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SUPERIOR COURT, STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

CITY OF NOVATO,

Petitioner,

v.

NORTH COAST RAILROAD AUTHORITY,

Respondent.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA TRANSPORTATION COMMISSION, CALIFORNIA DEPARTMENT OF FISH AND GAME, KERNEN CONSTRUCTION, MASS. ELECTRIC CONSTRUCTION CO., NORTHWESTERN PACIFIC RAILROAD COMPANY, AND DOES 1 TO 10,

Real Parties in Interest.

CASE NO. CV 074645

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER CITY OF NOVATO'S SECOND AMENDED PETITION FOR WRIT OF MANDATE AND REQUEST FOR PRELIMINARY INJUNCTION

[California Environmental Quality Act-CEQA]

Date: December 11, 2007
Time: 9:00 a.m.
Dept: E
Judge: Hon. James Ritchie

Friends of the Eel River, Californians for Alternatives to Toxics, the Environmental Protection Information Center, the Marin Conservation League, and the Watershed Preservation Network (hereafter collectively "Environmental Organizations") respectfully request leave of this Court to file an amicus curiae brief in support of the Petition for Writ of Mandamus and request for preliminary injunction filed by Petitioner the City of Novato (hereafter the "City"). Environmental Organizations share a strong interest in protection and restoration of the natural environment and resources currently being harmed by the actions of the Respondent and the Real Parties in Interest. Environmental Organizations also share a strong commitment to the purposes and procedures of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq., and their collective experience with CEQA may aid this Court in its consideration of the legal issues raised in this matter. Accordingly, Environmental Organizations request leave to file the amicus curiae brief attached as Exhibit A hereto. See Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 661, 665 (1939); see also Cal. Rules of Court Rule 8.200; 4 Witkin Cal. Proc., Pleading § 215 (4th ed. 1997) at 278-80.

1. The Environmental Organizations are familiar with the history of the Northwestern Pacific Railroad, the North Coast Railroad Authority, the issues involved in this case, and the pleadings and papers filed therein to date.

2. The Environmental Organizations share an interest in environmental protection and the enforcement of CEQA. The Environmental Organizations have an interest in full disclosure and analysis of the environmental impacts of the entirety of the project approved by Respondent and at issue here – namely, the reopening of the Northwestern Pacific Railroad. The Environmental Organizations have a similar interest in providing public comment in accordance with CEQA on those environmental impacts and on any feasible mitigation measures or alternatives that could avoid or lessen those impacts. The proper interpretation and application of CEQA in this matter affects the ability of the

Environmental Organizations to achieve their organizational purpose of protecting the environment and the quality of life of their members.

3. Collectively, the Environmental Organizations have thousands of members, many of whom live, work, recreate, and travel in the areas affected by the project at issue here. Some of these members will be directly impacted by Respondent's and Real Parties' efforts to repair and reopen the Northwestern Pacific Railroad. All of these members have a strong interest in proper interpretation and enforcement of CEQA, which furthers both environmental protection and informed self-government by ensuring that public agencies analyze and consider the full ecological implications of their actions. See Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 392 (1988). Those interests are directly threatened by Respondent's failure to comply with CEQA here.

4. Friends of the Eel River is a grassroots, non-profit organization with more than 2,500 members, working to restore the Eel River and its tributaries to a state of natural abundance. Friends of the Eel River has worked to curtail water diversions and other practices harming the Eel River watershed and its threatened salmon and steelhead fisheries. Friends of the Eel River is especially concerned with environmental degradation that could result from reopening the Northwestern Pacific Railroad through the Eel River Canyon, including a proposal to open a massive quarry adjacent to the rail line at Island Mountain. For many years, Friends of the Eel River has worked to maintain a neutral stance on the railroad, while simultaneously attempting to ensure that any proposal to revive the railroad will be protective of the Eel River and the natural environment. Respondent's failure to comply with CEQA has deprived Friends of the Eel River and its members of their ability to analyze and comment on the environmental impacts of, and possible alternatives to, reopening the Northwestern Pacific Railroad.

5. Californians for Alternatives to Toxics (CATs) was founded in 1982 by community groups from throughout northern California who wanted a regional resource

center for information and action about hazardous chemicals, especially pesticides, and for promotion of organically produced products. CATs' mission is to enable its members and the public to gain control over pesticides and other toxic chemicals within the environment of California in ways that will benefit people around the world. CATs and its members are especially concerned with the possibility of toxic chemical releases from repair and operation of the Northwestern Pacific Railroad, including pollution associated with removal and replacement of thousands of railroad ties. Throughout the past decade, CATs has testified at public hearings and otherwise expressed these concerns to public officials entrusted with decisions concerning rehabilitation and operation of the Northwestern Pacific Railroad. Opportunities for detailed environmental analysis and public comment such as those provided by CEQA are central to CATs' mission.

