

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36433

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

**NORTH COUNTY TRANSIT DISTRICT REPLY IN OPPOSITION
TO CALIFORNIA COASTAL COMMISSION'S UPDATES AND
THE CITY OF DEL MAR'S REPLY REGARDING RECENT
APPROVAL OF BLUFFS STABILIZATION PROJECT**

North County Transit District ("NCTD") respectfully submits its reply in opposition to the California Coastal Commission's ("CCC") first and second update, filed on June 23 and 29, 2022 ("CCC First Update" and "CCC Second Update", respectively), and the City of Del Mar ("City") reply¹, filed on July 1, 2022 ("City Reply"), all in response to the update NCTD filed on June 14, 2022 ("NCTD Update"). The CCC and City ask the Surface Transportation Board ("Board" or "STB") to decline to issue a declaratory order in this matter based on the facts in the CCC update regarding the recent approval of the Del Mar Bluffs Stabilization Project 5 ("Project"). NCTD

¹ The City Reply adopted and incorporated by reference the CCC arguments in the CCC First and Second Updates and added three additional arguments in support of its position. In the City Reply, the City falsely accuses NCTD of providing mostly "untrue and contrived" facts in the NCTD Update. Oddly, the City does not mention what was untrue about the facts that merely brought to the attention of the Board the CCC project consistency certification and a recent order by the district court in a related proceeding. That is because there were no untrue facts in the NCTD Update. Even more oddly, the facts in the NCTD Update did not even mention the NCTD agreement with the San Diego Association of Governments ("SANDAG") which is the main basis for the argument in the City Reply. Of course, the conversation that led to that tentative agreement did not occur until three days after NCTD filed the NCTD Update. Of note, the NCTD and SANDAG parties have yet to reach a formal agreement.

opposes this request by CCC and the City and provides the appropriate course of action based on Board precedent. NCTD also addresses various other related arguments in these filings by CCC and the City.

FACTS

For the benefit of the Board, the following is the unmodified text included in the NCTD memorandum regarding the SANDAG Board of Directors Agenda Item No. 16: Del Mar Bluffs Stabilization Project Update:

***Reports Agenda - Item 16: Del Mar Bluffs Stabilization Project Update
SANDAG Action Requested: Information—No Action Necessary
NCTD Action Requested: Information—No Action Necessary***

The stabilization of the bluffs is a critical safety project that supports the continued and uninterrupted operations of passenger and freight rail services.

On June 8, 2022, the California Coastal Commission (CCC) provided conditional concurrence for the Del Mar Bluffs 5 (DMB5) project (Project) based on the negotiated agreement between SANDAG and the CCC. NCTD identified the following conditions as unacceptable.

- The construction of coastal access and recreational improvements for a maintenance/safety project where legal public access does not exist today; and*
- The future reapproval and removal of the seawalls at the time of permit expiration in thirty years.*

NCTD believes that the conditions imposed by the CCC may have significant impacts on the costs of projects and are outside of the CCC's authority based on the 2002 determination made by the Surface Transportation Board (STB) regarding the double-tracking project in the City of Encinitas. In that case, the STB concluded that the preemption provision of 49 U.S.C. § 10501(b) and the Interstate Commerce Commission Termination Act of 1995 (ICCTA), expressly provides that the jurisdiction of the STB over "transportation by rail carriers", such as NCTD, is "exclusive" and determined that the City's Coastal Act permitting process was preempted by 49 U.S.C. § 10501(b) and ICCTA. (City of Encinitas v. North San Diego County Transit Development Board, et al., Case No. 01-CV-1734-J [AJB]). It Re: SANDAG Board of Directors on June 24, 2022 June 23, 2022 Page 4 of 4 is well settled precedent that Section 10501(b) categorically preempts requirements to obtain permits or other review before engaging in activity regulated by the STB.

Accordingly, NCTD believes that the STB will reaffirm its 2002 decision in its review of the petition that NCTD filed in 2020 that cited specific concerns related to local and state agency attempts to provide oversight and control over interstate rail projects.

