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Submitted electronically

To: Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board

CC: All parties of record

Re: STB Finance Docket No. 36433, *North County Transit District's Docket – Petition for a Declaratory Order*, Updated Opposition Statement from Surfrider

The Surfrider Foundation is a non-profit, environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through a powerful activist network. With 70 miles of coastline to protect, the Surfrider Foundation San Diego County Chapter (Surfrider San Diego) is one of the largest and most active chapters in the world. We are a grassroots organization, which means the people working to protect our local ocean, waves, and beaches are volunteers who care about the San Diego County coastline and want to protect our home. Surfrider San Diego is an active stakeholder representing the public in the conversation regarding the bluff stabilization and relocation of a section of the LOSSAN track in Del Mar.

We submitted a letter on 5 October 2020 detailing our opposition to North County Transit District's (NCTD) petition for a declaratory order, on the grounds that it would result in an unacceptable loss of the public's right to access the beach and is not supported by law or fact (attached as Exhibit A). In this followup, we would like to reiterate our opposition on the same grounds, as well as offer additional perspective as to why NCTD's opposition to the California Coastal Commission's (CCC) conditional concurrence for the San Diego Association of Governments (SANDAG) Del Mar Bluffs Stabilization Project #5 (DMB5) is misguided and inconsistent with NCTD's previous positions. Now that conditional concurrence was approved by the CCC on 8 June 2022, DMB5 can and should move forward as approved. An STB declaratory order pertaining to this project is wholly unnecessary.

Federal and state law must apply to ensure appropriate management of coastal resources outside of NCTD's Right-of-Way, just as it has for past rail corridor projects along Del Mar's bluffs.

NCTD claims that federal consistency review is preempted by the Interstate Commerce Commission Termination Act (ICCTA). In their letter to SANDAG, dated 19 May 2022¹, they also stated specific opposition to several of CCC's conditions, namely the authorization term and the coastal access and recreation conditions:

Although NCTD expressly opposes the permit process in total, it specifically opposes the following proposed requirements in the draft conditions provided by the CCC for the Project:

1. Authorization Term: The CCC proposed requirement that SANDAG remove the seawall and rip rap or submit a complete coastal development permit or consistency certification review application to the CCC at the expiration of the permit term is not agreeable.

NCTD does not agree to contribute any additional funding for the Project and/or associated mitigation impacts to remove the seawall and rip rap and/or be responsible for additional mitigation at the expiration of the term.

2. Coastal Access and Recreation: The proposed conditions require SANDAG "to develop and implement a capital improvement program to improve safe

public coastal access and recreation" in the Project area through the implementation of the following projects: (a) enhancement of the north-south trail system east of the rail track on the top bluff between Seagrove Park and 4th Street; (b) construction of a pedestrian rail crossing near 7th or 11th Street; and (c) construction of a beach accessway from the pedestrian rail crossing to the beach. The imposition of these proposed conditions on a railroad maintenance/safety project where legal public access does not exist today is exactly the type of overreach that prompted NCTD to file its petition with the STB in the first instance. Legal public access and recreation does not exist today in the railroad right-of-way; the proposed conditions are not in any way related to the railroad Project at issue or its associated impacts. Imposing lock-boxed mitigation dollars and demanding project conditions that are in no way related to the Project is unconscionable and clearly exceeds the CCC's authority.

¹ 19 May 2022: letter to SANDAG from NCTD Executive Director, Matthew Tucker. Entire letter included as Exhibit B.

In opposing the permit process in total, the authorization term for the conditional concurrence, and the coastal access conditions specifically, NCTD conveniently ignores the fact that a large portion of DMB5 will occur outside of NCTD's right of way (ROW). The seawalls and riprap backfill across 2,500 feet of the bluff toe will be situated not in NCTD's ROW but on state and city-owned beaches and tidelands. We also made the same point on the record at the Coastal Commission meeting and in numerous interactions with NCTD since October 2020.

Because the aforementioned components of DMB5 will take place on state and city land, their assertion that the entire project is preempted by the Interstate Commerce Commission Termination Act (ICCTA) is incorrect. The ICCTA was never meant to displace traditional state functions that do not regulate rail transportation. Meanwhile, the Coastal Zone Management Act (CZMA) mandates that federal agencies shall not approve projects that are inconsistent with the state's coastal management program². As DMB5 will be completed using federal funding, federal concurrence with the California Coastal Act is appropriate for this project, just as it has been for previous bluff stabilization projects aimed to protect the LOSSAN rail corridor in Del Mar.

As its name implies, DMB5 is the fifth bluff stabilization project conducted by SANDAG and/or NCTD to secure the railroad corridor through this particular stretch of eroding coastal bluff. A chronology from SANDAG³ is included below for reference:

² [Coastal Zone Management Act, U.S. Code §1456\(d\)](#): "Application of local governments for Federal assistance; relationship of activities with approved management programs State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of Title 31. Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security."

³ Source: SANDAG. [DMB4](#), which took place from May 2020 to Jan 2021, is not included in the referenced image and also underwent federal consistency review.

**Del Mar Bluffs
Completed Projects**


- 2000 Del Mar Bluffs Geotech Study (NCTD)
- 2001 Emergency Repairs at 8th St. (NCTD)
- 2001 Drainage Study (NCTD)
- 2003 Drainage Improvements (NCTD)
- 2007 Del Mar Bluffs 2 Stabilization with Soldier Piles (SANDAG)
- 2009 Del Mar Bluffs 3 Stabilization with Soldier Piles (SANDAG)





4

*DMB4 (2020-21) is not included in this infographic, but also underwent federal consistency review.

NCTD sought and was granted either emergency or regular Coastal Development Permits (CDP) from the CCC for their initial bluff studies and repair projects⁴. However, in 2004, NCTD took the position that federal consistency was the appropriate review process for subsequent Del Mar Bluffs Stabilization projects. NCTD and/or SANDAG submitted a Consistency Certification to the CCC in 2004 and for all subsequent projects. Below is NCTD's response to CCC staff re: their position for DMB2⁵:

Del Mar Bluffs Stabilization Project 2 is a federally funded project that NCTD is carrying out on behalf of the Federal Transit Administration. Because of this federal component, seeking a Coastal Consistency Waiver or Certification is appropriate. In addition, NCTD bases its position on the Surface Transportation Board decision and the federal laws and regulations underlying that decision.