6. The Environmental Protection Information Center, a grassroots, non-profit organization formed by community activists more than 30 years ago, works to protect and restore ancient forests, watersheds, coastal estuaries, and native species throughout Northwest California. EPIC uses an integrated, science-based approach, combining public education, citizen advocacy, and strategic litigation. For many years, EPIC has voiced concerns about the impact of the Northwestern Pacific Railroad on the Eel River and its threatened salmon and steelhead fisheries as well as the railroad's potential connection to other destructive industries such as gravel mining. Through extensive public outreach and detailed comments to federal, state, and local officials, EPIC long has argued that due to unstable geology, steep slopes, and high annual rainfall in the Eel River Canyon, the Northwestern Pacific Railroad will continue to contribute to environmental degradation of the watershed and will require tremendous infusions of taxpayer money in order to operate. EPIC relies heavily on the environmental analysis and public comment opportunities provided by CEQA in achieving its goals.

7. The Marin Conservation League (MCL) is a nonprofit organization with over 1,000 members. MCL was founded in the mid-1930s for the purpose of protecting and

preserving the habitats, open spaces, waters, and other natural assets of Marin County. MCL was instrumental in protecting well-known treasures such as Mt. Tamalpais and Angel Island State Parks, Golden Gate National Recreation Area, Pt. Reyes National Seashore, and countless smaller areas that now make up the Marin County Parks and Open Space District. Today, MCL continues to serve as an "environmental watchdog" for the County and cities of Marin, monitoring dozens of public and private plans and development proposals that might have significant impacts on the natural environment. MCL volunteer citizen activists, many with technical expertise, regularly appear before boards and commissions to advocate for appropriate action on development proposals. Informed decisions require an understanding of the possible impacts of proposals such as the reopening of the Northwestern Pacific Railroad for freight rail traffic. MCL believes that the intended operation of the Northwestern Pacific Railroad will have significant environmental impacts on Marin County, as well as from the repair and upgrading of all segments of the rail line, and, therefore, should receive comprehensive environmental analysis in an EIR. To break out parts of the project for separate review (i.e., to "piecemeal") would violate the spirit and letter of CEQA.

8. Watershed Preservation Network (WPN) is a 501(c)(3) non-profit organization serving Northern California. WPN's focus is on environmental education, conservation, advocacy, and networking and technical support for other non-profit organizations. WPN conducts environmental investigations to protect the public and environmental health, offers experienced consultation to the public and other non-profit groups on scientific investigation and resources related to environmental issues and situations, analyzes and comments on selected legislation and policy development, and participates in a wide variety of restoration and preservation projects. Essential resources for this work include the California Environmental Quality Act (CEQA), California's Brown Act, and the National Environmental Quality Act (NEPA), and other environmental laws that support complete and transparent public process. Without full and complete public disclosure of a proposed project's impacts, WPN and WPN's constituents are left with no way to gather information to

analyze proposals and participate in the public process. WPN has serious concerns with the environmental impacts of the North Coast Railroad Authority (NCRA) proposal to reinstate freight trains from Humboldt Bay/Eureka through the Eel River Canyon (including Island Mountain Quarry) south through Willits to Lombard. The northern reaches of the proposed freight project include environmentally sensitive habitat, extremely fragile geologic areas, and a designated Wild and Scenic River. The route also crosses through wetlands, including those in the Pacific Flyway, and hosts a variety of threatened and endangered species. The only way to assess these impacts and ensure minimal damage is through comprehensive compliance with CEQA, and an inclusive, responsive, and transparent public process.

9. Environmental Organizations are non-profit, public interest organizations. They are substantially and directly interested in this case because they and their members actively participate in environmental review proceedings under CEQA regarding projects in north coastal California. CEQA provides the primary avenue by which the Environmental Organizations are able to remain informed about, comment on, and attempt to address the environmental impacts of projects that directly affect their interests and the interests of their members.

10. The Environmental Organizations' purpose in filing an amicus brief is to alert this Court to a significant level of concern throughout Northern California regarding not only the environmental impacts of rehabilitating and operating the Northwestern Pacific Railroad, but also Respondent's disregard for CEQA in approving this project. The Environmental Organizations do not seek to introduce new legal theories or evidence. Rather, the Environmental Organizations submit this brief in order to elaborate on some of the key issues raised by the parties and to offer their assistance to the Court in interpreting and applying CEQA to the facts of this case.

11. To this end, the Environmental Organizations' brief focuses on three key legal issues: (1) the application of CEQA's statute of limitations; (2) Respondent's failure to consider the environmental impacts of the "whole project," and its adoption of an

unlawful pattern and practice of segmenting environmental review; and (3) Respondent's inappropriate reliance on inapplicable exemptions from CEQA.

WHEREFORE, Friends of the Eel River, Californians for Alternatives to Toxics, the Environmental Protection Information Center, the Marin Conservation League, and the Watershed Preservation Network respectfully request that this Court grant leave to file the amicus curiae brief attached as Exhibit A hereto.

Dated: November 30, 2007

SHUTE, MIHALY & WEINBERGER LLP

By: _____
KEVIN P. BUNDY
Attorneys for Amici Curiae Friends of the Eel River, Californians for Alternatives to Toxics, Environmental Protection Information Center, Marin Conservation League, and Watershed Preservation Network

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EXHIBIT A

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SUPERIOR COURT, STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

CITY OF NOVATO, Petitioner, v. NORTH COAST RAILROAD AUTHORITY, Respondent.	CASE NO. CV 074645 **BRIEF OF AMICI CURIAE IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF MANDATE AND REQUEST FOR PRELIMINARY INJUNCTION** [California Environmental Quality Act-CEQA] Date: December 11, 2007 Time: 9:00 a.m. Dept: E Judge: Hon. James Ritchie
CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA TRANSPORTATION COMMISSION, CALIFORNIA DEPARTMENT OF FISH AND GAME, KERNEN CONSTRUCTION, MASS. ELECTRIC CONSTRUCTION CO., NORTHWESTERN PACIFIC RAILROAD COMPANY, AND DOES 1 TO 10, Real Parties in Interest.	

