

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

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

**NORTH COUNTY TRANSIT DISTRICT REPLY IN OPPOSITION TO REQUEST FOR
ADDITIONAL BRIEFING**

North County Transit District (“NCTD”) respectfully submits this reply in opposition to the California Coastal Commission (“Commission”) request for additional briefing on its *Friends of the Eel River*¹ argument regarding self-governance.² NCTD asserts in reply that the Surface Transportation Board (“STB” or “Board”) is well aware of this California decision and has addressed the facts and issues in that case with respect to preemption in prior decisions. As a result, there is no further need for briefing of this issue and additional delay of this proceeding.

In fact, with respect to the Commission’s request to further delay this proceeding, since NCTD filed its Supplemental Status Update herein on March 4, 2022, the need for expedited consideration of this matter has become even more urgent. The Commission issued a Cease and Desist Order (attached hereto as Exhibit A) to NCTD on March 7, 2022, demanding that NCTD

¹ *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017).

² The Commission made this request in its Status Update and Opposition filed on March 8, 2022 in this proceeding. The City of Del Mar supported this request in its March 11, 2022 Reply to the Supplemental Status Update.

cease and desist from any construction of the safety fencing project in the right-of-way. The Commission noted therein that it was seeking to enforce the City of Del Mar's Local Coastal Plan.³ Shortly thereafter, on March 11, 2022, NCTD was served with a demand letter from the Friends of Del Mar threatening to file a lawsuit to enjoin NCTD from implementing its stated plan to install safety fencing on the Del Mar Bluffs unless NCTD agrees to suspend or terminate its plans to begin this work by March 18, 2022 (attached hereto as Exhibit B). Unfortunately, while the Commission, the City of Del Mar, and this citizen group are making every effort to delay the installation of the safety fencing on the rail line through these tactics, more horrific accidents will occur in this area where many people simply do not take the dangers of a rail line seriously like here when a jogger running on the tracks with his earbuds in was struck and severely injured by an Amtrak train as this video demonstrates.⁴

With respect to the *Friends of the Eel River* issue raised by the Commission, the Board has already expressed its opinion on that matter. In 2014, the California High-Speed Rail Authority ("Authority") filed a petition requesting that the Board issue a declaratory order regarding the availability of injunctive remedies under the California Environmental Quality Act ("CEQA") to prevent or delay construction of an approximately 114-mile high-speed passenger rail line between Fresno and Bakersfield, Cal. ("the Line"). See *Cal. High-Speed Rail Auth.—Pet. for Declaratory Order (CHSRA Declaratory Order)*, FD 35861 (STB served Dec. 12, 2014). The Authority claimed that *Town of Atherton v. California High-Speed Rail Authority*, 175 Cal. Rptr. 3d 145 (Ct. App. 2014), in which the California Court of Appeal held that the "market

³ This enforcement of Del Mar's Local Coastal Plan demonstrates the "patchwork of local regulation" concern that NCTD has pointed out in prior filings. This means each city with a Local Coastal Plan on the coast could make similar demands on a railroad if the Commission is allowed to proceed with its Cease and Desist Order.

⁴ <https://www.nbcsandiego.com/videos/jogger-hit-by-train-in-del-mar/2368213/>

participant” doctrine negated § 10501(b) preemption, should not affect the Board’s decision, arguing that the market participation doctrine was misapplied by the court in *Atherton*, as another California Court of Appeal had found in *Friends of the Eel River v. North Coast Railroad Authority*, 178 Cal. Rptr. 3d 752 (Ct. App. 2014).⁵ *CHSRA Declaratory Order*, slip op. at 2-3. This California Court of Appeal decision in *Friends of the Eel River* was appealed to the California Supreme Court, eventually resulting in the decision the Commission is relying on here.

Because of this conflict between these two courts of appeal and the pending California Supreme Court case in *Friends of the Eel River*, the Board issued a decision to inform interested parties and the California Supreme Court of its views on federal preemption of CEQA as it related to matters involving railroad transportation within the Board’s jurisdiction under § 10501(b). *Id.* at 5 (citing *Atherton*, 175 Cal. Rptr. 3d at 161 n.4 (noting that, as the agency authorized by Congress to administer the Interstate Commerce Act, the Board is “uniquely qualified” to address whether § 10501(b) preempts state law and that a request to the Board for a declaratory order would be the remedy for the Authority’s preemption claims)). Applying the well-established preemption principles, the Board concluded that CEQA was categorically preempted by § 10501(b) in connection with the Line. *CHSRA Declaratory Order*, slip op. at 10. The Board held, as it had in the past, that CEQA is a state preclearance requirement that, by its very nature, could be used to deny or significantly delay an entity’s right to construct a line that

⁵ The petition for review had been accepted by the California Supreme Court in *Friends of the Eel River* when the Authority filed its petition for declaratory order and was pending when the Board issued *CHSRA Declaratory Order*.

the Board has specifically authorized, thus impinging upon the Board's exclusive jurisdiction over rail transportation. *Id.*

In coming to this conclusion, the Board reviewed the conflict between the *Atherton* and *Friends of the Eel River* appeal court decisions. It addressed the same state sovereignty, market participant doctrine, and voluntary agreement arguments asserted by the parties in *Friends of the Eel River* Supreme Court case against preemption and found CEQA was preempted. In other words, although the Supreme Court decision in *Friends of the Eel River* obviously had not been issued at this time, the Board's decision in *CHSRA Declaratory Order* disagrees with that holding and found preemption under § 10501(b).

In 2015, Northwestern Pacific Railroad Company ("NWPCO"), one of the parties in the *Friends of the Eel River* case, also asked the Board to declare that CEQA was preempted by the Board's exclusive jurisdiction over railroad transportation under 49 U.S.C. § 10501(b) in a parallel proceeding to the *Friends of the Eel River* litigation. *Northwestern Pacific Railroad Company – Pet. for Declaratory Order*, FD 35977 (STB served Apr. 22, 2016). The Board denied NWPCO's petition for a declaratory order. The Board stated that because it had already ruled on preemption in the context of this precise matter involving the *Friends of the Eel River*, an additional declaratory order addressing the same issues was not warranted. Instead, the Board referred the parties to its recent decision in the *CHSRA Declaratory Order*, explaining that CEQA is categorically preempted by § 10501(b) in connection with rail lines regulated by the Board, including state-operated or owned rail lines.

Therefore, it is clear that further briefing on *Friends of the Eel River* is not necessary in this proceeding as the Board has already provided its opinion on the issues addressed in this case. The Board's opinion was that CEQA was preempted.

