

ENTERED
Office of Proceedings
April 26, 2022
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36433

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

**MOTION OF THE CALIFORNIA COASTAL COMMISSION
FOR ORDER HOLDING THIS MATTER IN ABEYANCE
PENDING RESOLUTION OF STATE COURT LITIGATION BETWEEN
THE COMMISSION AND NORTH COUNTY TRANSIT DISTRICT**

ROB BONTA
Attorney General of California
DANIEL A. OLIVAS
Senior Assistant Attorney General
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
State Bar No. 100967
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9329
Fax: (619) 645-2271
E-mail: Jamee.Patterson@doj.ca.gov
*Attorneys for Respondent California Coastal
Commission*

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Coastal Commission (Commission) moves this Board for an order holding this matter in abeyance until final resolution of state court litigation now pending between the Commission and North County Transit District (NCTD) regarding NCTD's obligation to comply with state law. As explained in the status report the Commission filed with the Board on March 8, 2022, the Commission's Executive Director issued a cease and desist order to NCTD, ordering it to cease and desist construction of the fence on the bluffs in the City of Del Mar without first obtaining Coastal Act authorization or confirmation from the Commission that the development is exempt. As a state government agency, NCTD is obligated to comply with state law. However, NCTD declined to confirm that it will comply with the cease and desist order and instead indicated its intent to proceed with the fence development without complying with state law. In order to insure the fence complies with – or is exempt from – state law, the Commission filed an action in state court on April 19, 2022, seeking declaratory and injunctive relief as well as civil fines and exemplary damages. A conformed copy of the complaint is attached as Exhibit A. An order of abeyance is appropriate to allow a separate state court case to proceed to resolution in order to resolve issues of state law between the parties.

ARGUMENT

I. NCTD IS A STATE GOVERNMENT ENTITY AND PUBLIC AGENCY THAT MUST COMPLY WITH STATE LAW.

NCTD is a self-described state government entity and public agency. As such, it is subject to state law requirements, even if they might not apply to private entities due to federal preemption. Two such requirements are the obligation to determine whether its proposed development is consistent with the Coastal Act that the Commission administers (Cal. Public Resources Code, § 30000 et seq.) as well as the California Environmental Quality Act (Cal.

Public Resources Code, § 21000 et seq. (CEQA)). NCTD expressly stated in its initial filing before this Board that it was entitled to a waiver of the filing fee pursuant to 49 C.F.R. § 1002.2(e) because “NCTD is a state government entity” and it is a “public agency charged by the California Legislature with the responsibility of providing public transit services in its areas of jurisdiction.” Petition, filed August 28, 2020. Yet, NCTD insists that its actions need not be subject to review for compliance with state law. NCTD simply cannot have it both ways. It cannot be a state government entity entitled to a fee waiver and yet be exempt from state law.

As a state government-created entity, NCTD is subject to the California Supreme Court’s decision in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677. That case involved a proposal by the North Coast Railroad Authority (the Authority) primarily to resume freight service along a stretch of tracks. Although the Authority prepared an environmental impact report (EIR) for the project, pursuant to CEQA, various groups challenged the adequacy of that EIR and the analysis performed by the Authority under CEQA. The Authority argued that the application of CEQA was preempted by the Interstate Commerce Commission Termination Act (ICCTA). The California Supreme Court held that the requirement for the Authority to comply with CEQA prior to approving its project was not “regulation” of rail transportation subject to ICCTA preemption, but rather constituted an act of self-governance that was part of the state’s retained sovereign abilities. The Authority was therefore required to comply with CEQA before approving or implementing rail projects. As the Court stated, “application of CEQA in this context constitutes self-governance on the part of a sovereign state and at the same time on the part of an owner.” The same rule applies here. NCTD must comply with state law, including the Coastal Act, before performing development including fencing.

