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August 28, 2020

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington DC 20423

ENTERED
Office of Proceedings
August 28, 2020
Part of
Public Record

Re: Docket No. FD 36433 – Petition for Declaratory Order

Dear Ms. Brown:

North County Transit District (“NCTD”) respectfully seeks a waiver of its filing fee pursuant to 49 C.F.R. § 1002.2(e) for its Petition for Declaratory Order. NCTD paid the fee on August 28, 2020 to ensure immediate consideration of its Petition by the Board.

§ 1002.2(e) sets out the fee waiver requirements:

Waiver or reduction of filing fees. It is the general policy of the Board not to waive or reduce filing fees except as described below:

(1) Filing fees are waived for an application or other proceeding which is filed by a federal government agency, or a state or local government entity. For purposes of this section the phrases “federal government agency” or “government entity” do not include a quasi-governmental corporation or government subsidized transportation company.

(2) In extraordinary situations the Board will accept requests for waivers or fee reductions in accordance with the following procedure:

(i) *When to request.* At the time that a filing is submitted to the Board the applicant may request a waiver or reduction of the fee prescribed in this part. Such request should be addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board.

(ii) *Basis.* The applicant must show the waiver or reduction of the fee is in the best interest of the public, or that payment of the fee would impose an undue hardship upon the requestor.

(iii) *Board action.* The Chief, Section of Administration, Office of Proceedings, Surface Transportation Board will notify the applicant of the decision to grant or deny the request for waiver or reduction.

FEE RECEIVED
August 28, 2020
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August 28, 2020
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First, NCTD is a state government entity. NCTD is a public agency charged by the California Legislature with the responsibility of providing public transit services in its areas of jurisdiction. The North San Diego County Transit Development Board was established in 1975 by California Senate Bill No. 802 to plan, construct, and operate public transit in North San Diego County. On August 30, 2006, California Governor Arnold Schwarzenegger signed AB 1238, which changed the name to the North County Transit District.

This fee waiver would be in the best interest of the public. NCTD provides crucial public transit services to the public in the densely populated area of North San Diego County. Using this fee for these vital transit services would be beneficial to the public.

Therefore, NCTD urges the Board to grant this request. Thank you for your consideration of this matter.

Sincerely,

/s/ Daniel Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue, NW
Suite 7000
Washington, DC 20006
danelliottiii@outlook.com

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

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

Daniel R. Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006
(703) 863-9670

Counsel for
North County Transit District

August 28, 2020

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36433

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

North County Transit District (“NCTD”) hereby respectfully petitions the Surface Transportation Board (“STB” or “Board”) for a declaratory order to eliminate uncertainty pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321. First, NCTD asks that the Board find that 49 U.S.C. § 10501(b) of the ICC Termination Act of 1995 (“ICCTA”) preempts any attempts by the City of Del Mar (“Del Mar”) and the California Coastal Commission (“Commission”) to regulate NCTD’s rail line maintenance and any other upgrading activities in its rail right-of-way pursuant to the state and local coastal permitting regime in California. Del Mar specifically has sought review of NCTD’s 2019 emergency rail maintenance (project to ensure that the track bed is stabilized to support continued operations) by the Commission under the Coastal Zone Management Act’s (“CZMA”) Federal Consistency Review and the California Coastal Act’s (“Coastal Act”) permitting regime, including Del Mar’s own local coastal zoning ordinances. The requested actions by Del Mar would impose sweeping mitigation requirements on NCTD and the eventual relocation of the existing railroad line and potentially the construction of

a multi-billion dollar underground tunnel.¹ Its City Council has also voted to oppose NCTD's construction of safety fencing in its rail right-of-way that would mitigate tragic trespassing events and reduce ongoing delays to passenger and freight rail service. As a result, NCTD justifiably is concerned that a similar Federal Consistency Review or Coastal Act challenge to this fencing project is forthcoming. Moreover, NCTD has two (2) more major bluffs stabilization rail maintenance projects that it intends to undertake in Del Mar in the near future. Therefore, 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.

Second, NCTD seeks a declaratory order that an application of the CZMA Federal Consistency Review by the Commission when a federal action is involved to these rail maintenance and upgrading projects, especially involving a rail line relocation as suggested by Del Mar and the Commission, could not possibly be "harmonized" with the ICCTA because this land use regulation of crucial rail work would directly interfere with and even defeat rail operations, thereby causing an irreconcilable conflict between these two (2) statutes.

BACKGROUND

1) NCTD Is a Common Carrier by Rail Subject to the Jurisdiction of the STB.

NCTD is a public agency charged by the California Legislature with the responsibility of providing public transit services in its areas of jurisdiction. The North San Diego County Transit

¹ While Del Mar does not mention a tunnel in its correspondence to the Commission, it has asked NCTD to build a tunnel in the past as part of its ongoing campaign to move the rail line. Moreover, due to the densely populated and developed area at issue on the rail line in Del Mar, a tunnel is probably the only way the relocation can be completed.

Development Board was established in 1975 by California Senate Bill No. 802 to plan, construct, and operate public transit in North San Diego County. On August 30, 2006, California Governor Arnold Schwarzenegger signed AB 1238, which changed the name to the North County Transit District.

NCTD provides about 10.3 million passenger trips per year primarily in North San Diego County. It covers a geographic area of approximately 1,020 square miles with an approximate population of 849,000 people. Its services include the BREEZE bus, SPRINTER hybrid rail, COASTER commuter rail, FLEX demand response service, and LIFT ADA paratransit service.

NCTD has an operating budget of \$127.4 million (FY21) and Capital Improvement Program of \$39.5 million (FY 21). It is governed by a Board of Directors with voting members from the cities of Carlsbad, Del Mar, Encinitas, Escondido, Oceanside, Solana Beach, San Marcos, Vista, and the County of San Diego. A representative from the City of San Diego serves on NCTD's Board of Directors as a non-voting member.

This Petition relates to the NCTD COASTER commuter rail line that runs north and south along the coast at the Pacific Ocean between the cities of Oceanside and San Diego. The San Diego coastal rail corridor is the southern terminus of the 351-mile Los Angeles-San Diego-San Luis Obispo (LOSSAN) Rail Corridor. The LOSSAN Rail Corridor is Amtrak's second busiest intercity passenger rail corridor in the nation, and it is shared by commuter and intercity passenger and interstate freight rail services. The 60-mile San Diego coastal rail corridor runs south from the Orange County line to downtown San Diego and is 75% double-tracked. The rail corridor is also designated as part of the Strategic Rail Corridor Network ("STRACNET") due to its importance for national defense.

Prior to impacts of COVID-19 and subsequent public health orders, NCTD operated 22 trains each weekday, as well as weekend service. These commuter trains average 4,886 weekday boardings and 1.4 million annual boardings. This service uses seven (7) locomotives and 28 bi-level passenger coaches to provide the COASTER service. NCTD shares the use of its tracks with Amtrak, Metrolink, BNSF Railway (“BNSF”), and Pacific Sun Railroad (“PacSun”). Amtrak operates the Pacific Surfliner intercity service on the tracks, operating 26 trips daily between Los Angeles and San Diego. Also, Metrolink operates commuter trains between Orange County and Oceanside while BNSF operates four (4) to six (6) daily freight trains on the San Diego coastal rail corridor. In 2017, BNSF moved more than 4.3 million tons of freight on this rail line. In sum, this rail corridor on which NCTD operates is crucial in many aspects to the movement of interstate and local passengers and interstate freight, as well as to the nation’s defense, in this local area, California, and the United States.

In 1992, NCTD acquired a 6.1-mile long portion of the San Diego Main Line (“the Line”) from The Atchison, Topeka and Santa Fe Railway Company (“Santa Fe”).² Part of the Line runs through Del Mar. Although this transaction transferred ownership of the track and related physical assets from Santa Fe to NCTD, Santa Fe retained the right to conduct freight operations on the Line pursuant to a permanent easement granted by NCTD, which are now handled by BNSF. In 1994, the Interstate Commerce Commission (“ICC”), the Board’s predecessor agency,³ issued a decision that authorized the acquisition of the Line, concluding, by the transaction, that NCTD had

² The Santa Fe was a predecessor to BNSF. Other entities acquiring similar interests in property from the Santa Fe in the same transaction were the Orange County Transportation Authority, the Riverside County Transportation Authority, the San Bernardino Associated Governments, and the San Diego Metropolitan Transit Development Board.

³ Under the ICCTA, Pub. L. No. 104-88, 109 Stat. 803 (1995), the ICC was abolished, and all remaining rail regulatory functions were transferred to the Board, effective January 1, 1996.

acquired sufficient power over Santa Fe's operations on the Line to require a finding that NCTD controlled the rail freight operations⁴ and had thus become a common carrier by railroad subject to the jurisdiction of the ICC. *See Orange County Transportation Authority–Acquisition Exemption–The Atchison, Topeka and Santa Fe Railway Company*, 10 I.C.C.2d 78, 90 (1994). As noted, NCTD now operates the COASTER commuter rail service over the Line.

