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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

ASSOCIATION OF AMERICAN RAILROADS, UNION PACIFIC RAILROAD COMPANY AND BNSF RAILWAY COMPANY Plaintiffs, v. CALIFORNIA OFFICE OF SPILL PREVENTION AND RESPONSE, THOMAS M. CULLEN, JR., CALIFORNIA ADMINISTRATOR FOR OIL SPILL RESPONSE, in his official capacity, AND KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, in her official capacity, Defendants.	Case No. 2:14-cv-02354-TLN-CKD SAN FRANCISCO BAYKEEPER, et al.'s AMICUS BRIEF IN SUPPORT OF CALIFORNIA OFFICE OF SPILL PREVENTION AND RESPONSE, et al. Date: January 15, 2014 Time: 2:00 PM Judge: The Hon. Troy L. Nunley Place: Courtroom 2, 15th Floor

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INTRODUCTION

In July 2014, California enacted SB 861 to add inland waters to the state's oil spill law, which originally covered only coastal and marine waters. Inland water oil spills pose grave risks to California's drinking water supplies, its myriad rivers used for recreation, and its abundant wildlife, including endangered salmon, that depend on clean rivers and streams for their survival. SB 861 fosters greater preparedness for devastating oil spills previously left beyond the reach of California's oil spill law.

SB 861 and its parent law are part of a cooperative federal-state legislative scheme of preparing for and cleaning up oil spills. SB 861 imposes obligations on oil facilities, including two at issue in this case: (1) to prepare a plan to clean up a worst case oil spill; and (2) to demonstrate financial ability to clean up such an oil spill. These requirements are part of California's emergency response regime, focused on fires, explosions, evacuation plans, and cleaning-up water contamination and oiled shorelines.

The Association of American Railroads, Union Pacific Railroad Company, and BNSF Railway Company (collectively "the Railroads") filed this lawsuit to exempt themselves from SB 861 on federal preemption grounds. However, the federal laws that govern the subject matter at issue – the Oil Pollution Act of 1990 and the Federal Water Pollution Control Act (commonly called the Clean Water Act ("CWA") – expressly preserve state authority to impose additional requirements and liability beyond what is mandated under federal law. This preservation of state police powers recognizes the deeply rooted role states play in protecting their residents and territories from oil spills.

Amici San Francisco Baykeeper *et al.* are conservation, sportfishing and local community groups who have long worked to safeguard California's estuaries, rivers, and lakes and have advocated for strong oil spill laws, including SB 861, to protect the environment from the grave risks of oil spills. Amici file this brief to ensure the Court has a full understanding of both the cooperative federal-state oil spill regulatory scheme, which preserves state prerogatives to go further than federal law, and the over-riding public and environmental interests in effective

preparation to minimize the destruction of California's waters in oil spills, which SB 861 promotes.

The Railroads argue principally that the Federal Railroad Safety Act ("FRSA") swallows up all other federal and state authority whenever applied to railroads. To support this draconian proposition, the Railroads cite cases that involve direct regulation of railroad tracks, rail cars, or train operations by states or localities. In contrast, the amended California oil spill law directs all oil facilities to develop spill response plans and demonstrate their financial capacity to clean up an oil spill disaster should one occur in California. As applied to the railroads, the law promotes preparedness to respond to incidents that occur when trains stop moving on the rails and spill oil, thereby creating a local environmental disaster that needs to be cleaned up.

The Railroads highlight the costs of preparing spill plans and conducting training and drills in their effort to enjoin application of SB 861 to railroads. Entirely absent from the Railroads' discussion of harm is the devastation oil spills wreak on communities and waterways. As described *infra* at 14-17, trains and pipelines carry extremely explosive Bakken crude oil and heavy tar sands crude, which is nearly impossible to clean up when it contaminates waterways. In light of the overwhelming environmental harm SB 861 seeks to prevent, this Court should refrain from blocking application of SB 861 to the railroads.

BACKGROUND

I. FEDERAL OIL SPILL LAWS EXPRESSLY PRESERVE STATE AUTHORITY TO IMPOSE ADDITIONAL OIL SPILL REQUIREMENTS AND LIABILITY.

In the wake of the Exxon-Valdez oil spill, Congress adopted the Oil Pollution Act of 1990 ("OPA"), a comprehensive oil spill liability, compensation, preparedness and response law. OPA makes responsible parties, including railroads, strictly liable "[n]otwithstanding any other provision or rule of law" for the costs of cleaning up an oil spill and for damages from a spill. 33 U.S.C. § 2702(a); *see also id*. § 1321(b)(3). OPA also amended the CWA to establish several layers of oil spill response planning with federal contingency plans at the federal, regional and local levels and individual plans for facilities and vessels, which together govern emergency removal and cleanup activities in an oil spill. *Id*. §§ 1321(d)(1) & (j)(1), (5). Despite

establishing this extensive federal scheme, Congress acknowledged the traditional police powers exercised by the states over oil spill liability and clean-up and included express non-preemption clauses preserving state rights. *Id.* §§ 1321(o); 2718.