II. THE BOARD SHOULD HOLD THIS MATTER IN ABEYANCE.

The Board should hold this matter in abeyance until NCTD has obtained a determination that its fencing project complies with – or is exempt from – state law. This Board has broad discretion to determine whether to hold a proceeding in abeyance, and its decision to do so in any particular situation is highly dependent on the facts and circumstances of the case. (See, *Atlas Land And Building Corporation And Atlas Materials Recycling Corporation—Petition For Declaratory Order— Industry Spur Track In Pittsburgh, PA* (Aug. 17, 2020) STB Docket No. FD 36380) (holding docket in abeyance pending the outcome of the related court litigation); *Pet. of the Nat'l R.R. Passenger Corp. for Relief Pursuant to 49 U.S.C. § 24905*, FD 36048, slip op. at 3 (STB served Oct. 3, 2016); *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry.*, NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012); see also, *Ballard Terminal R.R.—Pet. for Declaratory Order*, FD 36261, slip op. at 4-5 (STB served June 27, 2019); and *Norfolk S. Ry. Company Petition to Set Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R. Co.* (Dec. 18, 2019) 2019 WL 7484086, at *3.) Indeed, the Board has granted abeyance in circumstances other than where another proceeding might moot the proceeding before the Board. (See, *Dyno Nobel, Inc. v. Nustar Pipeline Operating P'ship, L.P.*, NOR 42147, at *4-5 (STB served Mar. 24, 2017) (holding a proceeding in abeyance until a court decided state law issues that were relevant to, but not determinative of, the issues before the Board).)¹ It would not be fundamentally unfair for this Board to hold this matter in abeyance to allow the state court to analyze the state law questions. (See, *Atlas Land And Building Corporation And Atlas Materials Recycling Corporation, supra*, at *4 (abeyance would not be fundamentally unfair to either party where

¹ The Commission previously requested that the Board direct the parties to engage in mediation to attempt to resolve this dispute. The Commission remains ready and willing to engage in mediation so long as NCTD refrains from constructing the fence project pending the outcome of the mediation.

party initiated court proceeding concerning the resolution of the state property law questions, that litigation was proceeding, and the completion of that litigation may allow for a more expeditious resolution of issues at the Board, if such action is ultimately necessary); *Ballard Terminal R.R.*, *supra*, at *5 (abeyance would not be fundamentally unfair to any party because obtaining answers to the state law questions would allow a more complete and accurate adjudication of the preemption dispute between the parties).)

CONCLUSION

For the foregoing reasons, the Commission requests that the Board order NCTD's petition held in abeyance pending resolution of the state court action.

Dated: April , 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
DANIEL A. OLIVAS
Senior Assistant Attorney General

s/Jamee Jordan Patterson
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
*Attorneys for Respondent California Coastal
Commission*

SD2020303489
83342823.docx

EXHIBIT A

1 ROB BONTA
Attorney General of California
2 JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
3 ROXANNE J. CARTER
Deputy Attorney General
4 State Bar No. 259441
600 West Broadway, Suite 1800
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 738-9416
7 Fax: (619) 645-2271
E-mail: Roxy.Carter@doj.ca.gov
8 *Attorneys for Petitioner and Plaintiff*
California Coastal Commission

Exempt from Filing Fees
(Gov't Code, § 6103, subd. (a))

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/19/2022 at 03:02:29 PM
Clerk of the Superior Court
By Nicole Adams, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

CENTRAL DIVISION

CALIFORNIA COASTAL COMMISSION,

Petitioner/Plaintiff,

v.

**NORTH COUNTY TRANSIT DISTRICT; DOES 1
THROUGH 25; AND**

Respondents/Defendants

**EXBON DEVELOPMENT, INC., A
CORPORATION; AND DOES 26 THROUGH 50,
INCLUSIVE,**

Real Parties in
Interest/Defendants.

Case No. 37-2022-00014504-CU-MC-CTL

**PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR
DECLARATORY RELIEF;
INJUNCTIVE RELIEF; CIVIL FINES
AND EXEMPLARY DAMAGES**

**(Pub. Resources Code, §30000 et seq.;
California Environmental Quality Act,
Pub. Resources Code § 21167; Code Civ.
Proc., § 1085)**

Date:
Time:
Dept:
Judge:
Trial Date:
Action Filed:

Petitioner and Plaintiff California Coastal Commission (“Coastal Commission”) alleges as follows. Pursuant to Code of Civil Procedure section 446, subdivision (a), any answer to this Petition and Complaint must be verified.

INTRODUCTION

1. North County Transit District (“NCTD”) is moving forward with construction of up to six-foot high fences, including welded wire, chain link, and post and cable fencing types, in segments along nearly a mile of sensitive coastal bluffs in the City of Del Mar without first complying with California law. This is an action brought by the Coastal Commission against Respondent NCTD for failure to comply with the California Environmental Quality Act, Public Resources Code sections 21000, et seq. (“CEQA”) before initiating a development project. This is also an action brought by the Coastal Commission against Defendant NCTD and Defendant Exbon Development, Inc. (“Exbon”) (collectively “Defendants”) for threatened and imminent violations of the California Coastal Act of 1976, Public Resources Code sections 30000 et seq. (“Coastal Act”) including, but not limited to, undertaking development within the coastal zone in the City of Del Mar without first obtaining a coastal development permit (“Permit”).

