

SERVICE DATE – MAY 23, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36433

NORTH COUNTY TRANSIT DISTRICT—PETITION FOR DECLARATORY ORDER

Digest:¹ The Board declines to issue a declaratory order regarding the applicability of certain laws and regulations related to a proposed bluff stabilization project and will hold this proceeding in abeyance with respect to the applicability of certain laws and regulations related to petitioner’s proposed fencing project.

Decided: May 22, 2023

On August 28, 2020, North County Transit District (NCTD), a California state agency responsible for providing public transit in north San Diego County and a common carrier subject to the Board’s jurisdiction,² filed a petition for declaratory order concerning proposed bluff stabilization projects and a separate proposed fencing project. The petition asks the Board to find that (1) the preemption provision of the ICC Termination Act of 1995 (ICCTA)—49 U.S.C. § 10501(b)—preempts any attempt by the City of Del Mar (Del Mar or the City) or the California Coastal Commission (Commission) to regulate NCTD’s rail line maintenance or upgrading activities in its rail right-of-way pursuant to the state coastal permitting regime under the California Coastal Act, Cal. Pub. Res. Code § 30000 et seq. (Coastal Act), and (2) any consistency review under the federal Coastal Zone Management Act (CZMA), 16 U.S.C. § 1451 et seq., cannot be harmonized with § 10501(b), because state and local regulation of NCTD’s rail maintenance and upgrading projects would directly interfere with or prevent rail operations,

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Interstate Commerce Commission, the Board’s predecessor, determined that NCTD is a common carrier because when it purchased the line from the Atchison, Topeka and Santa Fe Railway Company (Santa Fe), it granted a permanent easement to Santa Fe to conduct freight operations but maintained sufficient control over those freight operations to be deemed a common carrier. Orange Cnty. Transp. Auth.—Acquis. Exemption—Atchison, Topeka & Santa Fe Ry., 10 I.C.C.2d 78, 90 (1994). The successor of Santa Fe, BNSF Railway Company (BNSF), continues to operate over the line owned by NCTD. The National Railroad Passenger Corporation (Amtrak) also currently operates over the line.

causing an “irreconcilable conflict” between CZMA and ICCTA.³ (NCTD Pet. 1-2.) According to NCTD, the Commission and the City seek to apply the CZMA to a bluff stabilization project and to apply the Coastal Act to a proposed fencing project. (NCTD Pet. 2-3, 15-18, 20-21.)

For the reasons explained below, the Board will decline to issue a declaratory order with respect to the bluff stabilization project. The Board will also hold this proceeding in abeyance with respect to the fencing project to allow the Superior Court of the State of California for San Diego County to address issues before it in lawsuits against NCTD that are important to the preemption analysis in this case. If any preemption issues with respect to the fencing project remain unresolved after the state court proceedings, the Board may remove this proceeding from abeyance and address them.

BACKGROUND

The CZMA and the Coastal Act. The CZMA, a federal statute, and the Coastal Act, a state statute, can apply in an interrelated fashion where an entity seeks a federal permit or federal funding for activity that affects California’s coastal zone. The Commission has explained:

The CZMA encourages states to develop coastal management programs and implement the federal consistency procedures of the CZMA. Upon certification of a state’s coastal management program, all federal agency activities (including federal development projects, permits and licenses, and assistance to state and local governments) affecting the coastal zone must be consistent with the enforceable policies of the state’s certified program . . . The federal government certified the California Coastal Management Program (CCMP) in 1977. The enforceable policies of that document are Chapter 3 of the California Coastal Act of 1976. All consistency documents are reviewed for consistency with these policies.

California Coastal Commission, Federal Consistency,
<https://www.coastal.ca.gov/fedcd/fedcndx.html> (last visited May 16, 2023).