A. The Clean Water Act Expressly Precludes Preemption Of State Oil Spill Laws.

When Congress amended the CWA in 1970 to add substantial oil spill liability provisions, it expressly preserved states' oil spill laws. CWA of 1970, Pub. L. No. 91-224, 84 Stat. 91-115. For more than forty years, the CWA has included the following non-preemption provision:

> Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State, or with respect to any removal activities related to such discharge.

33 U.S.C.A. § 1321(o)(2). The House Report explained that this non-preemption provision preserved states' ability to impose "additional requirements and penalties" beyond those imposed under federal law. H. REP. No. 91-940, at 2727 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2727 (savings clause "disclaims any intention of preempting any state or political subdivision from imposing any requirement or liability with respect to the discharge of oil into waters in that state. Thus, any state would be free to provide requirements and penalties similar to those imposed by this section or additional requirements and penalties.").

B. The Oil Pollution Act Expressly Precludes Preemption Of State Oil Spill Laws.

When Congress enacted OPA in 1990, it included non-preemption clauses building upon and extending the CWA's preservation of state authority. The first OPA non-preemption clause is nearly identical to the CWA's non-preemption clause. 33 U.S.C. § 2718(a). Another OPA non-preemption clause goes further, providing, in pertinent part:

> Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—
>
> (1) to impose additional liability or additional requirements; or
>
> (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

> relating to the discharge, or substantial threat of a discharge, of oil.

Id. § 2718(c).

OPA's legislative history emphasizes the importance of retaining state authority to enact stricter oil spill laws. The Senate Report explained:

> Historically, the Committee on Environment and Public Works has protected the rights of States to impose more restrictive requirements or liability, particularly in the area of oil pollution law.. . . . To date, twenty-four States have enacted comprehensive oil pollution laws covering cleanup and damages and many have established compensation funds. . . . This legislation, as reported by the Committee, would permit such State laws to continue and would not preclude enactment of new State laws. The theory behind the Committee action is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so . . . .

S. REP. No. 101-94, at 6-7 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 727-28.

In the House, Representatives Miller and Studds offered an amendment to add non-preemption clauses that would, in the words of Representative Miller, preserve:

> the rights of States to set higher standards for oil pollution liability and more complete systems of compensation than are allowed under this bill or under current law. In addition, the amendment protects the rights of States to set higher levels of financial responsibility . . ..The amendment gives States the rights to protect their environments, the needs of their citizens and their particular situations. This is a fundamental right of the States to do that, and we should not take that right away in this legislation. . . .
>
> The National Association of Attorneys General is supporting the amendment. They tell us that the States are often the first line of defense in reacting to oilspills and often have an interest, and this is important for Members to remember, that is different and greater than that of the Federal Government in cleaning up and restoring the environment. We should not allow this legislation to destroy their ability to deal with that interest and to deal with those concerns.

135 CONG. REC. H8120-03 (daily ed. Nov. 8, 1989). Representative Studds likewise explained:

> We did not preempt State laws in the Clean Air Act or the Clean Water Act or the Superfund law or the Trans-Alaska Pipeline Act or the OCS Lands Act or the Deepwater Ports Act or any other statute related to the production, transportation, or regulation of oil. Why now? Why now, after the fiasco in Prince William Sound, should we be telling Governors, State legislatures, and the public that the Federal Government always knows best; that only the Federal Government and the spiller should decide when an oilspill cleanup is complete; that coastal communities and beachfront property owners and fishermen have no need – and should have no right – to hold the oil industry to a higher standard; that they have no right to do everything they can to protect themselves, their homes, their beaches, and their environment?

Id.

II. THE FEDERAL DEPARTMENT OF TRANSPORTATION'S SPILL PLAN REGULATION INVITES SUPPLEMENTAL STATE REGULATION.

OPA requires oil facilities, including railroads, located where an oil spill would cause substantial harm to navigable water, to submit oil spill response plans for federal approval. Spill plans must be consistent with the national contingency plan and must ensure availability of personnel and equipment necessary to remove a worst case discharge, describe training and equipment testing, and identify a qualified individual with authority to implement removal actions. 33 U.S.C. § 1321(j)(5)(C)(i)-(iv).

