

NORTH COUNTY TRANSIT DISTRICT
PETITION FOR DECLARATORY ORDER

0130111311 111-111 111112113153131111 111116

Pursuant to 49 C.F.R. § 1104.13, Del Mar residents and citizens Laura Schaefer and Shirli Weiss ("Del Mar Citizens") respectfully submit this Reply 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, regarding (1) the June 8, 2022 conditional approval by the California Coastal Commission ("Coastal Commission" or "Commission") of the Federal Consistency Certification for development in the coastal zone in Del Mar, California, submitted pursuant to the Coastal Zone Management Act ("CZMA") by the San Diego Association of Governments ("SANDAG") and (2) Petitioner North County Transit District's ("NCTD") conditional acceptance of same. SANDAG is the agency responsible for stabilization of the coastal bluffs located in the coastal zone in Del Mar, California ("Del Mar Bluffs"). Del Mar Citizens offer the perspective of individuals directly affected by the decisions of the STB as residents, property owners in the City of Del Mar ("Del Mar") and walkers of the Del Mar Bluffs' scenic trails. Del Mar Citizens are state and federal taxpayers and are constituents of Respondents "NCTD", the Coastal Commission, the City, and non-party SANDAG.¹

Projects to stabilize the geologically unstable Bluffs along Del Mar’s coast for continued rail use (“Bluff Stabilization”), as well as the two fencing projects (“NCTD Proposed Fencing Projects”) related to stabilization: fencing on Del Mar’s upper bluff top (“Upper Bluff Top”) on which no trains operate and

1

fencing at the lower bluff top (“Lower Bluff Top”) at track level, (collectively, the Projects”), are governed by several overlapping federal laws that can and, as Ninth Circuit case law directs,² should be harmonized: the Coastal Zone Management Act (“CZMA”) administered by the National Oceanic and Atmospheric Administration (“NOAA”), the Federal Railway Safety Act (the “FRSA”), administered by the Federal Railroad Administration (“FRA”), the Interstate Commerce Commission Termination Act (“ICCTA”), administered by the Board, and the National Environmental Policy Act (“NEPA”), which applies to STB decisions, as stated in the Board’s website.

NCTD urges the partial application of the ICCTA to the issue of preemption raised in the Petition. The Board should reject this approach and the NCTD’s Petition. Although the ICCTA informs the analysis, in cases involving significant safety issues, as all parties agree exist here, the FRSA, not the ICCTA provides the framework for preemption analysis. Through the CZMA and the FRSA, Congress provided for a federal-state regulation partnership governing safety of railroad passage through states, which, as applied here, triggers the application of the California Coastal Act of 1976 as amended (Division 20, Cal. Pub. Resources Code), enforced by the Coastal Commission.

Legal Basis to Reject the NCTD Petition

The Board should reject NCTD’s request for a declaratory order for the reasons stated in the replies opposing the Petition, as well as these key reasons:

1. The Board’s regulation, 49 CFR §1105.9(a), required NCTD to comply with CZMA upon its filing of the Petition. Because NCTD failed to comply with 49 CFR 1109(a), 49 CFR 1105.9(b) mandates that NCTD’s Petition be stayed pending its compliance or be dismissed.
2. The Bluff Stabilization and Fencing Projects are intended to address safety. The FRSA provides the framework for deciding preemption on matters affecting **safety of railroads**. The FRSA’s preemption provision, 49 U.S.C. §20106(a), contains two state law savings clauses at §20106(a)(2); both apply here, and they *permit* rather than preempt state regulation.
 - a. The FRSA’s first state law savings clause permits state regulation here because there is no national law that “covers the subject matter” of bluff stabilization for railroad rights-of-way or fall safety fencing in rights-of-way, and the California’s Coastal Act provides more stringent standards than the absence of national

² *Swinomish Indian Tribal Community v. BBSF Railway Company*, 953 F.3d 1142,1157 (9th Cir. 2020).

regulation. 49 U.S.C. 20106(a)(2).

