



January 19, 2022

Submitted electronically

To: Board of Directors
North County Transit District

CC: Louise Warren, Chief Counsel; Diana Lilly, San Diego District Manager; California Coastal Commission

Ashley Jones, City Manager, City of Del Mar
Hasan Ikhata, Chief Executive Officer, SANDAG

Re: Closed Session Item 1 - Surface Transportation Board Docket No. FD 36433

Dear Board of Directors,

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 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 make a difference.

We have previously voiced our concerns about NCTD's request to the federal Surface Transportation Board (STB) to bypass state and federal environmental review concerning the proposed track fencing and armoring in Del Mar. As NCTD recently requested that STB hear this matter, we have the following concerns regarding this action:

1. The NCTD petition goes far beyond the fencing and bluff stabilization work.
2. An STB ruling in favor of NCTD's request would have an immediate and significant detrimental effect on California and other coastal states' abilities to protect their beaches.
3. STB mediation is better suited to resolve this issue than an STB ruling.
4. The fencing issue is distinct from the bluff stabilization issue, and they should

not be combined into an overly-broad request to the STB.

5. It is an improper use of state funds to build a fence along the tracks when those state funds stipulated projects must undergo relevant environmental review.
6. NCTD should not be seeking declaratory relief for bluff stabilization if SANDAG has committed to Federal Consistency Review of these bluff stabilization projects.

The petition is overly broad

The NCTD petition goes far beyond the fencing and bluff stabilization work. Rather than focusing on the specific issues that must be addressed to move forward with the project, NCTD has chosen the nuclear option: asking a federal agency charged with promoting railroads to rule on the question of state and local governments' authority to protect its beaches. This overly-broad request is unnecessary and detrimental to the traditional balancing of federal and state interests in public safety and environmental protections.

Legal repercussions of an STB Ruling

If the STB rules to grant NCTD's petition to allow for an exemption from state and local environmental laws, this ruling would have an immediate detrimental effect on the California Coastal Commission's ability to uphold the strong protections embodied in the Coastal Act. The ruling is very likely to be appealed to the 9th Circuit Court of Appeals. Given the split among the courts on the question of preemption, an appeal to the 9th Circuit could rise to the US Supreme Court. This will have extremely far-reaching negative repercussions for states with strong environmental laws.

Even if the challenge does not rise to the Supreme Court, STB's decision to grant the petition will have immediate negative effects in other coastal zones with railroads seeking environmental exemptions, such as the current Humboldt Bay matter before the STB. The Coastal Commission could lose coastal permit jurisdiction over proposed development on tidelands and public trust lands. Other coastal states could similarly lose their environmental regulatory authority. From a practical standpoint, the matter will be tied up in the courts for years to come, further delaying NCTD's proposed projects (and adding significant legal costs). For all of these reasons, Surfrider urges NCTD to engage in STB-sponsored mediation to focus on and resolve the specific issues of concern in a timely manner.

STB-sponsored mediation

Despite our differences of opinion concerning the matter in front of the STB, we wholeheartedly support NCTD's mission to provide safe public transportation opportunities for our community. We acknowledge that Del Mar's coastal bluffs

provide important historic coastal access opportunities and are invaluable to the city's ecology and character. We further acknowledge that the LOSSAN corridor is considered critical infrastructure by regional, state, and federal entities; and that as a public transit option it provides opportunities for enhancing equity and reducing greenhouse gas emissions from transportation.

Rather than asking the STB to resolve this matter, we believe that STB-sponsored mediation between NCTD, the Coastal Commission, and the City is a better way to resolve these differences. Both the city of Del Mar and the Coastal Commission submitted motions requesting board-sponsored mediation to the STB, and we hope this can be taken as a gesture of good faith that there is still room for compromise. Surfrider understands that there are legitimate concerns regarding the best approach toward balancing the need for public safety and transportation as well as beach access and protection. STB-sponsored mediation can focus on the specific issues necessary to find the best balance between these varied interests within a specified time period so that this matter can be resolved promptly. In the past, the cities of Solana Beach, Encinitas, and Oceanside have successfully worked with NCTD to build safe and legal crossings; we hope those can serve as a model to guide further conversations between Del Mar and NCTD.

