone of trains on NWP's rail line from mile post 295.5 at Arcata, CA to milepost 63.4 between Schellville, California and Napa Junction."[30] In its 2007 decision, the Board also acknowledges that STB only has jurisdiction over passenger rail service that is provided between a place in a state and a place in the same state if it is a part of the interstate rail network.[31] The 2007 STB decision then expressly states that Emergency Order No. 21 had the effect of preventing any rail traffic that might originate on the CWR from being transported over the national rail system.[32] The 2007 STB decision also states that the line has been severed from, and is no longer linked to, and part of, the interstate rail system.[33] Accordingly, the STB decision determines that although the line had been part of the interstate rail network with respect to freight service prior to CWR's acquisition, there was no evidence in the 2007 record that the summer passenger excursion service was provided as part of the interstate rail network.[34] STB therefore found that failure to accommodate the passenger excursion service could not serve as the basis for a section 11101(a) violation.

Since Emergency Order No. 21 had the effect of preventing any rail traffic that might originate on the Mendocino Railway from being transported over the national rail system and the 2007 STB decision regarding the line now owned by Mendocino Railway expressly states that there was no evidence in the 2007 record that the passenger excursion service being provided was provided as part of the interstate rail network, it is unclear how the land division, the use of a multi-use shed, the construction of a depot or any other contemplated railway development[35] comprise transportation as "part of the interstate rail network." Similarly, since the preemption provisions of section 10501(b) do not apply to activities over which the Board's jurisdiction does not extend pursuant to 49 U.S.C. § 10501(a)(2)(A), it is unclear how the federal preemption

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[30] *Meyer, Trustee in Bankruptcy for California Western Railroad, Inc v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 30, 2007) citing to *Emergency Order No. 21*, 63 FR 67976 (Dec. 9, 1998).

[31] *Meyer, Trustee in Bankruptcy for California Western Railroad, Inc v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (January 30, 2007). See also 49 U.S.C. 10501(a)(2)(A).

[32] *Id.*

[33] *Id.*

[34] *Meyer, Trustee in Bankruptcy for California Western Railroad, Inc v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 30, 2007) citing to *Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 442, 444 (6th Cir. 1982) (*Magner-O'Hara*); *Fun Trains, Inc.—Operation Exemption—Lines of CSX Transp., Inc.*, STB Finance Docket No. 33472 (STB served Mar. 5, 1998); *Napa Valley Wine Train, Inc.—Pet. For Declaratory Order*, 7 I.C.C.2d 954, 955, 965-67 (1991). STB Finance Docket No. 34337. In *Magner–O'Hara*, the Sixth Circuit sustained an ICCTA ruling that it did not have jurisdiction over an application to operate a scenic passenger railway. The ICCTA found that the railway would operate entirely within Michigan and would not sufficiently affect interstate commerce to bring it within its jurisdiction. *See Magner–O'Hara* at 442, 445. The Sixth Circuit based its affirmance upon 49 U.S.C. § 10501(b), which, at that time, expressly excluded from ICCTA jurisdiction "the transportation of passengers or property ... entirely in a state." *Id.* While 49 U.S.C. § 10501 has since been amended, and the express exclusion eliminated, the statute still does not provide for jurisdiction over completely intrastate tracks. The statute provides for jurisdiction when the "transportation ... [is] between a place in ... a State and a place in the same or another State as part of the interstate rail network." 49 U.S.C. § 10501(a)(2)(A).

[35] As discussed above, it is our understanding that the purpose of the railway development is to "extend the tourist railroad west to the headlands and then north along a half-mile of coastline" for a "trees to seas" train experience.

provisions of section 49 U.S.C. § 10501(b) apply to either the land division or the contemplated railway development.

In *Eel River*, the California Supreme Court dealt with a State project and expressly cautioned that their opinion should not be read too broadly, including that it "should not be read to suggest that the ICCTA preemption clause is so sweeping as to displace state powers preserved under other federal provisions."

As you indicate in your letter, a recent decision of the California Supreme Court addresses whether the ICCTA preempted application of CEQA to a railroad project undertaken by a state public entity *Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 690-691, 220 Cal.Rptr.3d 812, 399 P.3d 37 (*Eel River*)). The California Supreme Court reversed the judgment of the court of appeal, which had determined that CEQA is preempted by federal law when the project to be approved involves railroad operations. The California Supreme Court instead held that application of CEQA to a state-owned rail line between Lombard and Willits operated by Northwestern Pacific Railroad was not the "regulation" of rail transportation but rather constituted an act of self-governance that was not preempted under the ICCTA.[36]

Further, the Eel River opinion expressly references a long line of case law that supports the conclusion that "the ICCTA does not broadly preempt *all* historic state police powers over health and safety or land use matters, to the extent state and local regulation and remedies with respect to these issues do not discriminate against rail transportation, do not purport to govern rail transportation directly, and do not prove unreasonably burdensome to rail transportation" *Eel River*, 3 Cal.5th at 721(emphasis in original).[37]

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[36] Here, the rail activity will be undertaken by a private railroad, not a public entity. Consequently, *Eel River* is not directly controlling in this situation.