- b. The FRSA’s second savings clause applies because the geologic instability of the Bluffs indisputably presents “an essentially local safety hazard” that is properly addressed by state regulation under the Coastal Act. 49 U.S.C. 20106(a)(2); Cal. Pub. Resources Code 20323.
3. *North San Diego County Transit Development Board—Petition for Declaratory Order*, 2002 STB LEXIS 490, FD 34111, relied on heavily by NCTD and its supporters, does not apply here. There, the STB followed the district court’s ruling that state regulation of the installation of a passing track was preempted by 49U.S.C. 10501(b). Multiple overlapping federal regulatory schemes, like the FRSA and CZMA, were not implicated in that case. Instead, the subject matter in question: “track” construction, fell squarely within 49 U.S.C. 10501(b), and did not involve issues of “safety” that fall within 49 U.S.C. §10501(c)(3), triggering the two FSRA preemption state savings provisions found in 49 U.S.C. §20106(a)(2).
4. The ICCTA can and should be applied in harmony in this case with the FRSA and CZMA. First, under 49 U.S.C. §10501(c)(2)(A), the ICCTA expressly *excludes* Board jurisdiction of NCTD’s public (passenger) rail transportation operation because under 49 U.S.C. §10501(c)(1) NCTD is a “local governmental authority” as defined by 49 U.S.C. §5302(11)(D) whose public transportation, defined in 49 U.S.C. §5302(15), is excluded from the Board’s jurisdiction. Correlatively, under 49 U.S.C. §10501(c)(3), the ICCTA *mandates* the application of the FRSA to railroad safety projects impacting NCTD’s public transportation operation, here, the Bluff Stabilization and Fencing Projects.
5. Second, the application of 49 U.S.C. §10501(c)(3) to NCTD’s public transportation by rail and state regulation of the Projects applies regardless of NCTD’s rail freight operation agreements with BNSF, which uses the same rail for passengers because:
 - a. California regulation of Upper Bluff Top fencing under the Coastal Act will not interfere with freight carriage because no trains run on the Upper Bluff Top level. NCTD itself has proposed to license the Upper Bluff Top trail for public use, admitting that public use of the Upper Bluff Top does not unreasonably burden interstate commerce.
 - b. NCTD does not propose to fence the Lower Bluff for at least two years; therefore, its purported concern that compliance with the Coastal Act will result in interference with commerce is speculative and its declaration of a “safety

emergency” requiring this Board’s immediate action is disingenuous.

- c. California regulation of the Bluff Stabilization project will facilitate, not interfere with freight carriage. The fact that rail passage through Del Mar is integral for national defense militates in favor of state safety regulation and SANDAG’s realistic goal of moving the tracks off the Bluffs by the year 2035. Despite numerous past SANDAG/NCTD stabilization measures, as recognized by engineers, geologists and a San Diego Grand Jury, the Bluffs remain a “weak link” in the system, placing national defense at risk as long as the Bluffs are used for rail passage.

Practical Reasons to Reject the NCTD Petition

6. NCTD’s Petition for preemption is made without regard for the long history of collaborative effort between SANDAG and the Coastal Commission with respect to Bluff Stabilization of Del Mar’s coast. Responsibility for bluff stabilization lies primarily with SANDAG. SANDAG and the Coastal Commission have expertise in engineering and geology; NCTD lacks such expertise. Cooperation among the Commission, NCTD, SANDAG and the City of Del Mar is also necessary and vital to the continued viability and safety of the rail network because Bluff Stabilization requires access to and erection of structures on substantial tracts of land *not within NCTD’s right-of-way*. In light of the Coastal Commission and SANDAG’s most recent cooperative effort that harmonizes the concurrent regulatory schemes implicated here, the Board should decline NCTD’s request for a Declaratory Order.

II. Pertinent Background and New Developments Addressed in the Status Report

A. Background

NCTD operates a railway over approximately 1.6 miles of fragile ocean bluffs (“Del Mar Bluffs”) in a right-of-way that passes along the coast in Del Mar, California. On August 28, 2020, NCTD filed its Petition against the Coastal Commission and Del Mar seeking global preemption with respect to ill-defined current and undefined future projects NCTD wishes to implement in its railway right-of-way.³ In later episodic

³ In 1992, NCTD, acquired a right-of-way to operate a railway that runs on Del Mar’s Bluffs, for nominal or no consideration from the Atchison, Topeka and Santa Fe Railway, predecessor to Burlington Northern Santa Fe Railway Company (“BNSF”), a freight carrier which retained an easement to use the right-of way. Transfers of railway rights-of-way to state-funded local government authorities such as NCTD is a way for a freight carrier to seek to benefit from substantial state taxpayer funding of construction projects in the transferred right-of way.

filings, NCTD belatedly attempted to cure the inadequacies of the Petition, directing most of its comments to three closely interrelated projects: the Del Mar Bluff Stabilization project engineered by SANDAG (“Bluff Stabilization”), and two fencing projects on the Bluffs which NCTD describes as “safety” fencing. Respondents and interested persons filed replies opposing the Petition on numerous grounds. The action was held in abeyance from November 2020 to December 2021 for settlement negotiations.