At the start of Del Mar Bluffs Stabilization Project 1, and prior to the referenced Surface Transportation Board decision, NCTD entered into a Memorandum of Understanding (MOU) with the City of Del Mar regarding how permits and related environmental compliance requirements would be addressed. That MOU called for NCTD to process Project 1 through the City of Del Mar's approved Local Coastal Program. Because Del Mar Bluffs Stabilization Project 1 also affected coastal resources under state jurisdiction, it made sense to process a concurrent permit application through the California Coastal Commission

⁴ (NCTD Coastal Development Permit)s [6-02-102](#), (NCTD drainage improvements, Del Mar), [6-01-081](#) (NCTD soldier piles, Del Mar), [6-97-062](#) (NCTD drainage improvements, Del Mar), [6/96-156](#) (NCTD soldier piles, Del Mar), [6-93-60](#) (NCTD - Del Mar)

⁵ 1 July 2004, [Coastal Commission Staff Report and Recommendation on Consistency Determination. Applicant: NCTD](#)

DMB Projects 2, 3, and 4 were all submitted by the applicants (either NCTD, SANDAG, or both agencies) to the CCC for federal consistency review. Therefore, in NCTD's own words and as established by their own past practice, current and future projects must also be subject to CZMA federal consistency review. While NCTD has experienced opposition from the City of Del Mar and its residents regarding their concurrent plans to erect security fencing within their ROW, that is no justification to petition the STB for a declaratory ruling against the established environmental review protocol for DMB5, which is a much larger and more consequential project that affects state coastal resources.

NCTD's opposition to the 30 year Authorization Term is invalid because Chapter 3 of the Coastal Act is the established standard of review for CZMA federal consistency.

Again, Surfrider would like to point out that construction taking place outside of NCTD's ROW cannot be preempted by an STB ruling because the ICCTA was never intended to displace traditional state functions that do not regulate rail transportation.

In California, the Coastal Act regulates development in the coastal zone and aims to strike a balance between coastal development and the preservation of public coastal resources. Chapter 3 of the Coastal Act⁶ is the standard of review for CZMA federal consistency for any project that includes the construction of shoreline protective devices (i.e. seawalls) on the public beach. Several sections address when shoreline protective devices such as seawalls can be used. In every case, their construction must either eliminate adverse effects to public beaches or provide mitigation in the case that said adverse effects are unavoidable:

⁶ [Chapter 3 of the California Coastal Act](#)

Section 30235 of the Coastal Act States:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

Section 30253 of the Coastal Act States (in part):

New development shall do all of the following:

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

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

Section 30270 of the Coastal Act States:

The Commission shall take into account the effects of sea level rise in coastal resources planning and management policies in order to identify, assess, and, to the extent feasible, avoid and mitigate the adverse effects of sea level rise.

In Condition One of their conditional concurrence for DMB5⁷, the CCC required that the seawalls and riprap backfill be removed at the end of the authorization term or after the rail corridor is moved off the bluff. As this section of DMB5 will be built and maintained on public beach land, the CZMA applies, and therefore so does Chapter 3 of the California Coastal Act. Regardless of the authorization term's length, the CCC is well within their right to require the removal of beach-damaging seawalls once the railroad is moved and the seawalls no longer serve a useful purpose.

We should also note that CCC's Condition One affords SANDAG the opportunity to apply for a permit extension in the case that railroad relocation has not been completed during the 30 year authorization term.

All parties stand to benefit from the expeditious relocation of the rail corridor from Del Mar's crumbling bluffs. Rail realignment is certainly a costly long-term project, but the cost of indefinitely leaving the tracks on the bluff would be reckless considering the long history of train accidents and bluff failures along this corridor.

⁷26 May 2022, [CCC Staff Report for DMB5](#), page 2 & 22

With NOAA projecting one foot of sea level rise projected by 2050⁸ and more to follow, bluff instability will only worsen.

Ultimately, no amount of engineering can continually hold back rising seas. *Even if* continuous beach armoring and bluff stabilization were pursued in place of railroad realignment, the costs could likely equal or surpass those of railroad realignment. Furthermore, beachgoing San Diegans and the organizations that represent them (including Surfrider) will not stand idly by while we witness the ongoing destruction of our beaches for the sake of saving a rail corridor that clearly needs to be relocated. NCTD chooses to ignore sea level rise projections and calls this project a “straightforward rail maintenance project.”⁹ We take issue with this mischaracterization and point to 20 years of aforementioned Del Mar Bluff Stabilization projects as evidence. If NCTD truly stands behind their stated mission “to deliver *safe*, convenient, *reliable*, and user-friendly public transportation services (emphasis added),” then Del Mar bluff railroad realignment must be a top priority.

The capital improvement projects required by the Coastal Commission are appropriate because replacement beach space for the seawall impact is not available.

NCTD opposes the CCC's coastal access and recreation conditions as “overreach,” stating that the conditions have nothing to do with the railroad stabilization project. They do not recognize that beach access pathways exist at 7th St. and 11th St. in Del Mar, since both pathways require illegally crossing their ROW to use. They also assume, incorrectly, that the exclusive benefactors of the new beach access would be residents of Del Mar, an affluent coastal city with only 4,200 residents.

Before responding to these arguments, let's focus on how the seawall component of DMB5 will negatively affect the public beach they're built upon. The seawalls adversely affect the beach in the following ways:

⁸February 2022, National Ocean Service [Sea Level Rise Technical Report](#)

⁹ 6 July 2022, “[NCTD reply in opposition to CCC updates and The City of Del Mar's reply Re: Recent Approval of Bluffs Stabilization Project to STB](#)”, page 9

- a) By preventing beach sand replenishment from the bluff itself
 - b) By taking up valuable public beach space on a stretch of beach that is already narrow at high tides, and will become narrower as sea levels rise
 - c) By worsening sand loss via erosion from waves when they hit the wall.
 - d) Fixing the back of the beach on an eroding coastline creating passive erosion.
- Over the long term, this leads to narrower beaches ¹⁰

The CCC determined that 49,366 square feet (1.13 acres) of beach will be lost over the 30 year authorization term as a result of DMB5's seawall construction along the public beach (DMB5 staff report, p. 36). They also determined that the seawalls would result in the additional loss of 17,824 cubic yards of natural sand replenishment to the beach¹¹.

These figures illustrate in detail - and in Surfrider's opinion, very conservatively - some of the adverse effects that DMB5's shoreline protective devices will impose upon this stretch of popular beach. Per Chapter 3 of the Coastal Act, these negative effects require mitigation. The standard of mitigation is further clarified in two Supreme Court cases, *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*¹². Those decisions set limits on governments' ability to impair property interests with land use regulations, and found that there must be a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

The CCC's justification for the coastal access conditions is sound based on Chapter 3 of the Coastal Act, and further buttressed by the Nolan Dollan standard. Proportionate mitigation for public beach loss would be an equal area of beach replacement. However, replacement beach space does not exist in Del Mar or anywhere near the project site. Therefore, the CCC concluded that the appropriate alternative would be for SANDAG to complete a series of capital improvement

¹⁰Griggs GB. The impacts of coastal armoring. Shore and beach. 2005 Jan;73(1):13-22. "Whenever a hard structure is built along a coastline undergoing net long-term erosion as a result of sea level rise, the shoreline will eventually migrate landward behind the structure (Figure 22). The effect will be gradual loss of the beach in front of the seawall or revetment as the water deepens and the shoreface profile migrates landward. This process is designated as passive erosion and is the process that has been well documented along many of the armored barrier islands of the Atlantic coast, as well as on Oahu (Fletcher et al. 1997), and along the coast of California and Washington." at page 20.

