

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

304759

ENTERED
Office of Proceedings
June 14, 2022
Part of
Public Record

Finance Docket No. 36433

NORTH COUNTY TRANSIT DISTRICT -
PETITION FOR DECLARATORY ORDER

SECOND SUPPLEMENTAL STATUS UPDATE

North County Transit District (“NCTD”) respectfully submits its Second Supplemental Status Update to advise the Surface Transportation Board (“STB”) of recent important events with respect to the above-captioned proceeding since its last Status Update on March 4, 2022, including a stay by the United States District Court for the Southern District of California (the “Court”) until the STB issues a decision in this proceeding. These recent events make NCTD’s request for expedited consideration of its petition for a declaratory order even more important at this time for the bluffs stabilization and safety fencing projects at issue in this proceeding.

BACKGROUND

As background, on August 28, 2020, NCTD filed a petition for declaratory order relating to certain actions of the City of Del Mar, Cal. (“City”) and the California Coastal Commission (“Commission”) regarding NCTD’s rail line maintenance and other upgrading activities in its rail right-of-way, specifically two separate projects for safety fencing and bluffs stabilization. Numerous filings were received in response to the petition, including from the Commission and the City, who have actively participated in this proceeding since its start. On November 6, 2020,

NCTD filed a motion to hold this proceeding in abeyance, stating that it recently had constructive discussions with the City and the Commission and that the three parties agreed that they should engage in further discussions to attempt to resolve the matters at issue. The Board granted NCTD's unopposed request and held this proceeding in abeyance until March 30, 2021 and directed NCTD to file a status update by that date. On March 29, 2021, NCTD filed a status report, stating that it, the City, and the Commission had engaged in further constructive discussions and that the parties had agreed that settlement discussions should continue. As such, NCTD, with the concurrence of the City and the Commission, requested that the Board continue to hold this matter in abeyance until December 31, 2021. The Board stated that it favors the private resolution of disputes whenever possible and granted the request, continuing to hold this matter in abeyance until December 31, 2021. The Board directed NCTD to file a status update by December 31, 2021.

For more than a year, the City, Commission, and NCTD attempted to resolve the issues regarding these projects raised in NCTD's petition, including talks about the terms of a license agreement that included a modified safety fencing plan in the City. Unfortunately, the parties failed to reach an agreement by the December 31, 2021 deadline.

As a result, on December 30, 2021, NCTD filed its status update pursuant to the order served on April 7, 2021 and asked the STB to lift the order holding this proceeding in abeyance and to place this proceeding in active status because the negotiations had not been successful. NCTD also explained that because the railroad projects at issue will begin soon, it requested that the Board expedite this proceeding to ensure the parties understand their obligations under the applicable laws.

On January 14 and 18, 2022, the City and the Commission each respectively filed responses to the status update, including motions for the STB to order the matter into its mediation program. NCTD opposed the request for STB mediation because it believed the parties were at an impasse in their negotiations. The Board has not ruled on this request by the City and Commission.

On January 20, 2022, the NCTD held a Board Meeting during which its Board approved a job order for the right-of-way safety fencing installation in the City. The Board approved the installation of a modified fencing plan contingent on the City executing a license agreement that would include the acceptance of liability for use of NCTD's right-of-way for an upper bluff trail and maintenance by February 28, 2022. In the event the City failed to enter into a license agreement by that date, the Board authorized NCTD Executive Director Matthew Tucker to proceed with a different fencing plan in the right-of-way.¹

Following the NCTD Board decision, NCTD reached out to the City expressing a willingness to consider further modifications to the terms of the license agreement in hopes of reaching agreement prior to the February 28, 2022 deadline. Following meetings between executive staff and legal counsel from NCTD and the City, which also included representatives of the Commission, a revised license agreement was agreed to by NCTD and the City subject to the City Council's approval.