After settlement negotiations conducted among Respondents without a mediator did not resolve the Petition, NCTD’s Board issued Del Mar an ultimatum: unless the City agreed to the terms and conditions of NCTD’s proposed license agreement (“Proposed License Agreement”), NCTD would construct a 6ft. high, heavy, hazardous and unsightly hogwire mesh fence on Del Mar’s fragile and scenic Upper Bluff trail. ⁴ If Del Mar yielded to NCTD’s terms and conditions, NCTD would license the Upper Bluff trail, (an area not used for the railway), to Del Mar for continued public use and construct a lighter (and less hideous) 4ft. high post-and-rail “fall safety” fence. The Proposed License Agreement was draconian and NCTD’s proffered consideration illusory because it would allow NCTD to remove the Upper Bluff (where the trail was located) entirely “at its sole and absolute discretion....” It also required Del Mar to release a panoply of rights and shifted certain NCTD staff costs and consulting fees to Del Mar. The Del Mar City Council rejected the Proposed License Agreement.

B. The Coastal Commission’s Conditional Approval of the Bluff Stabilization Project.

Meanwhile, SANDAG engineers and geological experts weighed in and submitted the largest of an on-going, multi-year and multi-phase plan for Bluff Stabilization that involved three components necessary to ensure geologic and engineering stability of the rail line: extensive seawalls erected on City and State-owned beaches outside of the right of way, changes to bluff slope, and concrete placed on the bluff top to stabilize the track bed. The Coastal Commission’s update filed on June 23, 2022 gave a detailed summary (*Id.* at pp. 3- 6) of the Commission’s June 8, 2022 concurrence, with conditions, in the Federal Consistency Certification that SANDAG submitted pursuant to CZMA on its plan for Bluff Stabilization. Safety fencing on the Upper Bluff Top is a condition to concurrence. Del Mar Citizens concur in the Commission’s summary of facts. On June 29, 2022, the Commission filed a further update reporting that the NCTD had arrived at an agreement in principle with SANDAG to withdraw objections to the Commission’s conditions to Federal Consistency Certification subject to finalization of an agreement with SANDAG and Del Mar. Practically speaking, an STB ruling of preemption would scuttle any agreement and delay ultimate resolution of the dispute for years. If preemption is determined after the agreement is finalized, it will likely cause NCTD to renege on any

⁴ Del Mar’s Upper Bluff consists of about a half mile of scenic walking trail on which no trains operate. The Upper Bluff Top is generally 40 to 60 ft. higher than and about 50ft. to 100ft. west of the lower bluff train tracks.

agreement it has made, since NCTD has continued with this action despite reaching this agreement

Del Mar Citizens respectfully request that the Board decline NCTD's request for declaratory relief, because doing so will allow all stakeholders to proceed with the work that SANDAG, the agency with primary responsibility for Bluff Stabilization, has determined is required to ensure trains can operate safely on the Bluff. Del Mar Citizens understand the Board has discretion to issue a declaratory order to terminate a controversy or remove uncertainty, and that discretion is broad. See *InterCity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority -- Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). Based on this standard, however, the Board should not exercise its discretion to commence a declaratory order proceeding. There is no reason for the Board to weigh in on a matter where the party seeking declaratory relief has essentially reached agreement with all major stakeholders. The Coastal Commission, SANDAG, the City and NCTD have agreed to a major project that will stabilize the Bluffs for the next 30 years. Seawalls shall be erected on property outside the right of way to ensure that the Bluffs will be stabilized for rail operation for decades to come. Safety fencing that has passed muster with SANDAG's geologists and has the Commission's concurrence will be constructed on the Upper Bluff. The ill-defined grounds NCTD cited for declaratory relief while this action was pending before the Board ceased to exist entirely when NCTD entered into an agreement with SANDAG to stabilize the Bluffs. In short, there is not a present controversy or uncertainty that rises to the level of requiring Board resolution.

III. ARGUMENT

A. NCTD Has Failed to Comply with STB Regulations Governing Coastal Zone Management Act Compliance, Hence Its Petition Must Either be Dismissed or Stayed Until it Does.

In its June 23, 2022 Update, the Coastal Commission showed why and how CZMA applies to SANDAG and NCTD's projects on the Del Mar Bluffs (16 U.S.C. § 1456, subd. (c) permitted projects) and (d) (federally funded projects). On June 8, 2022, the Commission heard and conditionally concurred in the Federal Consistency Certification that SANDAG, the agency responsible for Bluff Stabilization projects, submitted pursuant to CZMA. In its Updates, the Commission documented NCTD's serial flipflops on compliance with CZMA and again requested the Petition be denied. Del Mar Citizens concur in the Coastal Commission's and the City's arguments in their updates and respectfully add the following regarding CZMA:

By filing the Petition and seeking Board action with respect to a coastal zone, NCTD became an “applicant” within the meaning of [49 CFR 1105.4](#)⁵ subject to CFR 1105.9, which provides:

CRF 1105.9 Coastal Zone Management Act Requirements.