[37] The court's citation includes *Emerson v. Kansas Southern Ry. Co.* (10th Cir. 2007) 503 F.3d 1126, 1130, 1132-1133 [state tort claims for improper disposal of railroad ties not preempted]; see also *Franks Investment Co. LLC v. Union Pacific Ry. Co.* (5th Cir. 2010) 593 F.3d 404, 410 (*Franks*);.[the ICCTA does not preempt state law with a remote or incidental effect on rail transportation; state action enjoining railroad from removing privately owned railroad crossings not preempted; *PCS Phosphate Co., Inc. v. Norfolk Southern Corp.* (4th Cir. 2009) 559 F.3d 212, 218-220 (*PCS Phosphate*) [ICCTA preemption does not displace ordinary voluntary agreements between private parties]; ; *Adrian & Blissfield Ry. Co. v. Village of Blissfield* (6th Cir. 2008) 550 F.3d 533, 539-541 (*Adrian & Blissfield*); [state track maintenance statute that would require the railroad to pay for pedestrian crossings across its tracks was not preempted; imposing increased costs on railroad is not by itself enough to establish unreasonable interference]; *New York Susquehanna v. Jackson* (3d Cir. 2007) 500 F.3d 238, 252-255 (*Susquehanna)* [fines may be imposed under state law on railroad for environmental hazards at transloading facility; the ICCTA would not preempt, for example, rules fining the railroad for dumping debris or harmful substances]; *Green Mountain Railroad Corp. v. Vermont* (2d Cir. 2005) 404 F.3d 638, 643 (*Green Mountain*); *Florida East Coast Ry. v. City of West Palm Beach* (11th Cir. 2001) 266 F.3d 1324, 1328, 1331 (*Florida East Coast Ry.*); [ICCTA preemption does not extend to traditional police power of zoning and health and safety regulation]; *Jones v. Union Pacific Railroad Co.* (2000) 79 Cal.App.4th 1053, 1060, 94 Cal.Rptr.2d 661 [state nuisance action based on train noise and fumes not necessarily preempted if the plaintiffs can demonstrate the challenged nuisance did not further the railroad's operations]; *In re Vermont Ry.* (2000) 171 Vt. 496, 769 A.2d 648, 655 [zoning conditions imposed not on rail line but on truck traffic and environmental conditions at railroad's salt shed not preempted]; *City of Girard v. Youngstown Belt Ry. Co.* (2012) 134 Ohio St.3d 79, 979 N.E.2d 1273, 1283 [eminent domain action not categorically preempted]; *Home of Economy v. Burlington Northern Santa Fe Ry.* (N.D. 2005) 694 N.W.2d 840, 845-846 [state injunctive relief requiring reopening of grade crossing not preempted].)

And while you assert that it is settled that the ICCTA would preempt state regulation in the form of the state's imposition of environmental preclearance requirements, the Eel River Court's statement was limited to preclearances that would have the effect of halting a private railroad project. Here, since Emergency Order No. 21 defacto prevents any rail traffic that might originate on the Mendocino Railway from being transported over the national rail system and the 2007 STB decision regarding the track now owned by Mendocino Railway expressly states that there was no evidence in the 2007 record that the passenger excursion service being provided was provided as part of the interstate rail network, it is unclear how railroad development subject to the jurisdiction of the ICCTA is being halted.

Further, the Eel River opinion recognizes that there are various instances in which rail operations may also be subject to regulation under other federal laws that *preserve* state power to a defined degree.[38] In fact, the California Supreme Court opinion expressly cautioned that their opinion "should not be read to suggest that the ICCTA preemption clause is so sweeping as to displace state powers preserved under other federal provisions" (*Eel River*, 3 Cal.5th at 723).

The ICCTA does not preempt the Coastal Commission's jurisdiction pursuant to the Coastal Zone Management Act.

Even where no CDP is required because federal law preempts the Coastal Act in a particular situation, the Commission is the designated state coastal zone planning and management agency authorized to implement the federal Coastal Zone Management Act ("CZMA").[39] PRC § 30330. The Commission is responsible for reviewing proposed federal activities[40] and proposed federally authorized activities[41] to assess their consistency with the approved California Coastal Management Program ("CCMP"). The Commission can concur with, object to, or conditionally concur with a consistency determination, certification, or federal assistance application. Accordingly, whenever Mendocino Railway needs federal funding[42] or a federal license or permit in order to undertake a rail project or the project involves the disposition of a right of way, that project is subject to another form of

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[38] (See *People v. Burlington Northern Santa Fe Railroad* (2012) 209 Cal.App.4th 1513, 148 Cal.Rptr.3d 243 (*Burlington)* and cases cited [discussing the extent to which the federal rail safety law may preserve state rail safety provisions notwithstanding the ICCTA]; *Ass'n of American Railroads v. South Coast Air Quality Management Dist.* (9th Cir. 2010) 622 F.3d 1094, 1097-1098 [harmonizing the ICCTA with other federal statutes and those state laws that are preserved thereunder]; see also *U.S. v. St. Mary's Ry. West, LLC* (S.D.Ga. 2013) 989 F.Supp.2d 1357, 1360-1363; *Boston & Maine Corp. and Town of Ayer, MA, Petition* (STB, Apr. 30, 2001, No. FD 33971), 2001 WL 458685, p. *5 (*Boston & Maine*), affd. *sub nom. Boston & Maine Corp. v. Town of Ayer* (D.Mass. 2002) 191 F.Supp.2d 257.