To provide and improve both interstate freight and passenger service on the Line, NCTD continually maintains and upgrades this corridor that runs along the coast of the Pacific Ocean, including through Del Mar. This maintenance of the Line includes stabilization of the Del Mar Bluffs (“bluff(s)”) and other projects for these crucial freight and passenger rail services to safely and properly operate, like the safety fencing project. NCTD will continue to maintain the Line and engage in other projects to ensure the safety of the public along this right-of-way and to allow BNSF and NCTD to meet their common carrier obligations.

a) Bluff Stabilization Projects.

One of the projects at issue here on the Line is in a coastal bluffs area in Del Mar that is subject to ongoing erosion and localized slope failures, narrowing the distance between the tracks and the top of the bluffs over time. Bluff stabilization in Del Mar is crucial to this Line as erosion of these bluffs in the past has caused extremely unsafe and inoperable conditions for this vital rail service. (See December 5, 2019 NCTD Memorandum regarding Del Mar Bluffs Erosion and Stabilization attached hereto as Exhibit A.) The rail tracks on the bluffs are single-tracked and a

⁴ Specifically, NCTD acquired control over maintenance, dispatching, new track construction, and scheduling of service on the Line.

critical failure would eliminate all passenger and freight rail operations within San Diego County as there is no alternative route to divert this service.



NCTD RAIL LINE ALONG DEL MAR BLUFFS AT PRESENT

Since 1998, NCTD and the San Diego Association of Governments (“SANDAG”)⁵ have implemented a multi-phase approach to preserve the track bed along the bluffs. Detailed geotechnical studies conducted during this time served as the basis for the stabilization construction that has occurred since 2001. In general, the bluffs are expected to retreat at an

⁵ The San Diego region is home to 3.35 million residents who live in 18 incorporated cities and the County of San Diego. SANDAG is the public agency that serves as the regional forum for those local governments to come together and conduct planning, decision-making, and project implementation. With oversight by a Board of Directors – made up of elected officials from the 18 city councils and the County Board of Supervisors – SANDAG works on a wide array of projects, programs, and initiatives that support the region’s economy and protect the environment and quality of life. SANDAG also provides funding administration and planning for public transit in the San Diego region. It shares public transit planning and decision-making responsibilities with Caltrans, Metropolitan Transit System, NCTD, and other transit operators.

annual average rate of up to six (6) inches per year. However, the retreat occurs in episodes - with heavy rainfall, several block failures and surface slides have occurred since August 2018. After each erosion event, the corridor is closed to all train traffic while a complex, thorough inspection is completed, which causes transportation and economic impacts throughout the San Diego region. After one of these heavy rainfalls in November of 2019, NCTD and SANDAG completed an emergency bluff stabilization project in late 2019 that Del Mar formally has complained about in a Federal Consistency Review proceeding at the Commission described in more detail below.



NCTD RAIL LINE ON DEL MAR BLUFFS AFTER EROSION EVENT IN 2019

Eventually, bluff retreat in Del Mar will threaten the viability of freight and passenger rail service on the Line if measures to preserve the portion of the bluffs that supports the tracks are not

implemented. As part of this multi-phase approach, SANDAG and NCTD first completed an emergency repair in 2001, followed by drainage improvements and installation of a landslide warning system in 2003, and the installation of soldier piles in 2007 and 2010. NCTD and SANDAG are scheduled to begin another phase of construction on the bluffs in 2020. As a result, NCTD is extremely concerned that Del Mar and the Commission will interfere with these crucial, upcoming bluff stabilization rail projects under local, state or federal law that is applicable in coastal zones as described in more detail below.

b) Safety Fencing Project.

Moreover, NCTD plans to construct fencing along its right-of-way in Del Mar and other cities on this rail corridor to deter trespassing on the Line. This fencing is necessary to eliminate the tragic accidents and reduce passenger and freight delays that have occurred in the past in Del Mar and elsewhere involving trains and trespassers. NCTD soon will begin the construction of safety fencing on the right-of-way to deter the large number of trespassers, to protect the public from the self-evident dangers of the rail service near these tracks, and to mitigate the risks for passenger and freight carriers associated with substantial legal claims resulting from trespassing events.

Trespassers are common in the right-of-way along the bluffs of Del Mar and have led to numerous tragic accidents, including many deaths. There have been 112 fatalities and 174 incidents on the COASTER commuter rail line from 2010 to the present. (A copy of the NCTD trespassing incident chart is attached hereto as Exhibit B.) In Del Mar alone, there have been eight (8) fatalities and 14 incidents from 2014 to the present on the Line. These tragic accidents place significant stress on the train crews who witness these incidents and obviously on the families and

friends of the injured or killed. Moreover, these incidents cause passenger and freight shipping delays that impact the entire LOSSAN corridor. Typically, it takes 2 to 3 hours to restore normal operations after a fatality. These incidents also can damage the railroad infrastructure and equipment due to emergency stops. In addition, constant trespassing on the bluffs contributes to erosion creating more dangers on the Line. Finally, trespassers lead to potential liability and/or financial risks to NCTD and taxpayers. In fact, in October 2018, the Federal Railroad Administration (“FRA”) issued a Report to Congress, National Strategy to Prevent Trespassing on Railroad Property (“Report”). (A copy of which is attached hereto as Exhibit C.)⁶ The Report found that trespassing on railroad property is the leading cause of all rail-related deaths in the United States. More people are struck and killed by trains each year while trespassing – illegally entering or remaining on a railroad right-of-way – than in motor vehicle collisions with trains at highway-rail grade crossings. Between 2012 and 2017, the annual number of trespass-related pedestrian fatalities increased 18 percent, from 725 people killed in 2012 to 855 in 2017. The FRA found that the number of trespassing occurrences each year far exceeds the number of fatalities and injuries. This raises serious concern of the potential for even more trespasser accidents

To help understand the problem’s scope, the FRA analyzed the costs to railroads and society from rail trespassing. It found that during the five-year period from 2012 to 2016, 9,363 reported trespassing accidents cost society \$43.2 billion in fatalities and injuries (with an average cost of \$4.6 million per accident) and more than \$56.0 million in travel time delays. These

⁶ In its report on the FY 2018 Department of Transportation appropriation bill, the U.S. House of Representatives Committee on Appropriations requested that the FRA study and identify the causal factors leading to trespassing incidents on railroad property. The Committee also asked the FRA to develop a national strategy to prevent trespasser incidents and to submit the Report to the House and Senate Committees on Appropriations by August 1, 2018. This Report to Congress was the response to that request.

calculations do not include unquantified costs to the economy, such as lost productivity, and society, such as emotional distress.

The FRA explained that railroads own their rights-of-way and have a reasonable expectation of operating on their property without the presence or interference of unauthorized people. Any unauthorized person who enters or remains on a railroad right-of-way, equipment, or facility is trespassing. Trespassing on private railroad property, including a railroad's right-of-way, is illegal.

In response to the House Committee's request to identify and study the factors that lead to trespassing incidents, FRA studied available data and for the four-year period between November 2013 and October 2017, determined:

- Nationwide, excluding suicides, 4,242 pedestrians were killed or injured while trespassing on railroad property. With the 1,175 suicides included, the total rises to 5,417 people.
- Of the approximately 3,100 counties and county-equivalents in the United States, approximately 14 percent of all trespasser casualties occurred in 10 counties in 4 different states.
- In the top 10 counties, excluding suicides, 300 pedestrian trespassers were killed. With the 169 suicides included, the total increases to 469.
- 6 of the top 10 counties for trespasser casualties were in California and accounted for 7.9 percent of the U.S. total.
- The county with the most trespasser casualties, 110, was Los Angeles County, California, followed closely by Cook County (Chicago), Illinois, with 109 casualties.
- 74 percent of trespassing casualties occurred within 1,000 feet of a grade crossing.
- Slips, trips, and falls while trespassing caused 185 casualties, or 5 percent of trespassing casualties not at grade crossings.

The FRA found (with emphasis added) several community contributing factors to this rail trespassing dilemma:

- a) No (or insufficient) dedicated resources (personnel or funding).
- b) **Lack of physical deterrents, such as fences, natural or engineered barriers, or obstacles.**
- c) Failure to prosecute trespassers by local judicial process.
- d) Public perception of the dangers of trespassing on railroad property.
- e) Poor community planning.

On the NCTD rail corridor, FRA personnel observed trespassers crossing railroad property to travel from a residential neighborhood to the beach. Because neither the neighborhood nor the beach is a candidate for relocation, the FRA stated that solutions to this problem could include physical barriers and additional enforcement. The FRA found trespassing for convenience and **lack of deterrence, such as fencing**, enforcement, or education, to be the main contributing factors to the high number of casualties in the County of San Diego (9th highest county in US).