Under the CZMA, applicants for a federal permit or for federal funding for projects that would affect a coastal zone are required to seek review of their proposals by the Commission for consistency with the policies of the CCMP (i.e., Chapter 3 of the Coastal Act). 15 C.F.R. §§ 930.57, 930.94. If the Commission finds that the proposed activity is consistent with the CCMP, it will issue a concurrence, 15 C.F.R. §§ 930.63, 930.96, and the Commission can impose conditions on an activity through consistency review by issuing a conditional concurrence, 15 C.F.R. § 930.4. A conditional concurrence identifies conditions that must be satisfied for the Commission to find that an activity is consistent with the CCMP. *Id.* The Commission may also issue an objection. 15 C.F.R. §§ 930.62(d), 930.63(a), 930.96(b). In cases where the Commission issues an objection, the relevant federal agency cannot issue the

³ When there is a potential conflict between § 10501(b) and another federal law, the Board or a court must harmonize the statutes unless there is a “positive repugnancy” or an “irreconcilable conflict” between them. Ass’n of Am. R.R.s—Pet. for Declaratory Ord., FD 36369, slip op. at 3, 12 (STB served Dec. 30, 2020).

permit or the funding unless the National Oceanic and Atmospheric Administration (NOAA) overrides the objection by finding that the proposed activity is consistent with the objectives and purposes of the CZMA or is necessary for national security. 15 C.F.R. §§ 930.53(d), 930.62(c), 930.64, 930.120. This process is referred to as “consistency review.” See 15 C.F.R. § 930.60.

Where there are coastal development activities that do not involve federal action, the CZMA does not apply but the Coastal Act requires that a coastal development permit (CDP) be issued pursuant to state law, in many cases by local governments that are delegated state authority to issue such permits (here, the City). See Cal. Pub. Res. Code § 30600(a); Pac. Palisades Bowl Mobile Ests., LLC v. City of Los Angeles, 288 P.3d 717, 721-22 (Cal. 2012). The relevant state or local authority will issue a CDP if it determines that the proposed activity is consistent with the CCMP.⁴ Cal. Pub. Resources Code § 30601.3(c).

Positions of the Parties. NCTD states that it is seeking to install fencing along its right-of-way to enhance rail safety and that bluff stabilization projects are occasionally required to maintain the integrity of the bluff on which NCTD’s line sits.⁵ (NCTD Pet. 6-9.) NCTD asserts that the fencing project does not involve any federal action and is funded with state dollars. (NCTD Pet. 20-21.) According to NCTD, in cases where there is no federal involvement, the CZMA does not apply to rail maintenance and upgrade projects such as these, and any application of the Coastal Act is solely based on state law. (Id. at 23-24.) NCTD argues that courts and the Board have consistently held that any state permitting requirements are categorically preempted by § 10501(b) and, thus, any attempt to impose state permitting requirements on the proposed fencing project or on bluff stabilization projects is preempted. (Id. at 33-35, 40.) In addition, NCTD claims that consistency review under the CZMA for rail maintenance projects such as bluff stabilization cannot be harmonized with § 10501(b) because if a railroad were required to undergo consistency review every time it had to conduct rail maintenance, rail operations would come to a halt.⁶ (Id. at 46.) NCTD suggests that a Board order is needed not just to resolve disputes over current projects but to prevent application of the Coastal Act and consistency review under the CZMA from interfering with future rail

⁴ The Commission has not required NCTD to obtain a CDP in cases where consistency review applies, given that the consistency review process serves the same function as the CDP process: to ensure that the activity at issue is consistent with the CCMP. (Comm’n Reply Ex. 2 at Ex.7, Oct. 5, 2022.)

⁵ NCTD’s line runs along a bluff between the City and the Pacific coast. According to Del Mar residents Shirli Fabbri Weiss and Laura Schaefer (Residents), the bluff is “terraced like a three-layer cake consisting of (1) a beach layer (2) an 80- to-100-foot bluff [(Lower Bluff)] and (3) a 30- to-40-foot bluff up to the third layer at street level [(Upper Bluff)].” (Residents Reply 2-3, Mar. 24, 2022.) Residents explain that NCTD’s line is on a flat portion of the Lower Bluff, while homes and trails are on the Upper Bluff. (Id.; see also NCTD Pet., Ex. A at 3-5 (photographs showing NCTD’s line in relation to the surrounding area).)

⁶ NCTD also asserts that state law CCMP policies applied through the consistency review process are not federal law requirements and are preempted to the same degree that any other state law requirement would be preempted. (NCTD Pet. 38-40.)

maintenance and upgrade projects. (See NCTD Pet. 2-3, 25, 36-37, 46-47; NCTD Rebuttal 8 n.4; NCTD Reply July 6, 2022, 10, 14; NCTD Reply 7-8, Sept. 6, 2022.)