Moreover, *Friends of the Eel River* is distinguishable from the case at hand. First, the rail line at issue in *Friends of the Eel River* was inoperable and did not have any freight service on it when it was bought by North Coast Railroad Authority (“NCRA”), a California government subdivision, with state grant funds to resume freight service thereon. NWPCO, a private entity, was given a contract to operate the line by NCRA and did begin providing limited freight service on the rail line before the litigation began. NCTD, on the other hand, owns a rail line that is heavily used by Amtrak for interstate passenger service and BNSF for interstate freight service.⁶ Pursuant to two separate operating agreements with Amtrak and BNSF, NCTD is required to maintain the rail line to allow these two rail carriers to provide these crucial interstate services. Amtrak has a statutory right to operate on the NCTD rail line under the Rail Passenger Service Act. *See* 49 U.S.C. § 24308. BNSF has authority to operate on the line pursuant to the ICC Termination Act and retained a permanent freight easement to operate on the line when it was purchased by NCTD. *See Orange County Transportation Authority–Acquisition Exemption–The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C.2d 78 (1994). In sum, the Commission’s requirement for a permit before NCTD can install a safety fence in its right-of-way not only impacts NCTD but also BNSF and Amtrak. *See, e.g., Or. Coast Scenic R.R. v. Or. Dep’t of State Lands*, 841 F.3d 1069 (9th Cir. 2016). In other words, the Commission’s preclearance requirements under the guise of state sovereignty here will have an impact on two major interstate rail operations that are not California government subdivisions and are based on statutory and property rights beyond NCTD’s control, in essence allowing the Commission to stop their rail services on this line through NCTD if it has its way

⁶ Amtrak operates the Pacific Surfliner intercity service on the tracks, operating 26 trips daily between Los Angeles and San Diego with an annual ridership of nearly 3 million people. **It is the second busiest intercity passenger rail corridor in the United States.** BNSF operates four (4) to six (6) daily freight trains on the San Diego coastal rail corridor. In 2017, BNSF moved more than 4.3 million tons of freight on this rail line.

here. Moreover, if NCTD is prohibited from providing adequate maintenance of the line by the Commission's preclearance interference here, BNSF and Amtrak have the contractual right to step in and provide this service. Accordingly, the Commission's interference is clearly tied to these other two interstate rail operations and cannot be viewed as an internal California government matter.

In addition, this case involves the California Coastal Act (Cal. Pub. Res. Code, § 30000 et seq) and the Coastal Zone Management Act (16 U.S.C. § 1451 et seq.) ("CZMA"), whereas *Friends of the Eel River* involved CEQA. The CZMA created a federal-state partnership. The main purpose of the CZMA is to encourage and assist coastal states in preparing and implementing coastal zone management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. U.S. Code Congressional and Administrative News, 92nd Congress, Second Session, 1972 Volume 3, p. 4776. The CZMA is a voluntary program for states. If a state elects to participate, it develops and implements a coastal management program ("CMP") pursuant to federal requirements. *See* CZMA § 306(d); 15 C.F.R. part 923. State CMPs are comprehensive management plans that describe the uses subject to the management program, the boundaries of the state's coastal zone, the organization of the management program, and related state coastal management concerns. The CZMA federal consistency provision is a primary incentive for states' participation because it allows states to review federal activities that have coastal effects in order to ensure they are consistent with the federally approved policies of the state CMP. *See* 16 U.S.C. § 1456. The CZMA encourages state regulation of the coastal zone by granting funds for the implementation of approved state programs and subjecting activities affecting the coastal zone by federal agencies and licensees to consistency review under § 1456.

The California Legislature passed the Coastal Act in 1976 providing for coastal regulation. Cal. Pub. Res. Code, § 30000 et seq. The Coastal Act created the Commission and designated it

as the state agency responsible for implementing the state's authority under the CZMA. Cal. Pub. Res. Code, §§ 30300, 30330. In 1977, the acting Secretary of Commerce approved California's CMP, which includes the Coastal Act. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 893-894 (CD. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979). The Coastal Act contains the enforceable policies of the California CMP for purposes of the CZMA. Cal. Pub. Res. Code, § 30008.

In a rulemaking that addressed preemption, the National Oceanic and Atmospheric Administration ("NOAA") explained in its Final Rule regarding changes to these state CMPs:

Even though states review Federal actions under the CZMA Federal consistency authority (a Federal law requirement), the states apply their CZMA enforceable policies, which are based on state law, to review Federal actions. 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).

Coastal Zone Management Act Program Changes Procedures (Final Rule), 84 FR 38118-01, at 38128 (NOAA issued Aug. 6, 2019).

Therefore, unlike CEQA, which is strictly a state environmental program, the Coastal Act

is part of a federal-state partnership implemented through the CZMA as described. This partnership allows California to engage in federal consistency review which it could not do otherwise. As such, the Coastal Act cannot be viewed as a way for California to administer control over a state subdivision's activities but is part of a complicated process that requires federal approval for its use by California to regulate its coastal zone.

Furthermore, until this date, any NCTD rail project that was reviewed by the Coastal Commission was done through the Federal consistency review process with the San Diego Association of Governments ("SANDAG"). The Commission has never asserted that NCTD had to go through the Coastal Act state permitting process and obtain a Coastal Development Permit or CDP. Now, because the Commission knows Federal consistency review does not apply to the safety fencing project because there is no federal action, it seeks to change course requiring a state permit and claiming conveniently that its actions are part of the state process for monitoring state subdivisions like NCTD. This sudden change of course demonstrates that the Commission is not following any type of internal state review process but is simply attempting to assert its perceived authority in direct conflict with the STB decision in the 2002 Encinitas matter and avoid § 10501(b) preemption by making NCTD obtain this "state" permit. *See North San Diego County Transit Development Board – Petition for Declaratory Order*, FD No. 34111 (STB served Aug. 21, 2002).

In conclusion, based on the foregoing discussion, NCTD respectfully asks the Board to deny the Commission's request for further briefing on the *Friends of the Eel River* issue and to issue a decision on this urgent matter in an expedited fashion.

Respectfully submitted,

/s/ Daniel R. Elliott

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Attorney for North County Transit District

Dated: March 14, 2022

Certificate of Service

I certify that I have, this 14th day of March 2022, served by email copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
Daniel R. Elliott
Attorney for North County Transit District

EXHIBIT A

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 228
SAN FRANCISCO, CA 94105
FAX (415) 904-5400
TDD (415) 597-5885

**VIA ELECTRONIC MAIL AND CERTIFIED MAIL**

March 7, 2022

Mathew Tucker
Executive Director
North County Transit District
810 Mission Avenue
Oceanside, CA 92051
(Certification No. 7019 1640 0001 5124 2355)

Subject: Executive Director Cease and Desist Order No. ED-22-CD-01

Date Issued: March 7, 2022

Expiration Date: June 5, 2022

Property Location: The North County Transit District right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County. This area includes the properties currently identified by the San Diego County Assessor's Office as APNs 299-240-24-00, 300-073-01-00, 300-95-01-00, 300-175-01-00, 300-183-03-00, and 300-174-14-00.

Threatened Violation: The proposed installation of a large-scale fencing project along the Del Mar bluffs without a Coastal Development Permit.

I. ORDER

Pursuant to my authority under California Public Resources Code ("PRC") Section 30809, and as the Executive Director of the California Coastal Commission ("Commission"), I hereby order the North County Transit District ("NCTD") to cease and desist from undertaking any development, as that term is defined in the Coastal Act (see PRC § 30106), including, but not limited to, the installation of fencing, in NCTD's right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County ("the Property"), including along the Del Mar bluffs, without first obtaining Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt.

II. PERSONS SUBJECT TO THE ORDER

The persons subject to this Executive Director Cease and Desist Order ("EDCDO") are the following: NCTD; their employees, agents, and contractors; and anyone acting in concert with any of the foregoing, including anyone or any entity conducting development related to the threatened violations described below, on its or their behalf.