The FRA determined that its analysis demonstrates that it needs to do more than educate and facilitate mitigation when trespassing issues arise. Proactive use of current, relevant data and analysis to identify areas at systemically high-risk for trespassing incidents is the best way to develop and facilitate implementation of specific mitigation strategies with communities, local governments, law enforcement, and impacted railroads. However, the FRA asserted that education and outreach are not enough. **It stated that engineering solutions (e.g., fencing, automated video detection systems) designed to prevent or discourage trespassing on railroad property can be utilized in conjunction with frequent and consistent enforcement of trespasser laws.**

As a result of these ongoing, tragic accidents on its rail corridor and this Report, NCTD is compelled to construct fencing to protect the public from the rail service on the Line in Del Mar.

NCTD soon will begin constructing safety fencing in its right-of-way in the following locations (estimated measures in linear feet (LF)):

- 1) Oceanside - Cassidy Street between S. Meyers Street and Broadway Street:
 - 1800 LF between MP 227.61 and MP 227.95 EAST of railroad tracks north of Cassidy.
 - 100 LF between MP 227.62 WEST of railroad tracks north of Cassidy Street.
 - 1320 LF between MP 228.20 and MP 228.45 EAST of railroad tracks south of Cassidy.
 - 2110 LF between MP 227.95 and MP 228.35 WEST of railroad tracks south of Cassidy.
- 2) Encinitas - Coast Highway between Encinitas Boulevard and La Costa Avenue
 - 13200 LF between MP 235.10 and MP 237.60 WEST of railroad tracks.
 - 13200 LF between MP 235.10 and MP 237.60 EAST of railroad tracks.
- 3) Del Mar – Del Mar Bluffs
 - 7390 LF between MP 244.1 and MP 245.5 WEST of railroad tracks.
 - 7390 LF between MP 244.1 and MP 245.5 EAST of railroad tracks.

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. As discussed above, this fencing project is crucial for the safety of the public and this vital interstate passenger and freight service as well as the commuter service on the Line. Like with the bluff stabilization projects, NCTD is extremely concerned that Del Mar or the Commission will interfere with this crucial rail safety project under local, state or federal law under the coastal permitting regime described in detail below.

2) Del Mar Letter to California Coastal Commission Seeking Local, State and/or Federal Review of a Rail Maintenance Project by NCTD.

Incorporated in 1959, Del Mar is a seaside city located just 20 miles north of the City of San Diego. The Line runs through Del Mar along the Pacific coast. Del Mar has a population of

approximately 4,200 people and covers 2.2 square miles. The community is primarily comprised of single-family residential neighborhoods, with retail uses and restaurants in the downtown, a commercial area, and several hotels. Del Mar employs approximately 60 full-time employees and 70 part-time, seasonal employees. Del Mar has constantly complained about the Line that runs through the bluffs and has consistently opposed actions by NCTD to maintain the Line and protect trespassers on the railroad right-of-way.

On April 21, 2020, Del Mar wrote a letter (“Letter”) to the Commission, requesting extensive mitigation measures in a pending Federal Consistency Review proceeding (*SANDAG*, CC-0001-20 (filed 3/12/20)) of the SANDAG rail track bed emergency repair work mentioned above along a section of the coastal bluffs in Del Mar on the Line. (A copy of the Letter is attached hereto as Exhibit D). Del Mar claimed that the emergency repair work did not properly include mitigation for impacts to aesthetics and sought a commitment by the Commission to subject any future bluff stabilization project by SANDAG to Federal Consistency Review. As noted, the portion of the Line in Del Mar at issue in the Letter is owned by NCTD, which has responsibility for its maintenance and dispatching pursuant to its purchase agreement with Santa Fe described above.

In this Letter, Del Mar stated that the emergency repair work by NCTD to fix the coastal bluffs failure in the railroad right-of-way on the Line was entirely located within its Overlay Zones, which are provided for in Implementing Ordinances in Del Mar’s Commission-certified Local Coastal Program (“LCP”). This LCP has been incorporated into the Del Mar Municipal Code (“DMMC”), in part, as Chapters 30.50, 30.55, and 30.60. Del Mar asserted that the standard of review for this emergency repair of a rail line is set forth in this certified Del Mar LCP, which

includes a Shoreline Protection Line (“SPL”) that follows the approximate center line of the railway tracks.

As noted above, after heavy rains in late 2019, a portion of the bluff immediately adjacent to NCTD’s rail track bed collapsed and portions of NCTD’s rail track bed in Del Mar on the coastal bluffs were washed away, making rail operations extremely unsafe. Without this emergency repair work, NCTD, Amtrak, PacSun, and BNSF would not have been able to operate on the Line. As a result, NCTD immediately had to repair its track bed to ensure the safety of the rail operators and the public and to maintain service on the rail line that is critical to the national economy and military. The emergency repair work included the construction of bluff stabilization devices (retaining walls) adjacent to the track bed for two (2) sections of the failing bluffs and the excavation of loose soil to provide a stable working area. The emergency repair work resulted in exposed vertical walls visible from the beach below and the excavated soil was not replaced. The repair included shotcrete wall treatments that blended the wall face into the adjacent bluff.

In its Letter, Del Mar requested far-reaching, unduly burdensome mitigation measures for this interstate rail maintenance project to be levied by the Commission. First, Del Mar asked the Commission to require NCTD to cover the exposed walls entirely with natural material including soil and native plantings. It argued that under the Commission-certified Del Mar LCP (DMMC Section 30.50.060), the construction of a protective structure may be authorized if it meets a list of findings – in particular Finding G, which reads: “G. Will, if there is a vertical wall element in the proposed protective structure, have the seaward face of the vertical wall located within the Shoreline Protective Area only if there is no other feasible location for effectively protecting a principle structure; there is no feasible, less environmentally damaging alternative; **and feasible mitigation measures have been provided to minimize adverse environmental effects; but in**

no event have the seaward face of the vertical wall more than five feet westward of the Shoreline Protection Area line.” (emphasis added by Del Mar in Letter). Del Mar took the position that the exposed vertical walls treated with shotcrete were not consistent with the bolded section above and should include feasible mitigation to minimize adverse environmental effects to aesthetics. Del Mar claimed that this aesthetic mitigation of NCTD’s crucial rail maintenance project should be added as part of the Commission’s Federal Consistency Review.

Del Mar added that this mitigation is further supported by the fact that the location of the walls are more than five (5) feet westward of the SPL line (which follows the approximate center line of the NCTD railway tracks) and, although the wall location is justified to address the emergency, the walls should not be visible with the incorporation of this mitigation. Further, Del Mar asserted that the completed grading does not appear to be consistent with the coastal bluff setback provisions in DMMC Section 30.55.080 and that it is unaware if a geotechnical report has been provided to the Commission to sufficiently address the requirements of DMMC Section 30.55.090.

Del Mar then proposed a laundry list of mitigation requirements for future bluffs projects. Del Mar posited that the perpetual reliance upon long-term stabilization efforts along the Del Mar Bluffs must be addressed and requested a commitment by the Commission as part of this Federal Consistency Review that **any future bluff stabilization project** proposed by SANDAG on behalf of NCTD will:

- 1) Prepare a report and hold ample community meetings [by the Commission] to solicit public feedback as a prerequisite to submitting a project for Federal Consistency Review:
 - a) The report shall outline what was presented, what feedback was heard, and how the

project was modified as a result (or not modified with an explanation why); 2) Go through a full Federal Consistency Review process with ample public notice provided, including all interested parties and affected cities; 3) Be required to thoroughly analyze the project under the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) and make the draft documents available for public review and comment; 4) Include a comprehensive analysis of the long-term effects on sand supply and coastal processes resulting from the proposed use of bluff stabilization structures; and 5) Analyze feasible alternative designs for the permanent, inland relocation of the rail corridor including: a) Anticipated funding sources; b) Reasonable timeframe for construction; and c) Use of NCTD bluff right-of-way post-relocation for purposes of public access, recreation, and open space.

This letter to the Commission clearly seeks an incredibly onerous review of routine rail maintenance by a common carrier, NCTD, on its rail line. It even goes so far as to ask the Commission to examine a relocation of the Line in Del Mar from the bluffs to an inland site and while not explicitly stated, attempts to advance the construction of a multi-billion dollars tunnel project that NCTD has no capacity to fund.⁷ This incredibly burdensome track relocation request has been publicly supported by the Commission as the inevitable solution to the bluff stabilization issue. (See Del Mar Times, *State Coastal Commission Says Del Mar Train Tracks Need to Move Inland* (Aug. 16, 2020), attached hereto as Exhibit E). In addition, Del Mar has consistently attempted to limit routine maintenance projects on the bluffs to “temporary improvements” which includes attempts to limit the useful life of piles and other design elements of these bluffs’ projects.