[39] The CZMA is codified in 16 U.S.C. Chap. 33 (§§1451-64) and the rules for implementing the CZMA are established in federal regulations at 15 CFR Part 930.

[40] The Commission reviews federal consistency determinations made by federal agencies conducting federal activities or development projects.

[41] The Commission reviews federal consistency certifications made by federal agency applicants.

[42] A federal agency activity is any function performed by or on behalf of a federal agency in the exercise of its statutory responsibilities. Although a federal agency activity requiring a consistency determination does not include the issuance of a federal license or permit or the granting of federal assistance to a state or local agency, a federal agency activity does include activities for which federal funds are used to construct the facility. Subsections (a) and (c) of 49 CFR 930.31 specifically acknowledge that there is this residual category of federal actions not covered under subparts D, E or F of Part 930.

Commission review, which must occur before the funding or the federal license or permit may be issued.[43]

For example, when Mendocino Railway sought federal funding[44] in order to undertake their rail project, that federal agency activity was subject to another form of Commission review, federal consistency review, which must occur before any funding or the federal license permit may be issued.[45]

We also note that federal consistency review is automatically triggered by specified federal licenses or permits including Department of Transportation–STB Permits for: (a) railroad construction and acquisitions (49 USC § 10901)[46]; (b) exemption from service requirements for rail transportation and applications for rail line abandonments (49 USC §§ 10502, 10903); and (c) removal of trackage and disposition of right-of-way (49 USC § 10101 et seq.). For example, the Commission's consistency certification authority could be triggered in situations where another entity would be operating an expanded line as part of the interstate rail network and the entity required Board authority to do so.[47]

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[43] See 16 U.S.C. § 1456; *AARR, supra*, 622 F.3d at 1097 (9th Cir. 2010), citing *Boston & Maine Corp. and Town of Ayer, MA, Petition* (STB, Apr. 30, 2001, No. FD 33971), 2001 WL 458685, p. *6 (*Boston & Maine*), affd. *sub nom. Boston & Maine Corp. v. Town of Ayer* (D.Mass. 2002) 191 F.Supp.2d 257.[if two federal laws are capable of coexistence, they should be read in harmony with each other), citing, *inter alia, Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1998); cf. Southern Pac. Transp. Co. v California Coastal Commission*, 520 F.Supp.800 (N.D. Cal. 1981) [harmonizing the CZMA with the Interstate Commerce Act and specifically upholding the Coastal Commission's CZMA review role over rail projects].

[44] Although Mendocino Railway applied for a US Department of Transportation BUILD grant in 2018 to fund tunnel repairs, this grant was denied in February 2019. Chris Calder, *Skunk Train's Mill Site Purchase Still on Hold*, Fort Bragg Advocate News (February 7, 2019).

[45] See 16 U.S.C. § 1456; *AARR, supra*, 622 F.3d at 1097 (9th Cir. 2010), citing *Boston & Maine Corp. and Town of Ayer, MA, Petition* (STB, Apr. 30, 2001, No. FD 33971), 2001 WL 458685, p. *6 (*Boston & Maine*), affd. *sub nom. Boston & Maine Corp. v. Town of Ayer* (D.Mass. 2002) 191 F.Supp.2d 257.[if two federal laws are capable of coexistence, they should be read in harmony with each other), citing, *inter alia, Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1998); cf. Southern Pac. Transp. Co. v California Coastal Commission*, 520 F.Supp.800 (N.D. Cal. 1981) [harmonizing the CZMA with the Interstate Commerce Act and specifically upholding the Coastal Commission's CZMA review role over rail projects].

[46] Mainline track is within the Board's jurisdiction and is subject to the licensing requirements of 49 U.S.C. § 10901. Excepted track is also within the Board's jurisdiction, 49 U.S.C. § 10501(b), but under 49 U.S.C. § 10906, Board authorization is not required for the construction, operation, abandonment, or discontinuance of such track. Jersey Marine Rail—Pet. for Declaratory Order, FD 36063, slip op. at 2 n.3 (STB served Jan. 30, 2017); Brazos River Bottom Alliance—Pet. for Declaratory Order, FD 35781, slip op. at 4 (STB served Feb. 19, 2014). Excepted track is used for loading, switching and other activities ancillary to the main-line service. *Nicholson v. ICC*, 711 F2d 364, 367-368 (D.C. Cir. 1983) In determining whether a particular track is mainline subject to Board licensing or excepted track ancillary to the main-line service, the agency and courts consider the track's intended use, physical characteristics, and relationship to the rail system. Tri-City R.R.—Pet. for Declaratory Order, FD 36037 (STB served June 1, 2017); The history of the track and other factors may also play a role in the Board's determination. See, e.g., Union Pac. R.R.—Operation Exemption—in Yolo Cty., Cal., FD 34252, slip op. at 4 (STB served Dec. 5, 2002); Park Sierra Corp.— Lease & Operation Exemption—S. Pac. Transp. Co., FD 34126 et al., slip op. at 5 (STB served Dec. 26, 2001). STB decisions have relied on certain indicia, including the length of the track; whether it serves more than one shipper; whether it is stub-ended; whether it was built to penetrate new markets; whether the shipper is located at the end of the track; whether there is regularly scheduled service; traffic volume; who owns and maintains the track; whether the track was constructed with light-weight rail; the condition of the track; what the track is used for (e.g., switching, loading, and unloading); whether there are stations on the track; and whether operations on the side track are merely ancillary to the common carrier service provided on the main track. *Tri City Railroad Company, LLC –Petition for Declaratory Order*—STB FD 36037 (Service Date June 1, 2017)