III. IDENTIFICATION OF THE PROPERTY

The property that is the subject of this EDCDO is the NCTD right-of-way along the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County. This area includes the properties currently identified by the San Diego County Assessor's Office as Assessor's Parcel Numbers 299-240-24-00, 300-073-01-00, 300-95-01-00, 300-175-01-00, 300-183-03-00, and 300-174-14-00.

IV. DESCRIPTION OF THE THREATENED VIOLATIONS AND THE PARTIES THREATENING TO UNDERTAKE THE ACTIVITIES

The issuance of this EDCDO is in response to NCTD's representations that it intends to commence the construction of a fencing plan along the Del Mar bluffs without first obtaining a Coastal Development Permit ("CDP") or any other type of Coastal Act authorization.

V. AUTHORITY TO ACT

The Executive Director of the Commission is issuing this Order pursuant to his authority under PRC Sections 30809(a)(1) because the activities addressed by this EDCDO constitute a threat to undertake activity without first securing Coastal Act authorization and because the local government with a certified local coastal program has requested the Commission assume responsibility for the enforcement of the Coastal Act, including issuance of this EDCDO to address the threat of unpermitted development.

VI. FINDINGS

The threatened violation in this matter includes, but is not necessarily limited to, NCTD's represented intent to implement a fencing plan along the Del Mar bluffs without a CDP or any other form of Coastal Act review, despite Commission staff's warning that the fencing plan cannot be implemented without such a CDP.

In October 2020, Commission staff received formal notice that on August 28, 2020, NCTD had filed a Petition for Declaratory Order (Petition) with the federal Surface Transportation Board (STB). In the Petition, NCTD sought an order to prohibit the Commission and the City of Del Mar from being able to regulate NCTD's development along the Del Mar bluffs, including projects such as the fencing plan at issue here. On

October 5, 2020, the Commission, along with the City of Del Mar, concerned Del Mar residents, and the Surfrider Foundation, filed oppositions to NCTD's Petition.

In October 2020, NCTD presented its intention to the City of Del Mar ("City") to construct a 6-foot tall chain link fence at the track level and also along the upper bluffs in Del Mar based on a "Trespasser Risk Reduction Study" that NCTD had recently published. NCTD did not seek approval for the project; rather, NCTD informed the City that it would be agreeable to negotiating with the City to construct a different type and size of fencing if the City would pay for the modified fence and if the City would fully assume liability and indemnify NCTD for incidents that occur within the area of the modified fencing.

On October 15, 2020, I sent a letter to the NCTD Board of Directors expressing my surprise and disappointment that NCTD, suddenly and without any notice except for the formal service of a copy of NCTD's Petition, took action to end its practice of collaboration with the Coastal Commission on transportation projects in the San Diego region. I noted the long cooperative history between NCTD and the San Diego Association of Governments (SANDAG) on the planning, review, and approval of numerous transportation projects in San Diego related to railroad infrastructure and the value of this coordination to all parties. I additionally expressed my concern regarding NCTD's representation to the City of Del Mar that it would unilaterally proceed with a project to fence the Del Mar bluffs without any state or local review. At this time, I requested that NCTD withdraw its Petition before the STB and work with the Commission on the fencing plan to find alternatives that would protect public safety, ensure public access to bluff trails and the beach, and protect coastal resources.

NCTD's refusal to obtain state or local authorization is also problematic because the Caltrans grant which provided funding to NCTD for this project required NCTD to comply with all applicable laws, including environmental regulations.

On December 10, 2020, the City, NCTD, and the Commission entered into a Settlement Discussions Agreement for the purpose of facilitating confidential negotiations and discussions to reach a Settlement Agreement regarding the STB matter. And in March 2021, in order to continue good faith discussions, the parties agreed to a stay of the STB matter through December 31, 2021.

From March 2021 to November 2021, Commission staff met with NCTD staff on a monthly or bimonthly basis in an attempt to come to an agreement on how Commission staff and NCTD would collaborate on NCTD LOSSAN corridor development projects, including a Del Mar bluff fencing plan to ensure public safety, in order to ensure that these projects are consistent with the Coastal Act and receive all necessary authorizations. Commission staff also attempted to work with NCTD specifically on the design of the fencing plan for the Del Mar bluffs in an attempt to limit the project's negative impacts to coastal resources protected by the Coastal Act, including public views, stability of bluffs, public access and other coastal resources.

Despite Commission staff's extensive efforts, on December 30, 2021, NCTD filed a report with the STB seeking to reopen and expedite its Petition against the Commission and Del Mar. On January 14 and 18, 2022, Del Mar and the Commission each respectively filed responses, including a motion for the STB to move the matter into its mediation program. On January 19, 2022, NCTD opposed the request for mediation, stating that it does not believe an agreement could be reached. The STB has not yet issued any ruling on this matter.

The very next day, on January 20, 2022, NCTD's Board of Directors approved Job Order No. 21009-005, to hire general contractor Exbon Development Inc. for the installation of the Del Mar bluffs fencing plan. The NCTD Board approved the fencing project to go forward without any Coastal Act authorization, despite the fact that NCTD had been advised for several years by Commission staff that such development requires Coastal Act authorization before any such work can commence, and offers by Commission staff to attempt to find a resolution that was consistent with the Coastal Act.

Despite Commission staff's warning that the fencing plan cannot be implemented without Coastal Act authorization, NCTD has indicated its intent to move forward with the fencing plan without such Coastal Act authorization.

NCTD's representation that it will move forward with the installation of fencing along the Del Mar bluffs without a CDP constitutes a threat to undertake unpermitted development. Under the Coastal Act (PRC § 30600(a)), and the City of Del Mar Municipal Code (Section 30.75.040), any person wishing to perform or undertake development in the Coastal Zone must obtain a CDP, in addition to any other permit required by law. Development is broadly defined by PRC Section 30106 and, similarly, by Section 30.75.030 of the City of Del Mar Municipal Code, as follows:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

NCTD has represented that it intends to construct fencing along the Del Mar bluffs without obtaining a CDP, clearly "threatening" to undertake development without a CDP. The installation of this fence constitutes development as defined in the Coastal Act, as the placement of solid material and a change in the intensity of use of land, and therefore is subject to the permit requirements of the Coastal Act and the Del Mar Local

Coastal Program ("LCP"). Additionally, in a March 2, 2022 telephone conversation and confirmed in writing on the same day, the City of Del Mar has requested that the Commission assume responsibility for enforcement in this matter.

On March 3, 2022, as the Executive Director of the Commission, I gave NCTD notice of my intent to issue an EDCDO. The letter I sent to NCTD that day, captioned "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" ("NOI"), is attached hereto as Exhibit A. The NOI cited the relevant legal provisions of the Coastal Act defining development needing authorization under the Coastal Act and gave NCTD the opportunity to provide assurances that would obviate the need to issue this EDCDO by responding in writing by noon on Monday, March 7, 2022, with a response that includes the following (a "satisfactory response" as referred to in Coastal Act 30809):

1. A commitment that NCTD will not begin work for the installation of fencing along the Del Mar bluff without a Coastal Development Permit that is in full force and effect.
2. A plan detailing the steps NCTD will take in order to receive a Coastal Development Permit, including a date by which NCTD will submit a Coastal Development Permit application.

Later in the day on March 3, you, as the Executive Director of NCTD, sent an email message to me confirming receipt of my letter and indicating that you would review the letter and determine a response. We are in receipt of your letter of today's date in which you declined to provide a satisfactory response as indicated above.