On October 5, 2020, the City filed a reply to the petition. The City argues that a declaratory order is not warranted because there is no current controversy. (City Reply 1, Oct. 5, 2020.) The City states that the after-the-fact consistency review has been completed for the 2019 emergency bluff stabilization project—the focus of NCTD’s petition—without the imposition of mitigation measures and that any future dispute is speculative and unlikely given that the stakeholders have always cooperated on the several bluff stabilization projects in the past. (*Id.* at 1-2.) Further, according to the City, under state law, the San Diego Association of Governments (SANDAG), not NCTD, has authority over the planning, development, funding, and construction of projects in the NCTD right-of-way and is the entity that is subject to consistency review by the Commission.⁷ (*Id.* at 2.) In addition, the City argues that NCTD has not provided any specific facts regarding how the consistency review under the CZMA would interfere with rail operations and therefore has not demonstrated that § 10501(b) and the CZMA cannot be harmonized. (*Id.* at 19-23.) The City further claims that NCTD has not shown that enforcement of the Coastal Act under state law is preempted because a finding of preemption would require a fact-specific analysis and NCTD has failed to provide sufficient facts regarding rail maintenance activities or state policies to allow the Board to make a determination. (*Id.* at 23-24.) Finally, the City claims that under the California Supreme Court’s decision in Friends of the Eel River v. North Coast Railroad Authority, 399 P.3d 37, 43 (Cal. 2017), the application of state law requirements to state entities, such as NCTD, does not constitute regulation but self-governance and is therefore not preempted by § 10501(b). (City Reply 26-29, Oct. 5, 2020.)

The Commission also filed a reply to the petition on October 5, 2020.⁸ The Commission argues that application of the CZMA to rail operations can be harmonized with ICCTA as evidenced by the Commission’s long history of approving rail projects without conflict and by the fact that the Board’s own regulations require applicants to go through consistency review for certain projects that require Board approval. (Comm’n Reply 11-13, Oct. 5, 2020, citing 49 C.F.R. § 1105.9.) The Commission further asserts that the Board should not issue a declaratory order here because there is no active controversy to resolve. (Comm’n Reply 14-15, Oct. 5, 2020.)

⁷ SANDAG has not participated in this proceeding.

⁸ The following parties also filed replies in opposition to the petition: the Sturgis family (homeowners in the City of Del Mar), Residents, and the Surfrider Foundation. The following parties filed replies in support of the petition: the Northern Indiana Commuter Transportation District, certain members of the Commuter Rail Coalition (an association of commuter rail agencies), and Amtrak. The Association of American Railroads filed a reply that did not take a position on the petition but stated that there should be no set of facts that would cause the Board to find that states can use permitting requirements to prevent railroads from performing necessary maintenance and, although the CZMA allows states to exercise authority over land use in coastal areas in some circumstances, other federal laws can preempt certain applications of such authority. The Military Surface Deployment and Distribution Command filed a comment that also did not take a position on the petition but was filed to inform the Board and the parties that the rail line at issue is important to national defense.

On October 26, 2020, NCTD filed a rebuttal to the replies to its petition and a motion for leave to file that rebuttal (i.e., a reply to a reply), in which NCTD asserted the existence of an active controversy by providing additional information regarding the details and timing of the proposed projects. NCTD explained that it was about to begin a new bluff stabilization project in part of its right-of-way located in Del Mar and that the Commission takes the position that this project is subject to consistency review.⁹ (NCTD Rebuttal 7.)

On November 6, 2020, NCTD filed a motion to hold the proceeding in abeyance, stating that it was involved in discussions with the City and the Commission to attempt to resolve the issues presented in the petition. The Board granted that motion in a decision served on November 30, 2020. Over a year later, on December 30, 2021, NCTD filed a status update stating that negotiations between the parties had not been successful and requesting that the Board remove the proceeding from abeyance and expedite the proceeding.