¹¹ 26 May 2022, [CCC Staff Report for DMB5](#), page 37

¹² [Nolan v. CCC opinion summary and annotations, Justia.com](#) & [U.S. Reports: Dolan v. City of Tigard, 512 U.S. 374 \(1994\)](#).

projects to “address longstanding deficiencies and priority needs for the project area.” Specifically, the projects call for formalization of an existing lateral trail along the bluff, a legal railroad crossing at either 7th or 11th St. where historical beach access trails currently exist (albeit westward of NCTD’s ROW), and a vertical beach access near the railroad crossing.

To be clear, Surfrider does not dispute NCTD’s claim that no legal beach access currently exists along their ROW. However, we recognize that the vertical beach access pathway at 11th St. predates the railroad (in its current location) by at least 25 years. Therefore, it is fair to say that these beach accesses were obstructed by the railroad’s placement along the Del Mar bluff in the 1920’s. A railroad crossing and beach access at 10th St. did follow the original railroad relocation to the bluff in the 1920s, but these were removed in the 1960’s. Below is a photograph of the old bath house at the foot of 11th St.; the trail can clearly be seen behind it¹³.



Surfrider agrees with the CCC and takes the view that the “rampant illegal crossings” that NCTD decries should be viewed as clear evidence of a longstanding need for a formal crossing and vertical beach access that will benefit the entire region. NCTD wrongly assumes that Del Mar’s beaches are enjoyed exclusively by Del Mar’s 4,300 residents, therefore making the argument that CCC’s coastal access conditions allocate funds to a wealthy coastal community while taking away said funding for

¹³ photo from Del Mar Looking Back, by Nancy Hanks Ewing, published by the Del Mar Historical Society. Caption: “Bathhouse on the beach at the foot of the carriage down from 11th Street as viewed from the observation deck of the natatorium.”

transit projects in needier communities. However, Del Mar's beaches are a regional treasure that attract over 2 million visitors per year¹⁴. As the massive disparity between Del Mar's population and the total number of visitors makes clear, the vast majority of beachgoers in and around the project area do not reside within Del Mar city limits..

The two closest public beach accesses are Torrey Pines State Beach to the south, and Powerhouse Park to the north. Free parking is very limited at both beaches; meanwhile, paid parking is available but prohibitively expensive for many middle and low-income individuals and families. It costs \$15 to park at Torrey Pines State Beach, and the public parking lot that serves Powerhouse Park charges \$45 a day. An additional beach access in-between Torrey Pines and Powerhouse Park would take pressure off these highly impacted beaches and allow for additional free parking opportunities that do not require walking upwards of a mile to access the beach at no cost.

NCTD's threat to obstruct the construction of the capital improvement projects can only serve to further delay this critical railway safety project.

Lastly, we'd like to point out recent inconsistencies within NCTD's letters that concern us in regards to ensuring DMB5 is completed without obstruction. In their May 19 letter to SANDAG, NCTD states the following:

If, despite the foregoing, SANDAG determines that it intends to advance the Project prior to a determination by the STB, SANDAG will assume all responsibility and financial obligation for permit compliance. NCTD will not provide any funding now or in the future for any "Coastal Access and Recreation" conditions and expressly reserves the right to oppose any future requirements that impact railroad operations and/or safe operations of the railroad and/or that imposes any financial obligations for such elements.

In the quote above, NCTD clearly states that they will not contribute any funding to the coastal access project conditions required in the CCC's conditional concurrence. However, they make no mention of obstructing the projects from being completed

¹⁴ delmar.ca.us, city website. About Del Mar: "Del Mar attracts residents, and upwards of 2 million visitors annually from all over the world, who come to enjoy the beautiful dog-friendly beaches, hiking trails, scenic views, and the many shops and dining opportunities located within the Del Mar village.

and the first sentence implies that they have no intention of denying access to their ROW.

In their subsequent letter to this agency (STB) on 14 June 2022,, NCTD went further and stated that they intend to obstruct the completion of CCC's conditions by barring SANDAG access to their ROW¹⁵:

By way of reminder, NCTD is the owner and maintainer of the railroad at issue; SANDAG, under the provisions of California Senate Bill 1703, is only authorized to assume specified responsibilities and functions related to planning, programming, project development and construction. Under SB 1703, NCTD retained all operational/maintenance control and safety responsibility for the railroad right-of-way. NCTD grants SANDAG access for approved capital improvements and reserves the right to reject access to NCTD's railroad property. In the instant matter, NCTD shall not authorize SANDAG to advance construction of the safety improvements noted herein related to the stabilization project under the terms and conditions imposed by the Commission.

Since this time, NCTD and SANDAG have reportedly reached a verbal agreement on how to proceed. However, nothing is in writing at the time of this letter.

In addition to being inconsistent, it would be an abuse of power for NCTD to obstruct the conditionally approved DMB5 project based on their own opinions. To do so would set a dangerous precedent that would slow the completion of what they've deemed a critical safety project. For example, if NCTD blocks SANDAG's access to their ROW to complete these beach access projects, what is to stop CA State Parks and the City of Del Mar from retaliating in-kind and preventing SANDAG from building the conditionally approved seawalls?

Considering the long trail of letters that catalog the disagreements between NCTD and the City of Del Mar, this eventuality is not hard to imagine. NCTD's threat to withhold access to their ROW and potentially delay this critical rail safety project cannot be allowed to stand in light of the federal consistency reached between the CCC and the project applicant, SANDAG.

¹⁵ 14 June 2022, [NCTD Petition for Declaratory Order: Second Supplemental Status Update](#), page 12

For all of the aforementioned reasons in this letter and our previous letter, dated 5 October 2022 and included as Exhibit A, we respectfully request that the Surface Transportation Board decline NCTD's petition for declaratory relief. The conditional concurrence agreed upon between the CCC and the project applicant, SANDAG, allows DMB5 to proceed in a way that protects this critical railroad corridor *while* limiting the extent of permanent damage to the public beach below. Outside of NCTD, all other parties involved in this process - SANDAG, the City of Del Mar, the Coastal Commission, CA State Parks¹⁶ and Surfrider to name a few - have signaled their acceptance of the conditional concurrence. Thank you for the opportunity to comment on this important matter.

Sincerely,

Mitch Silverstein

San Diego County Policy Manager

The Surfrider Foundation

mitch@surfridersd.org

619.736.7757

Kristin Brinner & Jim Jaffee, Beach Preservation Co-Leads

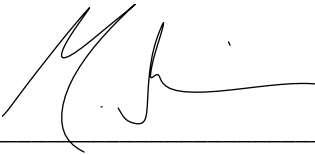
San Diego County Chapter, Surfrider Foundation

¹⁶ Smith, Darren. Senior Environmental Scientist, CA State Parks, San Diego Coast District. From his public comment letter for DMB5 federal consistency, 3 June 2022 ([page 17 of CCC Correspondence](#)): "SANDAG has worked earnestly to reduce the effects of this Project and appears committed to the longer-term solution of removing the proposed seawall and realigning the rail so that it is not as vulnerable to coastal processes. This commitment would provide opportunities for greatly improved public access and improved visitor experience at Torrey Pines State Beach. We strongly support the commitment to re-aligning the rail corridor to a more inland location and restoring the beach and bluff to a more natural condition within the 30-year timeframe."