(a) If the proposed action affects land or water uses within a State coastal zone designated pursuant to the Coastal Zone Management Act ([16 U.S.C. 1451](#) et seq.) applicant must comply with the following procedures:

(1) If the proposed action is listed as subject to review in the State’s coastal zone management plan, applicant (with, or prior to its filing) must certify (pursuant to [15 CFR 930.57](#) and [930.58](#)) that the proposed action is consistent with the coastal zone management plan.

(2) If the activity is not listed, applicant (with, or prior to its filing) must certify that actual notice of the proposal was given to the State coastal zone manager at least 40 days before the effective date of the requested action.

(b) If there is consistency review under [15 CFR 930.54](#), the Board and the applicant will comply with the consistency certification procedures of 15 CFR 930. Also, the Board will withhold a decision, stay the effective date of a decision, or impose a condition delaying consummation of the action, until the applicant has submitted a consistency certification and either the state has concurred in the consistency certification, or an appeal to the Secretary of Commerce (under [15 CFR 930.64\(e\)](#)) is successful. 49 CFR 1105.9

Thus, the Regulations applicable to an applicant seeking Board action with respect to land within a coastal zone, specifically require, and do not purport to preempt, the CZMA’s requirements of state law compliance.

NCTD has not complied with 49 CFR §1105.9(a). As a consequence, pursuant to 49 CFR §1105.9(b), the Board must either withhold its decision on the Petition until NCTD, as an “applicant” as defined by 49 CFR §1105.4, has submitted a consistency certification to the Coastal Commission and either the state has concurred or an appeal to the Secretary of Commerce (under [15 CFR § 930.64\(e\)](#)) is successful, or dismiss the Petition.

**B. THE FRSA, NOT THE ICCTA, DETERMINES PREEMPTION OF STATE LAWS
REGULATING SAFETY OF RAILROADS**

⁵ “Applicant” means any person or entity seeking Board action, whether by application, **petition**, notice of exemption, or any other means that initiates a formal Board proceeding. 49 CFR 1105.4. (Emphasis Added)

Despite Defendants' reliance on the ICCTA, the FRSA is the primary statutory authority that controls preemption in the sphere of railroad safety. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 107 (2nd Cir. 2009) (“[s]everal circuits that have examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration (‘FRA’), not the Surface Transportation Board (‘STB’). . . . Thus FRSA provides the appropriate basis for analyzing whether a state law, regulation or order is pre-empted by federal law.” *Id.* at 107; *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517, 523 (6th Cir. 2001), (Ohio track clearance standard was related to rail safety and thus required preemption analysis under FRSA); *see also Nat’l Ass’n of Regulatory Util. Comm’rs v. Coleman*, 542 F.2d 11, 15 (3d. Cir. 1976); *Haynes v. Amtrak*, 423 F. Supp. 2d 1073, 1084 (C.D. Cal. 2006) (“[The ICCTA] does not preempt the plaintiffs’ claims because the [ICCTA] preemption provision does not apply to railroad safety claims, which are instead governed by FRSA.”). Here, it is undisputed that Fencing and Bluff Stabilization present safety issues. Thus, the FRSA, not the ICCTA, controls the preemption analysis.

C. The FRSA Does Not Preempt Plaintiffs’ State Law Claims Here

There is no preemption of state law in this case because the FRSA’s preemption provision has two distinct “savings” clauses, both of which apply to the Bluff Stabilization and Fencing Projects.

49 U.S.C. § 20106(a) provides:

(a) National uniformity of regulation.

(1) Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force any law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order, related to railroad safety when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a). (Emphasis added). In 49 U.S.C. § 20106 (a)(2), Congress expressly preserved the power of the states to adopt safety laws and regulations in two broad areas: first, to regulate railroad safety where there is no federal regulation “covering the subject matter” of the State requirements and second, to adopt more stringent state

railroad safety requirements where an essentially “local safety hazard” necessitates it, where such state requirements are not incompatible with a federal law, regulation or order and do not unreasonably burden interstate commerce. 49 U.S.C. §20106(a)(2).