2. It is the policy of the state of California to “[t]ake all action necessary to provide the people of [California] with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.” (Pub. Resources Code, § 21001, subd. (b).) Because the contemplated fencing is a “project” under CEQA (Pub. Resources Code, § 21065) and NCTD has failed to identify an applicable exemption under CEQA, NCTD should have undergone the mandatory environmental analysis prior to approving construction and contracting Exxon to construct the fencing. Because Respondent NCTD is in violation of its duties under CEQA, the Coastal Commission requests this court issue a writ of mandate against NCTD and set aside its approval of the fencing project and contract with Exxon.

3. The Permit program is the process by which the Coastal Commission implements the Coastal Act's multi-faceted policies in order to balance diverse uses within the coastal zone. The primary goal of the Coastal Act is to "[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." (Pub.

1 Resources Code, § 30001.5.) Any person “wishing to perform or undertake any development
2 within the coastal zone [...] shall obtain a coastal development permit.” (Pub. Resources Code, §
3 30600, subd. (a).)

4 4. Defendants stated their intent to perform development, including by constructing
5 fencing, along the coastal bluffs in the City of Del Mar without first applying for and securing a
6 Permit in compliance with the Coastal Act. Pursuant to Public Resources Code section 30809,
7 the Coastal Commission’s Executive Director issued a Cease and Desist Order (“Order”)
8 directing NCTD to cease development, including the construction of the fencing, until they come
9 into compliance with the Coastal Act.

10 5. NCTD failed to comply with the Order and has continued to pursue development, in
11 violation of both the Coastal Act and the Order. As of the date of filing this Complaint,
12 Defendants have intentionally and continually failed and refused to comply with the Coastal Act,
13 and NCTD remains in violation of the Order, despite the Coastal Commission’s attempts to work
14 with Defendants to bring them into compliance. Because Defendants are in violation of the
15 Coastal Act and NCTD is in further violation of the Order, Coastal Commission seeks declaratory
16 relief and injunctive relief and requests this court order Defendants to immediately cease
17 undertaking of the development; order Defendants to apply for a coastal development permit prior
18 to resuming construction; and issue civil fines and exemplary damages.

19 THE PARTIES

20 6. At all relevant times, the Coastal Commission was and is a state agency created
21 pursuant to Public Resources Code section 30330. The Coastal Commission has the authority
22 and responsibility to implement and enforce the provisions of the Coastal Act by the filing of
23 lawsuits. (Pub. Resources Code, §30334, subd. (b).) As a “person” within the meaning of section
24 30111 of the Public Resources Code, the Coastal Commission may bring actions for declaratory
25 and injunctive relief, pursuant to Public Resources Code section 30803, as well as civil fines,
26 pursuant to Public Resources Code section 30805, in response to Coastal Act violations.

27 7. Defendant and Respondent, North County Transit District (“NCTD”), is a state
28 agency created by the California legislature and is responsible for public transportation in a

1 region of San Diego County. (See P.U.C., § 125050.) As a “person” within the meaning of
2 section 30111 of the Public Resources Code, NCTD must comply with the Coastal Act. As a
3 state-funded and publicly-created state entity, NCTD must comply with state environmental laws,
4 including the Coastal Act and CEQA, even when conducting railroad-related activities regulated
5 under federal law. (*Friends of the Eel River v. North Coast Railroad Authority* (2019) 3 Cal.5th
6 677.)

7 8. Defendant and Real Party in Interest, Exbon Development, Inc. (“Exbon”), is a
8 corporation organized and existing under the laws of the State of California and authorized to
9 conduct business in California. NCTD has contracted with Exbon to construct the fencing, in
10 violation of the Coastal Act. As a “person” within the meaning of section 30111 of the Public
11 Resources Code, Exbon must comply with the Coastal Act. Exbon has been contracted to
12 undertake the fencing project, which qualifies as a “project” for purposes CEQA, as described in
13 Public Resources Code section 21065, and its rights under its contract with NCTD will be
14 affected by the outcome of this petition. Accordingly, Exbon is a real party in interest. (Pub.
15 Resources Code, § 21167.6.5.)