In 1996, the Department of Transportation ("DOT") promulgated a rule codifying OPA's statutory spill plan requirements for the transportation sector. 49 C.F.R. §§ 130.5, 130.31(b). The final rule, however, establishes a threshold for comprehensive spill plans that had the effect of exempting the railroads. In particular, the comprehensive spill plan obligation applies only to railroads that transport more than 1000 barrels (42,000 gallons) in a single rail car, yet no rail cars transporting oil have that capacity. *Id.* § 130.31(b). Invoking a different subsection of § 1321, the rule requires preparation of what it calls a "basic" spill plan containing only a general description of response plans for rail cars having a capacity of 3500-42,000 gallons. *Id.* § 130.31(a). These basic plans do not need federal approval. Nor must they ensure the availability of personnel, equipment, and training to remove a worst case discharge.

The rule indicates that it is subject to the CWA's non-preemption clause, which:

> does not preempt, but rather accommodates, regulation by States and political subdivisions concerning the same subject matter. Thus, the establishment of oil spill prevention and response plan requirements in this rule will affect neither existing State and local regulation in the area, nor State and local authority to regulate in the future.

61 Fed. Reg. 30,533, 30,539 (1996) (citing 33 U.S.C. § 1321(o)). DOT refused to issue the rule under the Hazardous Materials Transportation Act ("HMTA") in order to invoke that law's more extensive preemption of non-federal requirements, stating that "Federal oil transportation regulations should carry the preemptive force of Federal hazmat law only when they are issued

to implement the mandate of that law." *Id*. at 30,539.[1] Thus, the federal rule leaves ample room for states like California to adopt their own spill plan requirements.

The recent spate of crude-by-rail accidents has revealed the inadequacy of the federal spill plan regulation. The National Transportation Safety Board ("NTSB") highlighted this shortcoming after a crude oil train derailed in July 2013 in Lac Mégantic, Quebec, spilling 1.6 million gallons of oil, igniting a fire that destroyed four blocks of the downtown and killing 47 people, and contaminating wetlands, a river and a lake. The NTSB recommended that DOT require railroads to submit and obtain federal approval of spill plans demonstrating their ability to respond to a worst case oil spill. NTSB Safety Recommendation R-14-5 (Jan. 21, 2014) [http://www.ntsb.gov/doclib/reclett ers/2014/R-14-004-006.pdf]. It found that the current regulation "circumvents the need for railroads to comply with the spill response planning mandates of the federal Clean Water Act" and "is rendered ineffective because of its lack of applicability to any real-world transportation scenario." *Id*. at 9. In July 2014, DOT solicited public comment on an advance notice of proposed rulemaking to require comprehensive railroad spill plans. 79 Fed. Reg. 45,079, 45,082 (Aug. 1, 2014). In light of the currently inadequate federal spill plan regime as applied to railroads, states can play a critical role by invoking their expressly preserved authority to ensure adequate preparedness for oil spills.

III. SB 861 EXPANDS CALIFORNIA'S OIL SPILL PREVENTION REQUIREMENTS TO INLAND WATERS.

California's Lempert-Keene-Seastrand Oil Spill Prevention and Response Act ("Oil Spill Act") created the Office of Spill Prevention and Response to direct oil spill removal, abatement, containment and cleanup in coordination with the federal government, established oil spill response planning and financial responsibility requirements, and created an oil spill fund supported by an oil fee. Cal. Gov. Code §§ 8670.1-8670.72 (West). As originally enacted, the Act applied only to coastal and marine waters.

[1] While the American Trucking Association made the request to invoke HMTA preemption, nothing in DOT's rejection of that request is limited to the rule's impacts on trucks, as the Railroads suggest (at 17 n.17). DOT's rationale is unequivocal and applicable across the board.

California enacted SB 861 in June 2014, along with a bill enacted in 2008, to extend the Oil Spill Act's reach to cover all inland waters and spills. 2014 Cal. Legis. Serv. Ch. 35 (S.B. 861) (West). To facilitate this expansion, SB 861 amended the Act's definitions to include railroads, and its other provisions to encompass all waters of the state at risk of oil spills. SB 861 does not create a new regulatory regime targeting railroads. Instead, it subjects railroads, along with pipelines, trucks, and other onshore sources of oil spills to the Act's requirements.