Since NCTD failed to respond to my notice in a "satisfactory manner," as that phrase is defined in PRC section 30809(b), I am issuing this EDCDO to direct you to cease and desist from undertaking unpermitted development on the Property.

Your March 7 letter also raised two points to which I would like to respond. First, you assert that the Commission's authority here is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, and you claim that this preemption was established by what you refer to as the 2002 STB Decision. The Commission is well aware of that decision, having participated in the proceeding. However, the 2002 STB Decision was primarily about the threshold question of whether NCTD's operations were subject to the STB's jurisdiction. Because that matter involved a proposal to build actual track, the decision did not address whether Coastal Act review would be preempted for more ancillary types of development by a common carrier.

Moreover, much has transpired since the 2002 STB Decision. Two critical examples of subsequent developments limiting the extent to which federal law can preempt states' regulation of their own political subdivisions include the U.S. Supreme Court's decision

Nixon v. Missouri Municipal League, 541 U.S. 125 (2004), and the California Supreme Court's recent decision *Friends of Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017). Given NCTD's status as a creature of state law, these cases establish the principle that NCTD is required to comply with the Coastal Act.

The second point you raised in your March 7 letter that could benefit from some clarification is your statement that the Commission is not "the proper entity to impose a CDP" because the project would occur within the City of Del Mar's certified LCP jurisdiction. My March 3 letter does not assert that NCTD would need a CDP *from the Commission*, nor does this Order require that NCTD obtain a CDP from the Commission. The order in the first section of this letter directs NCTD to "cease and desist from undertaking any development . . . without first obtaining Coastal Act authorization or confirmation from the Coastal Commission that the development is exempt." Thus, this Order indicates the need to comply with the Coastal Act, without specifying the permitting entity.

We do not disagree that the City of Del Mar ("City") has primary permitting jurisdiction in areas that are both covered by its LCP and not subject to the Commission's retained jurisdiction pursuant to PRC section 30519(b). However, as we explained, PRC section 30809 allows the Commission to enforce the requirements of the City's LCP, including the requirement that one secure a permit prior to commencing development, as long as such assistance is requested by the certified local government. As is explained above, the City asked the Commission to take this action. Thus, the Commission is authorized to issue this Order even if the City would be the entity to conduct the initial review of any CDP application.

VII. COMPLIANCE OBLIGATION

Strict compliance with the terms of this order by all parties subject thereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties of up to Six Thousand Dollars (\$6,000) per day for each day in which each violation persists, pursuant to PRC section 30821.6, and may result in other such penalties and relief as provided for in the Coastal Act.

VIII. APPEAL

Pursuant to PRC section 30803(b), any person or entity against whom this order is issued may file a petition with the Superior Court seeking a stay of this order.

IX. EFFECTIVE DATE

This order shall be effective upon its issuance on March 7, 2022 and shall expire 90 days from the date this Order was issued.

X. EXECUTIVE DIRECTOR

The phrase "Executive Director" refers to the Executive Director of the Commission unless otherwise indicated. For purposes of any Commission approvals described in this EDCDO, or any requested revisions necessary for such an approval, approval by the Executive Director shall include the approval of the Commission's Executive Director, Chief of Enforcement, or Deputy Chief of Enforcement, and such approvals may be relayed by other Commission staff members.

XI. NOTICE OF INTENT TO COMMENCE FURTHER PROCEEDINGS

The parties identified in this letter have been notified that the Executive Director also intends to commence cease and desist order proceeding pursuant to section 30810 before the California Coastal Commission as set forth in my letter of March 3, 2022. Should a cease and desist order be necessary, staff intend to bring this matter before the Commission at the Commission hearing in June 2022. In addition to these enforcement actions, if NCTD moves forward with its plan to construct fencing along the Del Mar bluffs without a Coastal Development Permit, the Commission may, among other remedies, also commence Restoration Order proceedings pursuant to Section 30811 of the Coastal Act, Administrative Penalty proceedings pursuant to Section 30821 and/or 30821.3 of the Coastal Act, and proceedings to record a Notice of Violation of the California Coastal Act against the Property, pursuant to Section 30812 of the Coastal Act. Through my letter of March 3, the parties identified in this letter were alerted to their right to respond to staff's allegations by completing a Statement of Defense form (SOD) and returning it by March 23, 2022, or a future date if an extension is granted.

Executed in San Francisco, California on March 7, 2022.



JOHN AINSWORTH,
Executive Director

Encl. Exhibit A - 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

Exhibit A

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 228
SAN FRANCISCO, CA 94105
FAX (415) 904-5400
TDD (415) 597-5885

**VIA CERTIFIED AND ELECTRONIC MAIL**

March 3, 2022

Mathew Tucker
Executive Director
North County Transit District
810 Mission Avenue
Oceanside, CA 92051
(Certification No. 7015 1730 0000 9497 3329)

Subject: 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.

Property Location: The railroad corridor of the LOSSAN railroad between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) in the City of Del Mar in San Diego County. This area includes the properties currently identified by the San Diego County Assessor's Office as APNs 299-240-24-00; 300-073-01-00; 300-95-01-00; 300-175-01-00; 300-183-03-00; and 300-174-14-00.

Threatened Violation¹: The proposed installation of a large-scale fencing project along the Del Mar bluffs without a Coastal Development Permit.

Dear Mr. Tucker:

The purpose of this letter is to provide written confirmation of the oral notice given to you on March 3, 2022, via a voicemail at the number provided for you by the North County Transit District ("NCTD") web contact page, of my intent, as the Executive Director of the Commission, to take the enforcement actions described below related to the above-described, proposed construction activity on the property located within the rail corridor along the Del Mar bluffs between Coast Boulevard (Mile Post 244.1) and North Torrey Pines Road (Mile Post 245.7) of the LOSSAN railroad ("the Property") if NCTD fails to respond to this notice in a "satisfactory manner." First, as my staff explained in the voicemail earlier today, unless the actions described below are taken in

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all unpermitted development on the Property that is in violation of the Coastal Act. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other unpermitted development on the Property as indicative of Commission acceptance of, or acquiescence in, any such development. Please further note that the term "violation" as used throughout this letter refers to alleged violations of the Coastal Act.

the timeframe listed below, I intend to issue an Executive Director Cease and Desist Order ("EDCDO") directing 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. Second, this letter also provides notice that I intend to commence proceedings for issuance by the Commission of its own Cease and Desist Order to direct NCTD to cease and desist from undertaking any development on the Property without first obtaining a CDP.

These enforcement actions are in response to NCTD's representations that it intends to commence the construction of a large-scale fencing plan along the Del Mar bluffs without first obtaining a CDP. In addition to the above enforcement actions, and as described briefly, below, depending on how NCTD responds, the Commission may also commence Restoration Order Proceedings pursuant to Section 30811 of the Coastal Act, Administrative Penalty proceedings pursuant to Section 30821 and/or 30821.3 of the Coastal Act, and proceedings to record a Notice of Violation of the California Coastal Act against the Property, pursuant to Section 30812 of the Coastal Act.