16 9. The true names, whether corporate, individual or otherwise, of real parties in interest and
17 defendants named herein as Does 1 through 50, inclusive, are currently unknown to the Coastal
18 Commission or are parties for whom liability is uncertain to the Coastal Commission because
19 discovery has not been completed at this time. The Coastal Commission, therefore, sues these
20 defendants by such fictitious names. The Coastal Commission is informed and believes and
21 thereupon alleges that Does 1 through 50 include any individual, organization, partnership, limited
22 liability company, or other business association or corporation, including any utility, and any federal,
23 state, local government, or special district or an agency thereof. The Coastal Commission will seek
24 leave to amend this complaint to show their true names and capacities when they have been
25 ascertained.

26 10. In this Complaint when reference is made to any act or omission of Defendants, such
27 allegations shall include the acts and omissions of owners, officers, directors, agents, employees,
28

1 contractors, affiliates and/or representatives of Defendants while acting within the course and scope of
2 their employment or agency on behalf of Defendants during the relevant time periods.

3 **JURISDICTION AND VENUE**

4 11. Venue is proper in the County of San Diego under Code of Civil Procedure section
5 392, subdivision (a)(1), because the property that is the subject of this action is located in, and the
6 alleged violations occurred and are continuing to occur in, San Diego County. Specifically, the
7 alleged violations occurred and are continuing to occur in the City of Del Mar, zip code 92014,
8 thus venue is proper in the Central Branch of San Diego Superior Court. (Super. Ct. San Diego
9 County, Local Rules, rule 1.2.2.)

10 12. The Superior Court has jurisdiction over this matter as an unlimited civil case.

11 13. The Superior Court has jurisdiction in this action pursuant to California Code of Civil
12 Procedure section 1085.

13 **RELEVANT LEGAL BACKGROUND**

14 14. The California Supreme Court has found that application of CEQA to decisions of a
15 state-created public entity “constitutes self-governance on the part of a sovereign state” that is not
16 preempted by federal law. (*Friends of the Eel River v. North Coast Railroad Authority* (2019) 3
17 Cal.5th 677 at 723.)

18 15. CEQA “shall apply to discretionary projects proposed to be carried out or approved by
19 public agencies [...] unless the project is exempt from this division.” (Pub. Resources Code, § 21080,
20 subd. (a).)

21 16. CEQA requires that a lead agency determine whether a project may have a significant
22 impact on the environment and prepare either a negative declaration if it will not, or an environmental
23 impact report if it may. (Pub. Resources Code, § 21080, subd. (c) and (d).)

24 17. “Project” for the purposes of CEQA includes “an activity which may cause [...] a direct
25 physical change in the environment” that is either “directly undertaken by any public agency” or is an
26 “activity undertaken by a person which is supported, in whole or in part, through contracts [...] from
27 one or more public agencies.” (Pub. Resources Code, § 21065.)

1 18. “Lead Agency” under CEQA “means the public agency which has the principal
2 responsibility for carrying out or approving a project which may have a significant effect upon the
3 environment.” (Pub. Resources Code, § 21067.)

4 19. If a project is exempt under CEQA, the notice of exemption “shall not be filed with the
5 Office of Planning and Research or the county clerk **until the project has been approved.**” (Cal.
6 Code Regs., tit. 14, § 15061, subd. (d), **emphasis added.**)

7 20. “When a state agency files this notice, the notice of exemption shall be filed with the
8 Office of Planning and Research.” (Cal. Code Regs., tit. 14, § 15062, subd. (c)(1).)

9 21. Under the Coastal Act, any person “wishing to perform or undertake any development
10 within the coastal zone [...] shall obtain a coastal development permit.” (Pub. Resources Code, §
11 30600, subd. (a).) “Person” means “any individual, organization, partnership, limited liability
12 company, or other business association or corporation, including any utility, and any federal, state,
13 local government, or special district or an agency thereof.” (Pub. Resources Code, §30111.)

14 22. “Development” for purposes of the Coastal Act includes “the placement or erection of
15 any solid material or structure [...]” (Pub. Resources Code, § 30106.)

16 23. The Coastal Act authorizes the Coastal Commission’s executive director to issue an order
17 directing a person who “has undertaken, or is threatening to undertake, any activity that [...] may
18 require a permit from the commission without securing a permit” to cease and desist. (Pub. Resources
19 Code § 30809, subd. (a).) “The cease and desist order shall be issued only if the person or agency has
20 failed to respond in a satisfactory manner to an oral notice given in person or by telephone followed
21 by written confirmation [...]” (Pub. Resources Code § 30809, subd. (b).)

22 24. Pursuant to Public Resources Code section 30803, “[a]ny person may maintain an action
23 for declaratory and equitable relief to restrain any violation of this division, of a cease and desist order
24 issued pursuant to Section 30809 or 30810, or of a restoration order issued pursuant to Section 30811.
25 On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to
26 restrain any further violation of this division. No bond shall be required for an action under this
27 section.”