This lawsuit challenges only two of SB 861's requirements. The first requires railroads that transport oil as cargo, like other facilities and vessels, to submit comprehensive spill plans for approval by the Office of Spill Prevention and Response. Cal. Gov. Code §§ 8670.29(a), 8670.30.5 (West). The spill plans cannot conflict with the national contingency plan, and their contents are comparable to what DOT prescribes for comprehensive spill plans, except that SB 861 makes these requirements applicable to oil trains. The second requirement provides that railroads and other oil facilities demonstrate their financial ability to clean up and pay damages for a worst case spill. *Id.* §§ 8679.37.51(d), 8679.37.53.

ARGUMENT

The Supreme Court has repeatedly emphasized that states have traditionally had great latitude to exercise their police powers to protect the health and safety of their citizens. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996). Accordingly, in addressing claims of federal preemption, the courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Where a federal statute contains a preemption clause, the court's task is to interpret the domain expressly preempted by the language of that clause. *Medtronic*, 518 U.S. at 484. Here, the express non-preemption clauses in CWA and OPA preserve California's authority to enact SB 861.

I. SB 861 FALLS SQUARELY WITHIN THE STATE'S POLICE POWERS PRESERVED BY FEDERAL CLEAN WATER AND OIL SPILL LAWS.

SB 861 imposes precisely the types of state requirements that OPA and the CWA expressly protect from federal preemption. The CWA, as amended by OPA, requires that spill

plans "ensure by contract or other means . . . the availability of private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge." 33 U.S.C. § 1321(j)(5)(C)(iii). California's spill plan components mirror OPA's.

The CWA and OPA expressly preserves state authority to impose "any requirement or liability with respect to the discharge of oil" within the state. 33 U.S.C. § 1321(o); *accord* 33 U.S.C. § 2718. The term "any requirement" is understood to preserve state power to impose regulations that go beyond what federal law imposes. *See Bates v. Dow Agrosciences, Inc.*, 544 U.S. 431, 443 (2005) ("requirements" encompasses positive enactments such as statutes and regulations as well as common law duties). Neither the language of the non-preemption clauses nor their legislative histories provide any basis to limit California's power to require oil facilities to submit spill plans or demonstrate their financial ability to clean up a worst case oil spill.

In fact, the CWA's non-preemption clause is in the very same section of the statute that requires the preparation of spill plans. Specifically, Congress prescribed the obligation for oil facilities to submit spill plans in 33 U.S.C. § 1321(j) and preserved state authority to add to those requirements in 33 U.S.C. § 1321(o). In *United States v. Locke*, 529 U.S. 89, 105-07 (2000), the Supreme Court pointed to the placement of OPA's non-preemption clause in a particular OPA title as evidence that Congress intended to preserve state authority only "to impose liability or requirements 'relating to the discharge, or substantial threat of discharge, of oil'" – the matters addressed in that title – and not to regulate marine vessel design and operation under the Ports and Waterways Safety Act. Here, the placement of the non-preemption clause in 33 U.S.C. § 1321 reveals Congress's unequivocal intent to preserve state authority to impose additional spill planning requirements.

Indeed, DOT acknowledged state authority to go further than federal spill planning requirements when it applied those requirements to the transportation sector. The 1996 DOT rule explicitly states that: "Federal regulation under § 1321 does not preempt, but rather accommodates, regulation by states . . . . Thus, the establishment of oil spill prevention and

response plan requirements in this rule will affect neither existing State and local regulation in the area, nor State and local authority to regulate in the future." 61 Fed. Reg. at 30,539.[2]

In addition, California's financial responsibility requirements are designed to ensure that oil facilities will be able to clean up a worst case oil spill and pay damages for which OPA and California law make oil facilities strictly liable. OPA's legislative history noted that OPA's non-preemption provision "protects the rights of States to set higher levels of financial responsibility." *See* 135 CONG. REC. H8120-03 (daily ed. Nov. 8, 1989). And the Supreme Court has confirmed that OPA preserves state authority to "establish . . . financial requirements relating to oil spills." *United States v. Locke*, 529 U.S. at 105. Indeed, in *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973), the Supreme Court relied on the CWA's non-preemption clause to uphold Florida's Oil Spill Prevention and Pollution Control Act, which required proof of financial responsibility in addition to imposing strict liability and certain oil containment equipment requirements. The Railroads' preemption arguments cannot be reconciled with the clear congressional intent to preserve state authority to enact the very types of oil spill requirements embodied in SB 861.