History of Commission Staff's Efforts to Coordinate with NCTD on a Fencing Plan

In October 2020, Commission staff received formal notice that on August 28, 2020, NCTD had filed a Petition for Declaratory Order (Petition) with the federal Surface Transportation Board (STB). In the Petition, NCTD sought an order to prohibit the Commission and the City of Del Mar from being able to regulate NCTD's development along the Del Mar bluffs, including projects such as the fencing plan at issue here. On October 5, 2020, the Commission, along with the City of Del Mar, concerned Del Mar residents, and the Surfrider Foundation, filed oppositions to NCTD's Petition.

In October 2020, NCTD presented its intention to the City of Del Mar to construct a 6-foot tall chain link fence at the track level and along the upper bluffs in Del Mar based on a "Trespasser Risk Reduction Study" that NCTD had recently published. NCTD did not seek approval for the project; rather, NCTD informed the City that it would be agreeable to negotiating with the City to construct a different type and size of fencing if the City would pay for the modified fence and fully assume liability for the fencing.

On October 15, 2020, I sent a letter to the NCTD Board of Directors and expressed my surprise and disappointment that NCTD, suddenly and without any notice except for the formal service of NCTD's Petition, took action to end its collaboration with the Coastal Commission on transportation projects in the San Diego region. I noted the long cooperative history between NCTD and the San Diego Association of Governments (SANDAG) on the planning, review, and approval of numerous transportation projects in San Diego related to railroad infrastructure and the value of this coordination to all parties. I additionally expressed my concern regarding NCTD's representation to the City of Del Mar that it would unilaterally proceed with a project to fence the Del Mar

bluffs without any state or local review. At this time, I requested that NCTD withdraw its Petition before the STB and work with the Commission on the fencing plan to find alternatives that would protect public safety, ensure public access to bluff trails and the beach, and protect coastal resources.

On December 10, 2020, the City, NCTD, and the Commission entered into a Settlement Discussions Agreement for the purpose of facilitating confidential negotiations and discussions to reach a Settlement Agreement regarding the STB matter. And in March 2021, in order to continue good faith discussions, the parties agreed to a stay of the STB matter through December 31, 2021.

From March 2021 to November 2021, Commission staff met with NCTD staff on a monthly or bimonthly basis in an attempt to come to an agreement on how Commission staff and NCTD would collaborate on NCTD LOSSAN corridor development projects, including the Del Mar bluff fencing plan, to ensure that these projects are consistent with the Coastal Act and receive all necessary authorizations. Commission staff also attempted to work with NCTD specifically on the design of the fencing plan for the Del Mar bluffs in an attempt to limit the project's negative impacts to public access and coastal resources.

Despite Commission staff's extensive efforts, on December 30, 2021, NCTD filed a report with the STB seeking to reopen and expedite its Petition against the Commission and Del Mar. On January 14 and 18, 2022, Del Mar and the Commission each respectively filed responses, including a motion for the STB to move the matter into its mediation program. On January 19, 2022, NCTD opposed the request for mediation, stating that it does not believe an agreement could be reached. The STB has not yet issued a ruling on this matter.

Then, on January 20, 2022, NCTD's Board of Directors approved Job Order No. 21009-005, to hire general contractor Exbon Development Inc. for the installation of the Del Mar bluffs fencing plan. The NCTD Board approved the fencing project to go forward without the authorization of a CDP, despite the fact that NCTD had been advised for several years by Commission staff that such development requires a CDP before any such work can commence.

Despite Commission staff's advice that the fencing plan cannot be implemented without a CDP, NCTD has indicated its intent to move forward with the fencing plan without Coastal Act authorization.

Executive Director Cease and Desist Order

Section 30809 of the Coastal Act authorizes the Executive Director to issue an order: (1) directing "any person or governmental agency" to cease and desist and to take actions necessary to avoid irreparable injury if that party is threatening to undertake an activity without securing a necessary permit from the Commission, or (2) to enforce any

requirements of a certified local coastal program ("LCP"), when the local government requests the Commission to assist with, or assume primary responsibility for, issuing such an order.

Under Section 30600(a) of the Coastal Act, and Section 30.75.040 of the City of Del Mar Municipal Code, any person wishing to perform or undertake development in the Coastal Zone must obtain a CDP, in addition to any other permit required by law. Development is broadly defined by Section 30106 of the Coastal Act and, similarly, by Section 30.75.030 of the City of Del Mar Municipal Code, as follows:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land ... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

NCTD has represented that it intends to construct fencing along the Del Mar bluffs without obtaining a CDP, clearly "threatening" to undertake development without a CDP. The installation of this fence constitutes development, as the placement of solid material and a change in the intensity of use of land, and therefore is subject to the permit requirements of the Coastal Act and the Del Mar LCP. Additionally, in a March 2, 2022 telephone conversation and confirmed in writing on the same day, the City of Del Mar has requested that the Commission assume responsibility for enforcement in this matter.

Section 30809(b) of the Coastal Act states:

The cease and desist order shall be issued only if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity.

Section 13180(a) of the Commission's regulations (Title 14, Division 5.5 of the California Code of Regulations (CCR)) defines the term "satisfactory manner," as that term is used in Coastal Act Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice." Therefore, as stated in the voicemail left for you at the number provided for you by NCTD's web contact page and confirmed by this letter, I am informing you that to prevent the issuance of the Executive Director Cease and Desist Order ("EDCDO") to you, you must provide a response that complies with the requirements listed below, within the timeframe listed below. If NCTD fails to comply with one or more of these requirements, an EDCDO will be issued to

NCTD. Any violation of that EDCDO could subject NCTD to administrative and civil penalties under Chapter 9 of the Coastal Act. To prevent issuance of the EDCDO, you must immediately cease all unpermitted development, and respond in writing by noon on Monday, March 7, 2022, and your response must include the following:

1. A commitment that NCTD will not begin work for the installation of fencing along the Del Mar bluff without a Coastal Development Permit that is in full force and effect.
2. A plan detailing the steps NCTD will take in order to receive a Coastal Development Permit, including a date by which NCTD will submit a Coastal Development Permit application.

If Commission staff do not receive a written response from NCTD by noon on Monday, March 7, 2022, or that response does not provide the elements outlined above, "satisfactory" assurances as set forth above and in 30809 of the Coastal Act, will not have been met and we will be required to act accordingly.

Notice of Intent to Commence Proceedings for the Issuance by the Commission of a Cease and Desist Order

I am also notifying you of my intent to commence proceedings for issuance by the Commission of a Cease and Desist Order to direct you to, among other things, cease and desist from undertaking unpermitted development on the Property without a CDP. Additionally, if NCTD proceeds with its plans to install fencing on the Del Mar bluffs, the Commission may commence proceedings for a Restoration Order and Administrative Civil Penalties and proceedings to record a Notice of Violation of the California Coastal Act against the Property.

Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states the following:

*If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program ... under any of the following circumstances:
(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.*

As explained above, NCTD has represented that it intends to construct fencing along the Del Mar bluffs without obtaining a CDP. This fencing clearly constitutes "development" within the meaning of the above-quoted definition and therefore is subject to the permit requirements of section 30600(a) and the LCP. And again, the City of Del Mar has requested that the Commission assume responsibility for enforcement in this matter. For these reasons, the criteria of Section 30810(a) of the Coastal Act have been met, and I am sending this letter to initiate proceedings for the Commission to determine whether to issue a Cease and Desist Order.

Based on Section 30810(b) of the Coastal Act, the Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act, including removal of any unpermitted development or material.