Parties of record:

I certify on July 25, 2022 that all parties of record have been served via email in this matter.

Signed:



Mitch Silverstein

EXHIBIT A



October 5, 2020

Submitted electronically

To: Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board

CC: Timothy J. Strafford, Association of American Railroads
William C. Pate, City of Del Mar
Daniel Elliott, North County Transit District
Louise Warren, Chief Counsel; Diana Lilly, San Diego District Manager; California Coastal Commission
Christa Johnson, City Manager; Ellie Haviland, Mayor; Terry Gaasterland and Dwight Worden, City Councilors, City of Del Mar

Re: Docket No. FD 36433, Opposition to North County Transit District's Petition for a Declaratory Order

Dear Ms. Brown,

The Surfrider Foundation is a non-profit, environmental organization dedicated to the protection and enjoyment of the world's oceans, waves and beaches for all people, through a powerful activist network. With nearly 70 miles of coastline to protect, the Surfrider Foundation San Diego County Chapter (Surfrider San Diego) is one of the largest and most active chapters in the world. We are a grassroots organization, which means the people working to protect our local ocean, waves, and beaches are volunteers who care about the San Diego County coastline and want to protect our home. Surfrider San Diego is an active stakeholder representing the public in the conversation regarding the bluff stabilization and relocation of a section of the LOSSAN track in Del Mar. **We oppose the petition for declaratory order filed by the North County Transit District (NCTD) as it will result in an unacceptable loss of the public's right to access the beach and is not supported by law or fact.**

Executive summary

The petition is asking for a declaratory order for two very different types of projects. In regards to future rail maintenance and bluff stabilization projects, we believe the petition must be denied on the following basis:

1. Federal law and state law must apply to ensure appropriate management of coastal resources.
2. Congress did not intend the Interstate Commerce Commission Termination Act (ICCTA) to displace traditional state functions that do not regulate rail transportation.
3. Maintaining the track in place, potential future double tracking activities, and other future bluff stabilization projects involve land outside of the Right of Way (ROW) controlled by NCTD, including State Tidelands, City, or State Beaches. As such, federal and state law must be applied to ensure appropriate management of coastal resources.
4. Federal grant conditions for past and future bluff stabilization projects require compliance under the Coastal Act and Coastal Zone Management Act (CZMA).
5. NCTD is not the proper applicant for a petition, as the San Diego Association of Governments (SANDAG) was the applicant for the August 2020 California Coastal Commission Consistency Certification CC-0001-20¹. SANDAG will also be the applicant for future projects, including track relocation and Del Mar Bluffs Stabilization Projects 5 and 6.
6. The Coastal Commission has concurred with Consistency Certifications and granted Coastal Development Permits (CDPs) for past bluff stabilization projects. Therefore, NCTD has no basis to preemptively claim that future projects will be denied under the Coastal Act.

In regards to the proposed safety fencing, we believe the petition must be denied primarily on the following grounds:

¹ August 12, 2020: Coastal Commission Energy, Ocean Resources & Federal Consistency item 13b, After-the-fact Consistency Certification by SANDAG for Del Mar Bluffs Emergency Repair Project <https://www.coastal.ca.gov/meetings/agenda/#/2020/8>

1. The placement of fences, even if entirely in NCTD's ROW, has adverse impacts on historical coastal access, which is protected under Chapter 3 of the Coastal Act and must be subject to Coastal Commission review.
2. The Transit and Intercity Rail Capital Program stipulates that recipients of funding for the proposed safety fencing must comply with all relevant federal and state laws, regulations, policies, and procedures.

Future bluff stabilization, track maintenance, and double tracking

NCTD has no grounds to attempt to preemptively bypass review of future bluff projects for the following reasons:

1. Federal and state law must apply to ensure appropriate management of coastal resources

A decision to preempt coastal zone management, a role which has been designated to the state through the federal Coastal Zone Management Act, will frustrate the federal law designed for proactive coastal planning, increased transparency, and stakeholder input.² The Coastal Zone Management Act ("CZMA") was passed by Congress in 1972 to encourage coastal states to develop and implement coastal zone management plans. In enacting the law, Congress recognized the importance of meeting the challenge of continued growth in the coastal zone. Congress declared their intent "to preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations."³ The congressional declaration of policy included the purposes to protect natural resources, manage coastal development, prioritize coastal dependent uses, and provide for public access and recreation.

The CZMA requires that projects comply with the state's enforceable policies and will be carried out in a manner consistent with the state's Coastal Management Program.⁴ The CZMA implements the national Coastal Zone Management Program, which is adopted within each state through Coastal Management Programs ("CMP"). In California, the CMP is implemented by the California Coastal Commission and governed by the state law, the California Coastal Act.⁵ A key element of the Act is coordinating state and federal actions to give coastal states a strong voice in

² 16 U.S.C. §§1451-1465.

³ 16 U.S.C. sec 1452(1)-(6).

⁴ 16 USC sec. 1456.

⁵ Cal. Pub. Res. Code §§ 30000, *et seq.*

decision-making, which they otherwise would not have, for activities that may affect a state's coastal uses and resources. Accordingly, attempts to limit state review of major coastal projects undermine both the spirit and intent of the CZMA, which includes participation from coastal states and territories.

The California Coastal Commission has set the standard for effective coastal management plan implementation. No other agency, federal or state, is monitoring sea level rise, dynamic shoreline processes, bluff erosion, and coastal management needs like the California Coastal Commission. To mute their voice on the matter would be doing a disservice to not only beachgoers and residents, but also railroad commuters and industry alike by failing to implement long-term and comprehensive solutions to bluff erosion. California's long-standing commitment to coastal preservation is an intrinsic component of the State's internal decision-making process. The self-imposed review is meant to ensure that projects are thoroughly vetted so that they can move forward in an economically and environmentally sustainable manner.

Just as National Environmental Policy Act ("NEPA") compliance and enforcement is not preempted by the STB for this issue, neither should the Coastal Zone Management Act's purpose and objectives in creating a coastal management structure.

