

# Next stop, even more CEQA litigation

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The California Supreme Court recently issued an important environmental and constitutional law decision that is simultaneously unique and part of a lengthy pattern: *Friends of the*

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*Eel River v. North Coast Railroad Authority*, 2017 DJDAR 7206 (July 28), is the latest of nearly a dozen Supreme Court cases in the last few years interpreting California's most prominent and cross-cutting environmental law — the California Environmental Quality Act. But the ruling is unique in that it's the first time in CEQA's 47-year history that the justices have had the opportunity to consider the extent to which CEQA is preempted by federal law.

*Friends of the Eel River* is further significant because the case raises the issue of federal preemption of CEQA in a most controversial factual context: railroad construction and operation. From ever-increasing numbers of trains shipping crude oil from distant oilfields to California refineries, to construction of Gov. Jerry Brown's contentious high-speed rail project, these days California railroad siting, construction and operation decisions are politicized indeed.

In *Friends of the Eel River*, the Supreme Court rejected the argument of railroad proponents and federal regulators that federal law fully preempts CEQA when it comes to publicly owned railroad projects in California. The decision represents a judicial compromise between the more extreme arguments advanced by the litigants — a compromise that's unlikely to satisfy fully either side and which portends continuing uncertainty and additional, future litigation.

The facts of *Friends of the Eel River* are relatively straightforward: Local officials in the Northern California sought to reestablish freight rail service over a long-abandoned private railroad line between Arcata and Napa County. In 1989, they persuaded the California Legislature to create a public entity, the North Coast Railroad Authority, to help accomplish that objective.

As part of its efforts to rehabilitate the line and resume freight shipments, the rail authority undertook environmental review of the proposed project under CEQA. In 2013, however, the authority reversed course and for the first time took the position that CEQA's application to the project is preempted by federal law — specifically, the Interstate Commerce Commission Termination Act of 1995 (ICCTA).

Opponents of the North Coast rail project promptly sued to challenge the rail authority's preemption claim. Both the trial court and the California Court of Appeal agreed with the rail authority that the federal law fully preempts CEQA's application to the project.

The California Supreme Court granted review, no doubt in part due to the fact that another state Court of Appeal had held in an earlier case that the ICCTA does not preempt CEQA's application to a far more prominent railroad proposal — California's high-speed rail project.

On the merits, the Supreme Court reversed in a lengthy and nuanced 6-1 decision authored by Chief Justice Tani Cantil-Sakauye. The majority concluded that the ICCTA does not fully preempt CEQA's application to publicly owned California railroad projects.

Before doing so, however, the court digressed to analyze a question not before the justices: whether CEQA's application to *private* railroad projects is preempted by the ICCTA. The majority concluded that it is — at least where application of CEQA “would have the effect of halting a private railroad pending environmental compliance.”

But turning to the publicly owned railroad project directly at issue in *Friends of the Eel River*, the justices reached a quite different conclusion. When it comes to railroad projects owned and operated by the State of California or its political subdivisions, opined the majority, the ICCTA doesn't totally preempt CEQA.

The justices predicated this latter conclusion on two theories. First, the court interpreted the ICCTA's express preemption clause as not superseding "all historic state police powers over health and safety or land use matters, to the extent state and local regulations 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."

The majority's second rationale for rejecting blanket federal preemption of CEQA concerning public railroad projects is more novel — and controversial. The justices reasoned that when the state applies CEQA to its own railroad projects or those of California local governments, it does not engage in the type of traditional "regulation" that's expressly proscribed by the ICCTA. Instead, the court concluded, CEQA "operates as a form of self-government when the state or a subdivision ... is itself the owner of the [railroad] property and proposes to develop it." The majority summarizes this portion of the decision by concluding, "It appears to us extremely unlikely that Congress, in enacting the ICCTA, intending to preempt a state's adoption and use of the tools of self-governance in this situation."

The Supreme Court remanded the case to the Court of Appeal "for further proceedings consistent with this opinion." Notably, however, it declined to issue an injunction barring construction and operation of the railroad while the lower court sorts out precisely how to apply the Supreme Court's rather Delphic ruling.

Justice Carol Corrigan issued a short, solitary dissent, indicating that she would find CEQA's application to private and public railroad projects equally preempted by the ICCTA. Her key disagreement was with the majority's self-governance vs. regulation distinction. "I do not follow that logic," Justice Corrigan declared. She criticized the court's holding as "based not on settled law but on an entirely novel theory construing regulation as a form of 'self-governance.'"

*Friends of the Eel River* is significant in numerous respects. First, the California Supreme Court rejects the notion that federal law automatically trumps CEQA. In doing so, the decision perpetuates the court's robust interpretation of CEQA generally, as well as the justices' understandable — and quite appropriate — reticence to find California statutes preempted by federal law.

Additionally, the Supreme Court was certainly looking beyond the specific facts of *Friends of the Eel River* in reaching its decision. The justices are surely aware of the multiple lawsuits brought against the state of California by opponents of high-speed rail, who have seized upon CEQA as their principal legal weapon. So too, the court is cognizant of the administrative rulings of the Surface Transportation Board (the federal agency assigned by Congress to administer the ICCTA) which find CEQA fully preempted as to private and public railroads alike — including high-speed rail.

Indeed, a fascinating backstory to the *Friends of the Eel River* litigation is the fact that opponents of the high-speed rail project separately appealed the transportation board's 2015 administrative ruling that CEQA's application to the high-speed rail project is preempted to the 9th U.S. Circuit Court of Appeals. Shortly after the 9th Circuit heard oral arguments in that case last month, the Court of Appeals dismissed the case, finding that the lack of a final transportation board decision deprived the court of jurisdiction. That dismissal, in turn, eliminates — at least for now — the possibility of a federal-state court conflict on the CEQA preemption questions and greatly lessens the chances that the U.S. Supreme Court would grant review in *Friends of the Eel River*.

But *Friends of the Eel River* has its shortcomings. The California Supreme Court's decision continues an unfortunate pattern in the court's recent CEQA jurisprudence of providing precious little guidance to lower courts and CEQA practitioners. Rather than provide "bright line" direction as to the scope of CEQA preemption with respect to railroad projects, *Friends of the Eel River* continues a court trend in favor of fact-based, complex "balancing test" decisions that are less than clear. For example, even with respect to privately operated railroad projects, *Friends of the Eel River* declares that federal preemption of CEQA is not absolute. With land use conflicts arising across California over safety concerns regarding private railroads moving hazardous "oil trains" from throughout the U.S. to in-state refineries, future courts and cases will have to grapple with the precise scope of CEQA preemption in that

context.

And the uncertainty over CEQA's continuing applicability to *publicly* operated California railroads like high-speed rail is even greater under the nuanced and less-than-clear majority opinion in *Friends of the Eel River* — as aptly noted in Justice Corrigan's dissent.

In sum, neither side in this litigation won a clear-cut victory from the Supreme Court. And the principal beneficiaries of the ambiguities contained in the court's decision are the attorneys who will be called upon to litigate future cases regarding the scope of CEQA's continued, permissible application to controversial private and public railroad projects in California.

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