Advance Notice of Restoration Order

Section 30811 of the Coastal Act authorizes the Commission to order restoration of a site in the following terms:

In addition to any other authority to order restoration, the commission ... may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission ... the development is inconsistent with this division, and the development is causing continuing resource damage.'

NCTD's plan to install fencing along the Del Mar bluffs without obtaining a CDP denies the opportunity for the City and/or the Commission to ensure that NCTD's fencing project is consistent with the LCP and the Coastal Act. Without this review, it is likely that the installation of fencing along the Del Mar bluffs will be inconsistent with the Coastal Act's resource protection provisions, such as Section 30251 (scenic and visual qualities), Section 30240 (environmentally sensitive habitat areas), Section 30231 (protection of biological productivity and water quality), Section 30253 (hazards/geologic stability), and Sections 30210 and 30212 (provision of public access). Should the fencing block public views of scenic resources, harm habitat, negatively impact water quality, cause bluff erosion, or prevent public access, this would meet the definition of continuing resource damage under Section 13190 of the Commission's regulations, which defines damage as "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development." For these reasons, if NCTD goes forward with its plan to install fencing along the Del Mar bluffs without a CDP, the Commission may commence proceedings for the issuance of a Restoration Order to restore the Property to the condition it was in before the unpermitted development occurred.

The procedures for the issuance of Restoration Orders are described in Section 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.

Accordingly, any Restoration Order that the Commission may issue will have as its purpose the restoration of the Property to the conditions that existed prior to the occurrence of the unpermitted development described above.

Advance Notice of Administrative Civil Penalties and Exemplary Damages

The Coastal Commission is also authorized to impose administrative civil penalties by a majority vote of the Commissioners present at a public hearing under Section 30821 of the Coastal Act, for cases involving violations of the public access provisions of the Coastal Act, and under Section 30821.3, for cases involving the violation of any provision of the Coastal Act other than public access, including, but not limited to, damage to archaeological and wetlands resources and damage to environmentally sensitive habitat areas. In this case, the installation of fencing will likely result in significant violations of the public access provisions of the Coastal Act by changing the intensity of use of trails along the bluff. The fencing may also violate additional provisions of the Coastal Act by causing bluff instability and impeding views of coastal resources.

The penalties imposed may be in an amount of up to \$11,250, for each violation, for each day in which each violation has persisted or is persisting, for up to five (5) years. If a person fails to pay an administrative penalty imposed by the Commission, under Coastal Act Section 30821(e), the Commission may record a lien on that person's property in the amount of the assessed penalty. This lien shall be equal in force, effect, and priority to a judgement lien.

The Coastal Act also includes a number of other penalty provisions that may be applicable as well. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed \$30,000 and shall not be less than \$500 for each instance of development that is in violation of the Coastal Act. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development. Civil liability under Section 30820(b) shall be imposed in an amount not less than \$1,000 per day and not more than \$15,000 per day, for each violation and for each day in which each violation persists. Section 30821.6 also provides that a violation

of a Cease-and-Desist Order of the Commission can result in civil liabilities of up to \$6,000 for each day in which each violation persists. Lastly, Section 30822 provides for additional exemplary damages for intentional and knowing violations of the Coastal Act or a Commission Cease and Desist Order.

Response Procedure

In accordance with Sections 13181(a) of the Commission's Regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent to commence Commission Cease and Desist Order proceedings by completing the enclosed Statement of Defense (SOD) form. The SOD form must be directed to the attention of Sarah Salvini, at the address listed below, no later than March 23, 2022.

California Coastal Commission
Attn: Sarah Salvini
455 Market Street, Suite 288
San Francisco, CA 94105

If such a hearing is required, Commission staff intends to schedule the hearing for the Cease and Desist Order during the Commission's hearing of June 2022.

This notice letter does not preclude NCTD from still reaching a cooperative resolution with the Commission for addressing the longer term situation at the site. Should this matter be resolved via mutual agreement, an SOD form would not be necessary. We remain willing to resolve this matter amicably and without the need for a contested hearing and would like to work with you to achieve that end. The Consent Order process provides an opportunity to resolve these issues through mutual agreement. While requiring compliance with the Coastal Act and the LCP, Consent Orders give you additional input into the process of the resolution of the violation. Consent Orders would provide for a permanent resolution of this matter and thereby resolve the complete violation without any further formal legal action.

If you are interested in discussing the possibility of agreeing to Consent Orders, please contact Sarah Salvini, Statewide Enforcement Analyst at sarah.salvini@coastal.ca.gov.

Resolution

As stated above, in order to address the short term situation and to prevent the issuance of the EDCDO, you must immediately cease all unpermitted development, and respond in writing by noon on Monday, March 7, 2022, and your response must include the following:

1. A commitment that NCTD will not begin work for the installation of fencing along the Del Mar bluff without a Coastal Development Permit that is in full force and effect.

2. A plan detailing the steps NCTD will take in order to receive a Coastal Development Permit, including a date by which NCTD will submit a Coastal Development Permit application.

If Commission staff do not receive a written response from NCTD by noon on Monday, March 7, 2022, or that response does not provide the elements outlined above, "satisfactory" assurances as set forth above and in 30809 of the Coastal Act, will not have been met and we will be required to act accordingly.

Please direct your response to this Notice of Intent to Issue an Executive Director Cease and Desist Order to my staff via Sarah Salvini, Statewide Enforcement Analyst at the address on the letterhead or at (415) 904-5220. My staff continues to work, for the most part, remotely so the best way to reach Ms. Salvini is by email: sarah.salvini@coastal.ca.gov. If you have any questions, please feel free to contact her at that email. Thank you very much for your attention to this matter and we look forward to working this matter out with you.

Sincerely,



JOHN AINSWORTH,
Executive Director

Attachment: Statement of Defense form

cc: Lisa Haage, Chief of Enforcement, CCC
Alex Helperin, Assistant Chief Counsel, CCC
Aaron McLendon, Deputy Chief of Enforcement, CCC
Justin Buhr, Statewide Enforcement Supervisor, CCC
Sarah Salvini, Statewide Enforcement Analyst, CCC
Ashley Jones, City Manager, City of Del Mar
Hasan Ikhata, Executive Director, SANDAG
Exbon Development Inc.

Attachment

CALIFORNIA COASTAL COMMISSION

455 MARKET STREET, SUITE 228
SAN FRANCISCO, CA 94105
FAX (415) 904-5400
TDD (415) 597-5885

**STATEMENT OF DEFENSE FORM**

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by a notice of intent to initiate enforcement proceedings. This notice of intent indicates that you are or may be responsible for or in some way involved in either a violation of the commission's laws or a commission permit. The document summarizes what the (possible) violation involves, who is or may be responsible for it, where and when it (may have) occurred, and other pertinent information concerning the (possible) violation.

This form requires you to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You should complete the form (please use additional pages if necessary) and return it no later than March 23, 2022 to the Commission's enforcement staff at the following address:

California Coastal Commission
Attn: Sarah Salvini
455 Market Street, Suite 288
San Francisco, CA 94105

If you have any questions, please contact **Sarah Salvini** at **(415) 904-5220** or, preferably, by email at sarah.salvini@coastal.ca.gov.

