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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36433

**NORTH COUNTY TRANSIT DISTRICT –
PETITION FOR DECLARATORY ORDER**

**REPLY OF
THE ASSOCIATION OF AMERICAN RAILROADS**

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September 17, 2020

The Association of American Railroads (“AAR”) on behalf of itself and its member railroads, respectfully submits this reply to the North County Transit District (“NCTD”) Petition for Declaratory Order (“Petition”) filed with the Surface Transportation Board (“STB” or “Board”) in this docket.¹ The Petition raises complex and important legal issues. Specifically, the Petition addresses the interplay between aspects of the Coastal Zone Management Act (“CZMA”) and ICC Termination Act (“ICCTA”) and the applicability of California state land use law to NCTD. The Petition appears to seek a broad declaration that ICCTA preempts any regulation of line maintenance or upgrade projects pursuant to state and local permitting regimes. It further claims that CZMA Federal Consistency Reviews by state agencies cannot be “harmonized” with ICCTA as applied to line maintenance and upgrades and, therefore, is preempted. Petition at 2-3.

Both the Board and the courts have repeatedly addressed the question of state and local permitting and preclearance requirements as imposed on railroads, holding that state or local permitting or preclearance requirements, including environmental and land use permitting requirements, are categorically preempted. *Soo Line R.R. Company—Petition for Declaratory Order*, FD 35850, slip op. at 4 (Dec. 22, 2014) (emphasis added) (internal citations omitted). Thus, there should be no set of facts that should cause the Board to reach an outcome here that would allow states or localities to use permitting and preclearance requirements to prevent railroads from performing maintenance necessary to safely fulfill their common carrier obligations to serve shippers.

¹ AAR is a non-profit trade association, representing freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service. AAR is the nation’s leading railroad policy, research, standard setting, and technology organization. AAR and its members are committed to operating the safest, most efficient, cost-effective, and environmentally sound rail transportation system in the world.

Section 10501’s broad preemption provision is clear that the Board’s jurisdiction over rail operations is “exclusive” and “preempt[s] the remedies provided under *Federal* or State law.” 49 U.S.C. 10501(d) (emphasis added). Nonetheless, the Board seeks to harmonize federal statutes and regulations where they may be in conflict unless there is an irreconcilable conflict between the laws. *Joint Petition for Declaratory Order—Bos. & Maine Corp. & Town of Ayer, Ma*, 5 S.T.B. 1041 (2001). Where such a conflict exists between ICCTA and another federal law, the Board has already recognized that ICCTA displaces that federal law where it regulates railroad operations, is applied in a discriminatory manner against railroads, or where those laws create the risk of a patchwork of localized regulation. *See United States Environmental Protection Agency—Petition for Declaratory Order*, FD 35803, slip op. at 8 (STB served Dec. 30, 2014). *See also Grafton & Upton R.R.—Petition for Declaratory Order*, FD 35779, slip op. at 6 (STB served Jan. 27, 2014). These standards are well established and AAR believes that it is important to the viability and integrity of the railroad network that they be respected.

Moreover, preemption issues with respect to the CZMA are often questions of first impression and may raise complex legal questions. Courts have recognized that the CZMA provides an explicit mechanism by which states may, under certain circumstances, exercise authority over public and private uses of land and water in coastal zones, *i.e.*, federally approved coastal zone management programs. *See* 16 U.S.C. § 1454; *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008). States have been granted the authority to “review federal projects, federally financed projects, and projects receiving federal licenses and permits ... to ensure that they abide by state-defined enforceable coastal policies.” *Algonquin Gas Transmission, LLC. v. Town of Weymouth*, 365 F. Supp. 3d 147, 156 (D. Mass. 2019) (internal citation omitted). However, the courts have also recognized that there are limits on state and

local authority under CZMA where another federal law regime covers the activity at issue. *See, e.g., AES Sparrows Point*, 527 F.3d at 126 (holding that a local zoning ordinance purportedly passed under the authority of the CZMA that expressly sought to block the construction of a proposed LNG terminal was preempted by the Natural Gas Act).

Because of the important issues raised in the petition, AAR will monitor other filings in this proceeding. Should the Board seek further evidence and argument, AAR will evaluate how application of the law to the facts presented here could implicate the broader railroad industry.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'K. D. Kirmayer', is written over the typed name.

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September 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of September 2020 served copies of the foregoing upon all parties of record in this proceeding by electronic mail consistent with 49 C.F.R. 1104.12(a).

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Sincerely,

/s/ Kathleen Birch

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