2. Congress did not intend the ICCTA to displace traditional state functions that do not regulate rail transportation.

We respectfully suggest that the STB should not engage with this matter because it does not have jurisdiction over the repair and maintenance work that has been done or may be completed in the future with respect to this rail line. Under 49 U.S.C. § 10501, the STB oversees (1) rates, classifications, rules, practices, routes, services, and facilities with respect to rail carriers and (2) construction, acquisition, operation, abandonment, and discontinuance of rail tracks. The courts and STB agree that the Interstate Commerce Commission Termination Act ("ICCTA") does not provide federal jurisdiction over track repair activities.⁶ The recent and potential future work on the rail line that is the subject of the NCTD petition does not implicate rate regulation, new construction, or abandonment; at most, future work to make this line safe and

⁶ Lee's Summit, MO v. Surface Transp. Bd., 231 F.3d 39, 42 n.3 (D.C. Cir. 2000); Detroit/Wayne County Port Authority v. I.C.C., 59 F.3d 1314 (D.C. Cir. 1995); Swanson Rail Transfer, LB—Declaratory Order—Swanson Rail Yard Terminal, Fed Carr. Case. P37354, 2011 WL 2356468, *2 (June 14, 2011); Union Pac. R.R. Co.—Petition for Declaratory Order—Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, 1998 WL 525587, *3-4 (Aug. 19, 1998) (citing Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926)).

secure will involve repair and rehabilitation.

Such repair and maintenance work falls squarely within the states' historical police powers over railroads. Congress enacted the Interstate Commerce Act in 1887 to address the growing patchwork of state economic regulation and revised it to also address corruption and rate-fixing. Over the course of the 20th century, however, Congress slowly deregulated the industry as concerns about monopoly power faded. Those deregulatory efforts culminated in the ICCTA, which abolished the sprawling jurisdiction of the Interstate Commerce Commission and replaced it with the much more limited role of the new STB.⁷

In doing so, Congress did not intend STB authority to usurp a state's historical ability to make decisions on state law or expenditures. Here, the California Coastal Commission's oversight of bluff stabilization or restoration work is an exercise of traditional state power that does not implicate the STB's statutory jurisdiction. Such state oversight is essential to protect people and resources along this important stretch of the California coast.

3. Blufftop rail projects involve land outside of NCTD's ROW, including State Tidelands or City or State Beaches, and are subject to protection under the Coastal Act and CMZA

In 2019, NCTD and SANDAG jointly applied for a Federal-State Partnership for State of Good Repair Program grant. The project was titled "Pacific Surfliner Coastal Bluff Track Bed Stabilization and Seismic Improvements Project" (Surfliner Coastal Bluff Stabilization Project). NCTD and SANDAG describe the project location in the Environmental Studies and Documents attachment to the Surfliner Coastal Bluff Stabilization Project grant application, and we are including this document as an attachment to our letter.

The Proposed Action site is located along a 1.6-mile portion of the existing NCTD railroad ROW in the City of Del Mar; refer to Figures 1a and 1b. The Proposed Action extends from rail Milepost (MP) 244.1 near Coast Boulevard south to MP 245.7 at Torrey Pines State Beach. Within this reach, the NCTD rail alignment runs atop the coastal bluffs, which are generally 50 to 70 feet high. Railroad ROW varies between approximately 100 feet and 235 feet in width and, in

⁷ In 1995, Congress completed its economic deregulation of the rail industry by adopting the ICCTA, which abolished the Interstate Commerce Commission and transferred its limited remaining powers to the new Surface Transportation Board. (Pub. L. 104-88, 109 Stat. 803.)

some places, extends onto the beach below. Portions of the Proposed Action site are also located within Torrey Pines State Beach along the base of the coastal bluffs that support the railroad tracks. The Proposed Action site lies entirely within the Coastal Zone.

As shown on Figures 1a and 1b, there are a variety of land uses within a 0.5-mile radius of the Proposed Action site that are considered sensitive, including residences, parks, beaches, schools, and a public library. The majority of the development within the vicinity of the Proposed Action is residential, with some commercial development primarily located along Camino Del Mar. The construction access and staging area for components 1 and 2A at the northern end of the Proposed Action Site is adjacent to two City parks, Powerhouse Park and Seagrove Park. The Del Mar Library is located approximately 900 feet east of components 1 and 2A. Toward the southern end of the Proposed Action site, components 8 and 9 and the associated construction access and staging areas are adjacent to/occur within Torrey Pines State Beach. Del Mar Elementary School is located approximately 430 feet east of components 2C, 4, 5, 6, 7, and 12.

Pages 4 and 5 of a June 2016 CE Request, Environmental Studies and Documents attachment from the Surfliner Coastal Bluff Stabilization Project grant application

NCTD and SANDAG state that portions of the projects are located outside of their ROW, on State Beach land. A CDP or Consistency Certification will be required to perform such extensive work outside of their ROW.

In addition to encroaching on state lands, construction activities for these proposed projects would also require access via the beach, potentially requiring a CDP:

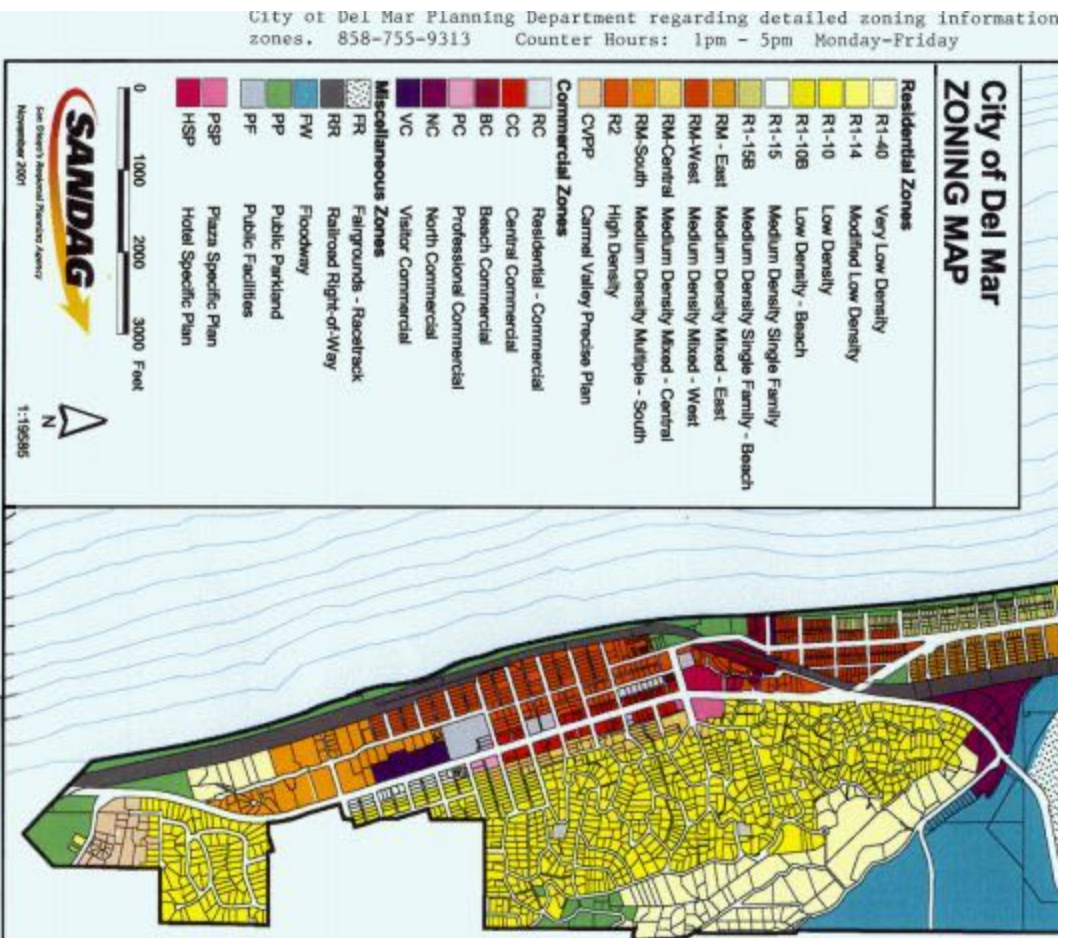
Components requiring access from the beach include stabilization of an existing storm drain headwall, temporary support of a surface outlet structure, replacement of an open chute structure with an underground storm drain, addition of a secondary outlet to an existing storm drain outlet structure, addition of new structural supports for three retaining walls and removal of debris from hydro-augers placed in 2002. The beach area would be accessed from the life guard tower at 17th Street to the north and the Torrey Pines State Beach to the south. All staging and work areas would require access by pickup trucks, flatbed trucks, dump trucks, a small back hoe, a drill rig and loader, and concrete ready-mix trucks. Parking would not be impacted. Work would be completed outside of the summer months when traffic and beach usage is at its peak. Removal of hydro-augers will require hand held equipment, lift and pickup truck to remove and dispose of the existing debris off site. Addition of the secondary outlet to the existing headwall would require use of hand held drilling equipment for additional outlet points. The remaining work would require excavation of existing materials, placement of new reinforcing and placement of concrete. All debris will be removed from the beach and disposed of offsite. No utilities are located within the work areas. All work areas will be temporarily fenced or flagged.