- 1. Facts or allegations contained in the notice of intent that you admit (with specific reference to the paragraph number in such document):**

- 2. Facts or allegations contained in the notice of intent that you deny (with specific reference to paragraph number in such document):**

- 3. Facts or allegations contained in the notice of intent of which you have no personal knowledge (with specific reference to paragraph number in such document):**

-
4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

5. Any other information, statement, etc. that you want to offer or make:

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding

(Please list in chronological order by date, author, and title, and enclose a copy with this completed form):

EXHIBIT B



AANNESTAD ANDELIN & CORN LLP

160 CHESTERFIELD DRIVE • SUITE 201
CARDIFF-BY-THE-SEA • CALIFORNIA 92007
www.aac.law • (760) 944-9006

Coastal Property Rights, Land Use & Litigation

March 11, 2022

SENT VIA ELECTRONIC MAIL AND CERTIFIED MAIL (corrected version)

Matthew Tucker
Executive Director
North County Transit District
810 Mission Avenue
Oceanside, CA 92051
MTucker@nctd.org

Re: NCTD's Proposed Installation of Fencing on the Del Mar Bluffs

Dear Mr. Tucker:

Our law firm represents the Friends of Del Mar Bluffs, a coalition of taxpayers and Del Mar residents devoted to preserving for public access and use, the spectacular scenic ocean view trails along the coastal bluffs in the City of Del Mar, California ("Del Mar Bluffs"). The public has enjoyed the Del Mar Bluffs for walking, running, meditating, and watching sunrises and sunsets for over 100 years, and for public access to the beaches. North County Transit District's ("NCTD") recent actions and threats to install fencing on the Del Mar Bluffs without compliance with California's environmental laws unlawfully threaten the viability, physical stability and public use of the Del Mar Bluffs, including the rights of the public to use trails overlooking the ocean and to continue to enjoy the scenic views afforded by the Del Mar Bluffs for over 100 years.

On behalf of the Friends of Del Mar Bluffs, we demand that, on or before March 18, 2022, NCTD reverse its decision to install fencing on the Del Mar Bluffs without compliance with California law. Please be advised that unless we receive NCTD's written agreement to terminate or suspend its fencing plans and to comply with the California Coastal Commission Executive Director's Cease and Desist Order issued March 7, 2022, on March 18, 2022, we will file a lawsuit seeking to enjoin NCTD from implementing its stated plan to install fencing on the Del Mar Bluffs.

Background

During 2020, NCTD disclosed its intention to install industrial style six-foot high-fencing on the Del Mar Bluffs. California citizens expected that NCTD would work with the City of Del Mar ("Del Mar") and the California Coastal Commission ("Coastal Commission") and comply with California's environmental laws in assessing and implementing any fencing. Del Mar encouraged that fencing be constructed between Coast Boulevard and 13th Street and potentially as far south as 11th Street, along with other measures to help prevent train accidents. Ultimately, NCTD decided to act unilaterally with respect to fencing, adopting a plan that deferred for up to two years construction of fencing where accidents mostly occur in Del Mar, defying California's environmental laws, and attempting to punish Del Mar for not accepting NCTD's contractual conditions. As you are aware, Del Mar and numerous private citizens have opposed NCTD's unilateral fencing plans in legal proceedings, correspondence, public hearings, and efforts at negotiation.

On January 19, 2022, the California Attorney General issued a letter to NCTD's Board ("Attorney General Letter"), warning it that a vote by it to approve a Job Order to contractor Exbon Development, Inc. ("Exbon") for construction of fencing along the Del Mar Bluffs would be a violation of law and a breach of contract. On January 20, 2022, the majority of NCTD's Board voted to approve the Exbon Job Order to construct fencing along the Del Mar Bluffs. The type and height of the fencing was to depend on whether Del Mar accepted, by February 28, 2022, NCTD's contractual conditions. If Del Mar did not accept NCTD's conditions, the proposed fencing generally would be more damaging, unsightly, and intrusive than if it agreed to the conditions, particularly on Del Mar's Upper Bluff. The vote defied the Attorney General's warning not to approve a fencing contract prior to compliance with California's environmental laws.

On February 28, 2022, Del Mar's City Council voted to reject NCTD's conditions. On March 7, 2022, the Coastal Commission issued an Executive Director Cease and Desist Order ("Commission Executive Director Order") requiring that NCTD cease and desist from violation of California environmental laws, including ceasing and desisting from implementation of any fencing plans without first complying with such laws.

While NCTD is already aware of many valid legal challenges to its plans to install fencing on the Del Mar Bluffs, including from the Coastal Commission, I am writing to provide notice to NCTD that if it does not cease and desist from the installation of fencing on the Del Mar Upper Bluffs without complying with California law, we will file a lawsuit on behalf of the Friends of Del Mar Bluffs citizen group based on causes of action including those described below. We will

Matthew Tucker
Executive Director, NCTD
March 11, 2022
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seek injunctive relief, damages, recovery of costs and attorneys' fees pursuant to Code of Civil Procedure §§ 1021.5 and 526a along with any other remedies available to our clients. The primary allegations and causes of action from our prospective complaint are provided below:

**NCTD's Breach of the Grant Agreement and Breach of the Covenant of
Good Faith and Fair Dealing Arising from the Grant Agreement**

In or about January, 2018, NCTD, along with co-applicant SANDAG, applied for \$501,000,000 in grant funds, through a grant request titled the 2018 California Transit and Intercity Rail Capital Program Grant Request ("2018 Grant Request"), from the California Department of Transportation ("CalSTA"), an agency funded by California taxpayers, to pay for a number of proposed projects in San Diego County and along the LOSSAN corridor.

Among the projects for which NCTD sought funding was a project whereby NCTD sought to stabilize the fragile and deteriorating Del Mar lower bluff ("Lower Bluff") and a project to construct fencing on the Del Mar upper bluff ("Upper Bluff") and Lower Bluff. NCTD also stated in its 2018 Grant Request that it would seek another \$85,000,000 in additional funds from federal and/or state funding sources for its projects.

NCTD subsequently entered into Master Agreement 64NCTDMA effective October 18, 2018, as supplemented ("Grant Agreement") with the State of California acting on behalf of CalSTA. The Grant Agreement provides that NCTD must comply with "all state and federal laws and policies," and gives CalSTA the right to terminate the Agreement and funding on all projects funded by CalSTA upon reasonable evidence of a violation of state law. This condition requiring compliance with California law was material to the Grant Agreement as a whole and to any grant of funds by CalSTA, not just funding of fencing in Del Mar.

The requirement that funding grantees such as NCTD comply with California laws is a material part of CalSTA grant agreements. This requirement ensures that would-be fund grantees such as NCTD comply with state and federal environmental laws and policies protecting California citizens. Californians are the intended beneficiaries of the grant agreements. Independently, requiring NCTD to comply with state and federal laws including environmental laws is a valid exercise of the State's self-governance powers. *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal. 5th 677. We believe this is especially true with respect to state created and funded public agencies such as NCTD.

Matthew Tucker
Executive Director, NCTD
March 11, 2022
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In addition, NCTD's Grant Agreement with CalSTA as a matter of law gave rise to a covenant of good faith and fair dealing for the benefit of California taxpayers that required that NCTD not take actions to avoid compliance with California and federal laws and policies.

