

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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NORTH COUNTY TRANSIT DISTRICT – )  
VERIFIED PETITION FOR DECLARATORY )  
ORDER )

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Docket No. FD 36433

**REPLY TO MOTION FOR ORDER HOLDING THIS MATTER IN ABEYANCE  
OF THE CITY OF DEL MAR**

The City of Del Mar (“Del Mar”) hereby replies in support of the Motion of the California Coastal Commission (“Coastal Commission”) for an order holding this matter in abeyance pending resolution of litigation between the Coastal Commission and North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on April 26, 2022 (“Abeyance Motion”).

The Board has “broad discretion” to hold proceedings in abeyance depending on the facts and circumstances before it. *E.g., Oakland Global Rail Enterprise – Operation Exemption – in Oakland, Cal.*, FD 36312 (STB served May 5, 2022) at 2. In this case, such discretion should be used to approve the Abeyance Motion.

As Del Mar has previously explained to the Board, NCTD is a state government entity authorized to operate public transit in North San Diego County. Del Mar agrees with the Coastal Commission, that, as an entity of the State, receiving state funding, NCTD’s adherence to state environmental laws and the California’s Coastal Management Program is not regulation by the state but a form of self-governance by the owner. *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 43 (Cal. 2017).

NCTD’s Reply to the Coastal Commission’s Abeyance Motion contends that the California Supreme Court’s decision in *Friends of Eel River* finding no preemption is inapplicable here where the Coastal Commission is attempting “to stop . . . rail services” on the line. NCTD Reply at 10 (filed Apr. 29, 2022). NCTD’s continuing claims of attempted rail line blockage are false. The Coastal Commission’s state enforcement action is not an attempt to stop rail operations, it is simply requiring that NCTD’s proposed installation of fencing along California’s coast be properly reviewed to ensure it is consistent with state law.

NCTD also contends at length that *Cal. High-Speed Rail*,<sup>1</sup> where the Board ruled on preemption issues even where state cases were pending, supports Board issuance of a Declaratory Order at this time. However, NCTD’s claim that *Cal. High-Speed Rail* involved “identical circumstances” is untrue and highly misleading, especially as it leaves out critical differentiating facts. That decision is inapposite,<sup>2</sup> and if anything, favors the granting of the Abeyance Motion.

First, *Cal. High-Speed Rail* involved actions seeking injunctive relief under the California Environmental Quality Act (“CEQA”) filed by seven counties, cities,

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<sup>1</sup> *Cal. High-Speed Rail Auth. – Petition for Declaratory Order*, FD 35861 (STB served Dec. 12, 2014).

<sup>2</sup> In *Cal. High-Speed Rail*, the STB asserted jurisdiction over the new “passing” track, not fencing on or around the right-of-way unrelated to operations.

citizens groups, and other third-parties that the Board referred to as “‘external’ third-party CEQA enforcement suits.” *Id.* at 14 n.24. The fact that the CEQA enforcement suits were brought by third parties, rather than the state, was key to the STB’s finding of a lack of infringement on state sovereignty:

Our analysis indicating that §10501(b) preempts third-party attempts to enforce CEQA against a state agency does not infringe upon California’s state sovereignty because the CEQA enforcement actions are not being brought by the state. Rather, the enforcement actions in state court are being brought by third parties against a state agency under the guise of state law.

*Id.* at 14. This finding was reiterated in its reconsideration decision (STB served May 5, 2015) at 4 (Miller comments). Here, unlike in *Cal. High-Speed Rail*, we do not have multiple third-party CEQA enforcement suits brought against a state agency, rather, we have an enforcement action under state law brought by the *State* itself. As such, *Cal. High-Speed Rail* instead supports a finding of no preemption.

Second, the Board in *Cal. High-Speed Rail* declined to opine on whether a project receiving state funding was required to comply with state funding requirements: “Whether CEQA compliance is required before the Authority is allowed to obtain or use Proposition 1A funding is a question of state law for a state court to decide.” *Cal. High Speed Rail* at 15. Citing the Supreme Court’s decision in *Nixon v. Mo. Mun. League*, 541 U.S. 125, 134-37 (2004), the Board explained that “even if a federal statute were to preempt a state requirement directed at a state agency, the state legislature still has the authority to *control the funding of the state agency and implicitly*

*the state agency's actions.*” *Id.* at 15 (emphasis added). Here, the grant of funding to the State created rail entity, NCTD, requires that the recipient abide by all state funding requirements, especially where it appears that NCTD voluntarily agreed to abide by state laws when receiving project funding.

NCTD’s failure to comply with CEQA and the California Coastal Act involve state law claims that are matters best resolved by a state court with general jurisdiction over such matters in the first instance.<sup>3</sup> Also, a declaratory order by the Board is not necessary at this time to aid the court in its determination of state law issues, nor has the court requested the Board’s assistance to date. Further, resolution of the court litigation may minimize or possibly moot disputed issues that have been raised, and otherwise better inform the Board in a manner that will ensure the efficient use of Board resources. *E.g., Oakland Global Rail Enterprise – Operation Exemption – In Oakland, Cal.*, FD 36312 (STB served May 5, 2022) at 3; *Norfolk S. Ry. Co. – Petition to Set*

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<sup>3</sup> NCTD claims, without support, that the federal courts’ “first-filed rule” supports denial of the Abeyance Motion, but it does not. *E.g., Dyno Nobel, Inc. & Dyno Nobel Louisiana Ammonia, LLC v. NuStar Pipeline Operating Partnership, L.P.*, NOR 42147 (STB served Mar. 24, 2017) at 1, 4-5 (Board holds proceeding in abeyance finding that underlying state law matters “would be best answered by a Louisiana state or federal court of general jurisdiction with the relevant expertise and experience,” even when no court action had been initiated yet).

*Trackage Rights Compensation – Norfolk & Portsmouth Belt Line R.R.*, FD 36223 (STB served Dec. 19, 2019) at 4.<sup>4</sup>

Accordingly, the Abeyance Motion should be granted. Further, should the Board still believe that some type of formal action on NCTD's Petition is required at this time, the Board should first grant Del Mar and the Coastal Commission's Motions for Mediation. Del Mar respectfully submits that, with the assistance of the Board staff, the parties are in the best position to reach a mutually agreeable resolution on contentious and complicated issues that avoids unnecessary, protracted litigation.

Respectfully submitted,

CITY OF DEL MAR

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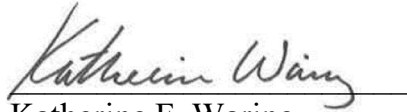
Its Attorneys

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<sup>4</sup> While NCTD complains about possible delays in STB decision-making should the Board grant the Abeyance Motion, the issuance of declaratory orders are discretionary, and regardless, any delays that might be caused by NCTD's failure to properly follow state law are of its own making.

## **CERTIFICATE OF SERVICE**

I hereby certify that this 12th day of May, 2022, I caused a copy of the foregoing document to be served by U.S. First Class Mail or by more expeditious means on all parties of record.

A handwritten signature in cursive script, reading "Katherine Waring", written over a horizontal line.

Katherine F. Waring

*An Attorney for City of Del Mar*