Construction of components on the beach could be completed during regular day time hours independent of train operations. The headwall, wood lagging retaining wall repair and reinforcement of the drainage chute outlet could be done concurrently with multiple crews, or sequentially with one move on of equipment. Placement of the new headwall would include excavation and shoring, followed by drilling and placement of the soil nails, placement of vertical reinforcing, placement of gunite and completed with placement of rockscape finish surface. Support for the retaining walls would include drilling and placement of the steel supports and placement of concrete followed by final placement of shims and connection to the existing wood lagging. Excavation and placement of concrete under the drainage chute outlet as well as modifications to the drainage outlet at MP 244.7 and removal of hydro-augers could be done concurrently with other projects. With mobilization and clean up, work on the beach would likely be completed within approximately 6 months. Addition of the storm drain replacement at the drainage chute would likely be in future phase due to funding, but would be completed in a similar work window outside of the summer months. This component would also require access from the rail corridor above the beach.

Pages 15 and 16 of the June 2016 CE Request, Environmental Studies and Documents attachment from the Surfliner Coastal Bluff Stabilization Project grant application

NCTD and SANDAG documented that construction equipment will need access to the state's beaches, and that project will be located outside of NCTD's ROW, so Coastal Act compliance will be required for these activities as well.

The below zoning map from Del Mar confirms that work areas will be outside the ROW.



City of Del Mar Zoning Map, Figure 2, June 2016 CE Request, Environmental Studies and Documents attachment from the Surfliner Coastal Bluff Stabilization Project grant application

As documented in NCTD's and SANDAG's grant application above, previous and future bluff stabilization work area is outside of NCTD's ROW. Thus this work will need Coastal Act compliance to perform work outside the ROW, especially on State Tidelands.

4. Federal grants for bluff stabilization projects require consistency certification

NCTD and SANDAG will be working on Del Mar Bluffs Stabilization Projects 5 and 6 in the coming years. We submit that NCTD must receive a Consistency Certification from the Coastal Commission as they are using federal funds for these bluff stabilization projects. Such a Certification is a requirement for federal grants.

NCTD and SANDAG themselves have stated this to be true in their own Surfliner Coastal Bluff Stabilization Project grant application. An August 2010 National Environmental Policy Act (NEPA) Categorical Exclusion (CE) Request for Del Mar Bluff Stabilization Project 3 was also included in the Surfliner Coastal Bluff Stabilization Project grant application:

Applicable Environmental Laws

The proposed action would be subject to the requirements of NEPA and the federal Coastal Zone Management Act, as described below. Also as described below, the proposed action would not be expected to result in the take of plant or wildlife species listed for protection under the Endangered Species Act or take/harm migratory birds protected under the Migratory Bird Treaty Act.

Page 10, April 202 CE Request, Environmental Studies and Documents attachment from the Surfliner Coastal Bluff Stabilization Project grant application

This excerpt clearly states that previous Del Mar bluffs stabilization projects are subject to the CMZA.

In the same grant application, NCTD and SANDAG continue to document that a condition of Federal Grants for Del Mar Stabilization Project 3 was a Consistency Determination.

Coastal Zone Management Act

The proposed action would occur entirely within the California coastal zone, as established by the California Coastal Act of 1976, as amended (California Public Resources Code Sections 30000 *et seq.*). Because of its location within the coastal zone, the proposed action can only receive federal funding if it is consistent with the coastal resources planning and management policies contained in Chapter 3 of the California Coastal Act. This requirement, described below, stems from the Federal Coastal Zone Management Act of 1972 (33 U.S.C. Sections 1451 *et seq.*), as amended through Public Law 104-150 (the Coastal Zone Protection Act of 1996).

The Federal Coastal Zone Management Act (Section 1456(d)) mandates that:

State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of

natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of section 6506 of title 31. Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this chapter or necessary in the interest of national security.

Pages 11 and 12, April 202 CE Request, Environmental Studies and Documents attachment from the Surfliner Coastal Bluff Stabilization Project grant application

CMZA (U.S. Code § 1456(d)) mandates that federal agencies shall not approve projects that are inconsistent with the state's coastal management program, in this case Chapter 3 of the Coastal Act.

NCTD and SANDAG have stated that previous Del Mar Bluffs stabilization projects were subject to the CMZA. NCTD and SANDAG have received federal funding for future Del Mar Bluffs Stabilization Projects 5 and 6. Therefore, in their own words, these future projects must also be subject to the CMZA.

5. NCTD is not the proper applicant for a petition

On August 12, 2020, the California Coastal Commission concurred with an after-the-fact Consistency Certification (CC-0001-20) for two emergency bluff stabilization measures constructed on the Del Mar bluffs in 2019. SANDAG, not NCTD, was the applicant for this certification.

Here follows important background for the consistency process:

- The Federal Consistency Unit of the California Coastal Commission implements the federal Coastal Zone Management Act of 1972, as it applies to development projects and support to state and local governments.
- All federal agency activities affecting the coastal zone must be consistent with the enforceable policies of the state's certified program.
- The review process used to implement this requirement is called a consistency certification for federal support (i.e. funding) to state and local agencies.