The California Coastal Act regulates safety of development in the coastal zone. Cal. Pub. Resources. Code §30253 provides:

New development **shall** do all of the following:

(a) **Minimize risks to life and property in areas of high geologic, flood, and fire hazard.**

(b) **Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area** or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Cal. Pub. Res. Code §30253.⁶ (emphasis added).

Both FRSA savings clauses articulated in 49 U.S.C. §20106(a)(2) apply to state regulation of NCTD’s proposed Fencing Projects and Bluff Stabilization in Del Mar. The first FRSA savings clause applies to allow state regulation “until the Secretary of Transportation prescribes a regulation or issues an order **covering the subject matter** of the State requirement.” 49 U.S.C. §20106(a)(2). (Emphasis added). The Supreme Court in *CSX Transp. Inc., v. Easterwood*, 507 U.S. 658 (1993) concluded that Congress’ use of the word “covering” in §20106 “indicates that preemption will lie only if the federal regulations **substantially subsume the subject matter of the relevant state law.**” *Id.* (Emphasis added). The Court recognized *the state interest and right to regulate railroad safety*, noting that “[t]he term ‘covering’ is ... employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses.” *Id.* at 665 (emphasis added). Thus, a “subject matter” is not preempted under the FRSA when the Secretary has issued regulations which merely “touch upon” or “relate to” that subject matter.

The Secretary of Transportation has not prescribed regulations or issued orders that uniformly cover ocean bluff stabilization for railway passage nor fencing to prevent falls remote from railroad tracks or fencing throughout rail corridors. Thus, state regulation provided through the Coastal Act and CEQA applies to this subject matter of

⁶ “Development” under the Coastal Act, includes the “placement or erection of any solid material or structure.” Cal. Pub. Resources. Code § 30106

Bluff Stabilization and Fencing under the first express exception to preemption stated in 49 U.S.C. § 20106 (a)(2).

State regulation of development, and specifically Fencing and Bluff Stabilization of the Del Mar Bluffs, is also encompassed by the second express exception to preemption in 49 U.S.C. § 20106(a)(2) because it meets all the criteria of the second savings clause: First, the instability of the Del Mar Bluffs acknowledged by all parties, obviously presents “an essentially local safety hazard” under the FRSA’s second savings clause. Second, the Coastal Act and CEQA provisions do not conflict with any federal law, regulation or order. Third, requiring NCTD to satisfy the state’s safety review process cannot present an unreasonable burden on interstate commerce as to the Projects. As to the Fencing Projects, (a) no trains run on the Upper Bluff so compliance with state regulatory process regarding fencing the Upper Bluff cannot interfere with commerce; (b) NCTD does not plan to implement a fencing project on the Lower Bluff Top, (except for a very short stretch of fence) for over two years, and has failed to demonstrate that requiring NCTD to comply with California’s environmental and safety review to fence the Lower Bluff Top two years in the future poses a burden to interstate commerce.

Finally, as shown by the Commission in its June 23, 2022 and July 21, 2022 filings, compliance with safety review and conditions to Federal Consistency Certification of the Bluff Stabilization project as provided under the Coastal Act, will facilitate safe passage of trains, not impede it and supports the rail corridor’s important role in national defense. This was obviously also the conclusion of SANDAG, the entity charged with Bluff Stabilization, which has chosen to comply with Coastal Commission requirements for compliance with the Coastal Act. Thus, state regulation of each of the Projects meets all of the criteria of the second savings clause of 49 U.S.C. §20106(a)(2).

D. *North San Diego County Development Corp Petition for Declaratory Order, FD 34111* is Inapposite.

North San Diego County Transit Development Board—Petition for Declaratory Order, 2002 STB LEXIS 490, FD 34111 (served Aug. 21, 2002), heavily relied upon by NCTD, which found preemption regarding construction of a passing track, is inapposite. That case did not involve a safety issue or the interplay of several federal regulatory schemes. Unlike this case, there the FRSA was not triggered and the CZMA did not apply.

E. The ICCTA Excludes NCTD Projects Affecting Public Transportation from Exclusive

Preemption and STB Jurisdiction but Mandates Application of FRSA to Such Projects.