Following NCTD's December 30, 2021 status update, the parties continued to contest whether resolution of NCTD's petition was needed, restating many of the arguments from their initial pleadings. (See, e.g., NCTD Status Update, Mar. 4, 2022; City Reply 1-5, Mar. 11, 2022; Comm'n Status Update 3, Mar. 8, 2022; Residents Reply 2-3, Mar. 24, 2022; NCTD Status Update 1, 7, 13, June 14, 2022.) The City, the Commission, and Residents have requested that the Board order Board-sponsored mediation. (City Mot. 3-5, Jan. 1, 2022; Comm'n Mot. 1, Jan. 19, 2022; Comm'n Mot. 4 n.1, Apr. 26, 2022; City Reply 4, May 12, 2022; Residents Reply 2, Mar. 24, 2022; see also City Reply 3-4, Jan. 14, 2022 (arguing that settlement discussions between the City and NCTD had been productive and were not at an impasse).) NCTD opposes such an order because it does not believe that further talks will help the parties resolve their differences. (NCTD Reply 1, 5, Jan. 19, 2022; see also NCTD Status Update 4-9, Mar. 4, 2022 (arguing that Board action is urgently needed to resolve the issues in its petition).)¹⁰

In addition, two actions have been filed against NCTD in the Superior Court of the State of California for San Diego County that are relevant to this proceeding. First, on March 21, 2022, a group called the Friends of Del Mar Bluffs filed a petition for a writ of mandate and complaint (Friends Complaint) in state court. (NCTD Status Update 2, Apr. 13, 2022 (attaching copy of Friends Complaint).) Second, on April 19, 2022, the Commission filed an action in state court (Comm'n Complaint) against NCTD to, among other things, enforce a March 7, 2022 Commission order directing NCTD to cease and desist from undertaking development (including construction of fencing on the bluffs in the City) without first obtaining Coastal Act

⁹ The Commission (on October 29, 2020) and the City (on November 5, 2020) filed replies to NCTD's rebuttal, both of which argued that the Board should reject the rebuttal because the Board's regulations do not permit a reply to a reply. Although under 49 C.F.R. § 1104.13(c) a reply to a reply generally is not permitted, in the interest of a more complete record, the Board will grant NCTD's motion. See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord., FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

¹⁰ NCTD's March 4, 2022 status update also stated that staff and legal counsel for NCTD and the City had reached an agreement on a modified fencing project but that the Del Mar city council rejected the agreement. (NCTD Status Update 3, Mar. 4, 2022.)

authorization or confirmation from the Commission that such development is exempt. Both state court actions were removed to federal court but were later remanded back to state court, where they currently remain. (NCTD Status Update 5-6, June 14, 2022; NCTD Status Update 4, Nov. 30, 2022.)

On April 26, 2022, the Commission filed with the Board a motion to hold this proceeding in abeyance pending resolution of the Comm'n Complaint. (Comm'n Mot. 2, Apr. 26, 2022 (attaching copy of Comm'n Complaint).) NCTD filed in opposition to the abeyance request on April 29, 2022, and the City filed in support of abeyance on May 12, 2022.¹¹

In a June 2022 status update, NCTD informed the Board that SANDAG has certified that the current bluff stabilization project complies with the CCMP. (NCTD Status Update 8, June 14, 2022.) According to NCTD, on June 8, 2022, the Commission conditionally concurred with SANDAG's certification, meaning that the Commission would allow the bluff stabilization project to proceed only if SANDAG agreed to certain conditions.¹² (NCTD Status Update 8, June 14, 2022.) NCTD states that although SANDAG is authorized by state law to perform functions related to planning, project development, and construction, NCTD owns the rail line and retains all operational/maintenance control and safety responsibility for the railroad right-of-way. (*Id.* at 12.) NCTD claims it can deny SANDAG access to the right-of-way if SANDAG seeks to advance construction related to the bluff stabilization project under the conditions imposed by the Commission. (*Id.*) The Commission responds that, under state law, SANDAG is the entity responsible for rail planning, financing, and construction in San Diego County and was therefore the applicant for purposes of federal consistency review. (Comm'n Update 4, June 23, 2022.) The Commission further states that NCTD has previously represented publicly that SANDAG (not NCTD) is responsible for implementing the bluff stabilization project and that, in early January 2022, SANDAG and NCTD agreed to prepare and submit a consistency certification application for the bluff stabilization project. (*Id.* at 2.)