[47] 49 U.S.C. § 10901 (requiring authority to acquire or operate a rail line); 49 U.S.C. § 10901(a)(4) (stating that Board authority is required for a "a person other than a rail carrier [to] acquire a railroad line ..."); Class Exemption—Acquis. & Operation of Rail

Moreover, even if any necessary STB permit or other form of authorization for a proposed activity is not a listed permit in the Commission's CCMP, so that CZMA review is not automatically triggered, the Commission monitors unlisted federal license and permit activities, which are subject to consistency review if OCRM determines they are reasonably likely to affect coastal uses or resources. 15 C.F.R. § 930.54. Further, STB's regulations state that if the activity "affects land or water uses" within the coastal zone, you must provide the Coastal Commission with notice of the proposal at least 40 days before the effective date of the requested action. 49 C.F.R. § 1105.9. Even for actions that "generally require no environmental documentation, [STB] may decide that a particular action has the potential for significant environmental impacts and that, therefore, the applicant should provide an environmental report." *Id.* at § 1105.6(d).

Therefore, we urge Mendocino Railway to coordinate early on with Coastal Commission federal consistency staff and all potentially relevant federal agencies to clarify the nature and extent of any Commission CZMA review authority. We also request that Mendocino Railway submit its proposals for development activities in the coastal zone to the Commission for a preliminary review to determine if the particular action in question is subject to federal consistency review.

We request that Mendocino Railway report and inform the Commission of any future development activities which might trigger Coastal Act permitting requirements.

Finally, the STB has also identified several types of measures that it has found not to be preempted and that are designed to ensure that railroads have a duty to report to agencies such as the Coastal Commission any possible activities that might require permit review, ensure that railroads comply with the Coastal Act when they construct railroad facilities, and submit environmental information to agencies such as the Commission. These measures that the STB deemed not too burdensome to be preempted include:

> "conditions requiring railroads to (1) share their plans with the community when they are undertaking an activity for which another entity would require a permit; [footnote omitted] (2) use state or local best management practices when they construct railroad facilities; (3) implement appropriate precautionary measures at the railroad facility, so long as the measures are fairly applied; [footnote omitted] (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin."[48]

Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 810 n.1 (1985) (explaining that under 49 U.S.C. § 10901, the terms "acquire" and "operate" include interests in railroad lines of a lesser extent than fee simple ownership, such as a lease or a right to operate).

[48] *Eel River , supra*, 3 Cal.5th at 722 citing *Boston & Maine Corp. and Town of Ayer, MA, Petition* (STB, Apr. 30, 2001, No. FD 33971), 2001 WL 458685, p. 7 (*Boston & Maine*), affd. *sub nom. Boston & Maine Corp. v. Town of Ayer* (D.Mass. 2002) 191 F.Supp.2d 257.

Conclusion

As discussed above, we are unable to conclude that the ICCTA results in preemption of Coastal Act permitting requirements for the contemplated railway development, including a land division that does not appear to be undertaken as a part of the interstate rail network. Therefore, we request that you transmit to us any information that provides us with a better understanding of both the basis for your positions on ICCTA preemption and the nature, scope and purpose of the railway development that you contemplate, including information that clarifies the relationship between the land division and railway development. Also, before conducting any development in the coastal zone, we request that Mendocino Railway coordinate with Coastal Commission staff (and local governments, as applicable) to determine if the particular action may require either a CDP or CZMA Review. Please contact me, or in my absence, Alex Helperin, the Acting Deputy Chief Counsel, at 415-904-5220 if you would like to discuss.

Sincerely,

Ann M Cheddar

ANN CHEDDAR
Senior Legal Counsel

cc: Marie Jones, Planning Director, City of Fort Bragg
Russell Hildebrand, Counsel for the City of Fort Bragg
Alex Helperin, Acting Deputy Chief Counsel, Coastal Commission

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STEPTOE & JOHNSON LLP

February 11, 2019

VIA E-MAIL AND FEDERAL EXPRESS
John Ainsworth
Executive Director
California Coastal Commission
89 California Street #200
Ventura CA 93001

Dear Mr. Ainsworth:

I am writing to you on behalf of Mendocino Railway ("Mendocino"), a Class III railroad headquartered in Fort Bragg, California, which is subject to the jurisdiction of the federal Surface Transportation Board ("STB"). I practice before the STB and specialize in matters involving STB jurisdiction and federal preemption of state laws affecting rail transportation.