II. THE RAILROADS OFFER NO BASIS TO EXCLUDE SB 861 FROM THE CWA AND OPA NON-PREEMPTION CLAUSES.

The Railroads argue that federal rail-specific laws – the Federal Railroad Safety Act ("FRSA") and the ICC Termination Act ("ICCTA") – have pre-eminence over any other law touching on rail safety. This is not a proper reading of the scope of FRSA preemption. The Railroads rely on cases that did not involve a competing non-preemption clause and ignore cases suggesting that the non-preemption clauses of OPA and the CWA trump FRSA and ICCTA, not vice versa.

[2] The Railroads quote out of context DOT's conclusion that it decided not to impose additional spill plan requirements on the railroads in light of the record of safe transportation of oil by rail at that time. Railroads' Brief at 15 (quoting 61 Fed. Reg. at 30,536). However, the full 1996 rule evinces DOT's understanding that it neither the authority nor any intent to preempt supplemental state oil spill regulation.

A. The Federal Rail Safety Act Does Not Trump Federal Clean Water and Oil Spill Laws.

FRSA contains a preemption clause that provides that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety" until DOT prescribes a regulation or order "covering the subject matter." 49 U.S.C. § 20106. In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65 (1993), the Supreme Court held that the fact that a regulation "relates to" or "touches upon" a railroad operation is not sufficient for preemption under FRSA; instead, FRSA preemption "will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Accordingly, the court looked "not at broad categories such as 'railroad safety,'" but at the narrower categories of train speed and warning devices. *See Southern Pacific Transp. Co. v. Public Utility Com'n of State of Or.*, 9 F.3d 807, 813 (9th Cir. 1993) (describing *Easterwood* analysis). The same narrow analysis is required here to ascertain whether state spill prevention regulations are subsumed by FRSA regulations.

1. The California Oil Spill Act is Distinct From the Subject Matter Covered By FRSA Regulations.

Under FRSA, DOT has regulated train tracks, rail cars, train speeds and other aspects of rail operations, and state regulation has generally been found to be preempted under FRSA's preemption clause when a federal regulation subsumes the state law subject matter. In *Easterwood*, for example, an FRSA regulation adopting speed limits preempted a negligence claim based on excessive speed. *Easterwood*, 507 U.S. at 674-76. Similarly, in *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 353 (2000), the Supreme Court held that federal regulations addressing the adequacy of warning devices at crossings preempted state tort liability for deficiencies in the warning systems. In other FRSA preemption cases, DOT had similarly adopted FRSA regulations directly covering the same subject matter. *See, e.g., CSX Transp., Inc. v. Williams*, 40 F.3d 667, 671 (D.C. Cir. 2005) (FRSA preempted District of Columbia law prohibiting shipment of certain hazardous materials without a permit within 2.2 miles of the Capitol Building); *BNSF Ry. Co. v. Swanson*, 533 F.3d 618 (8th Cir. 2008) (FRSA preempted Minnesota statute prohibiting interference with an injured employee's medical treatment).

FRSA preemption has given way in the field of environmental regulation, which "has long been regarded by the Court as particularly suited to local regulation." *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984). The Ninth Circuit's decision in *Southern Pacific Transp. Co. v. Public Utility Com'n of State of Or*., 9 F.3d 807, 812-13 (9th Cir. 1993) is instructive on the limits of FRSA preemption. In that case, a railroad challenged an Oregon law that allowed local authorities to ban the sounding of locomotive whistles at night at grade crossings equipped with other protective devices like automated gates or flashing lights. DOT had issued a federal regulation requiring train whistles to have a minimum sound capacity. Nonetheless, the Ninth Circuit held that the federal regulation addressing the capacity of the whistles did not subsume restrictions on the *use* of whistles in ways that constitute an annoyance and noise pollution. The court acknowledged that whistles are an important safety device, but that did not answer the preemption question. Where FRSA regulation did not subsume the subject of the state regulation, no preemption occurred. *Id.* at 812-13 ("FSRA preemption is even more disfavored than preemption generally … [it is] not an easy standard to meet.").

It is undisputed that DOT has promulgated no regulations under FRSA or other rail-specific safety laws covering the subject matter of SB 861. Accordingly, no case law supports finding preemption here.

2. FRSA's Preemption Clause Does Not Supersede the OPA and CWA Non-Preemption Clauses.

The only federal regulation touching on SB 861's subject matter is the 1996 spill planning regulation implementing OPA as to oil transportation generally. DOT promulgated that regulation under OPA, not the FRSA. Tellingly, the Railroads have cited no case finding FRSA preemption based on a federal regulation promulgated entirely under an environmental statute.