¹¹ Shortly after NCTD reported that both judicial proceedings had been remanded back to state court, the Commission on December 1, 2022, renewed its request that the Board hold this proceeding in abeyance pending resolution of the state court litigation. NCTD replied in opposition on December 7, 2022.

¹² The conditions required by the Commission include a redesign of proposed sea walls, construction of several pedestrian beach access and recreation features, measures to maintain beach access during construction, and removal of the sea walls after 30 years. (NCTD Status Update 10-11, June 14, 2020.) NCTD also states that the Commission's approval of the project is premised on the eventual movement of the entire NCTD rail line to an inland location. (NCTD Reply 9, July 6, 2020.) NCTD's petition claims that the City asked the Commission to examine a potential relocation of the line, and argues that any such requirement would be unenforceable either because it would be preempted or because it cannot be harmonized with ICCTA. (NCTD Pet. 41, 45.) The Commission responds that it does not seek to require NCTD to move the track now. The Commission also explains that it is SANDAG that is exploring the possibility of moving the track and SANDAG has stated that it could take decades to plan, fund, and construct such a project. (Comm'n Reply 15, Oct. 5, 2020.) Because it does not appear that movement of the track will be an issue any time soon, it would be premature for the Board to address that issue now.

On June 29, 2022, the Commission informed the Board that on June 17, 2022, NCTD and SANDAG reached an agreement to allow the bluff stabilization project to proceed as conditioned by the Commission's conditional concurrence. (Comm'n Update 1, June 29, 2022.) The Commission argues that NCTD therefore now seeks from the Board an advisory opinion regarding the validity of conditions to which NCTD has already agreed, and that the Board should decline to issue such a decision as a result. (*Id.* at 2; see also City Reply 7-8, July 1, 2022.)

On July 6, 2022, NCTD replied, stating that the agreement between it and SANDAG is simply an oral agreement that has yet to be formalized. (NCTD Reply 14, July 6, 2022.) NCTD further states that the agreement would allow SANDAG to proceed with construction, despite NCTD's objections, only if SANDAG agrees to fully fund and implement the conditions imposed by the Commission as a concurrent activity that is independent from the project. (*Id.* at 3.) In addition, NCTD argues that its agreement with SANDAG is not relevant to the Board proceeding here because NCTD's dispute is with the Commission, and because the agreement would expressly protect NCTD's right to continue seeking a determination from the Board. (*Id.* at 13-14.) NCTD also asserts that the fact that SANDAG is the entity responsible for engaging in the consistency review process is not relevant to this proceeding because NCTD, not SANDAG, has a common carrier obligation with respect to the rail line and it is NCTD whose rail operations have been unreasonably interfered with by the consistency review process.¹³ (NCTD Reply 13 n.9, July 6, 2022.) On October 20, 2022, NCTD reported that on October 11, 2022, the agreement between NCTD and SANDAG was finalized and that it allows NCTD to continue to advance its petition before the Board. (NCTD Status Update 2, Oct. 20, 2022.) NCTD attached a copy of the agreement to its status update.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The Board has broad discretion in determining whether to issue a declaratory order. See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); Delegation of Auth.—Declaratory Ord. Proc., 5 I.C.C.2d 675 (1989).

¹³ On July 25, 2022, the San Diego County Chapter of the Surfrider Foundation (Surfrider) filed a statement arguing, in part, that much of the bluff stabilization project will take place outside of NCTD's right-of-way on property owned by the city or the state and that ICCTA preemption therefore does not apply. (Surfrider Statement 3, July 25, 2022.) On July 27, 2022, Residents filed a reply to NCTD's June 14, 2022 status update arguing, in part, that the bluff stabilization project and the fencing projects are intended to address safety and that the preemption provision of the Federal Rail Safety Act (FRSA), 49 U.S.C. § 20106(a), rather than the ICCTA preemption provision, is the proper framework for addressing preemption on matters affecting the safety of railroads. (Residents Reply 8-10, July 27, 2022.) On August 2, 2022, NCTD replied in opposition to both pleadings, claiming that preemption applies regardless of where the bluff stabilization project is located because its regulation interferes with rail transportation and that FRSA preemption does not cancel out ICCTA preemption and does not apply to environmental laws such as the Coastal Act. (NCTD Reply 5-6, 8, Aug. 2, 2022.)