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INTRODUCTION

Friends of the Eel River, Californians for Alternatives to Toxics, the Environmental Protection Information Center, the Marin Conservation League, and the Watershed Preservation Network (collectively "Amici") respectfully submit this Brief in Support of the City of Novato's ("City's") Second Amended Petition for Writ of Mandate and Request for a Preliminary Injunction. As detailed herein, and in the papers filed by the City, the North Coast Railroad Authority ("NCRA") has adopted an unlawful policy of evading and frustrating the procedural and substantive requirements of the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA"). Specifically, the NCRA has approved several contracts, and has begun construction, on a massive undertaking: upgrading and reopening the entire Northwestern Pacific Railroad from its origins near Lombard to its terminus in Humboldt County. NCRA has done so without any disclosure or analysis of the environmental impacts of this overall project. Instead, NCRA has done what thirty years of case law says a public agency absolutely may not do: it has chopped the larger project into bite-sized pieces for the purpose of avoiding environmental review.

As discussed herein, the City has demonstrated a strong likelihood of prevailing on the merits of this case. NCRA has not violated CEQA once by accident, but rather many times, and with the apparent purpose of avoiding environmental analysis and accountability. Moreover, the equities clearly favor an injunction to preserve the status quo – and to prevent the NCRA from further pursuing its larger goals, at the expense of the environment – pending a full hearing on the merits.

The wisdom of NCRA's desire to reopen this railroad is not before this Court. The fundamental policies of CEQA, however, require that public agencies like the NCRA thoroughly analyze and fully disclose the environmental impacts of their decisions. NCRA has failed to do so.

STATEMENT OF FACTS

Amici adopt and incorporate by this reference the statement of facts set forth in Petitioner's Memorandum of Points and Authorities in Support of Temporary Restraining Order and Preliminary Injunction. Additional facts and citations to the record will be provided in the body of the argument as necessary.

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ARGUMENT

I. STANDARD OF REVIEW.

The test for issuance of a preliminary injunction is well-settled: the petitioner must show a likelihood of prevailing on the merits and that the balance of harms favors the relief requested by petitioner. See Code Civ. Proc. § 526(a)(1); IT Corp. v. County of Imperial (1983) 35 Cal.3d 63, 69-70. As set forth herein, the City has satisfied both elements of this test.

The standard of review applicable under CEQA requires a more extended discussion. The Legislature enacted CEQA to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74; see Pub. Res. Code §§ 21000 et seq.; 14 Cal. Code Regs. §§ 15000 et seq. ("CEQA Guidelines"). The Supreme Court has repeatedly held that CEQA must be interpreted to "afford the 'fullest possible protection' to the environment." Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 206 (quoting cases). CEQA also serves "'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.'" Laurel Heights Improvement Assn. v. Regents of Univ. of Cal. (1988) 47 Cal.3d 376, 392 (citation omitted). If CEQA is "scrupulously followed," the public will know the basis for the agency's action and "being duly informed, can respond accordingly to action with which it disagrees." Id. Thus, CEQA "protects not only the environment but also informed self-government." Id.

CEQA authorizes the Resources Secretary to designate a list of classes of projects that are generally exempt from study. Pub. Res. Code § 21084. However, the secretary "is empowered to exempt only those activities which do not have a significant effect on the environment." Wildlife Alive, 18 Cal.3d at 205; see Pub. Res. Code § 21084. "It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." Wildlife Alive, 18 Cal.3d at 206 (emphasis added). The Guidelines reflect this rule by providing that a categorical exemption may not be used (1) where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances," or (2) where "the cumulative impact of successive projects of the same type in the same place, over time is significant." §§ 15300.2(c) and (b).

A court reviews an agency's determination that a project is categorically exempt from CEQA for abuse of discretion. Pub. Res. Code § 21168.5; see Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal.App.4th 1165, 1192. Because the question of whether a project falls within a class of exemptions turns on an interpretation of the CEQA Guidelines, it is a question of law and the court reviews the agency's decision de novo. Azusa, 52 Cal.App.4th at 1192. Moreover, where the record includes any substantial evidence to support a fair argument that the project may have a significant effect on the environment, the agency abuses its discretion by applying the exemption. Id. at 1202-03; see also Banker's Hill, Hillcrest, Park West Cmty. Pres. Group v. City of San Diego (2006) 139 Cal. App. 4th 249, 264-67; Lewis v. Seventeenth Dist. Agric. Assn. (1985) 165 Cal.App.3d 823, 831 ("the possibility of any potential" effect precludes exemption). The statute's very low threshold for moving to the second step of the CEQA process reflects the Supreme Court's admonishment that exemptions be narrowly construed and not expanded beyond their statutory authorization. See Wildlife Alive, 18 Cal.3d at 205.