Even more fatal to the Railroads' case, DOT promulgated the 1996 regulations under CWA, which contains an express non-preemption clause. In *Easterwood*, the Supreme Court found that FRSA's preemption provision displayed "considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." 507 U.S. at 664. *Easterwood* therefore suggests that there is no FRSA preemption when the subject

matter is subsumed not by an FRSA regulation, but instead by a regulation promulgated under an environmental statute that expressly preserves state authority to go further. As the Ninth Circuit observed in *Chevron*, 726 F.2d at 497, "in an area of collaborative federal and state regulation, [c]oincidence of purpose actually militates against, rather than in favor of preemption."

Indeed, in *Askew*, the Supreme Court relied on the CWA's non-preemption clause in rejecting a claim that federal admiralty jurisdiction preempted a state oil spill law. *Askew*, 411 U.S. at 328-29; *see also Chevron*, 726 F.2d at 491 (rejecting preemption of Alaska statute prohibiting oil tankers from discharging ballast into territorial waters, in part because through express non-preemption clauses, "Congress has indicated emphatically that there is no compelling need for uniformity in the regulation of pollution discharges").

In short, the Railroads argue for federal preemption because SB 861 touches on rail safety. Their argument fails, however, because FRSA's preemption provision extends only to federal regulations governing train tracks, train cars, and rail operations that specifically and entirely subsume the subject regulated by a state. Here, no such FRSA regulation exists. Moreover, the Railroads' argument cannot be reconciled with the express non-preemption clauses in the statute under which DOT promulgated the only federal regulation on the subject matter covered by SB 861.

B. ICCTA Does Not Trump Federal Clean Water and Oil Spill Laws.

Unlike the regulations at issue in the cases embraced by the Railroads in arguing for ICCTA preemption, SB 861 falls squarely within the OPA and CWA non-preemption clauses. Indeed, the Ninth Circuit has indicated that ICCTA preemption withers when it intrudes into the state authority expressly preserved by the OPA and CWA non-preemption clauses.

First, in *Assoc. of American RRs v. S. Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010), the Ninth Circuit made it clear that "ICCTA does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce." By way of example, the court stated that ICCTA "likely would not preempt local laws that prohibit the dumping of harmful substances or wastes . . .," *id.*, which is what OPA, the CWA, and California's Oil Spill Act do. Moreover, the Ninth Circuit indicated

that ICCTA generally does not preempt state and local regulation that is undertaken as part of a cooperative state-federal environmental scheme "because it is possible to harmonize ICCTA with those federally recognized regulations." *Id*. at 1098.

Second, in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit held that ICCTA preempted state and local permitting requirements that could prevent reopening a rail line. *Id*. at 1030-31. In so ruling, the court recognized that courts have been reluctant to find preemption of traditional state police powers and cited *Chevron* as an example where federal pre-eminence over engines of commerce gave way to state authority because Congress expressly preserved state authority to take an active role in abating water pollution. *Id*. at 1031. Of course, the statute expressly authorizing state regulation in *Chevron* – the CWA – likewise preserves an active role for states in oil spill planning and preparation.

Even in the absence of an express non-preemption provision, ICCTA preemption must give way when traditional state police powers can be exercised without unreasonably burdening rail transportation. This proposition is supported by a case repeatedly cited by the Railroads to argue (at 9, 19-21) that SB 861 is categorically preempted because it "could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that" have been allowed under ICCTA. In that case, the Sixth Circuit held that ICCTA did not preempt a law requiring the railroad to pay for sidewalk repairs and pedestrian crossings because ensuring public safety at rail crossings falls within the state's police power and the requirement neither discriminated against the railroads nor unreasonably burdened rail transportation. *Adrian & Blissfield RR Co. v. Village of Blissfield*, 550 F.3d 533, 540-42 (6th Cir. 2008). The court reached this result even though the pedestrian crossing touched the tracks in a literal sense and had a financial impact on the railroad.

SB 861 extends a public safety and environmental law of general applicability to inland waters, which makes it applicable to railroads that transport oil through the state. It does not, however, target the railroads. Therefore, "[w]hat matters is the degree to which a challenged regulation interferes with rail transportation." *Assoc. of American RRs*, 622 F.3d at 1098 (internal quotations omitted). Preparing a spill plan and demonstrating the capacity to clean up a worst

case spill is only incidentally connected to and does not burden the movement of goods by rail. *See Hi Tech Trans, LLC*, 2003 WL 21952136 *3 (STB 2003) (defining the reach of ICCTA jurisdiction as the movement of goods by rail).