Mendocino has for some time been planning to restore railroad operations to land adjacent to its current rail yard. This land was owned by a predecessor of Mendocino (originally the Fort Bragg Railroad) and was used for more than a century to support rail operations. The current owner of the land discontinued rail support operations but agreed to sell the land to Mendocino so that Mendocino can resume service to a portion of the site and construct some additional rail facilities on the land. The sale is ready to close. The City of Fort Bragg concluded that a Coastal Development Permit would not be required because the project involves the development of rail facilities, and federal law governing rail transportation preempts state and local permit requirements as applied to rail projects.

While preparations were being made to finalize the land sale, an employee of the City sent a local representative of the California Coastal Commission ("CCC" or "Commission"), Cristin Kenyon, incorrect and outdated information about the City's treatment of the rail project and then followed up with a correction without providing the Commission representative with an explanation of the City's position. Ms. Kenyon responded to the confusion created by these inconsistent messages by requesting from the City "the specific basis for any determination that the City would be preempted by federal law from requiring a CDP in this case." (I attach for your convenience Ms. Kenyon's December 21, 2018 letter at Attachment 1.) The City Attorney for the City of Fort Bragg ("City") responded to Ms. Kenyon's letter, citing, among other things, a 2017 California Supreme Court decision that establishes the basis for federal preemption of state permit requirements as applied to rail projects. (See Attachment 2.) In a January 22, 2019 letter back to the City (misdated as December 21, 2018), Ms. Kenyon did not dispute the City's preemption conclusion but continued to insist that the City provide "evidence" that the permit requirement is federally preempted. (See Attachment 3.)

ATTACHMENT 1

In subsequent discussions with the City, Mendocino learned that the City has not changed its view on federal preemption of the permit requirement in this case, but it is now reluctant to allow the sale to proceed, given the possibility of litigation arising between the City and the Commission over this matter. The City suggested that Mendocino contact the Commission directly on this matter. I therefore write to ask that the Commission advise the City that it does not intend to challenge the City's conclusion that a permit requirement for Mendocino's restoration of rail services is preempted by federal law.

The law of federal preemption as applied here is very clear. Given the existence of a recent California Supreme Court decision setting forth the applicable legal standard, Ms. Kenyon's continuing request for "evidence" of preemption is neither reasonable nor appropriate. Federal preemption of state law permit requirements applied to rail projects is a matter of law. Even if a request for "evidence" were reasonable, it is unclear what type of "evidence" Ms. Kenyon seeks. If the "evidence" that Ms. Kenyon seeks is a ruling by a court or federal agency that the permit requirement in this case is preempted, then the insistence on such "evidence" is unreasonable as it merely forces the parties, including the state and local government authorities, to engage in costly, time-consuming and unnecessary litigation over well established law. The question of preemption should be something that responsible government officials can determine by examining the available precedent, without having to go into court or through adversarial proceedings to "prove." The City did undertake such a legal analysis and rightly concluded that the permit requirement is preempted. Unless the Commission believes, in good faith, that the City was wrong, that should be the end of it.

It is not as if the preemption question is even a close call. In 2017, the California Supreme Court succinctly described the applicable law: "state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted." *Friends of Eel River v. North Coast R.R.*, 399 P.3d 37, 60 (Cal. 2017). Indeed, as the Court noted in that decision, the STB specifically concluded that the California Coastal Act, the very source of the permit requirement at issue here, was preempted by ICCTA as applied to rail projects. *North San Diego County Transit Development Board—Petition for Declaratory Order*, 2002 WL 1924265 (STB 2002). Ms. Kenyon's January 22 letter asking for "evidence" of preemption conspicuously ignores the Supreme Court's ruling, but that ruling, and the standard it articulates, applies on all fours here, as the City has properly recognized.

First, the requirement to obtain a Coastal Development Permit before Mendocino can restore railroad operations on the land is without question a "state environmental permitting . . . regulation." Second, application of that requirement before Mendocino may undertake the restoration of its rail facilities "would have the effect of halting a private railroad project pending environmental compliance." In the words of the Court, "[p]reemption [is] required because 'the railroad is restrained from development until a permit is issued' and issuance of the permit depends on an exercise of state or local agency discretion." 399 P.3d at 62 (*quoting Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005)).

The preemption analysis here is straightforward, which makes Ms. Kenyon's demand for "evidence" of preemption all the more baffling and troublesome. With ICCTA, Congress deliberately and expressly chose to keep state and local governments out of rail facility development decisions for fear that local concerns would impede the efficient functioning of the rail network. That is precisely the effect of Ms. Kenyon's request for "evidence" of preemption. By demanding that the City produce "evidence" beyond the City Attorney's own legal explanation of why it believes the permit requirement to be preempted, the Commission is preventing a rail development project from moving forward.