1. The ICCTA Excludes Board Jurisdiction over NCTD's "Public Transportation" by Rail.

The ICCTA can and should be harmonized with the CZMA and FRSA as applied to the Projects. *Swinomish Indian Tribe v. BNSF Railway Co.*, 953 F3d 1142, 1157. As shown above, the Board's own regulations mandate NCTD's compliance with CZMA, demonstrating that CZMA has been harmonized with the ICCTA. 49 CFR § 1105.9. The ICCTA also can be harmonized with the FRSA, which provides the framework for deciding preemption of state law impacting railway safety issues. First, under the ICCTA, NCTD's "public transportation" rail operations are excluded from the ICCTA's exclusive preemption provision and excluded from the STB's jurisdiction because NCTD is a "local governmental authority." See 49 U.S.C. § 10501(c)(1)(A)(i) and 49 U.S.C. § 10501 (c)(2)(A). So too is the public transportation operation of any entity that contracts with NCTD to provide such services. 49 U.S.C. 10501§(c)(1)(A)(ii) and 10501§(c)(2)(A). NCTD qualifies as a "local governmental authority" under 49 U.S.C. 10501(c)(1) (as defined by 49 U.S. Code §5302(11)), providing "public transportation" (as defined by 49 U.S.C. §5302(15)) by rail because NCTD is a "publicboard... established under the laws of the State."⁷ (See, e.g., *N.J. Ass'n of R.R. Passengers--Pet. for Declaratory Order--Princeton Branch (Princeton Branch)*, 2014 STB Lexis 179, FD 35745 (served July 25, 2014) (finding STB lacks jurisdiction under 10501(c)(2) over New Jersey Transit's public transportation because New Jersey Transit qualified as a "local government authority," under 49 U.S.C. §10501(c)(1) i.e., a public corporation or board formed by state statute.); *Transit Solutions Group, LLC*, 2006 STB Lexis 144, FD No. 34833 (STB served Mar. 3, 2006) (holding STB lacked jurisdiction under 49 U.S.C. §10501(c)(2) over a transit district providing mass transportation (public transportation) because it qualified as a "local governmental authority"))).

2. Notwithstanding Exclusion from the Board's Jurisdiction of "Public Transportation" Operations of "Local government Authorities," such as the NCTD, the ICCTA Mandates that Projects "Related to" Railroad Safety Comply with Federal Safety Laws.

Although under 49 U.S.C. §10501(c)(1) and (2) the ICCTA *excludes* from STB jurisdiction, "public transportation" by rail provided by a "local governmental authority" such as NCTD, under 49 U.S.C. §10501(c)(3), the ICCTA expressly *requires* local governmental authorities to comply with federal laws related to railroad

⁷ NCTD, formerly named the North San Diego County Transit Development Board, is a "board" established by California Senate Bill 802 in 1976.

“safety.”

49 U.S.C. § 10501 (c)(3)(A) provides:

(A) Notwithstanding paragraph (2) of this subsection [excluding from Board jurisdiction public transportation by rail provided by local governmental authorities], a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

(i) safety...

49 U.S.C. §10501(c)(3)(A)(i) (emphasis added).

Thus, subsections (c)(2) and (3) of 49 U.S.C. §10501 make clear that public transportation⁸ provided by a “local governmental authority” such as NCTD (and entities contracting with it to provide transportation services) is outside of ICCTA exclusive preemption, *but that notwithstanding STB’s lack of exclusive jurisdiction, such local government authorities remain subject to federal laws “related to safety.”* 49 U.S.C. §10501 (c)(2), (3).⁹

The STB has acknowledged that the “laws of the United States” referred to in 49 U.S.C. §10501(c)(3)(A)(i) are the “rail safety laws” administered by the Federal Railroad Administration (“FRA”), which of course includes the FRSA. In *Massachusetts Bay Commuter Railroad Co., LLC -Petition for Declaratory Order*, 2003 STB Lexis 316, FD No. 34332, (STB served June 5, 2003), the STB found that it lacked jurisdiction over rail carrier Massachusetts Bay Railroad Co., LLC (“MBCR”) because MBCR was also a “local government authority” engaged in “mass transportation,” (the predecessor term to “public transportation.”) The STB said: “**Thus, MBCR’s operations as a rail carrier are excepted from Board jurisdiction.** MBCR will be subject to laws referred to in 49 U.S.C. 10501(c)(3)(A), including the rail safety laws administered by the Federal Railroad Administration.” *Id.* (Emphasis added)

As noted above, *North San Diego County Transit Development Board—Petition for Declaratory Order*, 2002 STB LEXIS 490, FD 34111 (STB served Aug. 21, 2002), heavily relied upon by NCTD, which found

⁸ “Public Transportation” include regular, continuing shared-ride surface transportation services. 49 U.S.C. 5203(15)

⁹ Congress’ specific use of the term “safety” in subsection (c)(3) of 49 U.S.C. §10501 demonstrates that safety of public transportation operations by rail is outside of STB jurisdiction because if Congress intended to include “safety” within the STB’s areas of exclusive jurisdiction specified in 10501(b), it would have used that term in that subsection rather than in subsection (c). *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”).

preemption regarding construction of a passing track, is inapposite. That case did not involve the CZMA nor did it raise a safety issue and therefore did not address or analyze the application of the FRSA. Here, because safety is the pivotal regulatory issue raised by all the parties and all stakeholders, the FRSA applies. The exclusion of passenger service from STB's jurisdiction and the application of subsections (c)(2) and (3) of 49 U.S.C. §10501 means that NCTD *is required to comply* with the FRSA with respect to safety issues impacting passenger service. As shown above, the FRSA in turn contemplates application of California law impacting safety through its two savings clauses, 49U.S.C. §20106(a)(2).