The Railroads rely on potential penalties that might be imposed for a failure to comply with provisions of the Oil Spill Act to contend that SB 861 has imposed a pre-clearance requirement that could prevent rail transportation. It is speculative at best whether the Administrator will construe and apply the Oil Spill Act in a manner that would interfere with rail transportation. To focus on potential remedies that may never be invoked (and may be disavowed) would allow the tail to wag the dog. In fact, the Oil Spill Act has a severability clause, which provides that, if the application of any provision of the Act to any person or circumstance is held invalid, "that invalidity shall not affect other provisions or applications . . . that can be given effect. . .." Cal. Gov. Code § 8670.95. The appropriate question then is whether California can extend oil spill planning and financial responsibility requirements to railroads along with other inland carriers of oil. In light of the express federal non-preemption clauses, the answer is clearly yes.[3]

III. THE EXTREME AND URGENT HARM TO COMMUNITIES AND THE ENVIRONMENT FROM OIL SPILLS FAR OUTWEIGHS THE COSTS TO THE RAILROADS OF COMPLYING WITH SB 861.

The country watched in horror as oil spewed from the Exxon Valdez and Deepwater Horizon, and Congress responded by declaring it to be the policy of the United States that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States . . ." 33 USC 1321(b)(1). While the Exxon Valdez devastated marine waters and coastlines, the national policy and OPA's preventive and response scheme extend to oil spills in

[3] The Railroads misconstrue SB 861's references to best available technologies. In directing the Administrator to promulgate spill plan regulations that provide the best available protection for the waters of California, the Oil Spill Act uses this term in the context of containing an oil spill, removing oil and cleaning up the damage left behind. Cal. Gov. Code § 8670.3(b)(1) & (c)(1) (definitions); Cal. Gov. Code § 8670.29(h) (spill regulations). The Railroads equate "best available technology" with tank car design standards, instead of containment booms, skimmers, and equipment that can remove discharges based solely on an SB 861 legislative finding that improvements are necessary to reduce oil spill risks in a wide array of arenas ranging from rail tank cars to terminals, pipelines, emergency response stations, inspection, enforcement and personnel. Cal. Gov. Code § 8670.2(g). No provisions in SB 861 address tank car design. Yet the Railroads (at 2) raise the specter of "subjecting a moving train to the requirements of 50 different standards for, say tank car design." The Railroads' assertions about fictional state regulation of tank car design and even locomotives are nothing more than a red herring.

inland waters. Of course, oil spills do occur, despite this national policy. Accordingly, OPA also made it a paramount goal to ensure maximum preparation for oil spills, including through spill plans to ensure those responsible for oil spills and responders at the federal, state and local levels have the capacity to clean up a worst case oil spill.

SB 861 furthers this national policy by extending California's Oil Spill Act to inland waters. California has experienced an alarming number of inland oil spills in recent years. Every year between 2004 and 2012, California's inland areas sustained over a thousand oil spills. In some years, nearly three thousand spills occurred.[4] And California's Office of Spill Prevention and Response has identified twenty "major" oil spills from pipelines and refineries, and nine "major" spills from trains and trucks since 1987.[5] Recent oil spills have killed birds, fish and riverine mammals. When a pipeline rupture spilled 100,000-gallons of diesel into a marsh, the clean-up cost over $100 million.[6] The costs would have been even higher if drinking water supplies, prize fisheries or more sensitive environments were contaminated. California's Energy Commission has found that the number of barrels of oil transported by rail in the state increased from 1.2 million barrels in 2012 to 6.3 million barrels in 2013, and California has more than 7,000 railroad crossings and 5,000 pipeline crossings over state waters.[7] Therefore, the number of oil spills into inland California waters is likely to increase in the coming years. In fact, a train carrying corn recently derailed and spilled its contents into the Feather River in California, but fortunately the train was carrying corn and not oil, which is also shipped on this track.[8]

Oil spills are also becoming more severe because more hazardous fuels are being produced and shipped. The recent surge in U.S. oil production is being driven by development of

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[4] California Office of Spill Prevention and Response, California Spills Reported to OSPR, by Year, *available at* http://www.dfg.ca.gov/ospr/NewsPubs/Factsheets.asp.

[5] California Office of Spill Prevention and Response, Major Oil Spills and Incidents in California, *available at* http://www.dfg.ca.gov/ospr/NewsPubs/Factsheets.asp.

[6] Natural Resource Damage Assessment Summary for Kinder Morgan Suisun Marsh spill, *available at* http://www.dfg.ca.gov/ospr/NRDA/Kinder-Morgan.aspx.

[7] Letter from Thomas M. Cullen, Jr., Administrator California Office of Spill Prevention and Response (August 12, 2014), *available at* https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID =91086.

