

**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 THIRD UPDATE**

North County Transit District ("NCTD") respectfully submits its reply in opposition to the California Coastal Commission's ("CCC") Third Update Regarding CCC's Approval of the Del Mar Bluff Stabilization Project, filed on August 22, 2022, claiming this decision is final and binding based on state law (the "Update"). However, judicial review of the federal consistency review at issue under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 et seq., ("CZMA") is not governed by state law, so CCC's claim is simply wrong.

In the Update, CCC noted that it conditionally had concurred with the San Diego Association of Governments' ("SANDAG") federal consistency certification for the Del Mar Bluffs Stabilization Project V ("Project") on June 8, 2022, pursuant to CZMA. CCC argues that its decision was final on the day it voted, and no lawsuit was filed within the sixty (60) day window to challenge the CCC's decision under Cal. Pub. Res. Code § 30801. It then argues the time to challenge CCC's approval ran on August 7, 2022, based on this California statute. As a result, CCC wrongly claims that any failure to timely challenge its determination renders that decision immune from any attack on any ground based on California state court decisions— *Lynch v. California Coastal Comm.* (2017) 3 Cal.5th 470, 476-477; *Lent v. California Coastal Comm.*

(2021) 62 Cal.App.5th 812, 831-832; *SLPR, L.L.C. v. San Diego Unified Port District* (2020) 49 Cal.App.5th 284, 321-323.

CCC's analysis treads the wrong path of assuming a foreclosure of Surface Transportation Board ("STB" or the "Board") jurisdiction because CCC incorrectly assumes that state action under CZMA somehow eclipses federal preemption. Section 307 of CZMA, 16 U.S.C. § 1456, gives states a role in federal agency decision-making, which they otherwise would not have, for activities that may affect a state's coastal uses or resources. But Section 307 by its terms also clearly reaches only non-preempted activity in the coastal zone: "[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the *enforceable policies* of approved State management programs." (emphasis added). In a Final Rule issued in 2019, the U.S. National Oceanic and Atmospheric Administration ("NOAA") gave the following explanation of the "enforceable policies" language of Section 307:

Within the context of the CZMA Federal consistency provisions, an enforceable policy is a state policy that has been incorporated into a state's federally-approved management program, is legally binding under state law (*e.g.*, through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a state exerts control over private and public uses and resources. *See* 16 U.S.C. 1453(6a) and 15 CFR 930.11(h) (enforceable policy). This means that enforceable policies must be given legal effect by state law and cannot apply to Federal lands, Federal waters, Federal agencies, *or other areas or entities outside a state's jurisdiction*, unless authorized by Federal law.

Coastal Zone Management Act Program Changes Procedures (Final Rule), 84 FR 38,118, at 38,119 (NOAA issued Aug. 6, 2019) (emphasis added).

Although the Final Rule discusses NOAA’s method of review of changes to state policies, it still provides instructive guidance in the present matter, as it makes clear that “enforceable policies” do not include state policies that are subject to federal preemption:

NOAA does not believe that the CZMA Federal consistency authority or NOAA’s approval of state enforceable policies for incorporation into state management programs, removes the application of Federal preemption to the state enforceable policies. The application of the Federal preemption doctrine to the CZMA and state enforceable policies as described in the proposed rule and in this final rule is NOAA’s long-standing position and does not represent a change in NOAA’s view or how NOAA would review state CZMA program changes under the revised regulations. NOAA believes that its application of Federal preemption to state CZMA enforceable policies is required by the definition of “enforceable policy” in CZMA section 304(6a) [16 U.S.C. § 1453(6a)] (must be legally binding under state law).

Id.

Here, the state of California’s policies, codified at Cal. Pub. Res. Code §§ 30000 et seq., are unenforceable against NCTD in the present instance, as federal law preempts such determination, rendering this action to be outside the state’s jurisdiction. *See* Cal. Pub. Res. Code § 30004 (acknowledging limitations on the California Coastal Act resulting from federal jurisdiction by stating that it shall only “provide maximum state involvement in federal activities *allowable under federal law or regulations*” (emphasis added)); Cal. Pub. Res. Code § 30003 (“All public agencies and all federal agencies, *to the extent possible under federal law or regulations or the United States Constitution*, shall comply with the provisions of this division.” (emphasis added)); *see, e.g., Cal. Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) (“We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law.”). Therefore, CCC is mistaken in its argument that state law, Cal. Pub. Res. Code § 30801, limits the STB’s authority to hear and decide NCTD’s challenge.

The federal preemptive nature of the Interstate Commerce Commission Termination Act (“ICCTA”), and STB’s exclusive jurisdiction to hear claims affecting NCTD as a common carrier by railroad, results in NCTD properly seeking a determination on its challenge from the STB directly. *See Orange Cty. Transp. Auth. et al.—Acquisition Exemption—The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C.2d 78, 90-91 (1994). Section 10501(b) of the ICCTA provides as follows:

The jurisdiction of the [Surface Transportation] Board over[:]

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State Law.

49 U.S.C. § 10501(b) (emphasis added).

For more than a century, the United States Supreme Court has made it clear that, under the United States Constitution’s Supremacy Clause, art. VI, cl. 2, state laws or regulations that are inconsistent with the agency’s plenary authority, or with the Congressional policy reflected in the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), are preempted. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). As acknowledged by the Ninth Circuit Court of Appeals in *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998), “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” As the agency authorized by Congress to administer the

ICCTA, the STB is “uniquely qualified to determine whether state law should be preempted by the [ICCTA].” *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.2d 321, 331-32 (5th Cir. 2008).