Ms. Kenyon's January 22 letter raises two factual issues that may have contributed to her confusion over preemption. First, the letter notes that "none of the property is owned by Mendocino Railway or any other railroad." As noted previously, the land at issue was in fact used to support railroad operations for over a century and was owned by a predecessor railroad to Mendocino. It is currently owned by Georgia Pacific and not being used for rail support operations, but Mendocino intends to return rail operations to the land by restoring rail facilities on it. In addition, Georgia Pacific wants to sell the land at issue to Mendocino, and Mendocino wants to buy the land for its railroad operations. The only impediment to Mendocino concluding its purchase and use of that land for its rail project is the uncertainty created by Ms. Kenyon's demand for "evidence" of preemption, which has made the City reluctant to rely on its own legal conclusion that the permit requirement is preempted. If it weren't for Ms. Kenyon's demand for further "evidence" of preemption, Mendocino would now own the property. Any concern about property ownership is thus a red herring.

Second, the letter notes that the STB "has not authorized any railroad activities on the property." Ms. Kenyon appears not to understand the scope of STB regulation of rail projects. The Mendocino project at issue involves the construction of side tracks, not mainline tracks. While the STB *does* authorize mainline rail track projects, it *does not* authorize side track projects. *Compare* 49 U.S.C. §10901 with §10906. But the lack of direct STB regulation of side track projects does not open the door to state or local regulation of such projects. ICCTA gives the STB exclusive jurisdiction over "the construction, acquisition [and] operation . . . of spur, industrial, team, switching, or side tracks, or facilities" even though the STB does not actively regulate those rail activities. 49 U.S.C. §10501(b). The STB and numerous courts have stated that "[f]ederal preemption applies without regard to whether or not the Board actively regulates the railroad operations or activity involved." *Wichita Terminal Ass'n—Pet. For Declaratory Order*, FD 35765, slip op. at 6 (STB served June 23, 2015) (citing *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068-69 (11th Cir. 2010) (finding state law claims preempted even though Board does not actively regulate side track); *Port City Props. v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (Congress intended to occupy the field and preempt state jurisdiction over excepted track, even though Congress allowed rail carriers to construct, operate, and abandon such track without Board approval). The lack of STB authorization of rail activity on the land at issue is the product of Congress's scheme of regulation and deregulation of rail activity – it is not a valid basis to question the application of preemption here.

The City has already concluded that ICCTA preempts the Coastal Development Permit requirement because the requirement to obtain a permit would illegally restrict Mendocino's rail

development project. There is no valid basis for questioning that decision; indeed, it is not even clear that Ms. Kenyon disagreed with the City's conclusion. Nevertheless, the cloud over the project created by her demand for "evidence" of preemption is delaying the rail project at issue and threatens to cause substantial damage to Mendocino. Such a result would not be the product of careful or reasoned decision-making, nor would it reflect the law.

Mendocino therefore asks the Commission to let the City know that it will not challenge the City's preemption analysis or the City's conclusion that the project does not need a permit. If, on the other hand, the Commission believes that a permit is required notwithstanding federal law preempting such state and local permit requirements, Mendocino requests that the Commission explain the grounds on which it believes that preemption is inapplicable so that Mendocino may pursue appropriate legal action.

Respectfully,

Anthony LaRocca
Counsel for Mendocino Railway

cc: Russell Hildebrand, Counsel for City of Fort Bragg
Mike Hart/Torgny Nilsson, Mendocino Railway

STATE OF CALIFORNIA - NATURAL RESOURCES AGENCY

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December 21, 2018

City of Fort Bragg
Attn: Marie Jones, Planning Director
416 N. Franklin Street
Fort Bragg, CA 95437

RE: City of Fort Bragg Coastal Development Permit (CDP) jurisdiction over a lot line adjustment on the former Georgia-Pacific lumber mill site (Mill Site)

Dear Ms. Jones:

This letter responds to your email of December 19, 2018 regarding a lot line adjustment contemplated at the Mill Site involving lands that may be purchased from Georgia Pacific by the Mendocino Railway and the question of whether that lot line adjustment requires a coastal development permit (CDP).

It is our understanding that Mendocino Railway (also referred to in this letter as the Skunk Train) is claiming that the contemplated lot line adjustment does not require a CDP because Mendocino Railway intends to purchase one of the resultant lots and extend railroad operations onto that resultant lot, and Mendocino Railway's status as a railroad subject to Surface Transportation Board (STB) jurisdiction exempts Mendocino Railway from local and state regulation (i.e. a claim of federal preemption).

However, there is no existing railroad service, facilities, or operations on the subject property. It is our understanding that the STB has not authorized any railroad activities on the property. The property is the site of a former lumber mill and is largely vacant except for a 67,500-square-foot structure known as Dry Shed #4. Dry Shed #4 was used for storage, drying and curing of timber for several decades and is currently vacant. Further, the property in question, including all parcels implicated in the lot line adjustment, is owned by the Georgia-Pacific Corporation. None of the property is owned by Mendocino Railway or any other railroad, nor do we know of any legal right, interest, or other entitlement any railroad has to use the property.