⁷ NCTD’s engineering department has estimated the cost of this tunnel relocation project to be between \$2.5 and \$3.5 billion in 2017 dollars.

It also claims in the Letter that there were violations of various Del Mar ordinances under its LCP, that was certified by the Commission under state law.

This request by Del Mar was submitted to the Commission that is presently examining this project under the CZMA Federal Consistency Review after the fact due to its emergency nature. *See* 15 C.F.R. § 930.32(b). This Letter by Del Mar regarding this emergency rail maintenance project and challenges to future maintenance and upgrade projects in the right-of-way under the CZMA Federal Consistency Review and/or state and local coastal law, as well as the public statements by the Commission advocating for relocation of the Line, causes NCTD to have significant concerns about how application of this coastal regulatory scheme will impact its rail operations and interstate commerce in the near future. This concern is only compounded by Del Mar's vote to oppose NCTD's safety fencing project, which is set to begin soon. As a result, NCTD is compelled to seek this declaratory order to protect its rail service from this onerous coastal regulatory regime whether under local, state or federal law.

As the regulatory regime for coastal zones in California is quite complex and involves an interplay of local, state and federal law, it is important to have an understanding of how these coastal laws are employed to understand why the ICCTA clearly preempts the application of these laws in this instance.

3) The Application of the CZMA and the Coastal Act.

A) The California Coastal Commission Is the State Agency Charged with Reviewing a Federal Activity for Consistency with California's Coastal Management Program.

In 1969, California suffered a disastrous oil spill off the coast of Santa Barbara. The spill focused national attention on the need for coastal protection, resulting in the passage of the CZMA

in 1972 (16 U.S.C. § 1451 et seq.). *State of California v. Norton*, 311 F.3d 1162 (9th Cir. 2002). The CZMA created a federal-state partnership. The main purpose of the CZMA is to encourage and assist coastal states in preparing and implementing coastal zone management programs to preserve, protect, develop and whenever possible restore the resources of the coastal zone of the United States. U.S. Code Congressional and Administrative News, 92nd Congress, Second Session, 1972 Volume 3, p. 4776. The CZMA is not an “attempt to diminish state authority through federal preemption”; instead, the “intent of the legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.” *Id.* The CZMA is designed to enhance, rather than narrow, a state’s role in management of its coastal resources. *Acme Fill Corp. v. San Francisco Bay Conserv. & Dev. Com.*, 187 Cal.App.3d 1056 (1986).

The California Legislature passed the Coastal Act in 1976 providing for coastal regulation. Cal. Pub. Res. Code, § 30000 et seq. The Coastal Act created the Commission and designated it as the state agency responsible for implementing the state’s authority under the CZMA. Cal. Pub. Res. Code, §§ 30300, 30330. In 1977, the acting Secretary of Commerce approved California’s Coastal Management Program (“CCMP”), which includes the Coastal Act. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 893-894 (CD. Cal. 1978), *aff’d* 609 F.2d 1306 (9th Cir. 1979). The Coastal Act contains the enforceable policies of the CCMP for purposes of the CZMA. Cal. Pub. Res. Code, § 30008.

When a coastal state, like California here, prepares a coastal zone management program that meets specific statutory goals and criteria, the federal government approves the program as the Secretary did in 1977 and gives the state the right to review development projects by a federal agency, any applicant’s federally permitted and licensed activities, and federally funded activities

by local governments for consistency with the state management program that affect the coastal zone. 16 U.S.C. § 1456 (emphasis added). This review process is called Federal Consistency Review. A federal agency's compliance with the consistency review procedure is mandatory. *California Coastal Commission v. United States*, 5 F. Supp.2d 1106 (S.D. Cal. 1998). Congress intended the consistency provision to play a crucial role in motivating the states to cooperate with the federal government under the CZMA. *Southern Pacific Corp. v. California Coastal Commission*, 520 F. Supp. 800, 803 (N.D. Cal. 1981).

As noted herein, Del Mar asks for numerous conditions relating to NCTD rail operations under Federal Consistency Review in its Letter to the Commission. The Commission stated that it had undertaken this CZMA Federal Consistency Review with respect to the emergency bluff stabilization project because there was a federal permit or license involved. *See* 16 U.S.C. § 1456(c)(3)(a). This review remains active before the Commission. Moreover, NCTD will begin another coastal bluff project in Del Mar this year. This project in all likelihood will also be subject to Federal Consistency Review. Therefore, NCTD has strong concerns about whether Del Mar and the Commission will place onerous conditions on these crucial rail projects that will interfere with its rail operations.

While Del Mar has not written a similar letter to the Commission regarding its opposition to the safety fencing project described above, it has voted publicly to oppose it at a November 19, 2018 City Council meeting. (A copy of the Minutes from the City Council Meeting is attached hereto as Exhibit F). Moreover, nearly 2,000 individuals from Del Mar have signed a petition opposing the project. NCTD reasonably wants to eliminate any uncertainty about an anticipated Del Mar challenge to this project that will cost approximately \$2 million to complete. At this time, the safety fencing project in the right-of-way does not involve any federal action and is funded

with state dollars. As a result, Federal Consistency Review should not apply here unless there is a federal action in the future, and the fencing project could only be subjected to a state or local challenge under the Del Mar LCP or the Coastal Act permitting regime.

B) The California Coastal Act's Regulation of the Coastal Zone Outside of Federal Consistency Review Solely Consists of a State and Local Law Permitting Regime.

In enacting the Coastal Act, the California Legislature focused on the avoidance of deleterious consequences of development on coastal resources. *Pacific Legal Foundation v. California Coastal Com.* 33 Cal.3d 158, 163 (1982); *CEED v. California Coastal Zone Conservation Com.*, 43 Cal.App.3d 306, 321 (1974). The Supreme Court of California has described the Coastal Act as a comprehensive scheme to govern land use planning for the entire coastal zone of California. *Yost v. Thomas*, 36 Cal.3d 561, 565 (1984).

The Act's stated goals include the protection of the coastline and its resources and the maximization of public access and recreational opportunities. Cal. Pub. Res. Code § 30001.5, subd. (a) - (d); *Landgate, Inc. v. California Coastal Com.*, 17 Cal.4th 1006, 1011 (1998); *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 571 (1990). The Act is to be liberally construed to accomplish its purposes and objectives. Cal. Pub. Res. Code § 30009; *Ojavan Investors, Inc. v. California Coastal Com.*, 54 Cal.App.4th 373, 386 (1997).

Another stated goal of the Act is to "encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development" in the coastal zone. Cal. Pub. Res. Code, § 30001.5, subd. (e). To this end, the California Legislature required local governments to develop LCPs, comprised of a land use plan and implementing ordinances, for planning and regulating development in the coastal zone. The LCP strives to ensure planned, comprehensive development within the coastal zone with a view to preserving, where feasible, the

overall quality of the coastal zone environment and its natural and artificial resources. *Citizens of Goleta Valley v. Board of Supervisors*, *supra*, 52 Cal.3d at p. 571.

Under the Coastal Act's legislative scheme, the LCP and the development permits issued by local agencies pursuant to the Coastal Act are a matter of local law and embody state policy. *Charles A. Pratt Construction Co., Inc. v. California Coastal Com.*, 162 Cal. App. 4th 1068, 1075 (2008). The Commission's primary responsibility is the implementation of the Coastal Act. It is designated the state coastal zone planning and management agency for any and all purposes. Cal. Pub. Res. Code § 30330.

Procedurally, a local government prepares the LCP, Cal. Pub. Res. Code § 30500, subd. (a), which must be submitted for the Commission's approval. Cal. Pub. Res. Code § 30512, subd. (a). The Commission may certify the LCP only if it meets the requirements of and is in conformity with the policies of the Coastal Act. Cal. Pub. Res. Code § 30512, subd. (c). Zoning and other actions to implement the LCP must also be submitted to the Commission for approval. Cal. Pub. Res. Code § 30513. Once the Commission certifies the LCP and all implementing actions become effective, the Commission's authority over coastal development permits is “delegated to the local government.” Cal. Pub. Res. Code § 30519, subd. (a). Finally, the Commission has appellate jurisdiction to determine whether the development permit issued by the local government is consistent with the LCP and coastal access policies. Cal. Pub. Res. Code § 30603, subd. (b).

Although local governments have the authority to issue coastal development permits, that authority is delegated by the Commission. The Commission has the ultimate authority to ensure that coastal development conforms to the policies embodied in the state's Coastal Act. In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government. *See City of Chula Vista v. Superior Court*, 133 Cal.App.3d 472, 489 (1982)

(Commission exercises independent judgment in approving LCP because it is assumed statewide interests are not always well represented at the local level).

