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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NORTH COUNTY TRANSIT DISTRICT –	)	
VERIFIED PETITION FOR	)	Docket No. FD 36433
DECLARATORY ORDER	)	
	)	

**REPLY TO THE THIRD SUPPLEMENTAL STATUS UPDATE
OF THE CITY OF DEL MAR**

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Dated: July 1, 2022

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Pursuant to 49 C.F.R. § 1104.13, the City of Del Mar (“Del Mar”) hereby replies to the Third Supplemental Status Update that North County Transit District (“NCTD”) filed with the Surface Transportation Board (“Board” or “STB”) on June 14, 2022 (“NCTD Third Supplement” or “Third Supp.”).¹

SUMMARY

Like in its previous two “status updates,” NCTD claims in its Third Supplement that “recent events make NCTD’s request for expedited consideration of its petition for a declaratory order even more important at this time.” Third Supp. at 1. Respectfully, and once again, they do not. Even after NCTD finally gets to its actual

¹ While NCTD’s filing is entitled “Second Supplemental Status Update,” NCTD previously filed its Second Supplemental Status Update on April 13, 2022, and therefore, NCTD’s June 14, 2022 filing is actually its third status update. Accordingly, Del Mar refers to NCTD’s June 14, 2022 filing as the NCTD Third Supplement.

update halfway through its filing,² much of its update grossly mischaracterizes and misrepresents the facts with respect to the Coastal Commission’s Federal Consistency Review of the Del Mar Bluffs Stabilization Project 5 (“Bluffs Stabilization Project” or “Project”) under the Coastal Zone Management Act (“CZMA”), and the state law action concerning NCTD’s fencing plans.

NCTD’s Third Supplement adds nothing new that warrants the issuance of a declaratory order at this time or that provides a basis for any finding of preemption, let alone the need for expedited consideration. To the contrary, the actual updated facts demonstrate that a substantial portion of NCTD’s petition has now been rendered moot because after two and a half years of hard work and cooperation, the participating governmental stakeholders, **including NCTD, have now reached agreement** on the Coastal Commission’s conditional concurrence of the Bluffs Stabilization Project. As such, there can be no conflict with ICCTA and it would be unwise and unnecessary for the Board to intervene.

² The first six and a half pages of NCTD’s filing are not an update at all, but instead simply repeat, almost verbatim, portions of NCTD’s previous two “updates” and other filings. Del Mar has already fully responded to and refuted these other pleadings, and the factual basis that NCTD incorrectly asserts as justification for its declaratory order request. For the reasons previously addressed by Del Mar, and the California Coastal Commission (“Coastal Commission”) in response to NCTD’s previous filings in this docket, nothing in the repetitive “background” section of NCTD’s Third Supplement provides valid support for its petition, or is necessary or helpful for the Board’s further consideration of the matter.

NCTD's Third Supplement only serves to further establish that a declaratory order from the Board might greatly impede and hinder the orderly and prompt implementation of the Bluffs Stabilization Project, and potentially jeopardize Project funding. Further, especially given the parties ability to reach final agreement on the Bluffs Stabilization Project, any remaining issues can and should be addressed through Board-sponsored mediation, under 49 C.F.R. § 1109, as Del Mar and the Coastal Commission have requested, just as the parties have cooperatively addressed and resolved railroad safety and stabilization projects on the Del Mar Bluffs for over two decades.

REPLY

In its June 23, 2022 update, and its June 29, 2022 update, (collectively "Replies") the Coastal Commission fully responds to NCTD's latest misstatements, corrects the record, and explains why NCTD's continuing complaints about the Coastal Commission's review of the projects are misleading and unwarranted. Del Mar hereby joins and adopts the Coastal Commission's Replies, and offers three additional points pertaining to the Coastal Commission's Federal Consistency Review, which is the main subject of NCTD's Third Supplement.

First, the factual basis for NCTD's continuing objections to the Bluffs Stabilization Project is mistaken and highly misleading. In fact, three of the four complaints NCTD raises in its Third Supplement against conditional approval of the Project and now claims will "necessitate the abandonment" of its rail line, including

Condition 1, 30-year Project authorization; Condition 5, submission of a plan to maintain public access during construction; and Condition 6, requiring storage and staging areas for the Project that avoid and minimize loss of beach access and parking (Supp. at 9-11), are not included or addressed at all in NCTD's response to the conditional concurrence that it filed with the Coastal Commission. *See* Letter from Matthew O. Tucker, Executive Director NCTD to California Coastal Commission (June 7, 2022) located at <https://documents.coastal.ca.gov/reports/2022/6/W7b/W7b-6-2022-corresp.pdf>. NCTD should not be allowed to complain about conditions that it did not even raise in its submission on conditional approval before the Coastal Commission.

More importantly, as Del Mar has previously advised, and the Coastal Commission also confirms in its June 23, 2022 update (at 5-6), the San Diego Association of Governments ("SANDAG"), not NCTD, has jurisdiction over the Bluffs Stabilization Project. As the Coastal Commission discusses, SANDAG as the lead agency on the Project is continuing to work in close cooperation with the Coastal Commission on Project review, and in fact, SANDAG, the Coastal Commission, **and NCTD** have now reached **agreement** on the Commission's conditional concurrence of the Project. *Id.* at 2, 9; Coastal Commission June 29, 2022 Update at 2-3. This agreement on the Project confirms and verifies that the Coastal Commission's conditional concurrence reached through a collaborative approach does not block or prevent rail operations as NCTD claims.