3. NCTD's Agreements With BNSF, a Freight Carrier, Does not Undermine Application of the FRSA or State Law As Permitted by the FRSA's Preemption Savings Clauses Because Compliance with State Law Regarding the Projects Does Not Unreasonably Burden Freight Carriage.

NCTD contends that it is a rail carrier and that SANDAG and NCTD's compliance with state law (here the Commission's conditions for concurrence with the Federal Consistency Certification), with respect to the Projects will unreasonably interfere with freight carriage and therefore burden interstate commerce. This is not true. In *Peninsula Corridor Joint Powers Board—Petition for Declaratory Order*, 2015 STB Lexis 215, FD 35929 (STB served Jul. 2, 2015), the STB analyzed facts analogous to the instant case with respect to the limitations on ICCTA jurisdiction and concluded that [49 U.S.C. § 10501\(b\)](#) did not preempt the application of CEQA to a project for the electrification of the Peninsula Corridor Joint Powers Board's rail line between San Jose and San Francisco. First, the STB found it did not have jurisdiction over "mass transportation provided by a local government authority," including "commuter services," which the STB found was equivalent to "public transportation." *Id.* at *5,6. Second, the STB rejected Caltrain's assertion that §10501(b) preempted the application of CEQA to the Project because Caltrain was a "rail carrier" by reason of its acquisition of a rail line subject to the Board's jurisdiction. The Board found that, "while Caltrain became a rail carrier subject to the Board's jurisdiction as a result of its acquisition of SP's rail line, Caltrain's [electrification] Project is not subject to the Board's jurisdiction, and therefore, federal preemption does not apply." *Id.* The STB distinguished *North San Diego County Transit Development Board—Petition for Declaratory Order*, FD 34111 (STB served Aug. 21, 2002), the principal case relied upon by NCTD here, stating that there was no "evidence that UP's rail operations would be adversely affected by any conditions

imposed on the Project pursuant to CEQA.” *Peninsula Corridor Joint Powers Board—Petition for Declaratory Order*, 215 STB Lexis 215, FD 35929 (STB served Jul. 2, 2015).

Here, state regulation (the Coastal Act) as required by CZMA and as permitted by FRSA and therefore required under state law, is not preempted, even though NCTD contends it is a rail carrier based on its agreements with BNSF. As shown in *In Peninsula Corridor Joint Powers Board—Petition for Declaratory Order*, 2015 STB Lexis 215, FD 35929, status as a “rail carrier” does not determine whether state regulation of the Projects is preempted. Here, State action that does not unreasonably interfere with freight carriage (interstate commerce) is not preempted. First, CZMA applies. SANDAG and the Commission have agreed upon the height and nature of fencing along the Upper Bluff as part of the mitigation plan conditions to the Commission’s concurrence with Federal Consistency Certification under CZMA. The shorter, lighter fence addresses geologic and scenic concerns under the Coastal Act and is fundamentally inconsistent with NCTD’s proposed 6ft.-high heavy wire mesh fence which creates a safety hazard to the deteriorating Upper Bluff (and was proposed only to extort contractual concessions from the City). Further, there is no evidence that NCTD’s compliance with the Coastal Act and CEQA with respect to its proposed fencing project on the Upper Bluff Top *where no trains operate* would have an adverse effect on rail carrier freight operation, or any effect for that matter. The fact that NCTD tried to license the Upper Bluff area to Del Mar, and would have foregone its proposed 6ft.-high fence is an admission that NCTD compliance with state law regarding fencing of the Upper Bluff would have no adverse (or any) effect on freight carriage.