II. PETITIONER HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Statute of Limitations for Challenging the Contracts Has Not Run.

The City filed this action on September 28, 2007, challenging NCRA's approval of three separate projects in violation of CEQA: (1) the June 13, 2007 Memorandum of Understanding with the California Department of Fish and Game; (2) the July 11, 2007, contract with Mass. Electric; and (3) the September 12, 2007, contract with Kernen Construction. Petition for Writ of Mandamus and Complaint for Declaratory Relief ("Pet'n") at ¶¶ 17-19, 57. On November 14, 2007, the City amended its petition to challenge a second November 1, 2007, contract with Mass. Electric and a November 7, 2007, contract between the NCRA and Ghilotti Bros. Second Amended Petition for Writ of Mandamus and Complaint for Declaratory Relief ("2d Am. Pet'n") at ¶¶ 18, 21-A.

NCRA concedes that the challenge to the November 7, 2007 approval is timely. North Coast Railroad Authority's Opposition to Preliminary Injunction ("NCRA Opp'n") at 10. NCRA and Mass. Electric argue that the other challenges are untimely, citing Notices of Exemption filed prior to approval of the contracts and agreements at issue. As explained below, these arguments must fail.

1. Because the Notices of Exemption Were Improperly Issued Before Project Approval, the Applicable Statute of Limitations is 180 Days from Commencement of the Project.

Generally, the filing of a Notice of Exemption triggers a 35-day statute of limitations for any challenge to the public agency's determination that the project is exempt from CEQA. Pub. Res. Code § 21167(d). However, a Notice of Exemption cannot be filed until *after* the project at issue has been approved. County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 963; see also § 15062(a). Where, as here, a Notice of Exemption is improperly filed *before* project approval, a challenge to the exemption determination may be brought within 180 days after the date of project approval. County of Amador, 76 Cal. App. 4th at 965.

NCRA states in conclusory fashion that its Board of Directors "approved the project[s]" at issue months before the Notices of Exemption were filed. NCRA Opp'n at 6. NCRA completely fails to support this assertion with legal argument or citations to the record and therefore has waived the argument. Duarte v. Chino Community Hospital (1999) 72 Cal.App.4th 849, 856 (argument unsupported by necessary record citation is waived); People v. Epstein (1937) 21 Cal.App.2d 488, 490 (where defendant failed to furnish the court with argument or citation of authorities in support thereof, the court will deem the point to have been abandoned). NCRA refers only to a declaration suggesting that the NCRA Board of Directors "approved the project" by authorizing two applications to the California Transportation Commission for grant funding. See Declaration of Mitch Stogner in Opposition to Preliminary Injunction ("Stogner Declaration" or "Stogner Dec.") at ¶¶ 14, 23. This unsupported contention is, in any event, contrary to settled law.

Amid the mass of material in the Stogner Declaration, a few key facts stand out. On March 8, 2006, the NCRA Board authorized the first of two grant applications, "TCRP application 32.4," which sought funding for "urgent" repair and maintenance activities in furtherance of NCRA's "strategic plan to upgrade the entire railroad" to Class 2 or 3 standards. See Administrative Record ("AR") at 664, 667-68. NCRA filed a Notice of Exemption on August 22, 2006, claiming that these activities were necessary to address, prevent, or mitigate emergency conditions. AR at 697 (citing CEQA Guidelines § 15269(b), (c)). After this Notice of Exemption was filed, the NCRA Board authorized four separate agreements for performance of this work, including the June 13, 2007,

Memorandum of Understanding with the Department of Fish and Game and the September 12, 2007, contract with Kernen Construction challenged by the City. See AR 746-47, 775.

On August 16, 2006, the NCRA Board authorized "TCRP application . . . 32.9," again seeking funding for activities necessary to "upgrade" the railroad to Class 2 or 3 standards. AR at 872, 875-79. The grant application expressly sought funding for and promised preparation of an "Initial Study" and "appropriate CEQA . . . documentation." AR 876. Nonetheless, the NCRA subsequently issued two Notices of Exemption for activities described in the application, the first on February 6, 2007, and the second on June 4, 2007. AR 886-905, 911-42. On July 11, 2007, "following confirmation of funding," Stogner Declaration at ¶ 28, the NCRA Board authorized a contract with Mass. Electric for signal work, which was executed on July 18. AR 972-73, 963-68.

As NCRA recognizes (NCRA Opp'n at 12), under CEQA, project "approval" occurs when a public agency agrees to be legally bound to take a certain course of action. County of Amador, 76 Cal. App. 4th at 965 (quoting City of Vernon v. Bd. of Harbor Comrs., (1998) 63 Cal. App. 4th 677, 688); see also CEQA Guidelines § 15352. The date of "approval" has important consequences for the applicable statute of limitations. In County of Amador, for example, an irrigation district adopted a resolution in December 1994 authorizing negotiations toward purchase of a water project. 76 Cal. App. 4th at 964. In April of 1995, the district filed a Notice of Exemption for the purchase, and in September of 1995, the district entered into an asset sale agreement with the water project's owner. Id. at 965. The Court of Appeal held that ratification of the later asset sale agreement – not the prior resolution authorizing negotiations toward the agreement – was the relevant "project approval" for CEQA purposes. Id. As a result, the Notice of Exemption filed before ratification of the asset sale agreement was premature, and the 180-day statute of limitations ran from the date of approval of the asset sale agreement. Id.