Recognizing the criticality of the Del Mar Bluffs Stabilization Project 5, SANDAG and NCTD staff met via teleconference on June 17, 2022, and based on those discussions, NCTD believes that we have collectively reached an agreement that supports the advancement of the project into construction, addresses NCTD concerns related to the conditions imposed by the CCC, and allows NCTD to continue to advance its petition with the Surface Transportation Board (STB) without being prejudiced by SANDAG's acceptance of the CCC project conditions pertaining to access and recreation. Staff is working on finalizing the terms of the agreement. NCTD's advancement of the project is contingent upon the execution of the final agreement between SANDAG and NCTD.

(Exhibit A, attached to the CCC Second Update).²

This communication dated June 23, 2022 is consistent with NCTD's communication to SANDAG's Executive Director, Hasan Ikhata, dated May 19, 2022 (attached hereto as Exhibit 1) and CCC's Executive Director, dated June 7, 2022, prior to the CCC approving the project conditions on June 8, 2022.³ Specifically, NCTD acknowledges the safety criticality of the bluffs stabilization Project, identifies overreach by the CCC, expressly rejects the CCC conditions, but states an allowance of SANDAG, if it desires, despite NCTD's objections, to agree to fully fund and implement the specified CCC conditions as a concurrent, non-project and segregated activity,

² In the CCC Second Update, CCC claims that it is providing additional information regarding NCTD's recent actions that NCTD has not mentioned to this Board, wrongly inferring that NCTD has purposefully failed to include this information in the NCTD Update. First, NCTD filed the NCTD Update on June 14 prior to its discussions with SANDAG on June 17. Second, NCTD and SANDAG have not finalized this agreement as this NCTD memorandum makes clear. As a result, NCTD will report any arrangement between the parties once it is reduced to writing and finalized, if at all. This is just another attempt by CCC to wrongly accuse NCTD of some type of deception like it did in the CCC First Update regarding the recent approval of the Project. None of these unfounded claims by CCC have any basis in fact and are unwarranted.

³ 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>.

at the sole expense of SANDAG, and expressly articulates NCTD's intent to continue seeking a determination from this Board regarding the Project for various reasons.⁴ NCTD's position regarding the need for a Declaratory Order should not be prejudiced by SANDAG's willingness, despite NCTD's objections, to separately fund project elements that are not appropriate for the CCC to include as part of its review of a rail maintenance and safety project under a federal consistency review. SANDAG's Executive Director's agreement with the CCC to accept the Project conditions is inconsistent with his letter on or around February 2022 (see letter from SANDAG to CCC attached to NCTD's Supplemental Status Update, filed March 4, 2022, as Exhibit F), which stated the following:

As to the request to include coastal access in the federal consistency review, the DMB5 project will not result in impacts to legal coastal access and thus, no mitigation for impacts to access is being proposed as part of the DMB 5 project. Road and access crossings are the responsibility of the local agency which has the responsibility for traffic control and law enforcement at the public roadway-rail grade crossings; not railroads or train operators (See 49 CFR Part 222). The City of Del Mar is ultimately responsible for identifying safe and legal crossings across the railroad tracks and applying to the California Public Utilities Commission (CPUC) pursuant to Public Utilities Code §§ 1201- 1205. SANDAG remains supportive and willing to facilitate and collaborate with the City and NCTD to identify access locations for consideration by the CPUC.

⁴ In its Petition for Declaratory Order, NCTD also asked for a ruling on whether CCC/City of Del Mar California Coastal Act regulation of its safety fencing project on the Del Mar Bluffs was preempted by 49 U.S.C. § 10501(b) as well. This issue was not argued in these pleadings by CCC and the City but has been discussed at length in other pleadings. Therefore, this reply by NCTD only addresses the Project preemption issue. This California Coastal Act permit preemption issue clearly should be resolved by the STB as it is now at issue in two subsequently filed cases now pending in federal district.

SANDAG's agreement to accept the CCC conditions was not approved by either the NCTD or the SANDAG governing Boards of Directors. For clarity, NCTD has stated in all of its communications that the Project will not be advanced if SANDAG does not agree to solely assume responsibilities and funding for the conditions deemed unacceptable by NCTD as a non-project concurrent activity.

ARGUMENT

1. The STB Obviously Has the Discretion to and Should Issue a Declaratory Order Regarding the Project which is Ripe and of Major Significance to the Rail Industry.