Second, there is no evidence that freight service is unreasonably burdened by NCTD compliance with state law regarding its proposed fencing on the Lower Bluff. Though NCTD argues that it is too burdensome to comply with the Coastal Act and that it must have extensive fencing on the Lower Bluff, it has deferred fencing at track level since it acquired the right-of-way in 1992 and plans to defer it for at least another two years. Just as in *Peninsula*, there is no evidence that BNSF’s rail operations “would be adversely affected by any conditions imposed on the [lower bluff fencing project] pursuant to CEQA [or the Coastal Act].” NCTD merely *speculates* that its compliance with state law will adversely affect freight operations, it fails to demonstrate that supposed consequence. Given the potential safety hazard of placing heavy fencing on the tops of either of the fragile and deteriorating Upper or Lower Bluffs, the savings clauses of the FRSA are triggered to permit Coastal Act regulation. 49 U.S.C. 20106(a)(2). The disciplined, objective review process required by CZMA triggering the application of state law

(the Coastal Act) and as permitted by the savings clauses of the FRSA, must be followed with respect to any proposed fencing.

Third, there is no evidence that the conditions to the Coastal Commission's concurrence of SANDAG's Bluff Stabilization Plan unreasonably burden freight operations. The Coastal Commission in its June 2022 Update shows that SANDAG's compliance with CZMA and by extension, the Coastal Act, does not interfere with interstate commerce but rather facilitates it. In this regard, NCTD's resistance to the timing of SANDAG's plans to move the tracks off the Bluffs as a condition of Commission concurrence is NCTD's stubborn quarrel with nature, not with SANDAG, the Coastal Commission or the City. The SANDAG/Commission agreement that the tracks must be moved off the Bluffs by 2035 is backed by their engineers and geologists. The Bluff deterioration from natural causes and train vibration is not "hypothetical" nor should be the plan for relocation of the tracks. NCTD's wish list is for decades more of precarious train use of the Bluffs. **But the stark reality is that SANDAG and NCTD have not been able to predict either the severity or timing of the frequent and multiple failures of the Bluffs, hence the need for the virtually constant stream of SANDAG's after-the-fact requests to the Coastal Commission for emergency certifications for Bluff stabilization.** The danger of running a train on the deteriorating Bluffs was recognized years ago by geologists and a San Diego County Grand Jury, which issued a report in 2018 recognizing Del Mar as the "weak link" in rail passage and urging SANDAG to adopt a strategy for "choosing one plan and rank the other plans for rerouting the railroads through Del Mar to enable the immediate participation of public agencies, environmental groups and the public in the selection and approval process." <https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2018-2019/DelMarBluffsRevisedReport.pdf>. Planning for transfer of the tracks off the Bluff in 2035 simply reflects the engineering and geological reality that stability of the tracks past that point is simply not supportable. NCTD apparently wants to forever gamble on the safety of the Bluff and would take that chance if left unfettered by state law. This is reminiscent of Ford Motor Company's financially-based decision to gamble with lives on the known risk presented by design of its Pinto automobile. No other Bluff stakeholder is willing to gamble with lives and property. The STB should not force that gamble by granting preemption and allowing NCTD, a local transit district, to make unilateral engineering decisions on the length of continued use of the Bluffs for train travel.

The July 21, 2022 letter filed with the Board from the Military Surface Deployment and Distribution

Command stated that “the rail line between Los Angeles and San Diego, including the segment owned by the North County Transit District (NCTD), is important to National Defense..... It is used by BNSF to provide rail freight service to the San Diego area. It is important for national defense that this rail line be maintained to support safe and reliable railroad operations.” The importance of the railway passage through Del Mar to national security coupled with the demonstrated unpredictability and fragility of the Bluffs, mandates that we not rely any longer than absolutely necessary, on the “weak link” in the system presented by rail passage over the Bluffs, and serves to highlight the reasonableness and importance of the Commission’s condition and SANDAG’s experts’ concurrence that SANDAG, tasked with transportation planning in San Diego, pursue rerouting of the tracks off the Bluffs by 2035. Thus, this condition to the Commission’s concurrence in the Federal Consistency Certification similarly does not burden, but rather helps ensure, the continued service of the rail line to National Defense.

V. CONCLUSION

For the reasons stated above, the Board should deny the Petition or at the very least, stay the Petition pursuant to 49 CFR §1105.9(b) until the NCTD completely complies with CZMA, and by extension, the California Coastal Act.

Respectfully Submitted,

Shirli Weiss

551 Stratford Court

Del Mar, CA. 92014

Laura Schaefer

158 6th Street

Del Mar CA 92014

Proof of Service

Finance Docket No. 36433

I certify that I have this 27th day of July, 2022, served copies of REPLY TO THIRD SUPPLEMENTAL STATUS UPDATE BY CITIZENS LAURA SCHAEFER AND SHIRLI WEISS upon all parties of record in this proceeding by email.

July 27, 2022,

Laura Schaefer