County of Amador is directly on point here. In March and August of 1996, the NCRA Board authorized *grant applications*. It did not "approve" the activities described in those applications. Like the resolution to negotiate a sale agreement in County of Amador, these decisions to authorize applications for funding did not legally bind NCRA to undertake any particular course of action. Nor could they: obviously, the applications could have been denied by the California Transportation

Commission, as NCRA concedes. See Stogner Dec. at ¶ 31. The NCRA Board legally bound itself to a particular course of action only when it entered into contracts and agreements for performance of specific repair and maintenance work. Critically, these "approvals" occurred *after* "confirmation of funding," Stogner Declaration at ¶ 28, and *after* the Notices of Exemption were filed. As a result, the Notices of Exemption were premature, and the applicable statute of limitations is 180 days from the date on which each contract was authorized. County of Amador, 76 Cal.App.4th at 965; see also Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1143 (holding that issuance of building permit, not prior "Approval in Concept" subject to multiple conditions, was legally effective "approval" triggering 180-day statute of limitations).

NCRA's argument to the contrary is without legal authority. NCRA cites only CEQA Guidelines section 15378(c), which provides that subsequent discretionary approvals by other government agencies responsible for permitting a project are not themselves "projects" under CEQA. This guideline has no application here, where NCRA has attempted to avoid environmental review by improperly splitting a large project into smaller pieces and unlawfully declaring those smaller pieces exempt from CEQA. Mass. Electric's opposition brief likewise adds nothing to NCRA's argument, and in fact tends to confirm that the Notices of Exemption were improperly issued before project approval. See Mass. Electric Construction Co.'s Opposition to Petitioner's Request for Preliminary Injunction ("Mass. Elec. Opp'n") at 2-3.

The 180-day statute of limitations applies here under Public Resources Code section 21167 and County of Amador. All of the contracts challenged by the City were approved less than 180 days before this action was filed. Accordingly, the City's challenges – both to NCRA's determinations that these projects are exempt from CEQA, and to NCRA's "piecemealing" of environmental review in violation of CEQA – are timely.

2. NCRA Has Engaged in a Pattern and Practice of Violating CEQA.

In addition to injunctive relief, the City prays for a declaration that NCRA has adopted an unlawful "pattern and practice" of violating CEQA. 2d Am. Pet'n at ¶¶ 50, 68-69. Such a pattern and practice action is available to challenge an agency's overall policy of ignoring or violating CEQA, and it may be combined with a mandamus action challenging particular administrative

decisions. See, e.g., East Bay Mun. Util. Dist. v. Dept. of Forestry & Fire Prot. (1996) 43 Cal.App.4th 1113, 1121-22; Californians for Native Salmon and Steelhead Assn. v. Dept. of Forestry (1990) 221 Cal.App.3d 1419, 1429. CEQA's short statutes of limitations apply only in challenges to specific approval decisions, not to a pattern and practice challenge, which contests the legality of an ongoing, existing policy. Californians for Native Salmon, 221 Cal.App.3d at 1431, fn. 5.

All of the contracts and approvals described in the Stogner Declaration, ¶¶ 14-29 – including but not limited to the specific administrative approvals challenged in the City's mandamus petition – are components of one overarching plan: upgrading and reopening the Northwestern Pacific Railroad from its southernmost point at Lombard to its northern terminus in Humboldt County. The grant applications discussed in the Stogner Declaration concede as much. See AR at 667, 877.

Yet NCRA has adopted a policy of attempting to avoid environmental review by segmenting its overall project into numerous pieces and claiming that these individual pieces are categorically exempt from CEQA. This policy is not only apparent from the pattern of exemption notices and contract approvals discussed in the Stogner Declaration, but also expressly set forth in the agency's 2006 end-of-year report, which declares a "current strategy" of seeking "environmental exemption[s]" under CEQA for "all of the repair work on the South End," of "eliminat[ing] the need for NEPA compliance" by not seeking federal funding for those same repairs, and of deferring preparation of a "later EIR to address impacts of freight operations." Petitioner's Partial Record of Proceedings ("PROP") at 271.[1] As described in further detail below, this attempt to avoid environmental review by chopping up a larger project into bite-sized pieces violates CEQA. NCRA should be enjoined from continuing its pattern and practice of violating CEQA, regardless of the date of any prior approvals.

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[1] This document is an "internal agency communication . . . related to the project or to compliance with [CEQA]," and thus should have been included in the Administrative Record. Pub. Res. Code § 21167.6(e)(10).

B. NCRA's Approval of Upgrading and Repair Contracts in Reliance on Categorical Exemptions Violated CEQA.

1. NCRA Must Consider "the Whole of the Project," Not Each Construction and Repair Project Individually.

CEQA applies to projects proposed to be carried out or approved by a public agency. Pub. Res. Code § 21080. The term "project" is given a "broad interpretation" to "maximize protection of the environment." McQueen v. Board of Supervisors (1988) 202 Cal.App.3d 1136, 1143 (disapproved on other grounds). A "project" is "the whole of an action," which has a potential for resulting in either "a direct physical change" or "a reasonably foreseeable indirect change" in the environment. § 15378(a); see Laurel Heights, 47 Cal.3d at 395-398.