Under 5 U.S.C. § 554(e), the STB has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. Granting a petition for a declaratory order is an action committed to the STB's discretion, and the STB's discretion in considering such requests is broad. *See Intercity Transportation Company - Petition for Declaratory Order - Classification of Battery Pack Cabinets* (not printed), No. 37476 (ICC served August 30, 1983), *aff'd*, *Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984). In exercising its discretion, the STB considers many factors, including significance to the industry and ripeness of the controversy. *See Delegation of Authority—Declaratory Order Proceedings*, 5 I.C.C.2d 675, 676 (1989).

Agencies are generally free to act in adversary or legislative capacities, and it is true not only in case of rulemaking but also where an agency proceeds via traditionally adjudicatory forms of decision, and thus an agency, if authorized by statute, may issue an adversary opinion or abstract declaration without regard to existence of actual controversy. *Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373 (D.C. Cir. 1979). Unlike United States District Courts, federal administrative agencies are not restricted to the adjudication of matters which are cases and controversies within the meaning of Const. Art. 3, § 1. *North Carolina Utilities Commission*

v. F.C.C., 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027. Therefore, it is clear that the STB has the discretion to issue a declaratory order here and should do so based on these factors, ripeness and significance to the industry, it normally considers in making this determination.

With respect to ripeness, the Project already has been subjected to a massive delay, from the date SANDAG submitted its request for consistency certification on August 12, 2021 to the date the CCC conditionally concurred with Consistency Certification CC-0005-21 on June 8, 2022. In other words, NCTD has had to wait for the last ten months for this ruling by CCC, all the while risking another bluffs collapse and possible rail disaster in its own rail right-of-way.⁵

After this huge delay, CCC imposed numerous additional conditions on the construction of this Project in order for NCTD and SANDAG to proceed with this crucial rail maintenance work. The scope of the project was reduced resulting in a 30-year useful life compared to 50-year useful life which was NCTD's expectation at the inception of the project. Additionally, some of the conditions will impose a huge financial burden on the Project that have absolutely no relationship to the work being done by NCTD in its right-of-way. For example, the CCC 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

⁵ CCC not only held NCTD hostage during these ten months but held SANDAG hostage as well. While the City and CCC claim that SANDAG was satisfied with the CCC certification, that is simply not true. Throughout the certification process, CCC squeezed SANDAG for more conditions including beach access. It even attempted to consolidate the entirely unrelated safety fencing project into the certification process for the Project for what one can only believe was to improve its chances in this litigation. SANDAG opposed these demands that had absolutely no relationship whatsoever to the Project but finally succumbed to the request for beach access conditions in order to move the project forward as it had little leverage against CCC while the project was under review. (See letters between SANDAG and CCC attached to NCTD's Supplemental Status Update, filed March 4, 2022, as Exhibits E and F.)

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 in the City. This condition 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.⁶

⁶ In the City Reply, it argues that NCTD should not be allowed now to complain about the conditions it did not object to during the CCC consistency review proceeding (like the onerous and arbitrary Condition One which would limit the authorization term for the Project to 30 years, instead of 50 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), apparently making an attempt at a waiver argument. However, NCTD has been arguing in this STB proceeding since August 28, 2020, that CCC has no right to regulate this Project at all pursuant to 49 U.S.C. § 10501(b). Moreover, NCTD Executive Director Matthew Tucker did object to all of the conditions imposed by the CCC with respect to preemption in a letter to the CCC: "The conditions being proposed by CCC for the Project, especially as it relates to the "Coastal Access and Recreation" conditions, are completely preempted by the ICCTA." In the same letter, he also objected to all of the conditions with respect to the CCC proceeding itself: "The conditions being proposed for the Project by the CCC 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 CCC to implement their requirements. Moreover, from a NCTD perspective, the CCC requests do not support state of good repair needs, improvements to mobility, climate change, or advance social equity outcomes." 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>. Also, in his testimony at the June 8, 2022 CCC hearing by NCTD Director of Engineering and Facilities Scott Loeschke, at <https://cal-span.org/unipage/?site=cal-span&owner=CCC&date=2022-06-08> at 3:33-3:34, he stated as follows: "The conditions being proposed for the Project by the CCC 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 is available to meet the proposed permit requirements of California Coastal Commission related to coastal access and recreation." Therefore, this waiver argument by the City is factually unfounded.