The CZMA “encourages state regulation of the coastal zone by granting funds for the implementation of approved state programs and subjecting activities affecting the coastal zone by federal agencies and licensees to ‘consistency review’ under § 1456. It does not otherwise federalize states’ [Coastal] Management Programs. There is no doubt that Congress can, if it so chooses, enact federal requirements which incorporate state regulatory standards, *see, e.g., Chevron, U.S.A., Inc. v. Hammond*, 726 F.2d 483, 489–90 (9th Cir.1984) (Clean Water Act adopts state permit requirements), but nothing in the CZMA or in the NOAA’s [National Oceanic and Atmospheric Administration (“NOAA”)] regulations purports to ‘convert’ state Management Programs into federally mandated standards.” *Granite Rock Co. v. California Coastal Com’n*, 590 F.Supp. 1361, 1371 (N.D. Ca. 1984) *rev’d on other grounds by* 768 F.2d 1077 (9th Cir. 1985). *See California Coastal Com’n v. Granite Rock Co.*, 480 U.S. 572 (1987); *Weaver’s Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 583 F.Supp.2d 259 (D.R.I. 2008) *aff’d by* 589 F.3d 459 (1st Cir. 2009). Rather, the Statement of Congressional Findings “encourage[s] the states to exercise *their full authority* over the lands and waters in the coastal zone.” 16 U.S.C. § 1451(i).

In sum, the Commission and Del Mar apply state and local law and policies when deciding matters under this coastal permitting regime in California. The Commission only acts under federal law when it exercises Federal Consistency Review.

ARGUMENT

As noted, Del Mar's request in its Letter regarding the emergency bluff stabilization project is in a Federal Consistency Review proceeding because of a federal permit or license as stated by the Commission. However, Federal Consistency Review should not apply to Del Mar's opposition to the safety fencing project, as there is no federal action to date, and should only involve state and local law under the Coastal Act's permitting regime as discussed above. Moreover, it remains uncertain whether Federal Consistency Review will apply to all future bluff stabilization projects that NCTD will undertake in the future. It certainly will not apply to all future rail maintenance and upgrade projects that NCTD will undertake in its right-of-way. As a result, NCTD has urgent concerns about the application of this coastal permitting regime to its rail right-of-way projects in California under local, state and federal law depending on the circumstances.

The application of this Coastal Act permitting regime under state and local law to rail operations is clearly preempted here based on the STB's 2002 decision regarding NCTD's previous request for a declaratory order and on other well-established ICCTA-preemption precedent. However, the Commission consistently and strongly takes the position that this axiomatic reading of state and local preemption law by the STB is incorrect.

In reviewing past consistency certifications for SANDAG (and North County Transit District (NCTD)) LOSSAN corridor double-track and bridge replacement projects, the Commission has noted a historic jurisdictional disagreement between the rail proponents and the Commission over whether the projects were subject to the state law coastal development permit requirement, or whether state law was preempted by the Interstate Commerce Termination Act of 1995, 49 U.S.C. §§ 10101 *et seq.* and past court decisions applying it. At the same time, the

Commission historically agreed to “set aside” such disagreements where the projects are still reviewable through the federal consistency process and rely on that procedure. Adopted Findings from CC-0001-18 (SANDAG, Eastbrook to Shell Double Track Railroad Project, City of Oceanside, San Diego County) (attached hereto as Exhibit G).⁸ Because of this blatant disregard of STB and federal court precedent by the Commission, NCTD is compelled to bring this Petition because the aforementioned safety fencing project and other rail maintenance and upgrading projects in the near future will not be subject to the CZMA Federal Consistency Review due to there being no federal action. Therefore, this “historic disagreement between rail proponents and the Commission” regarding preemption will soon be at issue. NCTD now wants to ensure that it can move forward with these crucial projects without unnecessarily having to go through this onerous state and local coastal permitting review and/or some other type of preemption litigation that may delay the work.

Moreover, even when Federal Consistency Review applies to an NCTD rail maintenance or upgrade project based on a federal action, this incredibly burdensome permitting process under federal law would create an irreconcilable conflict with the ICCTA’s rail regulation and would interfere unreasonably with interstate commerce, thereby overriding the CZMA federal regulation over rail operations of this nature.

⁸ While NCTD has been compliant with this tacit agreement to avoid preemption battles in the past, it now believes that it must assert its position regarding preemption under the ICCTA with respect to the Commission’s state and local permitting regime and the CZMA Federal Consistency Review. Complying with this complex regulatory scheme for every maintenance and upgrade project in NCTD’s right-of-way has become extremely onerous and is defeating rail operations. Moreover, the Letter from Del Mar asking to move the rail line inland was extremely concerning, and NCTD felt it had no other options available other than to settle this preemption dispute by seeking declaratory relief from the STB.

1) Summary of ICCTA Preemption Under 49 U.S.C. § 10501(b).

The Interstate Commerce Act is “among the most pervasive and comprehensive of federal regulatory schemes.” *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). The preemption provision of the Act, as broadened by the ICCTA, expressly provides that the jurisdiction of the Board over “transportation by rail carriers” is “exclusive.” 49 U.S.C. § 10501(b). The statute defines “transportation” expansively to encompass “a locomotive, car, ... yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail” as well as “services related to that movement.” 49 U.S.C. § 10102(9). Moreover, “railroad” is defined broadly to include “a switch, spur, track, terminal, terminal facility, freight depot, yard, and ground, used or necessary for transportation.” 49 U.S.C. § 10102(6). Section 10501(b) expressly provides that “the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under federal or state law.” Section 10501(b) thus is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. *See Norfolk S. Ry.—Pet. for Declaratory Order*, FD 35701, slip op. at 6 & n.14 (STB served Nov. 4, 2013).

The courts and the Board have emphasized the importance of national uniformity in laws governing rail transportation when interpreting § 10501(b). *See Fayus Enters. v. BNSF Ry.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (finding that application of state antitrust laws to rail transportation would “subject [shipments] to fluctuating rules as they crossed state lines” and therefore “directly interfere” with the purpose of § 10501(b)); *CSX Transp., Inc.—Pet. for Declaratory Order*, FD 34662, slip op. at 11 (STB served March 14, 2005), *recons. denied* (STB served May 3, 2005) (finding local regulation regarding routes for rail transportation of hazardous materials through the

District of Columbia preempted because such regulation would interfere with interstate commerce and lead to piecemeal regulation, subverting the purpose of § 10501(b)).

When examining state or local action affecting rail transportation, preemption under § 10501(b) may be categorical or “as applied.” *Grafton & Upton R.R.—Pet. for Declaratory Order*, FD 35779, slip op. at 4-5 (STB served Jan. 27, 2014). Categorically preempted actions are preempted “regardless of the context or rationale for the action.” *CSX Transp., Inc.—Pet. for Declaratory Order*, slip op. at 3 (STB served May 3, 2005). The Board and the courts have found that § 10501(b) categorically prevents states or localities from intruding into matters that are directly regulated by the Board (e.g., rail carrier rates, services, construction, and abandonment). It also categorically prevents states and localities from imposing requirements that, by their nature, could be used to deny a rail carrier's ability to conduct rail operations. **Thus, state or local permitting or preclearance requirements, including zoning ordinances and environmental and land use permitting requirements, are categorically preempted as to any facilities that are an integral part of rail transportation.** *See Green Mountain R.R. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) (emphasis added).

Other state or local actions may be preempted “as applied”—that is, only if they would have the effect of unreasonably burdening or interfering with rail transportation, which is a fact-specific determination based on the circumstances of each case. *See N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (federal law preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation”); *Joint Pet. for Declaratory Order—Bos. & Me. Corp. & Town of Ayer (“Ayer”)*, 5 S.T.B. 500 (2001), *recons. denied* 5 S.T.B. 1041 (2001); *Borough of Riverdale—Pet. for Declaratory Order—*

N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); *Borough of Riverdale—Pet. for Declaratory Order—N.Y. Susquehanna & W. Ry.*, 4 S.T.B. 380, 387 (1999).

The Board has stated that federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of § 10501(b) preemption, unless the federal environmental laws are being used to regulate rail operations directly or being applied in a discriminatory manner against railroads. *E.g.*, *Grafton & Upton R.R.—Pet. for Declaratory Order*, FD 35779, slip op. at 6. The Board also has acknowledged state and local agencies' role in enforcement of federal environmental statutes and has stated that § 10501(b) is not generally intended to interfere with that role. *Ayer*, 5 S.T.B. at 508. However, actions taken, and regulations enacted under federal environmental statutes or other federal statutes may directly conflict with the purposes and regulatory scheme under the Interstate Commerce Act. When such a conflict occurs, the Board or a court must determine whether the two (2) federal statutes and their applicable regulatory schemes can be “harmonized.” *Assn of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Ayer*, 5 S.T.B. at 509 n.28 (two federal statutes should be “harmonized” unless there is a “positive repugnancy” or “irreconcilable conflict” between them).