[8] *Derailed train spills grain into Feather River*, THE SACRAMENTO BEE, November 25, 2014, *available at* http://www.sacbee.com/news/local/transportation/article4143203.html; *see also* Tony Bizjak, *Senator Calls on Jerry Brown to halt crude oil trains in "treacherous" mountain passes*, THE SACRAMENTO BEE, December 2, 2014, *available at* http://www.sacbee.com/news/politics-government/capitol-alert/article4248324.html.

tar sands in Alberta, Canada and hydraulic fracturing in the Bakken shale formation predominantly in North Dakota. Both pose pernicious oil spill risks.

Tar sands oil is heavier and more likely to sink in water, which makes it nearly impossible to clean up because, according to EPA, the tar sands "will not appreciably degrade." Congressional Research Serv., *U.S. Rail Transportation of Crude Oil: Background & Issues for Congress* at 11 (2014). For shipping, it is usually blended with heavy metals and other toxic chemicals that remain in the water column for years and cause long-term toxicological impacts to water-borne life. *Id*. at 11-12. In July 2010, a pipeline accident in Marshall, Michigan released nearly 850,000 gallons of tar sands crude, leading to a two-year closure of a 25-mile stretch of the Kalamazoo River. Three years after the spill, the clean-up, which will cost over $1 billion, is still ongoing. *Id*.

Bakken crude oil is more flammable and volatile than conventional oil with an alarming propensity to ignite in rail accidents. *Id*. at 12. Bakken crude is increasingly being shipped to refineries by rail, often in unit trains with more than 100 loaded cars. The number of tank cars carrying crude oil has skyrocketed, increasing from only 9,500 tank cars in 2008 to over 400,000 tank cars in 2013, an increase of over 4000%. *Id.* at 1. The NTSB has cautioned that: "[t]he sharp increase in crude oil rail shipments in recent years as the United States experiences unprecedented growth in oil production has significantly increased safety risks to the public." NTSB Recommendations 14-1 through 14-3, at 4 (Jan. 23, 2014) [http://www.ntsb.gov/doclib/recletters/2014/R-14-001-003.pdf].

In accidents, Bakken crude poses extreme risks of igniting and exploding, as the Lac Mégantic accident so starkly demonstrates. That clean-up is still underway, including of the river, lake, and contaminated waters, and the damage to people and communities has been estimated at more than $1.2 billion. Draft Regulatory Impact Analysis, Docket No. PHMSA 2012-0082 (July 2014), *available at* http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0082-0179. Crude-by-rail accidents in the United States have likewise caused oil spills, contamination of wetlands, explosions, and evacuations, including a November 2013 derailment near Aliceville, Alabama that triggered explosions, an extensive fire, and a 630,000-gallon oil

spill that severely contaminated wetlands, and an April 2014 derailment that spilled 30,000 gallons into the James River, a drinking water source for Lynchburg and Richmond, Virginia. *Id*. at 19, 38; Cong. Research Serv. at 10; 79 Fed. Reg. 45,016, 45,019-20 (Aug. 1, 2014). To put the crisis into perspective, in 2013, more crude oil spilled in the United States (more than 1.1 million gallons) than the total amount that spilled from 1975-2012.[9]

DOT has found that the surge in crude-by-rail has created imminent hazards. 79 Fed. Reg. at 45,021, 45,029-35. In its recently proposed rule on tank car standards and rail operations, DOT estimates that, under the status quo, as many as 15 mainline rail accidents may spill substantial amounts of oil every year with the possibility of an additional disaster on the scale of Lac Mégantic every couple years. 79 Fed. Reg. at 45,022, 45,064.

In light of these extreme risks, the balance of harms unquestionably favors denying the Railroads' motion for a preliminary injunction. The devastation from an oil train accident is often horrific. Federal preemption may prevent states from barring hazardous crude rail shipments into the state, but states can exercise their preserved authority to prepare for and minimize the harm from an oil spill. SB 861 takes some modest steps to improve preparedness for inland oil spills both from railroads and other oil facilities. It furthers the national public policy of minimizing the harm to communities and waterways from oil spills. The harms it seeks to prevent or minimize far outweigh the financial costs to the railroads of preparing spill plans and ensuring adequate response capabilities.

CONCLUSION

For these reasons, the Railroads' motion for a preliminary injunction should be denied.

DATED: December 5, 2014

Respectfully submitted,

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[9] Curtis Tate, More Oil Spilled From Trains in 2013 than in Previous 4 Decades, Federal Data Show, McClatchy DC, Jan. 20, 2014, *available at* http://www.mcclatchydc.com/2014/01/20/215143/more-oil-spilled-from-trains-in.html.