However, these beach access conditions have absolutely no relationship to how the Project will impact coastal access in this area. The CCC 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 CCC appears to be basing these beach access conditions on the rampant illegal trespassing across the NCTD railroad right-of-way to gain access to the beach from the City. These CCC conditions imposed under Federal Consistency Review under the Coastal Zone Management Act simply cannot be harmonized with the Interstate Commerce Commission Termination Act (“ICCTA”) and clearly interfere greatly with interstate rail service on this line; otherwise, railroads across the country in coastal zones could be required to pay these unrelated, exorbitant costs and could be subjected to a patchwork of requirements, including taking of railroad right-of-way, by the relevant state coastal commissions in order to continue rail operations which is clearly unsustainable economically.⁷

⁷ CCC states that the Federal Railroad Administration (“FRA”) has approved and partially funded the Project. CCC notes the FRA is the federal agency responsible for railroad safety and the Federal Rail Safety Act (“FRSA”) is the primary statutory authority that controls preemption in the sphere of railroad safety.

NCTD, in response, points out that Congress has vested aspects of national rail oversight in different federal agencies: U.S. Department of Transportation - FRA (with primary jurisdiction over rail safety matters) and the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network). The jurisdiction and regulatory responsibilities of these federal bodies necessarily overlap to some degree, and, where they do, the federal bodies coordinate and cooperate with each other as appropriate. *See Boston & Maine Corp. v. STB*, 364 F.3d 318 (D.C. Cir. 2004); *Tyrrell*. “The fact that the preemption contained in section 10501(b) overlaps with the preemptions contained in FRSA ... does not lessen the preemptive effect of section 10501(b) or vice-versa.” *CSX Transportation, Inc.* FD 34662, slip op. at 10 (STB served Mar. 14, 2005) (citing *Tyrrell*, 248 F.3d at 523 (both the Board and FRA have jurisdiction over railroad safety and the ICCTA and FRSA preemptions should each be taken into consideration to determine whether a particular action is federally preempted)).

One major reason that permitting or preclearance requirements like the ones at issue here are categorically preempted is because they will delay or prohibit crucial rail infrastructure projects which could grind interstate commerce to a halt. *City of Auburn v. STB*, 154 F.3d 1025, 1031 (9th Cir. 1998) (state and local authorities could deny or unreasonably delay a railroad's right to construct or maintain its facilities or to conduct its operations, which would irreconcilably conflict with the Board's authorization of those facilities and operations); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 8-10 (STB served Mar. 14, 2005). These permitting requirements for rail operations could be used as a weapon by the relevant state agency to stop rail projects in their tracks and therefore must be preempted under 49 U.S.C. § 10501(b). *California High-Speed Rail Authority – Pet. for Declaratory Order*, FD 35861, slip op. at 10 (STB served Dec. 12, 2014); *DesertXpress Enters., LLC—Pet. for Declaratory Order*, FD 34914, slip op. at 5 (CEQA *per se* preempted for proposed 200-mile high-speed passenger system). *See also N. San Diego Cnty. Transit Dev. Bd.—Pet. for Declaratory Order*, FD 34111, slip op. at 9 (finding state and local requirement to apply for permit and prepare environmental report before constructing track to be preempted). In fact, the CCC certification of the Project is premised on the eventual movement of the entire NCTD rail line on the Del Mar Bluffs to an inland location. This requirement would cost multiple billions of dollars and clearly demonstrates how an agency like CCC can improperly impact interstate rail service if the STB does not act consistent with its authority and the law. Obviously, these concerns about the negative impacts of these types of permitting requirements expressed by the STB and the courts are exactly why the CCC's actions here cannot be harmonized with CZMA Federal Consistency Review, as the CCC has delayed and burdened this straightforward rail maintenance project, thereby making it almost impossible to complete.