On February 28, 2022, the City Council held a special meeting to consider the license agreement between NCTD and the City for public use of the NCTD right-of-way. The license

¹ Minutes of the Special and Regular Meetings of the NCTD's Board of Directors, Jan. 20, 2022, at 7, <https://lfportal.nctd.org/weblink/0/edoc/194186/Board%20Minutes%20-%2001202022%20-%20Special%20%20Regular%20Meeting.pdf>

agreement addressed the safety fencing project, public access to the upper bluff within the right-of-way, maintenance of the fence, liability, and other matters.² The City Council rejected the license agreement at the special meeting.³

The Executive Director of the Commission issued a Cease and Desist Order to NCTD on March 7, 2022, demanding that NCTD cease and desist from any construction of the safety fencing project in its right-of-way before it obtained a City of Del Mar Coastal Development Permit. The Commission noted therein that it was seeking to enforce the City of Del Mar's Local Coastal Plan.⁴ Shortly thereafter, on March 11, 2022, NCTD was served with a demand letter from the Friends of Del Mar Bluffs threatening to file a lawsuit to enjoin NCTD from implementing its stated plan to install safety fencing on the Del Mar Bluffs in its rail right-of-way unless NCTD agreed to suspend or terminate its plans to begin this work by March 18, 2022. NCTD did not agree to terminate its plans to build the safety fencing in its right-of-way.

Friends of Del Mar Bluffs filed a petition for writ of mandate and complaint for quiet title, invalidation of contract, and declaratory and injunctive relief, including preliminary injunctive relief, on March 21, 2022 in the Superior Court of the State of California for the County of San Diego. Specifically, Friends of Del Mar Bluffs claim NCTD violated a state grant agreement by not complying with state environmental permitting laws. Friends of Del Mar

² Special Meeting Agenda, Feb. 28, 2022, <https://www.delmar.ca.us/AgendaCenter/ViewFile/Agenda/02282022-2932>

³ San Diego Union-Tribune, *Del Mar Rejects Modified Plan for Railroad Fence*, Mar. 1, 2022, <https://www.sandiegouniontribune.com/communities/north-county/del-mar/story/2022-03-01/del-mar-rejects-modified-plan-for-railroad-fence>

⁴ This enforcement of Del Mar's Local Coastal Plan demonstrates the "patchwork of local regulation" concern that NCTD has pointed out in prior filings. This means each city with a Local Coastal Plan on the coast could make similar demands on a railroad if the Commission is allowed to proceed with its Cease and Desist Order.

Bluffs also “seek a judicial determination under California real property law of the public’s right to continue to access and use portions of the Del Mar Bluffs in NCTD’s right-of-way for sitting, walking, running, meditating, observing the Pacific Ocean and other public uses, as the public has for over 100 years.” In addition, Friends of Del Mar Bluffs seek declaratory relief establishing the invalidity of certain actions taken by NCTD on or around January 20, 2022, at a general meeting of its Board of Directors when it approved a contract to construct a 6-foot wire mesh fence on Del Mar’s upper bluff in the NCTD rail right-of-way without seeking a Coastal Development Permit under the California Coastal Act from the City. On April 12, 2022, NCTD filed a notice of removal of this civil action to the Court, where it sits.⁵

The Commission filed an action in state court against NCTD on April 19, 2022, seeking declaratory and injunctive relief as well as civil fines and exemplary damages. The Commission’s first cause of action seeks a writ of mandate directing NCTD to set aside its approval of the safety fencing construction, cancel its contract with Exbon, and refrain from taking other activities in furtherance of the safety fencing construction until NCTD complies with the California Environmental Quality Act (“CEQA”). The Commission also asks the state court for a declaration of rights and responsibilities of the parties with respect to CEQA, including that NCTD’s safety fencing project is not exempt from CEQA. The Commission’s second and third causes of action also request a declaration of rights and responsibilities of the parties with respect to the Coastal Act and the Executive Director of the Commission’s cease and desist order regarding compliance with the Coastal Act’s permitting requirements, respectively.

⁵ *Friends of Del Mar Bluffs et al. v. North County Transit District et al.*, Case No. 22-CV-503-LL-BGS (“FDMB Action”).

On April 26, 2022, NCTD filed a notice of removal in that action to the Court as well.⁶ On this same day, the Commission filed a motion at the STB for an order holding this matter in abeyance until final resolution of state court litigation now pending between the Commission and NCTD. NCTD opposed this motion. The STB has not ruled on this motion.

On April 29, 2022, NCTD filed a motion for a stay in the Commission Action in the Court pending resolution of this STB proceeding.⁷ On May 10, 2022, NCTD also filed a motion for a stay in the FDMB action.