The term "project" means "the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." § 15378(c). The term "does not mean each separate governmental approval." Id. Therefore, "[a]ll phases of project planning, implementation, and operation must be considered" in an Initial Study. Id. at § 15063(a)(1). Where the project contemplates future expansion or other action, the CEQA analysis must consider that action where the future occurrence is a "reasonably foreseeable consequence of the initial project" that will "likely change the scope or nature of the initial project or its environmental effects." Laurel Heights, 47 Cal.3d at 396.

Because the statute requires study of "the whole of an action," CEQA prohibits public agencies from "subdivid[ing] a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole." Orinda Assn. v. Bd. of Supervisors (1986) 182 Cal.App.3d 1145, 1171. CEQA "mandates 'that environmental considerations do not become submerged by chopping a large project into many little ones'" which, individually, may have lesser environmental effects but which together may be "disastrous." City of Santee v. County of San Diego (1989) 214 Cal.App.3d 1438, 1452 (citation omitted). For example, in McQueen, the court determined that an agency's CEQA review must consider not only the decision to purchase a piece of property containing hazardous substances, but also the consequences of storage, use and disposal of those substances. 202 Cal.App.3d at 1147. The court rejected the agency's argument that, because the agency had opted only to acquire the property on speculation

and had made no decisions regarding the disposition of the substances, CEQA analysis was "premature." Id. at 1146; see also Laurel Heights, 47 Cal.3d at 393-94.

These seminal decisions are consistent with the "basic tenet" of CEQA that an environmental analysis should be prepared "as early as feasible" in the planning process, so that environmental considerations may influence program design. Laurel Heights, 47 Cal.3d at 395. The later environmental review takes place, "the more bureaucratic and financial momentum there is behind a proposed project" and the harder it is to deal with environmental considerations that could have influenced program design. Id. This problem may be exacerbated where, as here, the agency prepares and approves the environmental study for its own project. Id.

Here, every single individual action undertaken by the NCRA has been in service of a single, overarching goal: upgrading and reopening the Northwestern Pacific Railroad from Lombard to Arcata/Samoa. AR at 667 (grant application seeking funding for "highest priority projects" in support of upgrading the "entire line" to Class 2 and 3 standards), 877 (grant application reiterating NCRA's "policy of reopening the entire Northwestern Pacific Railroad Line from Lombard to Arcata/Samoa"); see also AR 679 (NCRA strategic plan "call[ing] for . . . reopening of the entire line" and describing strategy of segmenting environmental analysis); AR 1092 (stating railroad operator's goal of reopening northern portion of line "as soon as possible" due to large volume of aggregate available); AR 1348 (NCRA resolution establishing "fundamental goal" of re-establishing freight service from Humboldt Bay to Lombard). Under CEQA, NCRA must consider the environmental effects of each component of this goal – in other words, the "whole of the project" – before undertaking to build any component part of it.

It makes no sense to analyze the environmental effects of repairs and upgrades separately from the effects of the railroad operations that those same repairs and upgrades will facilitate. NCRA concedes that the operation of the railroad and the execution of the lease are not exempt from CEQA, but apparently believes it is nevertheless "premature" to study them. Specifically, NCRA claims the Project consists of two separate and distinct components, namely repair of the railway and later operation of the railway. NCRA's attempt to explain this novel view is a model of circularity. See NRCA Opp'n at 10 ("The reason the exempt activities are not included in the EIR is that they

are exempt."). Again, NCRA misunderstands and misapplies CEQA. The law discussed herein is clear: a larger project cannot be split into smaller, seemingly more benign pieces on the theory that some of those smaller pieces might qualify for a categorical exemption.

More fundamentally, NCRA's approach—to ignore the portion of the Project that would involve the operation of the railway—is contrary to CEQA's basic principle that a "project" is "the whole of an action" resulting in either a "direct physical change" or "reasonably foreseeable indirect change" in the environment. § 15378(a); Laurel Heights, 47 Cal.3d at 395-398. Because the Project contemplates the ultimate reopening of the "entire line", NCRA's CEQA analysis must consider such future action as a "reasonably foreseeable consequence of the initial project." Laurel Heights, 47 Cal.3d at 396; Orinda, 182 Cal.App.3d at 1171 (agency may not "subdivide a single project into smaller individual subprojects in order to avoid the responsibility of considering the environmental impact of the project as a whole.").

It makes no difference that later approvals are also required from NCRA and/or other agencies to complete some of the construction that will occur pursuant to the Project. Laurel Heights, 47 Cal.3d at 399; McQueen, 202 Cal.App.3d at 1146-47. Indeed, that is frequently the case with projects that require an EIR, and CEQA instructs that environmental review must occur at the earliest opportunity. See, e.g., Friends of Mammoth v. Town of Mammoth Lakes Redevel. Agency (2000) 82 Cal.App.4th 511, 526, 535-36 (upon approval of redevelopment plan, EIR studying specific construction proposals was required even though they may never "actually come to fruition"); Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal.App.4th 182, 205-06 (agency may not defer study of impacts of securing water supply in EIR for specific plan simply by saying that if the impact is not addressed then later phases of the project will not be built).