Consequently, it is beyond dispute that this proceeding is ripe for determination as expeditiously as possible or CCC will have succeeded in forcing the Project to be the source of beach access for this wealthy community where no such legal access exists today and will continue to take arbitrary actions of this nature and to hold future rail projects hostage throughout California. *See, e.g., Rays Home Delivery Services – Pet. for Declaratory Order*, No. MC-C-30219 (ICC served Dec. 14, 1993) (ICC instituted declaratory order proceeding to determine whether petitioner was involved in interstate or intrastate commerce in order to determine if enforcement efforts by Illinois regulatory authorities were valid.); *French Paper Company – Pet. for Declaratory Order – Spur Track Determination*, FD 32559 (ICC served Jan. 25, 1995) (ICC instituted declaratory order proceeding despite railroad’s argument that there was no controversy where shipper was concerned about future rail service where the status of its track was disputed.); *May Dep’t Stores Company and Volume Shoe Corp. – Pet. for Declaratory Order – Transportation within Single State of Merchandise Imported by Water*, No. MC-C-30146 (ICC decided Aug. 22, 1989) (where state agency was “all but certain” to discipline carrier, ICC instituted declaratory proceeding to determine whether transportation was interstate or intrastate).

Moreover, as the participants in this proceeding demonstrate, the preemption issues that this case raises are of national significance to the rail industry. Without a preemption ruling here, local regulatory agencies across the country will be free to regulate railroads’ maintenance activities within a coastal zone. Not only will this severely interfere with rail service as demonstrated by the huge delay and onerous conditions here, but it will also create a patchwork of regulation as each state’s coastal commission weighs in on railroad maintenance projects across the country. The importance of these preemption issues also is demonstrated by the parties who

have chosen to support NCTD's position in this proceeding, like Amtrak and the Association of American Railroads.

In addition, this rail line is part of Amtrak's second busiest intercity passenger rail corridor in the nation. Amtrak operates the Pacific Surfliner intercity service on the tracks, operating 26 trips daily between Los Angeles and San Diego. Also, BNSF moved more than 4.3 million tons of freight on this rail line (in 2017) and cannot afford any further disruptions to its service in California that is already struggling during these unprecedented times for the U.S. supply chain. Furthermore, the rail corridor is designated as part of the Strategic Rail Corridor Network ("STRACNET") due to its importance for national defense. Without a decision, the CCC will be emboldened to continue its policy of regulating railroads in coastal zones in an onerous and arbitrary manner with a focus on supporting affluent coastal communities that are opposed to freight and passenger rail operations⁸. The national significance of a ruling on NCTD's declaratory order petition is extremely significant and warrants a decision as soon as possible to remedy this situation and to stop further actions by the CCC that run counter to 49 U.S.C. § 10501(b).

Therefore, the factors of ripeness and significance to the rail industry all strongly support a decision on this Petition for Declaratory Order by NCTD.

2. The Agreements between NCTD and SANDAG Have Absolutely No Impact on the Preemption Arguments Made by NCTD Regarding the Project.

⁸ In fact, there is an entire group in the City of Del Mar, led by a Del Mar City Councilmember, that will not be satisfied until NCTD's tracks, and one of the busiest interstate rail corridors in the country, is eliminated in its entirety. See <https://coaster-rail-to-trail.org>.

As noted by CCC and the City, NCTD and SANDAG agreed in early January 2022 to “[p]repare and submit to the Coastal Commission a consistency certification application for the proposed project. This shall include detailed project descriptions, maps, graphics, and analyses to provide evidence that the proposed designs are consistent with the relevant policies of the Coastal Act.” (Attached to CCC First Update as Exhibit D, p. 3, ¶ 7 [Addendum 18 Project Scope of Work EXHIBIT A S896855 for the “Del Mar Bluffs Stabilization 5”). It is not in dispute that SANDAG was the applicant for the federal consistency certification. (CCC First Update at p. 5). NCTD has consistently worked with SANDAG on rail projects related to its rail line to help with the certification process controlled by CCC. In doing so, NCTD certainly never has agreed with SANDAG or any other entity about the legal propriety of this preempted review process. SANDAG’s February 2022 letter was consistent with NCTD’s position regarding NCTD’s authority as a common carrier. SANDAG’s Executive Director has expressed a commitment to support the CCC’s and the City’s desire to relocate the tracks and construct improvements that provide safe and legal access based on its organizational goals/priorities within the region. NCTD hopes that the SANDAG Executive Director is able to identify the multi-billions in funding that will be required to support his commitments to the CCC. However, his commitments or desires are not binding upon NCTD, the designated rail agency of record for safety and the designated agency responsible for rail interstate commerce. In 2020, NCTD decided to challenge the CCC review process under 49 U.S.C. § 10501(b) in this proceeding, arguing that CZMA and the ICCTA could not be harmonized regarding the Project. However, NCTD wanted to move this critical safety project forward as it awaited a decision from the STB.