Under the circumstances presented here, the Board will exercise its discretion not to issue a declaratory order regarding the bluff stabilization project and will hold this proceeding in abeyance regarding the proposed fencing project so that the Superior Court of the State of California for San Diego County can address certain state law issues as discussed below.

The Bluff Stabilization Project. It is unnecessary for the Board to issue an order regarding the bluff stabilization project. First, the consistency review process under the CZMA for this project has already been completed. Second, following consistency review, SANDAG and NCTD reached an agreement for the project to go forward with the conditions required by the Commission and for SANDAG to pay for the costs associated with those conditions imposed. Thus, there no longer exists a dispute regarding the conditions. NCTD argues that its agreement with SANDAG is not relevant to this proceeding because the agreement is not between the rail carrier (NCTD) and the party seeking to regulate the rail carrier (the Commission). (NCTD Reply 14, July 6, 2022.) However, the fact that the Commission is not a party to the agreement does not change the fact that the agreement represents a binding declaration of NCTD's consent for the project to go forward with the conditions imposed through the consistency review process. Under the circumstances of this case, the Board will exercise its discretion and not issue an order to address a dispute that has already been resolved. And, for the reasons explained more fully below, the Board declines to issue an order regarding potential future disputes involving CZMA regulation at this time.

NCTD states that it “did not specifically petition the STB for a declaratory order for [the bluff stabilization project] alone” but sought clarification regarding preemption of rail maintenance projects generally to prevent ongoing interference with rail operations. (NCTD Reply 7-8, Sept. 6, 2022). NCTD argues that a Board determination is needed not just to settle the current dispute but to prevent the Commission from “hold[ing] future rail projects hostage.” (NCTD Reply 10, July 6, 2022.) According to NCTD, Board action to remove uncertainty is necessary in part because it “will soon begin other bluff stabilization projects” and “this type of work will continue well into the future.” (NCTD Rebuttal 8 n.4.) NCTD argues that the Board can resolve any future disputes now without knowing the facts of any particular dispute because (1) any application of consistency review to its operations is categorically preempted or, alternatively, (2) consistency review can never be harmonized with ICCTA. (NCTD Pet. 33-36, 38-44.)

NCTD's arguments are not persuasive. NCTD's claim that the CCMP policies applied through consistency review are categorically preempted as state permitting or preclearance requirements misses the mark: the “permitting” requirement here is the requirement to engage in the process of consistency review and to obtain a determination from the Commission that the activity is consistent with CCMP policies. These are requirements of *federal* law (the CZMA) and apply in cases where an entity seeks a federal permit or federal funding. *See* 15 C.F.R. §§ 930.57, 930.62, 930.94, 930.96. Although the Commission, a state entity, makes the consistency determination, it is the CZMA that requires it to do so. *See* 15 C.F.R. §§ 930.57, 930.62. Moreover, under the CZMA, NOAA (a federal agency) can override any objection by the Commission if it finds that “the activity is consistent with the objectives and purposes of the [CZMA]” (i.e., if it is consistent with the objectives and purposes of *federal law*). 15 C.F.R. § 930.120. Thus, even if the CCMP policies applied in consistency review are state law policies,

which the Board does not decide here, those policies are not a state permitting requirement subject to categorical preemption.

NCTD's alternative argument—that even if consistency review is a federal requirement, it can never be harmonized with ICCTA—also is without merit. According to NCTD, the application of consistency review to rail maintenance or upgrade activities cannot be reconciled with the purposes of ICCTA because rail operations would come to a “screeching halt” if railroads had to go through consistency review every time they needed to maintain or improve their tracks. (NCTD Pet. 46-47.) However, there is no indication that the Commission has attempted or will attempt to require consistency review for NCTD's routine or day-to-day maintenance work.¹⁴ NCTD's operations have been ongoing for decades and consistency review has not brought them to a “screeching halt.” Moreover, the Board's own regulations require rail carriers to go through the consistency review process for actions that require Board authority, see 49 C.F.R. § 1105.9, thereby demonstrating most clearly that ICCTA and consistency review are not irreconcilable. In addition, even rail projects that do not require Board authority (e.g., significant track maintenance and upgrade projects) may still require other federal environmental permits or review, including permits under the Clean Water Act (CWA). See, e.g., Ass'n of Am. R.R.s—Pet. for Declaratory Ord., FD 36369, slip. op. at 15 (STB served Dec. 30, 2020) (stating that CWA permits can be required for discharges from fueling facilities, maintenance facilities, or rail construction sites). Indeed, bluff stabilization projects and other projects in NCTD's right-of-way have required federal permits under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act, (Comm'n Update Ex. A at 15, June 23, 2022; Comm'n Reply Ex. 2 at Ex.7, Oct. 5, 2020), and NCTD has never suggested these permitting requirements cannot be harmonized with ICCTA.¹⁵ Further, NCTD has not identified anything to distinguish the consistency review process from these other federal environmental permitting and review requirements that would lead the Board to conclude that consistency review cannot be harmonized with ICCTA while these other federal requirements can be.¹⁶