As explained herein, the Commission’s above-noted position that NCTD is subject to state and local permitting requirements under the Coastal Act when Federal Consistency Review does not apply to rail projects in NCTD’s right-of-way clearly is wrong. This type of state and local permitting is “categorically” preempted by § 10501(b) because this state and/or local interference would defeat NCTD’s ability to conduct its rail operations. Moreover, even when the CZMA Federal Consistency Review is applicable to rail maintenance and upgrading projects, these two

(2) statutes cannot possibly be “harmonized” here because the result would be in direct conflict with the ICCTA and its regulatory scheme.

A. This Is Not the First Time NCTD Has Had to Bring a Petition for a Declaratory Order to the Board to Engage in Needed Rail Work on the Line Because a Coastal City Challenged Its Right to Do So under the Coastal Act’s Permitting Regime.

By petition filed on October 11, 2001, NCTD asked that the STB institute a declaratory order proceeding and determine that the City of Encinitas, CA (Encinitas/City) is prohibited from requiring NCTD to obtain a local permit or other prior approval in order to construct a passing track on the Line. *North San Diego County Transit Development Board – Petition for Declaratory Order*, FD No. 34111 (STB served Aug. 21, 2002). In this proceeding, NCTD intended to construct a passing track on the Line which would permit BNSF trains to pull over while allowing faster, more time sensitive passenger trains to pass and get to their destination on time.

The Board explained that the Coastal Act, “a California state law, requires that NCTD apply for and obtain a Coastal Development Permit from the City in order to construct the passing track. *See* Cal. Public Resources Code § 30600(a), (d) (Deering 2001).” Slip op. at 2. NCTD applied for such a permit in accordance with state law. After public hearings on NCTD’s request, the City’s planning commission determined that preparation of an environmental report would be required prior to construction. NCTD appealed this determination on October 10, 1997, to the City Council of Encinitas, but abandoned the appeal on February 20, 1998, before it was heard. On July 19, 2001, stating that it feared the loss of state funds for the project, NCTD’s board voted to proceed with construction of the passing track without the permit. Slip op. at 2-3. This decision eventually led NCTD to seek the STB’s guidance on preemption of this state and local coastal permitting regime under the Coastal Act in a declaratory order proceeding.

In August 2001, prior to NCTD's filing of its request for a declaratory order, Encinitas filed an action with the San Diego County Superior Court seeking declaratory and injunctive relief preventing NCTD from building the passing track until it fulfilled the state permitting requirement. On September 26, 2001, NCTD had the state court action removed to the United States District Court for the Southern District of California. On January 14, 2002, the District Court issued a decision finding that the City's permitting process is preempted by 49 U.S.C. § 10501(b), as broadened by the ICCTA, and dismissing the action with prejudice for lack of subject matter jurisdiction. *See City of Encinitas v. North San Diego County Transit Development Board, et al.*, Case No. 01-CV-1734-J (AJB) (*City of Encinitas*).⁹

The STB agreed with the *City of Encinitas* decision and found the Coastal Act permitting requirements to be preempted by the ICCTA. The STB explained:

As the court in *City of Encinitas* observed, “[c]ourts have interpreted [section 10501(b)] broadly, since ‘[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.’” *City of Encinitas*, slip op. at 5, citing *CSX Transp., Inc. v. Georgia Public Service Com’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

In addressing the scope of section 10501(b), the courts have found no basis for distinguishing between “economic” and “environmental” regulation, stating that:

if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic

⁹ 2002 WL 34681621 (S.D. Ca. 2002).

regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

City of Encinitas, slip op. at 6, citing *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (*City of Auburn*). Thus, as the court in *City of Encinitas* explained (slip op. at 6):

If the Court were to allow Encinitas to impose environmental or permit regulations upon NCTD operations, NCTD might be prevented from constructing the passing track. Such action would be tantamount to economic regulation by a local government over a rail carrier. The ICCTA demonstrates Congress' intent to preempt such regulatory authority over railroad operations and to vest jurisdiction over these claims exclusively in the STB. Accordingly, the Court finds that [the City's] claims are preempted by the ICCTA.

We have repeatedly held that state or local laws that would impose a local permitting or environmental process as a prerequisite to the **railroad's maintenance, use, or upgrading of its facilities** are preempted to the extent that they set up legal processes that could frustrate or defeat railroad operations because they would, of necessity, impinge upon the federal regulation of interstate commerce. *See Cities of Auburn and Kent, WA*, 2 S.T.B. 330 (1997), *aff'd*, *City of Auburn*; *Borough of Riverdale*, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) at 8; *Friends of the Aquifer*, STB Finance Docket No. 33966 (STB served Aug. 15, 2001) at 4 n.8.

State and local environmental regulation has been found to be preempted in those cases where the Board has licensing authority over railroad activities, as well as where it

does not. The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and it conducts an environmental review of such activities under the National Environmental Policy Act (NEPA) and can adopt appropriate environmental mitigation conditions in response to concerns of the parties, including local authorities. *See Joint Petition for Declaratory Order — Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served May 1, 2001) (*Ayer*) at 4, n.14. Even in situations that do not require a Board license — for example, a carrier building or expanding facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets, or constructing ancillary tracks and facilities excepted from the Board licensing requirement by 49 U.S.C. 10906 — in which the Board therefore does not conduct its own environmental review, the courts have held that the express statutory preemption of Section 10501(b) applies. *See Flynn v. Burlington N. Santa Fe Corp.*, 98 F. Supp.2d 1186 (E.D. Wash. 2000) (*Flynn*); *Ayer* at 8; *Riverdale I* at 5-9; *Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (STB served Feb. 27, 2001) (*Riverdale II*) at 3; *Friends of the Aquifer* at 4.

Here, as in *Stampede Pass* and *Ayer*, the City seeks to require that NCTD apply for and obtain an environmental permit and other pre-approvals as a prerequisite to building a passing track. As the court found in *City of Encinitas*, these state permitting requirements are preempted because, otherwise, the City could deny NCTD the right to proceed with its construction project, thus frustrating NCTD's proposal to construct a passing track that would benefit not only it and Amtrak but interstate freight carrier BNSF as well.

North San Diego County Transit Development Board, slip op. at 7-9 (footnotes omitted) (emphasis added). See also *Boston and Maine Corp. and Springfield Terminal R.R. Co.—Petition for Declaratory Order*, FD 35749, slip op. at 3 (STB served July 19, 2013) (zoning decisions issued by the town which would ban freight rail transportation to a warehouse in the town, are preempted by federal law); *Delaware v. STB*, 859 F.3d 16 (D.C. Cir. 2017); *CSX Transp., Inc.—Petition for Declaratory Order*, FD 34662, slip op. at 10 (“[r]egulating when and where particular products may be carried by rail . . . would constitute direct regulation of railroad activities” that is prohibited by ICCTA).

As discussed above, when Federal Consistency Review under the CZMA does not apply and only state and local permitting is at issue under the Coastal Act, this decision by the Board regarding NCTD’s previous request for a declaratory order under circumstances that probably would be even more impactful on a coastal zone clearly ends the discussion here about preemption under § 10501(b). Both situations involve California coastal state or local permitting requirements that would frustrate NCTD’s rail operations. In fact, a requirement for permits here to make the track usable and safe would have even greater effect on NCTD and BNSF because they might not be able to operate at all if NCTD is required to obtain state or local approval before these types of projects can be undertaken. Therefore, the result is the same: state and local coastal permitting and control of the bluffs rail maintenance projects or rail safety fencing construction projects are clearly preempted like the Board found in this previous NCTD declaratory order case.

B. The Board Does Not Need to Consider How the State and Local Coastal Permitting Regime Affects NCTD’s Rail Operations Because It Is Categorically Preempted Here.

“[T]he congressional intent to preempt this kind of state and local [permitting] regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding

it.” *City of Auburn*, 154 F.3d at 1031. For this reason, it is well settled that Section 10501(b) categorically preempts requirements to obtain permits or other review before engaging in activity regulated by the STB as noted herein. *See, e.g., City of Auburn*, 154 F.3d at 1029-31 (state and local permitting laws regarding railroad operations are preempted by plain language of Interstate Commerce Commission Termination Act); *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010) (any form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized by its very nature is “unreasonable interference with interstate commerce” and must be preempted); *Norfolk Southern Ry. Co. v. City of Alexandria*, 608 F. 3d 150 (4th Cir. 2010) (a local ordinance regarding truck traffic that may reasonably be said to have the effect of “managing” or “governing” rail transportation is preempted).

