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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36433

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

**STATUS UPDATE AND OPPOSITION OF
THE CALIFORNIA COASTAL COMMISSION
TO NORTH COUNTY TRANSIT DISTRICT PETITION**

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*Attorneys for Respondent California Coastal
Commission*

The California Coastal Commission (Commission) is in receipt of the North County Transit District's (NCTD) March 4, 2022 "Supplemental Status Update" and hereby offers its own update as a complement to thereto. As NCTD noted, much has occurred since its last Status Update on December 30, 2021. Of particular significance, although NCTD's last Status Update included a request that this proceeding be expedited in light of its goal to start work on various projects without any review for consistency with state law, NCTD did not await the resolution of this proceeding. As NCTD explained, on January 20, 2022, its Board approved a job contract to begin some of that work. The Commission's Executive Director (the CCC ED) asked that NCTD defer commencement of those activities, but NCTD declined, so the CCC ED issued a cease and desist order (Order) on March 7, 2022. That Order, attached as Exhibit A, directs the NCTD to cease and desist from undertaking development "without first obtaining Coastal Act authorization or confirmation from the Coastal Commission that development is exempt." As such, the Order recognizes the possibility that some of NCTD's proposed work may be found not to be subject to Coastal Act review.

However, unless and until a final determination to that effect is made, the Commission continues to oppose NCTD's petition to this Board for a determination that the Commission is preempted from requiring NCTD to comply with state law. As NCTD expressly stated in its initial filing before this Board, NCTD sought a waiver of the filing fee pursuant to 49 C.F.R. § 1002.2(e) because "NCTD is a state government entity" and it is a "public agency charged by the California Legislature with the responsibility of providing public transit services in its areas of jurisdiction." Petition, filed August 28, 2020. And yet, NCTD insists that its actions need not be subject to review for compliance with state law. NCTD simply cannot have it both ways. It cannot be a state government entity entitled to a fee waiver and yet be exempt from state law.

As a state government-created entity, NCTD is subject to the California Supreme Court's decision in *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677. That case involved a proposal by the North Coast Railroad Authority (the Authority) primarily to resume freight service along a stretch of tracks. Although the Authority prepared an environmental impact report (EIR) for the project, pursuant to the California Environmental Quality Act (CEQA), various groups challenged the adequacy of that EIR and the analysis performed by the Authority under CEQA. The Authority argued that the application of CEQA was preempted. The California Supreme Court held that the requirement for the Authority to comply with CEQA prior to approving its project was not "regulation" of rail transportation, but rather constituted an act of self-governance that was not preempted under Interstate Commerce Commission Termination Act. The Authority was required to comply with CEQA before approving or implementing rail projects. As the Court stated, "application of CEQA in this context constitutes self-governance on the part of a sovereign state and at the same time on the part of an owner." The same rule applies here. NCTD must comply with state law before performing development including fencing.

It bears mentioning that the mere fact that NCTD must comply with state law does not mean it will be unable to provide safety measures to protect the public. Nor does the Order require any of the things that NCTD lists in its numbered points at the end of its Status Update or invite illegal trespass. It merely requires NCTD to participate in a review process through which the Commission may ensure, though conditions not yet considered, much less settled upon, that any fencing complies with state law, including protecting the scenic and visual qualities of the coastal bluffs, minimizing impacts to public access, and insuring the stability and structural safety of the bluffs. (Cal. Public Resources Code, §§ 30210-30214, 30251-30253.)

In its initial opposition to NCTD's petition, the Commission focused primarily on the federal coastal zone management issues before the Board. The Commission noted and expressly did not waive the *Friends of the Eel River* argument, because, at that time, it was unnecessary to a resolution of this matter. Commission Reply, p. 6, fn. 1. Therefore, the Commission requests an opportunity to fully brief the question of self-governance before the Board acts on NCTD's petition.

Dated: March 8, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
DANIEL A. OLIVAS
Senior Assistant Attorney General

s/Jamee Jordan Patterson
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
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SD2020303489

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):

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on March 8, 2022, I served a copy of this **STATUS UPDATE AND OPPOSITION OF THE CALIFORNIA COASTAL COMMISSION TO NORTH COUNTY TRANSIT DISTRICT PETITION** on all parties of record by first-class mail and email as follows:

<p>Daniel R. Elliott Daniel Elliott PLLC 2000 Pennsylvania Avenue NW, Suite 7000 Washington, DC 20006</p> <p>1055 Thomas Jefferson Street NW Suite 500 Washington, DC 20007 Email: danelliottiii@outlook.com; delliott@gkglaw.com</p>	<p>William C. Pate Devaney Pate Morris & Cameron LLP 402 W. Broadway, Suite 1300 San Diego, CA 92101 Email: wpate@dpmclaw.com</p>
<p>Kristen Brinner Surfrider Foundation San Diego County Chapter 3900 Cleveland Avenue, Suite 201 San Diego, CA 92103 Email: kristin@surfridersd.org</p>	<p>Timothy J. Strafford Associate General Counsel and Corporate Secretary Association of American Railroads 425 3rd Street SW, Suite 1000 Washington, DC 20024 Email: tstrafford@aar.org</p>
<p>Peter A. Pfohl 1224 17th Street NW Washington, DC 20036 Email: pap@sloverandloftus.com</p>	<p>Shirli Fabbri Weiss and Laura Schaefer 934 23rd Street San Diego, CA 92102 Email: ls@boyce-schaefer.com</p>
<p>Louise Warren 455 Market St., Suite 300 San Francisco, CA 94105 Email: Louise.Warren@coastal.ca.gov</p>	<p>William Herrmann 1 Massachusetts Avenue N.W. Washington, DC 20001 Email: Byl.Herrmann@amtrak.com</p>
<p>Jeffrey G. Sturgis 150 6th Street Del Mar, CA 92014 Email: jeffsturgis@me.com</p>	

A. Lopez
Declarant

Angela Lopez
Signature