25. Pursuant to Public Resources Code section 30805, “[a]ny person may maintain an action for the recovery of civil penalties provided for in Section 30820 or 30821.6.”

26. Pursuant to Public Resources Code section 30820, the Superior Court may impose civil liability on “any person who performs or undertakes development that is in violation” of the Coastal Act “in an amount that shall not exceed thirty thousand dollars (\$30,000) and shall not be less than five hundred dollars (\$500).” (Pub. Resources Code, § 30820, subd. (a)(1).)

27. In addition, the Superior Court may impose civil liability “when a person intentionally and knowingly performs or undertakes the development in violation” of the Coastal Act “in an amount which shall not be less than one thousand dollars (\$1,000), not more than fifteen thousand dollars (\$15,000), per day for each day in which the violation persists.” (Pub. Resources Code, § 30820, subd. (b).)

28. Pursuant to Public Resources Code section 30821.6, “[a]ny person or governmental agency who intentionally or negligently violates any cease and desist order issued [...] by the executive director [...] may be liable civilly in a sum of not to exceed six thousand dollars (\$6,000) for each day in which that violation persists. Any actual penalty imposed shall be reasonably proportionate to the damage suffered as a consequence of the violation.” (Pub. Resources Code, § 30821.6.)

29. Section 30822 of the Public Resources Code states “[w]here a person has intentionally and knowingly violated any provision of [the Coastal Act], the commission may maintain an action, in addition to Section 30803 or 30805, for exemplary damages and may recover an award, the size of which is left to the discretion of the court.”

FACTUAL ALLEGATIONS

30. More than three years prior to NCTD’s project approval on January 20, 2022, NCTD improperly filed a Notice of Exemption on September 4, 2018, claiming its fencing project was exempt from CEQA as a “project for the institution or increase of passenger or commuter services on rail or highway rights-of-way already in use.” (Pub. Resources Code, § 21080, subd. (b)(10); *see also* Cal. Code Regs., tit. 14, § 15275.)

1 31. Although NCTD, as a state agency, has filed several CEQA notices of exemption with
2 the Office of Planning and Research from 1996 through 2021, including one in 2019 and two in 2021,
3 NCTD improperly filed its ill-timed September 4, 2018 Notice of Exemption for the fencing project
4 with the County of San Diego Clerk and failed to file any notice or other type of CEQA document
5 related to the fencing project with the Office of Planning and Research.

6 32. On January 19, 2022, the Coastal Commission, through the Attorney General, submitted
7 a letter to NCTD opposing the fencing project along the coastal bluffs in Del Mar because NCTD had
8 failed to comply with CEQA and the Coastal Act.

9 33. At its January 20, 2022 board of directors meeting, under Agenda item No. 13 “Approve
10 Job Order No. 21009-005 to Exbon Development, Inc. for Right-of-Way Fencing Installation in the
11 City of Del Mar,” NCTD voted not to postpone voting on the fencing until NCTD complied with the
12 Coastal Act and California Environmental Quality Act (CEQA). The NCTD board of directors then
13 proceeded to pass the following motion:

14 TO APPROVE THE MODIFIED FENCING PLAN THAT WAS
15 DEVELOPED BY THE NCTD, CALIFORNIA COASTAL COMMISSION, AND
16 CITY OF DEL MAR STAFF WORKING GROUP CONTINGENT ON THE CITY
17 OF DEL MAR EXECUTING A LICENSE AGREEMENT WITH NCTD THAT
18 INCLUDES THE ACCEPTANCE OF LIABILITY FOR USE OF NCTD’S
19 [RIGHT-OF-WAY] FOR THE UPPER BLUFF TRAIL AND MAINTENANCE
20 FOR THE MODIFIED FENCING PLAN BY FEBRUARY 28, 2022. **IF THE**
21 **CITY OF DEL MAR FAILS OR REFUSES TO ENTER INTO A WRITTEN**
22 **AGREEMENT ACCEPTING LIABILITY AND MAINTENANCE**
23 **RESPONSIBILITY BY FEBRUARY 28, 2022, THE BOARD AUTHORIZES**
24 **THE EXECUTIVE DIRECTOR TO EXECUTE THE NECESSARY**
25 **AGREEMENTS TO PROCEED WITH THE FENCING PROJECT IN**
26 **ACCORDANCE WITH THE STAFF RECOMMENDATION AS OUTLINED**
27 **IN THE STAFF REPORT,** SECONDED BY BOARD MEMBER JIM
28 DESMOND. (**Emphasis added.**)

1 The staff recommended fencing has been described by NCTD as up to six-foot tall welded
2 wire, chain link, and post and cable fence types that would run in segments along the
3 railroad between Coast Blvd. at the north end and near Spinnaker Court to the south in the
4 City of Del Mar.