I received an email from you on November 28, 2018 indicating that it was the City attorney's opinion that the subject lot line adjustment requires a CDP. The email stated in relevant part:

> *The Skunk train is a local tourism train and is claiming exemption from the Coastal Act under the interstate commerce clause of the US Constitution. Our attorney maintains that as a local serving tourism train, they are not engaged in interstate commerce and thus are not exempt from [...] land use regulations, including the Coastal Act and the local LCP.*

ATTACHMENT 2

On December 19, 2018 I received another email from you with a contrary decision. The email indicated that the City's attorney has determined that the Skunk Train is exempt from the requirement to obtain a CDP to process a lot line adjustment on the Mill Site. The email stated in relevant part:

> *The City's attorney has determined that the Skunk Train as a public utility is exempt from the requirement to obtain a CDP to process a LLA adjustment for the transfer of property between GP and the Skunk Train.*

A subsequent email from you yesterday indicated that you are *"not at liberty to share the City's legal opinion at this time."*

This letter officially requests that the City justify, in writing, it's basis for: (1) revising its November 28, 2018 position that the proposed LLA requires a CDP; and (2) instead taking the position that the contemplated lot line adjustment would not require a CDP from the City, including providing the specific basis for any determination that the City would be preempted by federal law from requiring a CDP in this case.

If you have any questions, please don't hesitate to call me at 826-8950.

Sincerely,

Cristin Kenyon
Supervising Analyst

Cc Mike Hart (mike@sierraenergy.com)

J & M
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January 17, 2019

California Coastal Commission
Attn: Cristin Kenyon
1385 Eighth Street, Suite 130
Arcata, CA 95521-5967

RE: *City of Fort Bragg Coastal Development Permit jurisdiction over a sale of land to a public entity on the former Georgia-Pacific Mill Site*

Dear Ms. Kenyon:

I am writing in response to your letter dated December 21, 2018 requesting more information regarding the sale of Georgia-Pacific land to the Mendocino Railway. I'd like to first clear up a fundamental misunderstanding of the basis of this transaction. It is not a lot line adjustment, but rather the sale of land to a public utility which sale is and transfer is exempt from the requirements of the California Subdivision Map Act. I will explain further why that is the case.

After my review of various legal opinions from prior Fort Bragg legal counsel, there is a recurring theme in their analysis and my initial analysis as well. There has been an ongoing legal debate as to whether or not the Mendocino Railway is recognized as a California Public Utility. Because of some legal actions taken by the Skunk Train related to the California Public Utilities Commission's (PUC) ability to regulate the excursion rates set by the Skunk Train, (a related subsidiary to the Mendocino Railway) it appeared they were not a regulated public utility. Case law related to the ongoing litigation between the City of Napa and the Napa Valley Wine Train

ATTACHMENT 3

seemed to support that point. As an established railroad, the question of whether or not the Mendocino Railway is federally regulated has not been in question.

Rather than continue the debate between conflicting legal opinions, I asked the Mendocino Railway owners to provide the City with a status letter directly from the PUC clarifying whether or not the Mendocino Railway was in fact recognized by the PUC as a regulated railroad and public utility. That confirmation letter from David Stewart with the PUC dated December 7, 2018 was provided to the City.

Having now established that the PUC recognized the Mendocino Railway as a regulated public utility, they have the right to the exemption from the Subdivision Map Act set forth in Government Code Section 66428, subdivision a.2. which states:

> *Land conveyed to or from a governmental agency, public entity, public utility, or for land conveyed to a subsidiary of a public utility for conveyance to that public utility for rights-of-way, unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map. For purposes of this subdivision, land conveyed to or from a governmental agency shall include a fee interest, a leasehold interest, an easement, or a license. [emphasis added]*

Therefore, under these circumstances, we are not evaluating a lot line adjustment, but rather the purchase of a surveyed portion of land by a public utility which is exempt from the requirements of the Subdivision Map Act. This land purchase by a public utility is not subject to the jurisdiction of the City, as it is a land conveyance only, and does not involve any application for development of the property at this time. Nor does the statutory language "unless a showing is made in individual cases, upon substantial evidence, that public policy necessitates a parcel map" supersede the general exemption in these circumstances. There is no evidence that a land transaction, which involves no development in the coastal zone, could create an impact to coastal resources. The scope of the City's consideration is simply our ability to require a permit related

to a purchase of land by a public utility, and does not extend to future development, which will be independently analyzed when and if a development proposal comes forward.

Further bolstering the right of the Mendocino Railway to proceed without permit requirements from the City is the California Supreme Court Case of *Friends of the Eel River v. North Coast Rail Authority* (2017) 3 Cal. 5th 677, 690-691, 702-713, 716-720 (Eel River) the California Supreme Court addressed the issue of federal pre-emption and held that a private railroad corporation with the legal status of a federally regulated railroad is not subject to the California Environmental Quality Act. In that case the court actually found that CEQA applied because the State of California had an ownership interest in the railroad but made it clear that a privately-owned railroad would not be held to the same standard. The court's reasoning was based on the uncertainty of delays and potential denial of the railroad's activities if subject to CEQA. The court stated in its opinion, "For the foregoing reasons, we acknowledge that state environmental permitting or preclearance regulation that would have the effect of halting a private railroad project pending environmental compliance would be categorically preempted. In the ordinary regulatory setting in which a state seeks to govern private economic conduct, requiring CEQA compliance as a condition of state permission to go forward with railroad operations would be preempted." By clear analogy, the requirements of the City to process a Coastal Development Permit for a land transaction that is exempt from the Subdivision Map Act would similarly subject the Mendocino Railway to delay and potential denial, thereby restricting the business of the railroad.