The only California case relied on by NCRA for the proposition that it may segment review of the portions of the railroad project is Del Mar Terrace Conservancy, Inc. v. City of San Diego (1992) 10 Cal.App.4th 712 (disapproved on other grounds), which involved the approval of a highway segment. That case is inapposite for several reasons. First and foremost, Del Mar does nothing to support NCRA's improper decision to segment review of railway *repair* from railway *operations*. Moreover, Del Mar involved the review of an EIR and not a NOE. Critically, the court

found that the EIR had appropriately examined, to the extent known and feasible, the general environmental impacts of potential future segments of the highway. Id. at 736-37. Here, there has been *no environmental review* whatsoever of the approved railway work.

Second, the highway segment at issue in Del Mar is factually different from the present case. In Del Mar, future approvals of additional highway segments in an area designated "Future Urbanizing Area" ("FUA") were highly speculative given (1) an adopted initiative prohibiting growth in the area without a vote of the electorate, and (2) the fact that "funding is not yet available for construction of the possible connection of SR 56 through the FUA." Id. at 734-735. Here, there is no prohibition on development in the Eel River Division and funding already has been earmarked for *the entire line*. See AR 879-80. Indeed, there is evidence in the record demonstrating that the railway will not be financially feasible unless the entire line is reopened. See, e.g., PROP 140-41. Even the rosy projections in the Business Plan for the railroad show negative cash flow for the Lombard to Windsor segment unless a highly speculative waste hauling contract with the County of Sonoma materializes within the first two years of operation. See AR 1093-94, 1131. Indeed, NCRA has acknowledged that past operators have failed to operate the *entire line* profitably. See AR 680. Thus, NCRA's claim that its Russian River Division has "independent utility" is without merit.

Under CEQA, NCRA should have considered the reasonably foreseeable consequences of all aspects of the re-opening of the railway before the *first* approval leading down that course. NCRA's determination that it could examine each railway repair contract separately from the other, and from the ultimate operation of the railway that this construction presages, is directly contrary to the appellate precedents cited above.

2. The Exemptions Cited by NCRA Do Not, On Their Face, Apply.

NCRA maintains that the contracts it has executed for upgrade and repair work necessary to reopen the Northwestern Pacific Railroad are categorically exempt from the statute's requirements for environmental analysis. In an apparent attempt to find an exemption that will "stick," NCRA cites a host of categorical exemptions in its various Notices of Exemption, including those in Guidelines sections 15301, 15302, 15303, 15304, 15305, 15308, 15309, 15311, 15321, and 15330. See AR 739, 886, 911. Unfortunately for NCRA, not one of the cited exemptions applies here.

Indeed, NCRA's opposition brief does not even attempt to explain why any of these exemptions might apply. By failing to provide any legal argument or citations to the record in response to the City's arguments on this point, NCRA has effectively conceded this claim and waived any defense. Security-First National Bank of Los Angeles v. Chapman (1940) 41 Cal.App.2d 219, 222 (where defendant failed to argue or present points or authorities in support of certain specified allegations in his answer, the court will not consider such allegations); see also citations, supra, p. 5.

NCRA's reliance on these exemptions is, in fact, indefensible. For example, the October 5, 2007, Notice of Exemption cites the exemptions for "existing facilities" found in CEQA Guidelines sections 15301 and 15302 (also known as "Class 1" and "Class 2"). AR 739. However, by definition, Classes 1 and 2 are inapplicable to projects that will result in more than a negligible expansion of capacity and use. § 15302(c) (replacement must involve only a "negligible or no expansion of capacity"); § 15301 ("negligible or no expansion of an existing use"). Here, the explicit purpose of the repair work is to "upgrade" the capacity of the existing railroad, see AR 667-68, 875-76, and thus the cited exemptions do not apply. See, e.g., Erven v. Bd. of Supervisors (1975) 53 Cal.App.3d 1004, 1014 (explaining that existing facilities exemption applies to road repairs but not road improvement). The categorical exemptions cited in NCRA's other Notices of Exemption are even further from the mark for the reasons discussed in the City's opening brief at pages 13-15 – reasons NCRA completely fails to address. Finally, NCRA's attempt to argue that its Nov. 7, 2007 approval is exempt as an "emergency" repair is specious. In addition to the fact that sections of the work occur nearly two years after the so-called emergency, the agency did not even cite the emergency exemption in its Notice of Exemption. AR 739.

3. Because There Is a Reasonable Possibility of a Significant Environmental Effect, a Categorical Exemption Is Improper.

Because CEQA allows exemptions for "only those activities which do not have a significant effect on the environment," it follows that if there is "any reasonable possibility" that the Project "may have a significant effect on the environment, an exemption would be improper." Wildlife Alive, 18 Cal.3d at 205-06 (emphasis added); see § 15300.2(c) (exemption improper where there is "a reasonable possibility that the activity will have a significant effect . . . due to unusual

circumstances"); § 15300.2(b) (no categorical exemption may be applied where "the cumulative impact of successive projects of the same type in the same place, over time is significant"). Thus, where there is substantial evidence that a project might impair the environment, a categorical exemption is improper—even if other substantial evidence in the record might support a conclusion that the project would not impair the environment. Azusa, 52 Cal.App.4th at 1195, 1199; Lewis, 165 Cal.App.3d at 829-30. "It is the possibility of a significant effect on the environment which is at issue, not a determination of the actual effect, which would be the subject of a negative declaration or an EIR." Lewis, 165 Cal.App.3d at 830.