CCC and the City seem to believe that a verbal or final agreement between NCTD and SANDAG has some type of significance with respect to this case. However, that is plainly wrong.⁹

Importantly, NCTD is making efforts to reach an agreement with SANDAG, not CCC. Therefore, a potential agreement does not have any relevance to NCTD's dispute with CCC regarding the Project and NCTD's communications consistently reaffirm its intent to seek a declaratory ruling from the Board. *See, e.g., California High-Speed Rail Authority*, slip op. at 10 (the Board has recognized that voluntary agreements between rail carriers and state or local entities that are regulating interstate commerce might not be preempted under § 10501(b)). This is also what happened in *Twp. of Woodbridge, NJ, et al. v. Consol. Rail Corp.*, NOR 42053 (STB served Dec. 1, 2000) at 4-5 (Conrail's voluntary resolution with city to resolve dispute regarding idling was not preempted), that the City relies on in making its voluntary agreement argument. This reasoning does not apply to agreements by a railroad with entities that are not regulating the railroad like here.

The City also relies on *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R.*, 297 F.Supp.2d. 326, 333 (D. Me. 2003) in support of its voluntary agreement argument. However, this case involved the rail carrier making an agreement with the rail shipper to provide rail service. The rail

⁹ CCC and the City also argue that SANDAG's role as applicant for the Project somehow has an impact on this case. This is simply a red herring. NCTD is the rail carrier as authorized by the STB. It is also the owner and maintainer of the railroad line at issue. It has the common carrier obligation and must accommodate the rail service by Amtrak and BNSF on its rail line. SANDAG has none of these responsibilities under state or federal law. 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. As a result, only NCTD has had its rail operations unreasonably interfered with by the CCC consistency certification process and has standing to bring this preemption case to the Board.

carrier then argued the rail shipper's claim under state law to provide rail service was preempted despite its agreement. The court rejected this argument based on this voluntary agreement with the rail shipper. This holding is inapposite to the facts at hand which does not involve an agreement between the party asserting preemption, the railroad, and the party opposing preemption. In other words, a verbal agreement between NCTD and SANDAG, which SANDAG has not agreed upon in writing, that merely allows SANDAG to assume responsibility for solely funding and implementing project conditions that are outside of the CCC's authority and which are opposed by NCTD, have no bearing whatsoever on the preemption argument here.

Even more importantly, the verbal agreement (which, as noted, has not been committed to writing) as referred to in the CCC Second Update, would expressly protect NCTD's right to pursue its preemption arguments before the Board. The verbal agreement, described in the NCTD memorandum discussed above, specifically **"allows NCTD to continue to advance its petition with the Surface Transportation Board (STB)."** This provision alone renders the voluntary agreement arguments by CCC and the City inapplicable.

NCTD felt it prudent to proceed with the work to stabilize the bluffs assuming SANDAG assumes responsibility for funding and implementing the conditions imposed by the CCC. This does not eliminate the delay it has already endured waiting for the CCC decision. This does not eliminate the incredibly onerous and arbitrary conditions that CCC has imposed for the Project to commence. Neither does this eliminate the CCC actions on future projects. In *California High-Speed Rail Authority, supra*, the Board held that even assuming arguendo that the Authority's previous CEQA compliance created an implied agreement, any such agreement unreasonably interferes with interstate commerce and is not enforceable under § 10501(b). Slip op. at 11. Similarly, here, even assuming NCTD's verbal agreement with SANDAG were pertinent to its

preemption argument, which they clearly are not, the onerous conditions and delay created by CCC would require the same result of preemption.

This request to not issue a declaratory order by CCC and the City is just another attempt to avoid a decision by the STB that is the most qualified forum to address preemption here. *See Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (quoting *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005)); *see also New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 331-32 (5th Cir. 2008). CCC and the City have already asked for a stay of this proceeding, mediation, and additional briefing to delay this case. CCC even has filed a state court action dealing with the same preemption issues and facts despite this existing proceeding here. Thus, it is clear that CCC and the City are simply attempting to stop the STB from ruling on these important issues which would be an inequitable result.

CONCLUSION

Based on the foregoing discussion, NCTD respectfully asks the Board to rule on its Petition for Declaratory Order and find that the regulation by CCC of these two rail projects in the right-of-way is preempted.