5 34. At a special meeting held on February 28, 2022, the City of Del Mar's City Council voted
6 against entering into the liability and maintenance agreement with NCTD. Accordingly, the Coastal
7 Commission and its executive director have determined that NCTD plans to proceed with its original
8 fencing plan without first obtaining a coastal development permit.

9 35. On March 3, 2022, the Coastal Commission issued oral notice, followed by written
10 confirmation, to NCTD that it planned to issue a cease and desist order as authorized under Public
11 Resources Code section 30809.

12 36. Because NCTD failed to respond satisfactorily to the oral notice and written
13 confirmation, on March 7, 2020, the Coastal Commission's executive director issued a cease and
14 desist order to NCTD pursuant to the Coastal Act. (Pub. Resources Code, § 30809.) The order
15 directed NCTD to cease development until had obtained Coastal Act authorization or confirmation
16 from the Coastal Commission that the development is exempt.

17 37. Upon information and belief, Defendants have continued to move forward with
18 construction in violation of the Coastal Act and the cease and desist order issued to NCTD.

19 **FIRST CAUSE OF ACTION**

20 *Violation of CEQA by Respondent NCTD* (Pub. Resources Code, § 21000, et seq.)

21 38. The Coastal Commission incorporates by reference the allegations in Paragraphs 1
22 through 37, inclusive, of this Petition and Complaint as though fully set forth herein.

23 39. The construction of fencing along the coastal bluff in the City of Del Mar constitutes a
24 "project" subject to CEQA. (Pub. Resources Code, § 21065.) NCTD's project is "subject to the
25 same level of review and consideration under [CEQA] as that of private projects required to be
26 approved by public agencies." (Pub. Resources Code, § 21001.1.)

27 40. Under CEQA, NCTD is responsible for conducting a preliminary review, determining the
28 significance of a project's environmental impact, drafting a notice of exemption or conducting an

1 initial study, and drafting the appropriate corresponding CEQA document for public review. (Cal.
2 Code Regs., tit. 14, § 15060, et seq.)

3 41. NCTD erroneously asserts the fencing project is exempt as a “project for the institution
4 or increase of passenger or commuter services on rail or highway rights-of-way already in use” under
5 Public Resources Code section 21080, subdivision (b)(10), and California Code of Regulations, title
6 14, section 15275. However, this exemption is improper as this project is not for the institution or
7 increase of any services. Unless a project is exempt, CEQA “shall apply to discretionary projects
8 proposed to be carried out or approved by public agencies [...]” (Pub. Resources Code, § 21080,
9 subd. (a).)

10 42. Even if the project was properly exempted, NCTD failed to file its Notice of Exemption
11 **after** the January 20, 2022 project approval, as well as failed to file it with the Office of Planning and
12 Research. (Cal. Code Regs., tit. 14, §§ 15061, 15062.)

13 43. NCTD failed to conduct an initial study to determine whether the project required a full
14 environmental impact review, a negative declaration or a mitigated negative declaration. (Cal. Code
15 Regs., tit. 14, §§ 15063, 15064, et seq.)

16 44. NCTD failed to draft the appropriate corresponding CEQA documents. (Cal. Code
17 Regs., tit. 14, §§ 15070, et seq., 15080, et seq.)

18 45. “[N]oncompliance with substantive requirements of [CEQA] constitute[s] a prejudicial
19 abuse of discretion [...]” (Pub. Resources Code, § 21005, subd. (a).)

20 46. If a court finds that NCTD has violated CEQA, “the court shall enter an order” that may
21 include one or more of the following: (1) a mandate that NCTD’s decision be voided; (2) a mandate
22 that NCTD “and any real parties in interest suspend any or all specific project activity or activities”
23 until NCTD has complied with CEQA; and/or (3) a mandate that NCTD take specific actions
24 necessary to come into compliance with CEQA. (Pub. Resources Code, § 21168.9, subd. (a).)

25 **SECOND CAUSE OF ACTION**

26 *Violation of the Coastal Act by All Defendants* (Pub. Resources Code, § 30600)

27 47. The Coastal Commission incorporates by reference the allegations in Paragraphs 1
28 through 46, inclusive, of this Complaint as though fully set forth herein.