For example, under nearly identical circumstances, in *Green Mountain R.R.*, 404 F.3d 638, the railroad sought to build a transloading facility on its property in Vermont. Some of these operations would be conducted alongside the railroad’s track and the Connecticut River. Vermont claimed that construction of these transloading facilities was subject to a state environmental land use statute (“Act 250”). During these state permit proceedings, the railroad objected claiming that the State Environmental Commission lacked jurisdiction to adjudicate the pending permit application because the ICCTA expressly preempted these activities. The railroad brought suit in federal district court which found the state’s efforts to enforce this state environmental law to be preempted under the ICCTA. The state appealed this decision and the appellate court affirmed the decision. The First Circuit found “[l]ike the regulations and ordinances consistently struck down by federal courts and by the Transportation Board, Act 250 mandates a pre-construction permit. Act 250's pre-construction permit requirement is preempted for two (2) reasons: (i) it ‘unduly

interfere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations, ' *Town of Ayer*, STB Finance Docket No. 33971, 2001 WL 458685, at *5; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely. *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13." *Id.* at 643. The court explained:

The State argues that Act 250 withstands preemption because it is an environmental, rather than economic, regulation. The distinction is not useful. *** Green Mountain serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over "rail transportation." Notwithstanding the environmental goals of the legislation, Act 250's permitting process "necessarily interfere[s]" with Green Mountain's "ability to construct facilities and conduct economic activities." *Green Mountain R.R. Corp.*, 2003 U.S. Dist. LEXIS 23774, at *13.

Id. at 644-45.

Thus, the Board need not consider in this proceeding about railroad maintenance and safety projects how these state and local permitting requirements under the Coastal Act would burden NCTD's rail operations. These types of requirements in this situation would directly regulate rail operations and are therefore categorically preempted. *See, e.g., Ass'n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 WL 2439499, at *7 (C.D. Cal. Apr. 30, 2007) ("Because the Rules directly regulate rail operations such as idling, they are preempted without regard to whether they are undue or unreasonable."); *CSX Transp., Inc.—Petition for Declaratory*

Order, FD 34662, slip op. at 3-4 (STB served May 3, 2005) (“[T]he preemption analysis is addressed not to the reasonableness of the particular state or local action, but rather to the act of regulation itself.”). Accordingly, any type of coastal zone regulation of the NCTD right-of-way here whether under state or local law would be preempted by the ICCTA because it would directly conflict with the Board’s regulatory authority over NCTD’s rail operations. *See Ass’n of American Railroads*, at *7.

Specifically, state or local permitting or review of rail maintenance or upgrades in the rail right-of-way in the coastal zone would directly impact rail transportation along the entire California coastline and more broadly, along the coast of all 34 states that have the CZMA coastal management plans. If any railroad needed to engage in a maintenance or an upgrade project, like in this situation, that was in a regulated coastal zone, it would have to obtain a permit before beginning such a project when the Coastal Act’s state and local permitting regime is found to be applicable. Therefore, if the maintenance project is an emergency repair needed to make the rail line usable or safe, the railroad may not even be able to operate on the rail line until it received a permit or review from the appropriate agency like the Commission or Del Mar. Moreover, a permit that was denied or delayed here for rail line safety fencing would also result in a railroad’s inability to prevent tragic accidents that would shut down rail service on the Line and could have onerous financial implications from possible lawsuits.

State and local coastal permitting authorities could require railroads to undergo a lengthy permit or review process that could render interstate rail operations in coastal areas all but impossible. Because railroads are continually maintaining and upgrading their lines, review of each maintenance or upgrade project would be a perpetual process possibly requiring new cases for the Commission and/or local government every day. Permits or review of rail maintenance or

upgrade projects would impose requirements directly on how railroads operate and amount to unworkable, direct regulation of rail operations that cannot be reconciled with ICCTA's central service obligations.

Therefore, the Commission's position that it or local governments can regulate NCTD's maintenance and upgrading of its rail line under the state and local coastal law must be rejected. This regulation is "categorically" preempted because this state and local coastal permitting regime would deny NCTD's ability to conduct rail operations.

C. Coastal Permitting or Preclearance for Rail Maintenance or Upgrades Would Create an Impermissible and Unworkable Patchwork of Regulation of Rail Maintenance/Upgrades.

As explained above, each coastal city in California has its own LCP approved by the Commission under the Coastal Act. Moreover, each coastal state has its own Coastal Management Plan approved by the Secretary of Commerce under the CZMA. (Currently, 34 states participate in the CZMA.) Any railroad that operates a rail line along the coast could be subject to an extraordinary number of compliance obligations under this extensive regulatory regime, many of which could conflict with one another. Coastal permitting of rail property that varies by state or even by city would create an impermissible and unworkable patchwork of regulations that unreasonably would burden interstate commerce. *See United States Environmental Protection Agency—Petition for Declaratory Order*, FD 35803, slip op. at 8 (STB served Dec. 30, 2014) (providing guidance in the Clean Air Act context that subjecting locomotives "'to fluctuating rules as they cross[] state lines' (and as they cross air quality regions) . . . would likely 'directly interfere' with the purpose of § 10501(b)'" (quoting *Fayus Enters.*, 602 F.3d at 452)). Interstate passenger and freight routes often run along the coast commonly passing through multiple states and cities. Such a variety of localized regulations would certainly have a "practical and cumulative impact"

on rail operations on the national rail network. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005). As discussed herein, a major objective of ICCTA preemption is “to prevent a patchwork of local regulation from interfering with interstate commerce.” *Wichita Terminal Assn BNSF Ry. Co. & Union Pac. R.R. Co.—Petition for Declaratory Order*, FD 35765 (STB served June 23, 2015). “[T]he Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.” H.R. Rep. No. 104-311, at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 808.

If a railroad had to comply with this wide variety of state and local laws for each maintenance or upgrade project that it undertook along the coast, compliance would be all but impossible as it tried to conform its right-of-way maintenance/upgrade practices to each area instead of to its interstate network. This result is exactly what § 10501(b) was meant to stop and why any state and local regulation of NCTD’s rail operations along the coast under the Coastal Act and LCPs must be “categorically” preempted.

d. Even When the CZMA Federal Consistency Review Is Applicable to an NCTD Rail Project, It Clearly Cannot Be “Harmonized” with the ICCTA Here and Regardless, the Commission’s CCMP State Policies Would Be Preempted by the ICCTA.

The Office for Coastal Management (“OCM”) of NOAA provided clarity regarding the CZMA federal consistency, specifically addressing preemption by federal laws like the ICCTA:

Federal preemption is the principle, derived from the Supremacy Clause of the Constitution, that a federal law can supersede or supplant any inconsistent state law or regulation. Preemption applies to state law and not other federal law. OCM’s long-

standing interpretation of the definition of “enforceable policy” under the CZMA (16 U.S.C. § 1453(6a)) is that if a state policy specifically seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA. For example, North Carolina sought to regulate low level aircraft in flight by adopting policies that imposed minimum altitude and decibel levels, and other overflight restrictions. OCM denied the state’s request to incorporate these policies into the North Carolina CMP because the policies were, on their face, preempted by federal law administered by the Federal Aviation Administration.

Applicability Consideration: Under the federal consistency authority, states apply NOAA-approved enforceable policies to federal actions. If a state’s enforceable policies, **as described or applied**, are not preempted, the state may apply them through CZMA federal consistency to a preempted field. It should be noted that whether state action is preempted is a fact-specific inquiry.

NOAA OCM, *CZMA Federal Consistency Overview*, at 6-7 (Feb. 24, 2020)(emphasis added)(citing 15 C.F.R. § 923.84(b)(“In order for NOAA to approve the incorporation of a new or revised enforceable policy into a state’s management program, the policy shall: *** (5) Not be preempted by Federal law. If a state policy is preempted by Federal law, the policy is not legally binding under state law and shall not be an enforceable policy under [16 U.S.C. 1453\(6a\)](#). Policies previously approved by NOAA as enforceable policies shall no longer be enforceable if Federal law enacted after NOAA's approval preempts the state policy.”) (*Overview* attached hereto as Exhibit H).

In a rulemaking that addressed this preemption policy, NOAA recently explained in its Final Rule regarding changes to coastal management plans:

Even though states review Federal actions under the CZMA Federal consistency authority (a Federal law requirement), the states apply their CZMA enforceable policies, which are based on state law, to review Federal actions. NOAA does not believe that the CZMA Federal consistency authority or NOAA's approval of state enforceable policies for incorporation into state management programs, removes the application of Federal **preemption** to the state enforceable policies. The application of the Federal **preemption** doctrine to the CZMA and state enforceable policies as described in the proposed rule and in this final rule is NOAA's long-standing position and does not represent a change in NOAA's view or how NOAA would review state CZMA program changes under the revised regulations. NOAA believes that its application of Federal **preemption** to state CZMA enforceable policies is required by the definition of "enforceable policy" in CZMA section 304(6a) [16 U.S.C. § 1453(6a)] (must be legally binding under state law).

Coastal Zone Management Act Program Changes Procedures (Final Rule), 84 FR 38118-01, at 38128 (NOAA issued Aug. 6, 2019). Congress in 1972 made clear that enactment of the CZMA did not diminish, modify or supersede this preexisting federal authority. 16 U.S.C. § 1456(e).