Second, as the Coastal Commission fully documents, (June 23 Update at 4, 6, 9-10) NCTD's characterization of the conditional concurrence conflicts directly with that of the Project sponsor, SANDAG. Exhibit B to the Coastal Commission's June 23, 2022 reply contains the SANDAG Board of Directors Project Update in the Coastal Commission's concurrence decision.³ SANDAG's Project Update is extremely positive as to the concurrence decision, and contradicts NCTD's update, in several meaningful respects, including:

- Describes the conditional approval as “a mutually agreeable solution” and that a “key milestone of the project” was the Coastal Commission’s conditional approval reached “after substantial collaboration between staff from SANDAG and CCC”;
- Describes that the Coastal Commission’s conditional approval on June 8th was imperative to allowing SANDAG to meet funding deadlines for grant funding of \$50 million;
- Describes as inevitable, not “entirely hypothetical,” the eventual need to move the rail line off the Bluffs;
- Confirms that 30 years, not 50 years, was and continues to be the plan that the SANDAG “project team” developed and supports;
- Describes “CCC’s access improvement conditions [as] provid[ing] long-needed safe legal access to the beach in this location, which is an important regional goal, as it will enhance public safety and improve freight and passenger rail operations”;
- Describes the Coastal Commission’s review process as collaborative, on which the Coastal Commission, NCTD, and Del Mar spent over two and a half years to develop; and

³ The Project Update is post-dated June 24, 2022, the date of the SANDAG’s recent Board meeting.

- Describes the Project, as conditioned, as “a critical public safety project” and that “it is imperative to move forward with the project without delay.”

SANDAG Board of Directors Project Update (dated June 24, 2022) at 1-2.

SANDAG’s Project Update confirms and verifies that the Coastal Commission’s conditional approval fully supports and furthers continuing railroad operations, and public safety, and not the opposite as NCTD claims. NCTD’s continuing complaints about the Federal Consistency Review process are an unwarranted and misguided attempt to manufacture a theory that Board involvement is allegedly warranted, when the facts show it is clearly not. Also, while NCTD has repeatedly complained that the Coastal Commission and Del Mar seek to unduly delay this important regional Project, ultimately it is NCTD that now boldly proclaims that “NCTD shall not authorize SANDAG to advance construction of the safety improvements . . . related to the stabilization project under the terms and conditions imposed by the Commission.” NCTD Supp. at 12.⁴

⁴ To the extent that SANDAG (and possibly NCTD, if it has standing) has any remaining issues with the Coastal Commission’s consistency review and/or conditional concurrence, the applicant has a remedy. It may file a notice of appeal to the National Oceanic and Atmospheric Administration (“NOAA”) Administrator under 15 C.F.R. § 930.125. Respectfully, the Board should not allow its processes to be used as a possible means to sidestep a sister agency’s (NOAA’s) established review procedures, especially in the face of a clear agreement by the applicant (and NCTD) in the consistency review determination.

Third, the Coastal Commission’s June 23, 2022 update provides further supporting information that NCTD, along with SANDAG, specifically **agreed** to participate in the Coastal Commission’s consistency certification application process for the Project. *See* Coastal Commission June 23, 2022 Update at 5. As the Coastal Commission aptly describes: “[g]iven that SANDAG has complied with this agreement, submitted the consistency certification to the Commission, and obtained the Commission’s conditional approval, NCTD cannot now disavow its agreement and seek to invalidate the Commission’s approval after-the-fact.” *Id.* The STB has consistently held that voluntary agreements of this type are not preempted, especially because such agreements “must be seen as reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce.” *Twp. of Woodbridge, NJ, et al. v. Consol. Rail Corp.*, NOR 42053 (STB served Dec. 1, 2000) at 4-5. Moreover, if accepted, such contract preemption would have no end and would lead to absurd results, as it would allow railroads like NCTD to unilaterally end-run any disfavored contractual commitments of its choosing. *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 297 F.Supp.2d. 326, 333 (D. Me. 2003).

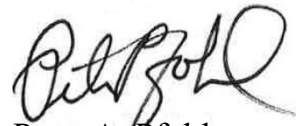
CONCLUSION

In summary, most of NCTD’s recitation of updated “facts” in its Third Supplement are untrue and contrived. The actual updated facts provide further support for the Board to decline to issue a declaratory order in this matter, especially since most of the objections raised by NCTD have now been rendered moot through its recent

agreement on the Coastal Commission's conditional concurrence of the Bluffs Stabilization Project. Significantly, the Coastal Commission's consistency review supports and furthers rail operations, and it is NCTD, and NCTD alone, that is now threatening to renege on its promises, deny Project access, delay bluff stabilization efforts, and jeopardize Project funding. Especially with substantial agreement between the parties now having been reached (despite some unfortunate harsh rhetoric and hyperbole by NCTD), Del Mar continues to believe that, if the parties collectively act in good faith, and with the assistance of the Board staff, they will come to a mutually agreeable resolution on the remaining issues that furthers the public interest. Accordingly, prior to taking any formal action on NCTD's petition, the Board should first grant Del Mar and the Coastal Commission's Motions for Mediation and commence mediation between NCTD, the Coastal Commission, SANDAG, and Del Mar to assist them in resolving any remaining differences.

Respectfully submitted,

CITY OF DEL MAR



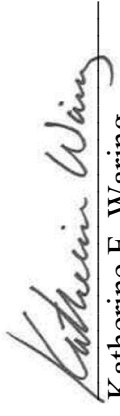
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Dated: July 1, 2022

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 1st day of July, 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.


Katherine F. Waring
An Attorney for City of Del Mar