Categorically preempted actions are preempted “regardless of the context or rationale for the action.” *CSX Transp., Inc.—Pet. for Declaratory Order*, Finance Docket No. 34662, 2005 WL 1024490, at *2-*3 (S.T.B. May 3, 2005). STB and courts have found that ICCTA § 10501(b) categorically prevents states or localities from intruding into matters that are directly regulated by the STB (e.g., rail carrier rates, services, construction, and abandonment). The ICCTA also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier’s ability to conduct rail operations. Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation. See *Green Mountain R.R. Corp.*, 404 F.3d at 642-43.

Therefore, it is indisputable that a suit challenging a consistency determination as preempted by federal law would be subject to federal law. See *City of Sausalito v. O’Neill*, 386 F.3d 1186 (9th Cir. 2004). CCC fails to recognize that NCTD has no reason to challenge in state court the decision of CCC to concur in SANDAG’s consistency determination. First, this action is before the expert federal agency regarding the specific issues at hand. Second, NCTD has standing to challenge in federal court, if necessary, the federal action of providing a consistency determination to CCC where the policies of CCC are not “enforceable policies” with which NCTD must maintain consistency. In fact, CCC concedes that federal consistency review constitutes a federal issue and relies on that fact in making its arguments in this case. See Reply of the California

Coastal Commission, Filing No. 301149, at 13 (filed Oct. 5, 2020) (“California’s coastal management program has been federally approved and is fully enforceable under the CZMA.”).

As a result, consistency certifications involving issues of federal preemption are not reviewed under state law as CCC claims, particularly where such state law by its own terms yields to overriding provisions of federal law. *See* Cal. Pub. Res. Code §§ 30004, 30004. “In general, judicial review of actions under CZMA is governed by the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551–559, 701–706.” *California Coastal Com’n v. U.S. Dept of the Navy*, 22 F. Supp. 3d 1081, 1092 (S.D. Cal. 2014) (citing *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1144 (9th Cir. 2000) (plaintiffs challenge to consistency certification reviewed under APA)). NCTD falls within the CZMA’s zone of interests and therefore has standing to bring suit to challenge the consistency determination as being preempted by federal law. *See City of Sausalito*, 386 F.3d at 1201 (“There is no indication that the CZMA was intended by Congress to insulate from judicial review the actions of the agencies required to comply with the statute. We have, in the past, allowed parties other than those charged with making or concurring in a consistency determination to bring suit under the CZMA.”). Further, the APA is subject to a 6-year statute of limitations. *Id.* at 1096 (citing 28 U.S.C. § 2401(a)). Therefore, NCTD has ample time to challenge this decision in federal court if it so desires at the appropriate time.

Moreover, even assuming CCC is correct in its assertion that this action is subject to state law, NCTD still would not be barred from pursuing its preemption claim in federal court. A plaintiff who seeks both declaratory and injunctive relief in federal court, on the grounds of federal preemption, against a state law that has already been applied to that plaintiff is not required to exhaust all available state remedies before seeking relief in federal court. *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958); *Stone & Webster Engineering*

Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983); *Braniff Int'l, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978). Where the state has “plainly indicated an intent to enforce [its law]” against the plaintiff, the controversy between the parties is “present and concrete.” *Public Utilities Commission of California*, 355 U.S. at 538–39. A plaintiff requesting an injunction not only asserts a right under federal law on the face of their complaint but also seeks affirmative relief to prevent interference with that right. *Stone & Webster Engineering Corp.*, 690 F.2d at 327. As the Supreme Court has noted, “where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.” *Public Utilities Commission of California*, 355 U.S. at 540. Therefore, it is clear that this California law would not bar NCTD from bringing an action regarding preemption, especially because CCC has demonstrated its clear intent to enforce its consistency determination in this situation. *See, e.g., Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 1260 (W.D. Wash. 2005); *Norfolk Southern Ry. Co. v. Pennsylvania Public Utility Com’n*, 2010 WL 1253551 (W.D. Pa. 2010).

In addition, it is important to note that NCTD did not specifically petition the STB for a declaratory order for this Project alone. NCTD brought this action over two years ago seeking clarification on preemption issues for rail maintenance projects like bluff stabilization and fencing in its rail right-of-way in coastal zones. As this proceeding has progressed, the disputes regarding the fencing project and this Project have become especially ripe as both have been improperly ruled on by the CCC in some fashion and have involved separate proceedings including the consistency certification and two federal civil cases. Although these specific proceedings and

projects related to rail maintenance are extremely important and are perfect examples of why preemption must be applicable under 49 U.S.C. § 10501(b), NCTD most importantly seeks a determination by the Board to keep these local and state agencies from improperly interfering with its crucial interstate rail service that includes operations by BNSF Railway and Amtrak.

It is ironic that CCC now argues that its consistency concurrence is final and binding. CCC did not address the preemption argument at all in its consistency decision despite NCTD's oral and written objections during the proceeding regarding this issue. This position that CCC's decision is final and binding regarding a determination on preemption that it never addressed is highly inequitable and illogical. The STB has jurisdiction over these pending issues regarding preemption and is the most qualified agency to make this determination. *See Emerson v. Kansas City S. Ry. Co.*, 503 F.3d at 1130 (quoting *Green Mountain R.R. Corp.*, 404 F.3d at 642); *see also New Orleans & Gulf Coast Ry. Co.*, 533 F.3d at 331-32. In other words, CCC's latest attempt to avoid a decision by the appropriate decisionmaker here should be rejected.

CONCLUSION

Based on the foregoing discussion, NCTD respectfully asks the Board to reject CCC's assertion that state law governs the review of its consistency concurrence. NCTD further requests that the Board rule on NCTD's Petition for Declaratory Order to find that federal law preempts regulation by CCC of these two rail projects in NCTD's right-of-way.

Respectfully submitted,

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Certificate of Service

I certify that I have, this 6th day of September 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
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