¹⁴ Indeed, the Coastal Act does not appear to require consistency review for most repair and maintenance activities. Cal. Pub. Res. Code § 30610(d) (stating that CDPs are not required for repair and maintenance activities except for certain extraordinary methods of repair and maintenance that the Commission determines involve a risk of substantial adverse environmental impact).

¹⁵ Practically speaking, consistency review is part of the federal permitting process for these types of permits because federal law, the CZMA, prohibits issuance of such permits for coastal activities until the relevant state agency has concurred with the applicant's consistency certification or until NOAA overrides a state's objection to an applicant's consistency certification. See 15 C.F.R. §§ 930.64, 930.97.

¹⁶ NCTD further argues that consistency review can result in differing requirements for rail maintenance or upgrade work from state to state or even city to city. (NCTD Pet. 45-46.) According to NCTD, this makes consistency review irreconcilable with ICCTA because it would create an unworkable patchwork of regulations that would unreasonably burden interstate commerce and make compliance impossible. (*Id.*) Again, there is no indication that consistency review has applied or will apply to NCTD's routine maintenance. In addition, NCTD's argument is belied by history. Consistency review has been required for decades and the Board

Because the federal requirement to engage in consistency review can generally be harmonized with ICCTA, the Board rejects NCTD's arguments. Any future disputes that may arise regarding the application of consistency review to NCTD's operations will be addressed on a case-by-case, fact-specific basis under the harmonization principles discussed above.

The Fencing Project. Unlike the bluff stabilization project, the dispute over the fencing project remains ongoing. As explained above, NCTD and the City's staff reached a tentative agreement regarding the fencing project, which was ultimately rejected by Del Mar's city council. (NCTD Status Update 3, Mar. 4, 2022.) The Commission then issued a cease and desist order to NCTD ordering it to refrain from any construction activities related to the fencing project until NCTD obtained a permit from the Commission. (Comm'n Status Update Ex. A, Mar. 8, 2022.) Subsequently, both the Commission and the Friends of Del Mar Bluffs initiated actions in state court with respect to the fencing project. (NCTD Status Update 2, Apr. 13, 2022; Comm'n Mot. 2, Apr. 26, 2022.)

For the reasons explained below, the Board will hold this proceeding in abeyance with respect to the fencing project so the state court can consider state law issues—including whether NCTD agreed to comply with California's environmental laws, including the Coastal Act, as a condition of receiving state funding for the fencing project—that may resolve the dispute or inform any future Board decision. Resolution of these state law issues is relevant to any preemption analysis in this case.

The Commission has ordered NCTD to obtain a CDP pursuant to the Coastal Act before going forward with the fencing project. (Comm'n Status Update Ex. A, Mar. 8, 2022.) NCTD argues that the requirement to obtain a CDP is preempted by 49 U.S.C. § 10501(b).¹⁷ (NCTD Pet. 29, 33.) However, the resolution of certain claims currently pending in court regarding the fencing project could inform, if not dictate, the outcome of any Coastal Act preemption analysis. Specifically, the Friends Complaint alleges that NCTD voluntarily agreed to comply with California environmental law, including the Coastal Act, as a condition of receiving a state grant for the fencing project. (NCTD Status Update Att. at 14-15, Apr. 13, 2022.) The Board has held that ICCTA preemption generally does not apply to a voluntary agreement. See e.g., Twp. of Woodbridge, N.J. v. Consol. Rail Corp., NOR 42053, slip op. at 5 (STB served Dec. 1, 2000) (holding that agreements between a township and a railroad to limit locomotive idling at certain hours were not preempted and stating that “[t]hese voluntary agreements must be seen as

is not aware of any claims or evidence that it has created an unworkable patchwork of regulations that cannot be harmonized with ICCTA.