FEDERAL COURT ACTIVITY UPDATE

On June 2, 2022, the Court agreed with NCTD that a stay is appropriate to allow the STB to determine the preemption issues pertaining to both cases.⁸ Although the Court had not heard from the Commission and FDMB regarding their position with respect to the stay, the Court stayed the cases *sua sponte* reasoning that “the orderly course of justice measured in terms of simplifying issues is served by allowing the STB to determine the preemption issues”⁹. In sum, the Court “exercised its power in the vein of judicial economy to avoid two different federal entities (*i.e.*, the District Court and the STB) from determining the same issues as the pleadings in these cases indicate that the parties disagree over preemption and whether the ICCTA creates a basis for removal in this case.”¹⁰ As a result, the Court granted NCTD’s motions to stay the

⁶ *California Coastal Commission v. North County Transit District et al.*, Case No. 22-CV-587-LL-BGS (the “Commission Action”),

⁷ NCTD Executive Director Matthew Tucker agreed in a sworn declaration submitted in support of the motion not to begin construction of the safety fencing project until the STB rules on its petition for declaratory order.

⁸ Commission Action (June 2, 2022), <https://ecf.casd.uscourts.gov/doc1/037118195233>

⁹ *Id.* at 8.

¹⁰ *Id.*

cases until the STB’s ruling on preemption.¹¹ Therefore, NCTD again respectfully urges the STB to rule on the preemption issues set forth in its petition, so it may commence construction on this safety fencing project in order to protect the public and eliminate delays to the freight and passenger rail service on its rail line.¹²

CALIFORNIA COASTAL COMMISSION ACTIVITY UPDATE

Del Mar Bluffs Stabilization Project

As has previously been noted, there are operational risks associated with operating rail service on the Del Mar bluffs due to bluff failures.¹³ Since 2003, the San Diego Association of Governments (“SANDAG”) and NCTD have completed four stabilization projects along the coastal bluffs between Coast Boulevard and Torrey Pines State Beach in the City. Bluffs Project 4 was initiated in late February 2021 due to a bluff collapse that required emergency repairs which included installing support columns into the bluffs to protect the tracks, rebuilding the bluff slope from the bottom up, installing sea walls to protect the toe of the bluffs, and installing drainage infrastructure to prevent further erosion. It is well documented that the pace of bluff

¹¹ On June 7, 2022, the Commission filed an Ex Parte Application to Vacate Stay and Resume Motion to Remand in response to this order which NCTD opposed. The court has not ruled on this application.

¹² See *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order*, FD 35861 (STB served Dec. 12, 2014); *Northwestern Pacific Railroad Company – Pet. for Declaratory Order*, FD 35977 (STB served Apr. 22, 2016); *Or. Coast Scenic R.R. v. Or. Dep’t of State Lands*, 841 F.3d 1069 (9th Cir. 2016); *North San Diego County Transit Development Board – Pet. for Declaratory Order*, FD No. 34111 (STB served Aug. 21, 2002); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 11 (STB served March 14, 2005), *recons. denied* (STB served May 3, 2005) (finding local regulation regarding routes for rail transportation of hazardous materials through the District of Columbia preempted because such regulation would interfere with interstate commerce and lead to piecemeal regulation, subverting the purpose of § 10501(b)).

¹³ See Amtrak OIG Report, *Safety and Security: More Active Engagement with Regional Partners Would Improve Awareness of Potential Operational Risks on the Pacific Surfliner Route*, Dec. 6, 2021. (Attached to NCTD Supplemental Status Update as Exhibit D).

erosion is accelerating and that no one knows if or when a significant failure could occur. Accordingly, NCTD and SANDAG collaborated with local, state, and federal stakeholders to identify funding to support safety improvements to address the accelerating failure events that were being experienced that caused both delays and shutdowns of rail operations and could cause a catastrophic rail accident. NCTD and SANDAG now have secured sufficient funding to stabilize the bluffs for 50 years. SANDAG submitted to the Commission a consistency certification pursuant to the Coastal Zone Management Act (“CZMA”).to implement the Del Mar Bluffs Stabilization Project 5 (“Project”) along a 1.6-mile-long segment of the existing NCTD railroad right-of-way in the City. The railroad runs atop these coastal bluffs which are generally 50 to 70 feet high and have a history of landslides and slope failure. This rail line is part of the nation’s second busiest rail corridor and serves Southern California’s key coastal population centers and two of the state’s most congested regions: Los Angeles and San Diego.