For the foregoing reasons, the City has determined that this land purchase transaction is exempt from the requirement of obtaining a Coastal Development Permit. It is not the City's position that any or all future development by the Mendocino Railway would be exempt from the requirements for a Coastal Development Permit. Please contact me by email at rah@jones-mayer.com if you have further questions or need any more information.

Sincerely,

Russell Hildebrand
City of Fort Bragg City Attorney

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STATE OF CALIFORNIA – CALIFORNIA NATURAL RESOURCES AGENCY GAVIN NEWSOM, GOVERNOR

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE
1385 EIGHTH STREET, SUITE 130
ARCATA, CA 95521
VOICE (707) 826-8950
FAX (707) 826-8960
WWW.COASTAL.CA.GOV

December 21, 2018

City of Fort Bragg
Attn: Russell Hildebrand, City of Fort Bragg Attorney
416 N. Franklin Street
Fort Bragg, CA 95437

RE: City of Fort Bragg Coastal Development Permit (CDP) jurisdiction over activities on the former Georgia-Pacific lumber mill site (Mill Site)

Dear Mr. Hildebrand:

I am writing in response to your letter dated January 17, 2019 relating to a proposed change in parcel boundaries on the Mill Site and the subsequent sale of a resultant Mill Site parcel to the Mendocino Railway. Your letter indicates that land purchase transactions do not require a Coastal Development Permit (CDP) and that any purchase of property on the Mill Site by the Mendocino Railway does not require a CDP. Your letter also indicates that the proposed activities on the Mill Site do not include a lot line adjustment regulated under the California Subdivision Map Act (SMA),[1] and the only action occurring on the Mill Site is a sale of land to a public utility. Thank you for sharing your position on the exemptions from the SMA afforded land conveyed to or from a public utility for rights-of-way.

However, our disagreement with the position set forth in the January 17, 2019 letter is not predicated on the SMA. The California Coastal Act and the SMA are two different statutory schemes and the SMA does not limit the exercise of authority under the Coastal Act. We take no position on the City's application of SMA requirements to the subject actions on the Mill Site. Rather, we maintain that an exemption under the SMA does not mean that a CDP is not required under the Coastal Act.

Pursuant to Section 30600(a) of the Coastal Act and Section 17.71.045(B) of the City's certified LCP, any person[2] wishing to perform or undertake development in the coastal zone must obtain a CDP, in addition to any other permit required by law. "Development" is defined by Section 30106 of the Coastal Act and Section 17.71.045(B) of the City's certified LCP as follows (*emphasis added*):

> *Development' means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials;*

[1] Under the Subdivision Map Act any conveyance of land to or from a public utility for conveyance to that public utility for rights-of-way (1) is not considered a division of land for purposes of computing the number of parcels, and (2) does not require a parcel map [§66426.5 and §66428(a)(2), respectively].

2 The definition of "person" under Coastal Act Section 30111 includes "any utility."

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ATTACHMENT 4

change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations...

As written, the above definition of development in Section 30106 of the Coastal Act and Section 17.71.045(B) of the City's certified LCP grants CDP jurisdiction with respect to any changes in intensity of use, *including* subdivisions under the SMA as well as any other division of land. It is our understanding that proposed actions on the Mill Site comprise reconfiguration of two legal parcel boundaries to facilitate the transfer of land from one parcel to the other. This change in legal parcel boundaries constitutes development under the Coastal Act as a change in the intensity of use of land, whether or not the proposed action to reconfigure parcel boundaries on the Mill Site is exempt under the SMA. Additionally, a change in intensity of use of land is not limited to subdivision pursuant to the SMA, *but also includes, among other activities*, any other division of land. Thus, the Coastal Act and the certified LCP define development to include all listed uses and all changes in intensity of use whether or not the specific use is among those listed. Therefore, the proposed reconfiguration of two parcel boundaries on the Mill Site constitutes development under the Coastal Act and certified LCP requiring a CDP from the City because it comprises a change in intensity of use of land.

Finally, as mentioned in our previous letter, none of the property is owned by Mendocino Railway or any other railroad or tourism train, nor do we know of any legal right, interest, or other entitlement any railroad has to use the property. The subject property is the site of a former lumber mill and is largely vacant except for a 67,500-square-foot structure known as Dry Shed #4. Dry Shed #4 was used for storage, drying and curing of timber for several decades and is currently vacant. There is no existing railroad or tourism train service, facilities, or operations on the property and it is our understanding that the Surface Transportation Board (STB) has not authorized any railroad activities on the property. Therefore, we continue to maintain that neither your recent letter nor any previous correspondence has provided any evidence for the conclusion that no CDP is required for the proposed change in parcel boundaries and we continue to request evidence that requiring a CDP for the proposed change in parcel boundarieswould (1) regulate the construction or operation of railroad operations or deny a railroad the ability to conduct its operations or proceed with activities the STB has authorized, or (2) have the effect of preventing or unreasonably interfering with railroad transportation..

If you have any questions, please don't hesitate to call me at 826-8950.

Sincerely,

Cristi Kenyon
Supervising Analyst