

810 Mission Avenue
Oceanside, CA 92054
(760) 966-6500
(760) 967-2001 (fax)
GoNCTD.com

March 7, 2022

Mr. John Ainsworth
Executive Director
California Coastal Commission
455 Market Street, Suite 300
San Francisco, CA 94105
Sent Via Electronic Mail: john.ainsworth@coastal.ca.gov

Re: Notice Prior to Issuance of Executive Director Cease and Desist Order and Notice of Intent to Commence Proceedings for the Coastal Commission's Issuance of a Cease and Desist Order

Dear Mr. Ainsworth:

The North County Transit District (NCTD) is in receipt of your letter dated March 3, 2022 regarding your Notice Prior to Issuance of Executive Director Cease and Desist Order ("EDCDO"). In the EDCDO, you have directed NCTD to:

- (1) cease and desist from conducting any unpermitted development on the Property without obtaining a Coastal Development Permit ("CDP"), including, but not necessarily limited to, the installation of fencing along the Del Mar bluffs; and (2) take necessary affirmative steps to avoid irreparable injury.

As you are aware, NCTD disagrees with the fundamental premise of your assertions of authority over both the District and the safety fencing project located on the Del Mar portion of the NCTD railroad right-of-way (the "Project"). Specifically, the matter of obtaining a CDP as a prerequisite to a rail project has been litigated and decided in *North San Diego County Transit Development Board – Petition for Declaratory Order*, FD No. 34111 (STB served Aug. 21, 2002), (hereinafter the "2002 STB Decision").

In the 2002 STB Decision, the same matter was at issue: a CDP requirement imposed by the City of Encinitas in order for NCTD to proceed with a rail project. The STB held in that case and has repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted on the basis of interstate commerce under Interstate Commerce Commission Termination Act of 1995 (ICCTA). See 49 U.S.C. § 10501(b).

The ability of the Commission to issue a cease and desist to NCTD on the premise of obtaining a Coastal Development Permit has been preempted for twenty years.

Furthermore, the Commission, through its legal representative, and you as the Executive Director, have known of the Project and have provided input through the "Working Group" as referenced in your letter since at least December 10, 2020, when the City of Del Mar,

NCTD, and the Commission entered into a Settlement Discussions Agreement. At no point during the more than 14 months the Working Group discussed, and revised various fencing plans did the Commission make any statement that a CDP was a requirement for the Project.

As the City of Del Mar has an approved Local Coastal Program ("LCP"), the Commission would not even be the proper entity to impose a CDP were it not preempted by the 2002 STB Decision. Per the Commission's own guidelines¹:

After an LCP has been finally approved, the Commission's coastal permitting authority over most new development is transferred to the local government, which applies the requirements of the LCP in reviewing proposed new developments. The Commission retains permanent coastal permit jurisdiction over development proposed on tidelands, submerged lands, and public trust lands, and the Commission also acts on appeals from certain local government coastal permit decisions.

Your issuance of an EDCDO continues the pattern of the Coastal Commission engaging in behavior that suggests that it is not subject to laws promulgated by the State of California as it relates to the prohibition of trespassing and federal law pertaining to NCTD's rights as a common carrier of rail based on decisions previously issued by the STB as documented in this letter and prior communications. The formal issuance of the EDCDO will provide yet another example to the STB and other entities that the Coastal Commission is operating outside of its legal authority.

Sincerely,



Matthew O. Tucker
Executive Director

cc: NCTD Board of Directors
SANDAG Board of Directors
Lisa Haage, Chief of Enforcement, California Coastal Commission
Alex Helperin, Assistant Chief Counsel, California Coastal Commission
Aaron McLendon, Deputy Chief of Enforcement, California Coastal Commission
Justin Buhr, Statewide Enforcement Supervisor, California Coastal Commission
Sarah Salvini, Statewide Enforcement Analyst, California Coastal Commission
Hasan Ikhata, Executive Director, SANDAG
Hee Yang, Vice President, Exbon Development, Inc.
Lori A. Winfree, General Counsel, NCTD

¹ <https://www.coastal.ca.gov/lcps.html>