SANDAG certified that the Project (CC-0005-21) complies with the California Coastal Management Program (“CCMP”) under CZMA and will be conducted in a manner consistent with that program. The Commission staff recommended that the Commission **conditionally concur** with Consistency Certification CC-0005-21 on the grounds that, if modified in accordance with the conditions recommended by staff, the Project described therein would be consistent with the enforceable policies of the CCMP. On June 8, 2022,¹⁴ the Commission **conditionally concurred** with Consistency Certification CC-0005-21 as recommended by staff, meaning it imposed numerous additional conditions on the construction of this Project in order for NCTD and SANDAG to proceed with this crucial rail maintenance work.¹⁵

¹⁴ <https://documents.coastal.ca.gov/reports/2022/6/W7b/W7b-6-2022-report.pdf>

¹⁵ <https://www.coastal.ca.gov/meetings/agenda/#/2022/6>

The Project would stabilize areas along the bluffs that were not included in previous, Commission-authorized projects and retrofit existing, previously approved stabilization infrastructure. SANDAG proposed these efforts to help protect the existing railroad track and maintain it for rail operations, including passenger and freight. The Project can be grouped into the following categories of development: upper bluff stabilization structures (approximately 3,800 linear feet), seawalls and cutoff walls (approximately 2,500 linear feet) and changes to the bluff slope, installation of new drainage infrastructure and retrofit of existing drainage systems, access road improvements, and public access improvements. Overall construction is anticipated to take approximately 36 months.

The Project also includes a request for after-the-fact authorization for emergency repair projects at Mile Post 245.2 and Anderson Canyon. The emergency repairs started on March 1, 2021 and focused on existing bluff stabilization structures/seawalls that had failed several weeks before

The Commission based its conditional approval on SANDAG actively planning and seeking funding for the inland relocation of the railroad line on the bluffs in the City, an entirely hypothetical project that would involve billions of dollars in funding and the possible construction of a tunnel under the City,¹⁶ The Commission found that it is appropriate in this instance to use a shorter timeframe for analyzing the stability of the project seawalls and that it is appropriate for them to be designed to withstand lower amounts of sea level rise and be removable based on this relocation of the rail line from the coastal bluffs to an inland location.

¹⁶ This rail relocation project also would require approval from the STB under 49 U.S.C. § 10901 and § 10903, as it would involve abandonment of the existing line and construction of a new rail line in a different location outside the existing right-of-way.

However, because this infrastructure may not be safe and structurally stable for its full potential life, **Condition One** would limit the Commission authorization term for it to 30 years and require that no less than six months prior to the expiration of that authorization, SANDAG submit an application to remove all of the shoreline armoring and restore the affected areas to their original condition.

In other words, the Commission is only authorizing the Project for this shorter 30 years instead of the needed 50 years and requiring removal of this work done on the bluffs as well as restoration to the affected area's original state at the end of this timeframe based on the relocation of the rail line. The cost of this Project removal and restoration in the right-of-way will cost tens of millions of dollars, not to mention the billions of dollars that will be needed to move the rail line. It is hard to imagine a regulatory requirement that interferes with interstate freight service more than this condition.

However, the Commission did not stop there. Next, it reasoned that over a 30-year life, the project seawalls would occupy 49,566 square feet of beach area that would otherwise be available to the public for coastal access and recreation and retain approximately 17,824 cubic yards of sandy material from the bluffs. As mitigation for these impacts, the Commission imposed **Condition Two** that includes planning, design, environmental review and then construction of three significant coastal access and recreation features. These include a designated pedestrian railroad crossing at either 7th Street or 11th Street, a beach accessway from the bluff top to the beach below, and enhancement and formalization of the existing informal blufftop trail between 4th Street and Seagrove Park. The capital improvement project would provide significant coastal access and recreation benefits, by addressing the Commission's determined need for a designated rail crossing and formal beach accessway in the Project area.

Condition Five would require SANDAG to submit a plan detailing how public access would be maintained to the maximum extent feasible during construction activities and **Condition Six** would require SANDAG to locate and configure storage and staging areas in a manner that avoids and minimizes loss of public beach access parking.

These beach access conditions have absolutely no relationship to how the Project will impact coastal access in this area. The Commission is apparently basing this condition in part on how the Project will limit beach access during and after its construction. However, there are no existing legal accessways for the public to cross the railroad tracks to reach the beach at present in the Project area. Therefore, the Commission appears to be basing these beach access conditions on the rampant illegal trespassing across the railroad right-of-way to gain access to the beach from the City that is unfortunately extremely common in this area. Not only do these conditions have no relationship to the Project's affect on the coastal area, but they will also tack an unknown, but significant, number of dollars onto the Project in addition to these amounts mentioned above. These Commission conditions simply cannot be harmonized with the Interstate Commerce Commission Termination Act ("ICCTA") and interstate rail service; otherwise, railroads across the country in coastal zones could be required to pay these exorbitant costs in order to continue rail service which is clearly unsustainable economically.