In 1977, the federal government certified the California Coastal Management Program (CCMP). 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.

Given that the Coastal Commission concurred that these activities were consistent, and NCTD was not the applicant for the Consistency Certification, we submit that

NCTD is not the proper applicant for a petition to the STB when it comes to this matter.

Additionally, NCTD is not currently scheduled to be the applicant for any Consistency Certifications for future bluff stabilization projects. As part of the August 2020 Certification, the staff report for this item noted the following:

SANDAG's consistency certification also includes information on its future Del Mar Bluffs Stabilization Projects 5 and 6, ongoing planning efforts for relocating the railroad off the bluffs, development of sea level rise vulnerability analysis and hazard adaptation reports, and progress reports and timelines to keep the Commission informed about the status of these projects and planning studies. SANDAG will continue to submit consistency certifications for Del Mar Bluffs stabilization projects and continue its coordination with the Commission staff during project design and implementation to ensure the protection of critical public infrastructure and coastal resources consistent with the Coastal Act. (page 2, CC-0001-20 (SANDAG) staff report, emphasis added)

Again, SANDAG is the planned applicant for future work, so it is not appropriate for NCTD to seek declaratory relief if they were not and will not be the applicant.

6. NCTD has no basis to preemptively claim that future bluff stabilization projects will not be found to be consistent with the Coastal Act

In 2020, the Coastal Commission concurred with the Consistency Certification so did not create an obstacle for SANDAG, or NCTD, in terms of the emergency repairs.

The staff report for this after-the-fact Consistency Certification also noted that the Coastal Commission has granted Coastal Development Permits (CDPs) and concurred with Consistency Certifications for numerous previous bluff stabilization projects:

"...the Commission found that bluff stabilization was necessary to protect the railroad trackbed and public safety and consistent with the geologic hazard minimization policies of Sections 30235 and 30253." (page 11, CC-0001-20 (SANDAG) staff report)

This includes installation of various soldier piles and drainage improvements, as well as for SANDAG's previous Del Mar Bluffs Stabilization Projects 2, 3, and 4:

- *"In CDP 6-96-156, the Commission authorized installation of 24 soldier piles at 13th Street, including visual treatment for the top of the exposed piles so that the project would blend in with the surrounding terrain...."*

- *"In CDP 6-01-081, the Commission authorized the installation of 12 soldier piles between 7th and 8th Streets, including conditions requiring erosion controls, best management practices, annual reporting, and Commission staff review of staging and construction plans, monitoring and maintenance plans, and the use of materials and colors.*
- *"The Commission concurred with CC-048-04 for SANDAG's Del Mar Bluffs Stabilization Project 2 for the installation of 1,326 linear-feet of soldier pile walls on the upper bluffs.*
- *"The Commission concurred with CC-020-10 for SANDAG's Del Mar Bluffs Stabilization Project 3 for the installation of 1,060 linear-feet of soldier pile walls at seven additional priority areas along the bluffs.*
- *"The Commission concurred with CC-0004-18 for SANDAG's Del Mar Bluffs Stabilization Project 4 for the installation of a variety of bluff stabilization and repair projects to protect the railroad trackbed, including bluff-top drainage improvements and slope failure repairs near: (1) 7th Street using an earth-colored cement slurry buttress fill within the eroded area of the upper bluff; (2) Anderson Canyon using new soldier piles, steel H-piles, concrete lagging, and backfilling; (3) 7th and 8th Streets using soldier pile walls on the upper bluff; and (4) 9th and 10th Streets using steel H-piles and lagging walls."* (page 10, CC-0001-20 (SANDAG) staff report)

Despite this robust history of authorizations and certifications, NCTD states in their petition:

...NCTD seeks a declaratory order now because it has numerous crucial, upcoming rail maintenance and upgrading projects that will be challenged under the Coastal Act or local coastal laws by Del Mar or the Commission based on their public statements described herein.

This statement by NCTD is inconsistent with previous determinations by the Coastal Commission. NCTD has no basis to claim that the Coastal Commission will act any differently for future CDPs or Consistency Certifications. No case or controversy is currently before the Board; future tracks will be proposed, planned and funded in coming decades. The Coastal Commission has issued certifications to dozens of actions and not objected to a single one. Similarly here, there is no objection to certification by the Commission, and conjecture for future objections is speculation. It is illogical to regulate a future project when the scope, geographic location, and potential effects cannot be identified yet.

Safety fencing

For decades, the San Diego community has enjoyed the bluffs in Del Mar as an area to view the ocean and access the beach below. Removing this historical access without providing any mitigation for the loss of access is inconsistent with Chapter 3 of California's Coastal Act. While the city of Del Mar denied NCTD a permit for the fence, this project should still be reviewed by the Coastal Commission. We also submit that NCTD does not have the authority to bypass local and state review, as NCTD would be using state funds to build the fence. In NCTD's petition to the STB, they state the following:

This important fencing project is expected to cost over \$2 million and will be funded from California monies from the Transit and Intercity Rail Capital Program but may later include federal dollars depending on how the funding process plays out in the future. (page 13)

However, guidelines for the Transit and Intercity Rail Capital Program, provided by the California State Transportation Agency (CalSTA), stipulate the following:

Applicants must comply with all relevant federal and state laws, regulations, policies, and procedures.⁸

Therefore, we submit that it is inconsistent with the state funds provided for the fencing project to attempt to bypass state laws such as the Coastal Act. While the federal funds are not being proposed to be used for the fencing, (thus precluding the need for a consistency certification by the Coastal Commission), the usage of state funds and impacts to coastal access mandate a review from the Coastal Commission under the California Coastal Act.

Bluff stabilization and fencing projects will cause adverse impacts to beach access

A core principle of the California Coastal Act of 1976 is to maximize public access to and along the coast, in addition to recreational opportunities in the coastal zone (Cal. Pub. Res. Code § 30000 et seq). We believe that the actions conducted by SANDAG (and possibly NCTD) will have impacts to access and recreation that must be reviewed under the Coastal Act.

The LOSSAN railroad runs through a 1.7 mile stretch of highly unstable bluffs in Del Mar. We submit that these coastal bluffs provide important historic coastal access opportunities and are invaluable to the ecology and character of Del Mar. We further acknowledge that the rail corridor is considered critical infrastructure by regional,

⁸ <https://calsta.ca.gov/-/media/calsta-media/documents/tircp-2018-final-guidelines.pdf>

state, and federal entities; and that as a public transit option it provides opportunities for enhancing equity and reducing greenhouse gas emissions from transportation. The safety threat related to the railroad's position along the bluffs in Del Mar is not a new phenomena. The tracks themselves were once farther inland and in 1910 were relocated to the present location. Since that time, three trains have fallen to the beach, the last time in 1941.⁹



*Train wreck - first three days January 1941.
Photo courtesy Larry Brooks, DMVA Historical Committee*

SANDAG, NCTD, the City of Del Mar, and other stakeholders are evaluating long-term options for relocating this stretch of railroad in order to address these predictable — and now imminent — hazards related to the erosion of the bluffs. There is also strong motivation to double track this segment of the track for capacity building and safety reasons. Double tracking is not feasible at the present location due to the associated risks. SANDAG is examining five long-term relocation alternatives. In the short-term, a

⁹ <https://publishing.cdlib.org/ucpressebooks/view?docId=ft0h4nb01z;chunk.id=0;doc.view=prin>

six-phased project is underway to provide immediate stabilization of the railway through approximately 2050.