Respectfully submitted,

/s/ Daniel R. Elliott

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Dated: July 6, 2022

Certificate of Service

I certify that I have, this 6th day of July 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

EXHIBIT 1

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May 19, 2022

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RE: California Coastal Commission Proposed Conditions related to Del Mar Bluffs 5 Stabilization Project

Dear Mr. *Hasan* Ikhata:

The North County Transit District (NCTD) is in receipt of the proposed conditions provided by the California Coastal Commission (CCC) as it relates to the Del Mar Bluffs 5 (DMB5) project (Project). As you are aware, NCTD filed a Petition for Declaratory Order at the Surface Transportation Board (STB) on August 28, 2020 (STB Finance Docket No. 36433), requesting clarification from the STB regarding whether Federal Consistency Review under the Coastal Zone Management Act was preempted under 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA). The conditions being proposed by CCC for the Project, especially as it relates to the "Coastal Access and Recreation" conditions are completely preempted by the ICCTA. Accordingly, NCTD recommends that SANDAG abstain from advancing approval of the Project through the CCC until a determination is made by the STB on NCTD's petition for declaratory order.

Although NCTD expressly opposes the permit process in total, it specifically opposes the following proposed requirements in the draft conditions provided by the CCC for the Project:

1. Authorization Term: The CCC proposed requirement that SANDAG remove the seawall and rip rap or submit a complete coastal development permit or consistency certification review application to the CCC at the expiration of the permit term is not agreeable.

NCTD does not agree to contribute any additional funding for the Project and/or associated mitigation impacts to remove the seawall and rip rap and/or be responsible for additional mitigation at the expiration of the term.

2. Coastal Access and Recreation: The proposed conditions require SANDAG "to develop and implement a capital improvement program to improve safe

public coastal access and recreation" in the Project area through the implementation of the following projects: (a) enhancement of the north-south trail system east of the rail track on the top bluff between Seagrove Park and 4th Street; (b) construction of a pedestrian rail crossing near 7th or 11th Street; and (c) construction of a beach accessway from the pedestrian rail crossing to the beach. The imposition of these proposed conditions on a railroad maintenance/safety project where legal public access does not exist today is exactly the type of overreach that prompted NCTD to file its petition with the STB in the first instance. Legal public access and recreation does not exist today in the railroad right-of-way; the proposed conditions are not in any way related to the railroad Project at issue or its associated impacts. Imposing lock-boxed mitigation dollars and demanding project conditions that are in no way related to the Project is unconscionable and clearly exceeds the CCC's authority.

If, despite the foregoing, SANDAG determines that it intends to advance the Project prior to a determination by the STB, SANDAG will assume all responsibility and financial obligation for permit compliance. NCTD will not provide any funding now or in the future for any "Coastal Access and Recreation" conditions and expressly reserves the right to oppose any future requirements that impact railroad operations and/or safe operations of the railroad and/or that imposes any financial obligations for such elements.

The conditions being proposed for the Project by the CCC 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 is available to meet the requests of the CCC to implement their requirements. Moreover, from a NCTD perspective, the CCC requests do not support state of good repair needs, improvements to mobility, climate change, or advance social equity outcomes.

NCTD remains committed to advancing this critical safety Project in a manner that preserves and utilizes public funds in a manner consistent with an equitable and legal application of regulatory requirements.

Sincerely,



Matthew O. Tucker
Executive Director

cc: SANDAG Board of Directors
Jack Ainsworth, Executive Director, California Coastal Commission
NCTD Board of Directors

VERIFICATION

I, Matthew O. Tucker, Executive Director of the North County Transit District, do hereby verify under the penalty of perjury that, to the best of my knowledge, the foregoing

**NORTH COUNTY TRANSIT DISTRICT REPLY IN OPPOSITION TO CALIFORNIA
COASTAL COMMISSION'S UPDATES AND THE CITY OF DEL MAR'S REPLY
REGARDING RECENT APPROVAL OF BLUFFS STABILIZATION PROJECT**

is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of the North County Transit District in connection with this proceeding before the Surface Transportation Board.

Executed on July 6, 2022.

A handwritten signature in black ink, appearing to read "Matt O 22", with a long horizontal flourish extending to the right.

Matthew O. Tucker, Executive Director
North County Transit District