Fencing and bluff stabilization are distinct issues

There are two separate but important issues that are being incorrectly combined into one overly-broad request to the STB: the immediate pedestrian safety issue that NCTD is attempting to address with the proposed fencing project, and the longer-term track stability issue that will be addressed via the San Diego Association of Governments (SANDAG) sponsored bluff stabilization projects (DMB5 and DMB6). These issues are distinct in important ways: the fencing project takes place within NCTD's Right of Way (ROW), while a majority of the bluff stabilization work is outside of NCTD's ROW. Seawalls constructed seaward of the bluff toe will occupy state tidelands, and construction equipment will need to access both state parks property and state tidelands in order to build the seawalls.

Because of this important distinction between the location of the fencing and stabilization projects, and the clear difference between ownership of the lands on which these projects will take place, NCTD should not attempt to seek such a broad exemption from the STB.

Improper use of state funds

NCTD has stated in its petition to the STB:

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 (TIRCP) but may later include federal dollars depending on how the funding process plays out in the future.

It seems strange that NCTD, as a state agency, would request federal exemption from state regulations for a project using state funds.

Additionally, the TIRCP grant NCTD secured to pay for the fencing project states the following in its grant guidelines:

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

It is potentially an improper use of the CalSTA TIRCP funds if NCTD bypasses environmental review by the Coastal Commission, which clearly has jurisdiction over review and approval of coastal development projects.

Commitment to Federal Consistency Review

SANDAG has also committed multiple times, on the record, to go through the Coastal Commission Federal Consistency Determination process for any work they will be doing throughout the phases of Del Mar Bluff Stabilization. In June 2020, the Coastal Commission issued a Modified Consistency Certification for Del Mar Bluff Stabilization Project 4. In that determination, SANDAG acting as agent for NCTD, agreed to mitigation for impacts to access and recreation by subsequent projects such as the proposed Del Mar Bluff Stabilization Project 5¹.

SANDAG agreed to: (1) add two additional public access projects to DMB 4; (2) 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; and (3) coordinate with Commission staff to identify appropriate mitigation measures for future Del Mar Bluffs stabilization projects prior to submittal of the associated consistency certifications.

With these measures the Commission found that the DMB 4 project was consistent with the shoreline structure, geologic hazards, public access and recreation policies of the Coastal Act.

Likewise in August 2021, SANDAG submitted documents to the Coastal Commission in support of Consistency Certification (CC) application no. CC-0005-21. This CC was submitted on behalf of SANDAG for the Del Mar Bluffs Stabilization 5 and 6 Project, as

¹ Modifications to Consistency Certification CC-0004-18 (SANDAG) for the Del Mar Bluffs Stabilization Project 4, Del Mar, San Diego County. June 18, 2020.
<https://documents.coastal.ca.gov/reports/2020/7/F11a/f11a-7-2020-report%E2%80%8B.pdf>

well as the follow-up authorization for the Del Mar Bluffs Emergency Repair Project at MP 245.2:

The project consists of a continuation of the previous phases of bluff stabilization improvements and includes additional bluff stabilization measures, bluff toe protection measures, drainage improvements and access road improvements along a 1.6-mile section of the rail corridor. These improvements are intended to be the minimum necessary to preserve trackbed support and maintain the viability for passenger and freight rail operations until the tracks can be relocated off of the bluffs.²

We are therefore confused why NCTD is asking the STB for such a broad exemption from state and federal oversight, when much of the work will be subject to a consistency determination.

In addition to SANDAG's commitment to Federal Consistency review of projects DMB5 and DMB6, as discussed above, much of the work for these projects will take place well out of NCTD's ROW. For example, seawalls constructed seaward of the bluff toe will occupy state tidelands, and construction equipment will need to access both state parks property and state tidelands. This further emphasizes the need for a Federal Consistency Review process.

Thank you for your consideration.

Sincerely,

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

Laura Walsh, California Policy Manager
Surfrider Foundation

² January 5, 2022 letter to Hasan Ikhata, Executive Director, SANDAG from Jack Ainsworth, Executive Director Coastal Commission re: Effects of Del Mar Bluffs Projects on Coastal Access and Recreation