NCTD breached the Grant Agreement by approving a Job Order to Exbon to commence fencing on the Del Mar Bluffs without compliance with California's environmental laws. NCTD's implementation of that Job Order is in defiance of the Attorney General Letter and the Commission Executive Director Order. Further, NCTD violated the covenant of good faith and fair dealing by filing and continuing to maintain an action before the Surface Transportation Board in an attempt to avoid its obligations under the Grant Agreement. NCTD's agreement and representation that it would comply with all state and federal laws and policies was a contractual undertaking that bound NCTD, regardless of principles of preemption. Moreover, like the railroad authority in *Friends of Eel River*, NCTD is "an arm of the state, created and funded by the state to carry out goals established by the Legislature." See *Friends of Eel River* 3 Cal. 5th at 730. There, the Supreme Court of California held that the application of California environmental laws would not be inconsistent with the ICCTA and its preemption clause. *Id.* at 740. The same is true here.

As noted, the NCTD Board's vote on January 20, 2022, to approve the Exbon contract to fence the Del Mar Bluffs without compliance with California's environmental laws including the laws specifically referenced in the Attorney General Letter was a breach of the Grant Agreement. After receiving the Attorney General Letter, NCTD attempted to circumvent its obligations under the Master Agreement by approving a Regular Board Agenda Errata Sheet dated Thursday, January 20, 2022, purporting to switch funding sources solely for the construction of fencing in Del Mar. NCTD's further efforts to circumvent its obligations under the Grant Agreement by switching funding sources for fencing of the Del Mar Bluffs are ineffective and void and a further violation of the covenant of good faith and fair dealing. Further, NCTD's attempt at circumvention efforts are an admission that it is bound by the Grant Agreement to comply with California law.

NCTD's proposed fencing also violates the Coastal Commission's permit requirement for SANDAG's Bluff Stabilization Plan 4 previously approved in February 2019, specifically, the requirement that SANDAG "prepare (in coordination with the North County Transit District and the City of Del Mar) a needed, comprehensive long-term public access improvement plan for the Del Mar area, which will be submitted to the Commission by February 2022." NCTD's proposed fencing plan submitted for Board approval on January 20, 2022, blocks 1.6 miles of beach access in violation of the spirit and intent of the permit requirement previously agreed to improve coastal access.

**The Public's Right to Use the Upper Bluff Trails Under Prescriptive Easement,
Public Right-of-Way Doctrine and Grantor's Intent**

NCTD claims a right-of-way based on a transfer of property from the Atchison, Topeka and Santa Fe Railway ("ATSF") to NCTD by deeds recorded on December 15, 1992, as Documents #1992-0802206 and #1992-0802209 ("1992 Deeds") in the San Diego County Recorder's Office. The 1992 Deed identifies the right-of-way transferred from ATSF Railway to NCTD by the 1992 Deeds as that same right-of-way transferred from South Coast Land Company to ATSF Railway by deed dated December 20, 1910, recorded in the County of San Diego, State of California on May 1, 1911, in Book 515 commencing at page 394 ("Right-of-Way"). This Right-of-Way was transferred only for the "maintenance and operation" of a railway.

The public has been using the trail on the Upper Bluff in the Right-of-Way in Del Mar for the purpose of running, walking, resting, enjoying views of the ocean, meditating and sitting, continuously for at least five of the years during the time that NCTD's predecessor ATSF Railway owned the Right-of-Way, and continues to use it for those purposes to this day. The public's use has been open and notorious. NCTD and its agents have characterized members of the public who walk on the Del Mar Bluffs as "trespassers."

Hence, the public has a prescriptive easement to use the Del Mar Bluffs for the purpose of running, walking, enjoying unobstructed views of the ocean, resting, meditating and sitting, which ripened during the time period that ATSF Railway owned the Right-of-Way because the public used the Upper Bluff for such purposes for at least 5 years while ATSF owned it and ATSF was not a public agency.

In addition or in the alternative, the public has a right to use the trail on the Upper Bluff because it is and has always been a public way.

In addition or in the alternative, the original Grantor of the Right-of-Way, the South Coast Land Company, intended that the public retain the right to use the Upper Trail portion of the Right-of-Way as shown by certain reservations to the Public and City in the grant deed originally transferring the Right-of-Way.

Invalidity and Illegality of NCTD Actions

On January 20, 2022, NCTD's Board held a general public meeting. In connection with Item 13 of the Agenda for that meeting, the majority of the Board voted to approve and authorize a contract to Exbon for the construction of certain fencing on the Del Mar Bluffs, the particulars of

which varied depending upon whether Del Mar continued to reject the terms and conditions of a license agreement which NCTD wanted Del Mar to approve.

We intend to challenge all of the material actions undertaken by NCTD in connection with Item 13 of the Agenda for the January 20, 2022, Board meeting, whether taken on or after January 20, 2022. The NCTD Board vote taken and award of the Exbon Job Order 21009-005 on January 20, 2022, was invalid and illegal for the following reasons, among others:

- a. NCTD's proposed license agreement, the rejection of which by Del Mar was the condition for the Board's vote to contract with Exbon to construct specific types of fencing without compliance with California law, was not published in the Board packet prior to the meeting and the Board's vote, so the public could not knowingly comment on the proposed Board action;
- b. NCTD's proposed license agreement lacked material terms at the time the Exbon Job Order was voted on, including, but not limited to, a written description of the License Area in its Exhibit A. Accordingly, the Board could not knowingly vote on a contract with Exbon for fencing, whose terms were conditioned on Del Mar's rejection of a proposed license agreement that lacked material terms;
- c. The Board failed to include in the published Board packet, or knowingly address in the NCTD Staff Report, the Attorney General Letter informing the NCTD Board that an NCTD vote to approve Job Order 21009-005 would be in violation of law and contract.

Exbon Job Order No. 21009-005 and the vote to approve it and any other action taken to implement it are invalid and illegal for the following further reasons:

- a. For the reasons stated in the Attorney General Letter objecting to the approval of the Exbon Job Order, including: (1) disruption of public coastal access; (2) using State funds for a project without complying with CEQA; (3) the project changing over time without compliance with state environmental laws; and (4) the unsuitability of welded wire mesh fencing in a bluff location;
- b. For the reasons stated in the Coastal Commission's 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

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Executive Director, NCTD
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dated March 4, 2022, sent to Matthew Tucker, Executive Director of NCTD outlining NCTD's violations of law;

- c. For the reasons stated in the March 7, 2022, Commission Executive Director Order, sent to Matthew Tucker, Executive Director of NCTD outlining NCTD's violations of law;
- d. Awarding of a sole source fencing contract without the benefit of engineering drawings, or competitive formal or informal bids on the specific fencing work sought on the Del Mar Bluffs violates Public Contract Code sections 22032 and 22034, and Public Utilities Code section 125222;
- e. The Leighton Consulting letters on which NCTD relied in the meeting were not supplied to the public and did not constitute the appropriate geotechnical analysis required by the Coastal Commission.

The above-described invalidity claim will also be brought pursuant to the Code of Civil Procedure 526a to obtain a judgment restraining and preventing an illegal expenditure and waste of funds by NCTD.

Please contact me at 760-944-9006 or anders@aac.law if you would like to discuss the above.

Sincerely,

AANNESTAD ANDELIN & CORN LLP



Anders T. Aannestad

cc: Lori Winfree, NCTD General Counsel, via email (LWinfree@nctd.org)
William Pate, Del Mar City Attorney, via email (WPate@dpmclaw.com)
Friends of Del Mar Bluffs