The leading cases reveal a wide range of factors that compel the conclusion that there is a reasonable possibility of a significant environmental effect due to unusual circumstances. For instance, admissions by agency staff of even "the possibility of any potential" environmental effects establish, as a matter of law, that the use of a categorical exemption is improper—even if the agency later concludes that mitigation measures included with project approval can adequately control those potential environmental effects. Lewis, 165 Cal.App.3d at 830-31. Indeed, "the very fact the [agency] took steps in mitigation makes it manifest there was a possibility of a significant effect." Lewis, 165 Cal.App.3d at 830. Similarly, the presence of a side agreement for environmental concerns establishes that an exemption is inappropriate. See Natural Resources Defense Council, Inc. v. City of Los Angeles (2002) 103 Cal.App.4th 268, 282. Moreover, the agency's recognition that existing facilities currently contribute (and cannot prevent) pollution precludes, as a matter of law, an exemption for continued operations. Azusa, 52 Cal.App.4th at 1198-99.

There is abundant evidence that this project carries with it a reasonable possibility of significant effects due to the unusual circumstances of the situation. It is undisputed that the ultimate operation of the railway will have environmental effects, and NCRA is currently preparing an EIR for later adoption. See NCRA Opp'n at 10. As explained in detail above, these later operations may not be segmented from the current repair and upgrade work for purposes of environmental review.

Further, the repair work alone carries a possibility of environmental effects that precludes the use of an exemption. NCRA effectively admitted as much in a "clarification" attached to its June 4, 2007, Notice of Exemption. In that document, NCRA admits that repair and upgrade activities along

the southern portion of the line may affect several sensitive species, but states that "BMPs have been developed and will be approved by the appropriate natural resource agencies to avoid significant impacts." AR 913-16. As set forth above, in order to be eligible for a categorical exemption from CEQA, a project itself must have no significant environmental impacts. An agency cannot bring a project within the scope of a categorical exemption, despite potentially significant environmental impacts, by adopting "BMPs" or any other mitigation measures. Azusa, 52 Cal. App. 4th at 1200-01. If NCRA wishes to incorporate mitigation measures into a project, it must do so in accordance with the procedure and substance of CEQA. Id. NCRA "cannot escape the law by taking a minor step in mitigation." Id. at 1200 (quoting Lewis, 165 Cal. App. 3d at 830).

4. It is Clear that the Cumulative Impact of Successive Projects of the Same Type in the Same Place, Is Significant

It is difficult to fathom, in light of the magnitude of the work authorized, that NCRA refuses even to conduct an Initial Study. Projects contemplated in the November 2006 grant application alone included replacement or repair of 53 grade crossings, repair and rehabilitation of 41 bridges, replacement of 50,000 railroad ties, placement of 62,000 tons of ballast, and repair and resurfacing of 62 miles of track. AR 876. NCRA's refusal to consider the cumulative environmental impact of these projects has deprived the public – and the decision-makers at the NCRA itself – of the opportunity provided by CEQA to make a fully informed decision.

III. THE BALANCE OF EQUITIES FAVORS A PRELIMINARY INJUNCTION.

NCRA, having proceeded in flagrant violation of CEQA, now complains that an injunction will cause the agency and its contractors irreparable harm. These complaints are meritless.

As an initial matter, the Court must keep in mind that a preliminary injunction only preserves the status quo pending a determination on the merits of this case. Once the merits have been heard, a more lasting remedy can be fashioned. In the meantime, however, NCRA should not be allowed to keep pursuing its goal of reopening the entire railroad without first complying with CEQA.

Indeed, the courts have rejected similar contentions that "equitable" principles should bar any such remedy: "As a matter of public policy and basic equity, developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project . . . ."

Bakersfield Citizens For Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1203; see also Woodward Park Homeowners Assn. v. Garreks, Inc. (2000) 77 Cal.App.4th 880, 888 ("the position that this case is moot because the project was constructed and operating prior to the court's . . . decision . . . is not only against public policy, it is absurd"). These cases expressly recognize that a party who constructs its project in the face of a CEQA challenge does so at its own risk. As the Woodward Park court explained:

> [The developer] chose to continue with the project despite the risk that pending litigation could result in rescission of the City's action approving it. Apparently the City and [the developer] buy into the philosophy of the mythical captain of the Starship Enterprise, James T. Kirk, who said: "May fortune favor the foolish." We do not. [The developer's] decision to complete and operate the project, despite the pending litigation, in no way provides an exemption to CEQA.

Id. at 890. Having done everything in its power to evade the requirements of CEQA at significant risk to the environment – and given the very strong likelihood that the City will prevail on the merits – NCRA should not now be allowed to complain that a brief delay will cause it irreparable harm.

CONCLUSION

For the foregoing reasons, NCRA's reliance on categorical exemptions for its approval of the Project violates CEQA. Moreover, the City's action challenging these violations is timely. Accordingly, Amici respectfully request that this Court grant the request for preliminary injunction.

Dated: November 30, 2007

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