Del Mar's sensitive bluffs are an important source of habitat and coastal access, and dynamic beaches and bluffs must be given the space to erode. Armoring and stabilization will not ultimately be effective as the bluff is already eroding measurably every year at a rate that will increase significantly as sea levels rise. Relocation should be pursued as quickly as possible without forgoing expert review. It will not likely occur within the next two decades. We are working proactively to ensure that short-term solutions for bluff stabilization are as adaptive as possible. Our region's strategy to brace itself against ongoing erosion, which will accelerate with sea level rise, should not include measures that will result in disastrous impacts that far outlast the benefits of our measures.

According to a study by the City of Del Mar's SLR Technical Advisory Committee's (STAC) Coastal Hazards, Vulnerability, and Risk Assessments document:

"The current localized vulnerability of the LOSSAN railroad to bluff erosion will increase in extent in the near-term and extend along almost the entire bluff before 2030. By this timeframe, the railroad would need to be moved inland or armored with a seawall to reduce the risk of the railroad collapsing (as a section of railroad collapsed and cause a train wreck in 1940). If a seawall is constructed, the beach will erode back to the seawall over time until little to no beach exists..."

In view of the above findings as well as other findings by the Coastal Commission, future actions on this segment of railroad must be evaluated for impacts to recreation and access, given the projected loss of beach due to seawalls or other similar structures. Any analysis should include alternative analysis, including relocating the tracks inland.

We agree that maintaining the tracks in place is necessary in the short term. We also agree with NCTD's assertion that the location of the tracks along Del Mar's bluffs presents a risk. However, fencing and bluff stabilization projects will cause adverse impacts to beach access which are inconsistent with the core principles of the Coastal Act. Coastal access should ultimately be improved, not removed, along the current bluff-top railway location.

In conclusion, NCTD's petition for declaratory order must be denied for the forgoing reasons. Bluff and beach projects have and will negatively impact beach access and must continue to be subject to review under the state's coastal management program, as implemented by the federal Coastal Zone Management Act.

Sincerely,

Kristin Brinner & Jim Jaffee, Beach Preservation Committee co-leads
Laura Walsh, Policy Manager
San Diego County Chapter, Surfrider Foundation

Angela Howe, Legal Director
Surfrider Foundation

Parties of record:

I certify on October 5, 2020 all parties of record have been served via email in this matter.

CC:

Timothy J. Strafford
tstrafford@aar.org
Association of American Railroads

William C. Pate
wpate@dpmclaw.com
City of Del Mar

Louise Warren
Louise.Warren@coastal.ca.gov
California Coastal Commission

Daniel Elliott
danelliottiii@outlook.com
North County Transit District

Signed:

Kristin Brinner

Kristin Brinner

EXHIBIT B

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

May 19, 2022

Mr. Hasan Ikhata
Chief Executive Officer
SANDAG
401 B Street, Suite 800
San Diego, CA 92101
Sent Via Electronic Mail: hasan.ikhata@sandag.org

RE: California Coastal Commission Proposed Conditions related to Del Mar Bluffs 5 Stabilization Project

Dear Mr. *Hasan* Ikhata:

The North County Transit District (NCTD) is in receipt of the proposed conditions provided by the California Coastal Commission (CCC) as it relates to the Del Mar Bluffs 5 (DMB5) project (Project). As you are aware, NCTD filed a Petition for Declaratory Order at the Surface Transportation Board (STB) on August 28, 2020 (STB Finance Docket No. 36433), requesting clarification from the STB regarding whether Federal Consistency Review under the Coastal Zone Management Act was preempted under 49 U.S.C. § 10501(b) of the Interstate Commerce Commission Termination Act (ICCTA). The conditions being proposed by CCC for the Project, especially as it relates to the "Coastal Access and Recreation" conditions are completely preempted by the ICCTA. Accordingly, NCTD recommends that SANDAG abstain from advancing approval of the Project through the CCC until a determination is made by the STB on NCTD's petition for declaratory order.

Although NCTD expressly opposes the permit process in total, it specifically opposes the following proposed requirements in the draft conditions provided by the CCC for the Project:

1. Authorization Term: The CCC proposed requirement that SANDAG remove the seawall and rip rap or submit a complete coastal development permit or consistency certification review application to the CCC at the expiration of the permit term is not agreeable.

NCTD does not agree to contribute any additional funding for the Project and/or associated mitigation impacts to remove the seawall and rip rap and/or be responsible for additional mitigation at the expiration of the term.

2. Coastal Access and Recreation: The proposed conditions require SANDAG "to develop and implement a capital improvement program to improve safe

public coastal access and recreation" in the Project area through the implementation of the following projects: (a) enhancement of the north-south trail system east of the rail track on the top bluff between Seagrove Park and 4th Street; (b) construction of a pedestrian rail crossing near 7th or 11th Street; and (c) construction of a beach accessway from the pedestrian rail crossing to the beach. The imposition of these proposed conditions on a railroad maintenance/safety project where legal public access does not exist today is exactly the type of overreach that prompted NCTD to file its petition with the STB in the first instance. Legal public access and recreation does not exist today in the railroad right-of-way; the proposed conditions are not in any way related to the railroad Project at issue or its associated impacts. Imposing lock-boxed mitigation dollars and demanding project conditions that are in no way related to the Project is unconscionable and clearly exceeds the CCC's authority.

If, despite the foregoing, SANDAG determines that it intends to advance the Project prior to a determination by the STB, SANDAG will assume all responsibility and financial obligation for permit compliance. NCTD will not provide any funding now or in the future for any "Coastal Access and Recreation" conditions and expressly reserves the right to oppose any future requirements that impact railroad operations and/or safe operations of the railroad and/or that imposes any financial obligations for such elements.

The conditions being proposed for the Project by the CCC impose significant obligations and undetermined future project costs to the region far beyond the implementation of the stabilization Project. NCTD is unaware of any funding that is available to meet the requests of the CCC to implement their requirements. Moreover, from a NCTD perspective, the CCC requests do not support state of good repair needs, improvements to mobility, climate change, or advance social equity outcomes.

NCTD remains committed to advancing this critical safety Project in a manner that preserves and utilizes public funds in a manner consistent with an equitable and legal application of regulatory requirements.

Sincerely,



Matthew O. Tucker
Executive Director

cc: SANDAG Board of Directors
Jack Ainsworth, Executive Director, California Coastal Commission
NCTD Board of Directors