1 48. Under Public Resources Code section 30600, subdivision (a), any person “wishing to
2 perform or undertake any development within the coastal zone [...] shall obtain a coastal development
3 permit.”

4 49. Defendants NCTD and Exxon are undertaking development within the coastal zone, but
5 have failed to obtain a coastal development permit.

6 50. Plaintiff Coastal Commission is entitled to declaratory and equitable relief to restrain
7 Defendants’ violation of the Coastal Act. (Pub. Resources Code, § 30803.) “On a prima facie
8 showing of a violation of this division, preliminary equitable relief shall be issued to restrain any
9 further violation of this division. No bond shall be required for an action under this section.” (*Id.*)

10 51. This court may impose civil liability on Defendants for their violation of the Coastal Act
11 “in an amount that shall not exceed thirty thousand dollars (\$30,000) and shall not be less than five
12 hundred dollars (\$500).” (Pub. Resources Code, § 30820, subd. (a)(1).)

13 52. As Defendants have knowingly and intentionally undertaken development in violation of
14 the Coastal Act, this court may impose additional and continuing civil liability against Defendants “in
15 an amount which shall not be less than one thousand dollars (\$1,000), not more than fifteen thousand
16 dollars (\$15,000), per day for each day in which the violation persists.” (Pub. Resources Code, §
17 30820, subd. (b).)

18 53. Further, the Coastal Commission is entitled to seek “exemplary damages and may
19 recover an award, the size of which is left to the discretion of the court.” (Pub. Resources Code, §
20 30822.)

21 **THIRD CAUSE OF ACTION**
22 *Violation of the Cease and Desist Order by NCTD*
 (Pub. Resources Code, §§ 30803 and 30809)

23 54. The Coastal Commission incorporates by reference the allegations in Paragraphs 1
24 through 53, inclusive, of this Complaint as though fully set forth herein.

25 55. When the Coastal Commission’s executive director has reason to believe a violation of
26 the Coastal Act may occur, she or he is authorized to issue an Order. (Pub. Resources Code, §
27 30809.)
28

56. In compliance with Public Resources Code section 30809, the Coastal Commission's executive director issued an Order against NCTD on or about March 7, 2022, directing NCTD to cease development until it had obtained Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt.

57. Nevertheless, NCTD has continued to pursue construction of the fencing and failed to seek a Permit or an exemption from the Coastal Commission, in violation of the Order.

58. The Coastal Commission is entitled to seek declaratory and injunctive relief against NCTD for NCTD's violation of the executive director's Order issued pursuant to Public Resources Code section 30809. (Pub. Resources Code, § 30803.) "On a prima facie showing of a violation of this division, preliminary equitable relief shall be issued to restrain any further violation of this division. No bond shall be required for an action under this section." (Id.)

59. This court may impose civil liability on NCTD for its violation of the Order “in an amount that shall not exceed thirty thousand dollars (\$30,000).” (Pub. Resources Code, § 30820, subd. (a)(2).)

60. As NCTD has knowingly and intentionally undertaken development in violation of the Order, this court may impose additional and continuing civil liability against NCTD in a sum “not to exceed six thousand dollars (\$6,000) for each day in which that violation persists.” (Pub. Resources Code, § 30821.6, subd. (a).)

61. Further, the Coastal Commission is entitled to seek “exemplary damages and may recover an award, the size of which is left to the discretion of the court.” (Pub. Resources Code, § 30822.)

PRAYER FOR RELIEF

WHEREFORE, the California Coastal Commission, requests the Court grant the following relief:

FIRST CAUSE OF ACTION

A. Issue a writ of mandate directing NCTD to (i) set aside and withdraw its approval of construction of the fencing along the coastal bluff in Del Mar; (ii) cancel its contract with Exxon

1 Development, Inc. for construction of the fencing; and (iii) refrain from taking on any other activities
2 in furtherance of construction of the fencing until it complies with CEQA;

3 B. Issue a declaration of rights and responsibilities of the parties with respect to
4 CEQA. Specifically, the Coastal Commission seeks a declaration from the court that: (i)
5 Respondent's fencing project is not exempt from CEQA; (ii) Respondent NCTD violated CEQA by
6 approving the fencing project and contracting with Exbon without first complying with CEQA; (iii)
7 NCTD's approval of the fencing project and contract with Exbon without complying with CEQA was
8 an abuse of discretion; and (iv) that NCTD's approval of the contract with Exbon and approval of the
9 fencing project are void *ab initio* or otherwise invalid and of no legal effect;