NCTD strongly opposed the conditions proposed by the Commission in the staff report for the Project, arguing they are completely preempted by the ICCTA. Moreover, NCTD argued that the Commission's attempt to extract an unlimited funding commitment for coastal access improvements when the Project will have no impact on existing coastal access is completely arbitrary. Accordingly, NCTD stated that it shall not authorize the advancement of this Project into construction until such time that the STB has acted on NCTD's petition for declaratory order

or unless the Commission removes these conditions for the Project or unless SANDAG expressly agrees to solely fund and implement any such conditions.

By way of reminder, NCTD is the owner and maintainer of the railroad at issue; SANDAG, under the provisions of California Senate Bill 1703, is only authorized to assume specified responsibilities and functions related to planning, programming, project development and construction. Under SB 1703, NCTD retained all operational/maintenance control and safety responsibility for the railroad right-of-way. NCTD grants SANDAG access for approved capital improvements and reserves the right to reject access to NCTD's railroad property. In the instant matter, NCTD shall not authorize SANDAG to advance construction of the safety improvements noted herein related to the stabilization project under the terms and conditions imposed by the Commission.

NCTD noted that it, the Commission, and SANDAG have agreed that the Project impacts are limited to loss of beach recreational space and future beach sand, with no impacts to coastal access. NCTD explained that the mitigation projects in this conditional consistency determination required by the Commission impose a massive financial burden on NCTD, BNSF, and Amtrak to operate on this rail line and do not address those agreed-upon impacts. NCTD emphasized that the conditions being proposed for the Project by the Commission impose significant obligations and undetermined future project costs to the region far beyond the implementation of the stabilization Project. NCTD is unaware of any funding that has been authorized to meet the requests of the Commission to implement their requirements. Moreover, from an NCTD perspective, the Commission requests do not support state of good repair needs, improvements to mobility, climate change, or advance social equity outcomes.

Despite these objections by NCTD regarding the Project as well as preemption by the ICCTA, the Commission approved the SANDAG certification with these onerous and unrelated conditions. In other words, the Commission is engaging in regulation that will reduce the useful life of the rail repair project and require NCTD to redirect critical railroad funding to build pedestrian crossing for one of the most affluent communities in the United States.¹⁷ NCTD is not willing to accept the risk of redirecting critical rail funding that is not consistent with its rail operations, or be subjected to future failures based on an assumption that a multi-billion-dollar tunnel will be built to move the rail traffic off the bluffs and sufficient funding will be provided to support its maintenance at some point in the future. It is hard to imagine conditions that are more incompatible with interstate rail service and therefore preempted by the ICCTA than those described above that impose massive additional costs on this crucial rail safety project and necessitate the abandonment and relocation of the rail line itself.¹⁸

CONCLUSION

Based on the foregoing, NCTD respectfully urges the STB to issue a decision on the preemption issues raised in its petition herein as soon as possible to allow it to operate its rail line in accordance with the ICCTA without undue interference from these permitting requirements.

¹⁷ See Letters between Commission and SANDAG in Jan. 2022. (Attached to Supplemental Status Update as Exhibits E and F).

¹⁸ See *United States Environmental Protection Agency—Pet. for Declaratory Order*, FD 35803, slip op. at 8 (STB served Dec. 30, 2014) (providing guidance in the Clean Air Act context that subjecting locomotives “‘to fluctuating rules as they cross[] state lines’ (and as they cross air quality regions) . . . would likely ‘directly interfere’ with the purpose of § 10501(b)”); *Ass’n of American Railroads – Pet. for Declaratory Order*, FD 36369 (STB served Dec. 30, 2020).

Respectfully submitted,

/s/ Daniel R. Elliott

Daniel R. Elliott
GKG Law, P.C.
1055 Thomas Jefferson St., NW
Suite 500
Washington, DC 20007
(202) 342-5248
delliott@gkglaw.com

Attorney for North County Transit District

Dated: June 14, 2022

Certificate of Service

I certify that I have, this 14th day of June 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott

Daniel R. Elliott
Attorney for North County Transit District