¹⁷ NCTD seeks a determination not only that the Coastal Act is preempted as applied to the fencing project but as to all other future rail maintenance or upgrade projects in the right-of-way. (See NCTD Pet. 2-3, 25, 36-37, 46-47.) However, as noted above, the Coastal Act contains an exception for maintenance. Cal. Pub. Res. Code § 30610(d). In addition, the Board is unwilling to conclude that all future maintenance or upgrade projects within NCTD's right-of-way would constitute “transportation by rail carrier” subject to preemption under § 10501(b). City of Alexandria, Va., FD 35157, slip op. at 2 (explaining that whether a particular activity is “transportation by rail carrier” under § 10501(b) is a case-by-case, fact-specific determination).

reflecting the carrier’s own determination and admission that the agreements would not unreasonably interfere with interstate commerce”); see also PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 221 (4th Cir. 2009) (holding that § 10501(b) does not expressly preempt voluntary agreements and that voluntary agreements are generally not impliedly preempted for unreasonably interfering with rail transportation). Moreover, in California High Speed Rail—Petition for Declaratory Order, FD 35861 (STB served Dec. 12, 2014), the Board stated that it would not even reach the question of whether a voluntary agreement might be preempted where the railroad had agreed to certain requirements as a condition of receiving government funding. Whether the carrier was required to comply with a specific state law as a condition of that funding was deemed by the Board a state law issue for a state court to decide. Id. at 15 (citing Nixon v. Mo. Mun. League, 541 U.S. 125, 134-37 (2004) (explaining that even if a federal statute were to preempt a state requirement directed at a state agency, the state legislature still has the authority to control the funding of the state agency and implicitly the state agency’s actions)). Thus, whether NCTD agreed to comply with the Coastal Act as a condition of grant funding for the fencing project is an issue relevant to any preemption analysis, but an issue that is clearly within the purview of the state court. Once the state court resolves that question, either the court or the Board can address any remaining preemption issues.¹⁸

Abeyance is appropriate where it would promote efficiency and not be fundamentally unfair to any party. E.g., Grafton & Upton R.R.—Pet. for Declaratory Ord., FD 36518, slip op. at 3 (STB served Nov. 3, 2021). For the reasons discussed above, resolution of the state law questions regarding NCTD’s obligations under the grant agreement would inform the preemption analysis in this case and therefore promote efficiency. See Ballard Terminal R.R.—Pet. for Declaratory Ord., FD 36261, slip op. at 5 (STB served June 27, 2019). Abeyance would not be fundamentally unfair to any party here because obtaining answers to contractual questions would allow a more complete and accurate adjudication of the preemption dispute between the parties. See id.

Accordingly, this proceeding will be held in abeyance pending resolution of the state court proceedings regarding the issues discussed above. If any preemption questions remain unresolved after the state court has ruled, the Board may remove this proceeding from abeyance to address those questions. The parties will be directed to submit any relevant court decision to the Board within five days of its issuance.

It is ordered:

1. NCTD’s motion for leave to file a reply to a reply is granted.

¹⁸ If the court were to determine that NCTD did not agree to comply with the Coastal Act as a condition of funding for the fencing project, the ICCTA preemption questions and other related issues raised by the parties—including the role FRSA preemption may have here and the effect of the Friends of the Eel River decision, if any, on this case—would need to be addressed by the court or the Board. See City of Sammamish, Wash.—Pet. for Declaratory Ord., FD 36161, slip op. at 4 (STB served Mar. 29, 2018) (explaining that the Board and courts have concurrent jurisdiction to decide preemption questions).

2. NCTD's request for a declaratory order concerning the bluff stabilization project is denied.

3. With respect to NCTD's request for a declaratory order concerning the fencing project, this proceeding is held in abeyance as discussed above.

4. The Board will provide a copy of this decision to the Superior Court of the State of California for San Diego County.

5. Parties are directed to submit any relevant court decisions to the Board within five days of issuance.

6. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.