10 *SECOND CAUSE OF ACTION*

11 C. Issue a declaration of rights and responsibilities of the parties with respect to the
12 Coastal Act. Specifically, the Coastal Commission seeks a declaration from the court that the
13 Defendants' actions are separate and continuing violations of the Coastal Act;

14 D. Enter a judgment for the Coastal Commission and against Defendants NCTD,
15 Exbon, and Does 1-50, inclusive, for violations of the Coastal Act as described in the Second Cause
16 of Action;

17 E. Enter preliminary and permanent injunctions requiring that all Defendants cease
18 and desist the undertaking of their development, comply with the Coastal Act, and obtain Coastal Act
19 authorization before continuing construction of the fencing;

20 F. Order each Defendant to pay civil fines up to \$30,000, plus additional fines up to
21 \$15,000 for each day in which the violation persists pursuant to Public Resources Code section
22 30820, subdivisions (a) and (b);

23 G. Order each Defendant to pay exemplary damages pursuant to the Coastal Act for
24 violation of the Coastal Act as described in the Second Cause of Action;

25 *THIRD CAUSE OF ACTION*

26 H. Issue a declaration of rights and responsibilities of the parties with respect to the
27 cease and desist order. Specifically, the Coastal Commission seeks a declaration from the court that
28 NCTD's actions are separate and continuing violations of the Order;

1 I. Enter judgment for the Coastal Commission and against Defendant NCTD for
2 violations of the cease and desist order as described in the Third Cause of Action;

3 J. Enter preliminary and permanent injunctions requiring that NCTD cease and desist
4 the undertaking of its development, and comply with the demands listed in the executive director's
5 cease and desist order;

6 K. Order NCTD to pay civil fines up to \$30,000, plus additional fines up to \$6,000 for
7 each day in which the violation of the Order persists pursuant to Public Resources Code section
8 30821.6;

9 L. Order NCTD to pay exemplary damages pursuant to the Coastal Act for violation
10 of the Order as described in the Third Cause of Action;

11 *ALL CAUSES OF ACTION*

12 M. Grant the Coastal Commission its costs of attorneys' fees, enforcement, and suit
13 herein, plus interest, as provided by law, including but not limited to Public Resources Code section
14 1021.8; and

15 N. Grant such other and further relief as the Court deems just and proper.

16
17 Dated: April 19, 2022

Respectfully submitted,

18 ROB BONTA
19 Attorney General of California
20 JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General

21
22 /s/Roxanne J. Carter
23 ROXANNE J. CARTER
24 Deputy Attorney General
Attorneys for Plaintiff State of California, ex
25 rel. California Coastal Commission
26
27
28

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on April 26, 2022, I served a copy of this **MOTION OF THE CALIFORNIA COASTAL COMMISSION FOR ORDER HOLDING THIS MATTER IN ABEYANCE PENDING RESOLUTION OF STATE COURT LITIGATION BETWEEN THE COMMISSION AND NORTH COUNTY TRANSIT DISTRICT** on all parties of record by first-class mail and email as follows:

Daniel R. Elliott Daniel Elliott PLLC 2000 Pennsylvania Avenue NW, Suite 7000 Washington, DC 20006 1055 Thomas Jefferson Street NW Suite 500 Washington, DC 20007 Email: danelliottiii@outlook.com ; delliott@gkglaw.com	William C. Pate Devaney Pate Morris & Cameron LLP 402 W. Broadway, Suite 1300 San Diego, CA 92101 Email: wpate@dpmclaw.com
Kristen Brinner Surfrider Foundation San Diego County Chapter 3900 Cleveland Avenue, Suite 201 San Diego, CA 92103 Email: kristin@surfridersd.org	Timothy J. Strafford Associate General Counsel and Corporate Secretary Association of American Railroads 425 3 rd Street SW, Suite 1000 Washington, DC 20024 Email: tstrafford@aar.org
Peter A. Pfohl 1224 17th Street NW Washington, DC 20036 Email: pap@sloverandloftus.com	Shirli Fabbri Weiss and Laura Schaefer 934 23rd Street San Diego, CA 92102 Email: ls@boyce-schaefer.com
Louise Warren 455 Market St., Suite 300 San Francisco, CA 94105 Email: Louise.Warren@coastal.ca.gov	William Herrmann 1 Massachusetts Avenue N.W. Washington, DC 20001 Email: Byl.Herrmann@amtrak.com
Jeffrey G. Sturgis 150 6th Street Del Mar, CA 92014 Email: jeffsturgis@me.com	

A. Lopez
Declarant



Signature