Therefore, when the CZMA Federal Consistency Review is applicable to a rail maintenance or upgrade project because it involves a federal action, any coastal policy or the application of it under the CCMP that would be preempted by the ICCTA would not be enforceable under this federal coastal regulatory regime. As explained herein regarding the clear federal preemption of this state and local coastal permitting regime, any application of the CCMP policies to rail maintenance or upgrades by NCTD in its right-of-way would clearly be preempted.

Moreover, applying these California laws to any requirement by the Commission as requested by Del Mar to move the track off the bluffs inland would without question be preempted. Therefore, the Commission cannot apply these preempted state policies in the CZMA Federal Consistency Review to these types of crucial rail activities in the coastal zone in Del Mar based on NOAA's reading of 16 U.S.C. § 1453(6a). *See* 15 C.F.R. § 923.84(b).

Even assuming that these CCMP policies can be applied to these NCTD rail operations in some fashion, it is clear that the CZMA federal review of these crucial NCTD rail operations is irreconcilable with the ICCTA rail statutory scheme and these two (2) statutes cannot be "harmonized." As discussed, the CZMA is part of a federal scheme allowing state review of federal actions that have effects on state coastal uses or resources. Therefore, any time there is a federal action relating to NCTD's rail operations as discussed herein, the Commission could claim Federal Consistency Review is required before any work can begin. *See Southern Pacific Transportation Co.*, 520 F.Supp. at 805 (there is no explicit "affirmative showing of an intention to repeal" the CZMA federal consistency provision in whole or in part in the Interstate Commerce Act). *See, e.g., Boston and Maine Corporation – Abandonment – in Suffolk County, MA ("Boston & Maine")*, AB-32 (Sub-No. 92) (STB served Dec. 21, 2001) Therefore, it has been held that the CZMA must be given effect so long as the CZMA and the ICCTA are not irreconcilable and the CZMA does not stand as an obstacle to the objectives of the ICCTA. *Id.*

In *Boston & Maine*, regarding the abandonment of a railroad line in Massachusetts, NOAA found, and the STB concurred, that the CZMA process and the applicant's compliance with the state's enforceable policies were not preempted by the ICCTA. The Massachusetts Office of Coastal Zone Management ("CZM") submitted a comment indicating that the line is located within the Massachusetts coastal zone and that the proposed abandonment could have an adverse effect

on coastal resources or uses. CZM indicated that it was seeking approval from the United States Department of Commerce, Office of Ocean and Coastal Resource Management (“OCRM”) to review the proposed abandonment under the CZMA. Under the CZMA, the STB stated that it was prohibited from granting a license or permit affecting a coastal zone until it received a consistency certification from a state.

In a letter, OCRM approved CZM's request to review Boston and Maine's (“B&M”) proposed abandonment under the CZMA. The OCRM advised CZM that its decision must be consistent with the Board's decision in [Ayer, supra](#). At the Board’s Section of Environmental Analysis's (“SEA”) request, the STB imposed a condition prohibiting B&M from performing any salvage activities until it completes a CZMA consistency certification and notifies SEA of the completion. Obviously, in this instance, applying the CZMA to a rail abandonment would have no impact on rail operations because they were being shut down, unlike here where the CZMA review of rail maintenance and upgrades in the right-of-way could bring NCTD’s active rail operations to a standstill.

In *Ayer*, the STB provided:

Finally, nothing in [section 10501\(b\)](#) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the CWA, and the SDWA. See Stampede Pass, 2 I.C.C.2d at 337 & n.14; Riverdale I at 7. Thus, the lack of a specific environmental remedy at the Board or under state and local laws (as to construction projects such as this, over which the Board lacks licensing power) does not mean that there are no environmental remedies under other Federal laws.

Of course, whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

5 S.T.B. at 508.

As discussed herein, actions taken, and regulations enacted under federal environmental statutes or other federal statutes may directly conflict with the purposes and regulatory scheme under the Interstate Commerce Act. When such a conflict occurs, the Board or a court must determine whether the two (2) federal statutes and their applicable regulatory schemes can be “harmonized.” *Ass’n of American Railroads v. South Coast Air Quality Management Dist.*, 622 F.3d 1094, 1097-98 (9th Cir. 2010); *Ayer*, 5 S.T.B. at 509 n.28 (two federal statutes should be “harmonized” unless there is a “positive repugnancy” or “irreconcilable conflict” between them). Therefore, under this standard, it would be necessary to determine whether Federal Consistency Review of rail maintenance (bluff stabilization) and upgrade (safety fencing) projects needed to continue rail service and the requested condition by Del Mar to move the rail line to accommodate its citizen’s access to the beach possibly can be “harmonized” with the ICCTA.

In this circumstance, “harmonization” of the ICCTA and the CZMA would merely result in the ICCTA being disregarded and the CZMA Federal Consistency Review being applied. First,

assuming the Commission required Federal Consistency Review before NCTD would be permitted to fix its rail line in the coastal zone or imposed unreasonable conditions (like the movement of the Line off the bluffs as requested by Del Mar and supported by the Commission), a shipper on the Line, that did not receive adequate service due to the CZMA review process, could bring a case to the STB alleging a violation of NCTD's or BNSF's common carrier obligation under 49 U.S.C. § 11101(a). Of course, any dispute regarding a railroad's common carrier obligation would have to be under the jurisdiction of the Surface Transportation Board—a result that clearly demonstrates why preemption must apply, as it is not for the state effectively to instruct NCTD when it can operate its rail line. *See BNSF Railway Company v. California State Board of Equalization*, 2016 WL 6393507, *3 (N.D. Ca. 2016). Therefore, Federal Consistency Review of maintenance work like the bluffs project that blatantly interferes with a railroad's common carrier obligation cannot be “harmonized” with the ICCTA.

Similarly, if Federal Consistency Review of the safety fencing project was required, this regulation again would directly interfere with NCTD's rail operations by making them less safe. It would be impossible to “harmonize” NCTD's need to operate safely with the CZMA Federal Consistency Review without risking the loss of life which tragically occurs often along this rail corridor. As discussed in the FRA's Report, this fencing is crucial to stopping accidents involving rail trespassers. Without the fencing, NCTD would take the substantial risk that the injured or killed trespassers could bring litigation, claiming NCTD failed to install this safety aid knowing it was crucial to protecting the public. Also, as noted herein, there have been 174 trespasser incidents in this corridor over the past ten years causing a disruption to rail service each time. This high-density corridor cannot afford to have this constant disruption of rail service due to trespasser incidents without eventually causing rail shippers to have their freight service delayed consistently.

This constant delay again could result in a shipper alleging NCTD is not meeting its common carrier obligation and bringing a case to the STB. Again, it is not for the state to decide whether rail shippers should receive adequate rail service by essentially controlling vital rail projects in the right-of-way. Therefore, again, Federal Consistency Review and the ICCTA cannot be harmonized here.

This argument is even stronger with respect to Del Mar's request to the Commission to decide whether to move the rail line itself (a request that the Commission has supported in the press and public discussion). The STB is the only agency with jurisdiction over the abandonment and construction of rail lines. *See* 49 U.S.C. §§ 10901, 10903. "Harmonization" of Federal Consistency Review with the ICCTA could not be possible in this situation as well because states cannot have the power to control whether active rail lines can be moved which is solely subject to the jurisdiction of the STB. *See, e.g., Coastal Zone Management Act Program Change Procedures*, 84 FR at 38127 ("NOAA could not approve a state proposed policy that regulates the siting of onshore liquefied natural gas (LNG) terminals regulated by the Federal Energy Regulatory Commission (FERC) under the Natural Gas Act, since FERC has exclusive jurisdiction over the siting of onshore LNG terminals and states are federally preempted from regulating the siting of LNG terminals. Such a policy could not be legally binding under state law, as required by the CZMA definition of enforceable policy in CZMA section 304(6a).") Likewise, it is not for the state to decide where an active rail line should be located but is only for the STB to determine, thereby again making harmonization impossible.

Moreover, as discussed herein, the STB has previously ruled in similar circumstances involving a conflict between the federal Clean Air Act and the ICCTA that "harmonization would not be possible under § 10501(b) if the result was a patchwork of environmental regulations that

impacted the railroad. *United States Environmental Protection Agency—Petition for Declaratory Order*, FD 35803, slip op. at 8. If each state Coastal Commission (34 in all) were able to control how railroads maintained or upgraded their lines in coastal areas and where an active rail line should be located, “this type of regulation would be preempted because of the potential patchwork of regulations that could result, contravening Congress's purpose in enacting [§ 10501\(b\)](#).” *Id.* If this type of coastal regulation was permitted, railroads would be subject “to fluctuating rules as they cross[] state lines”, and Federal Consistency Review would therefore “directly interfere” with the purpose of [§ 10501\(b\)](#). See *Fayus Enters.*, [602 F.3d at 452](#). This differing regulation in 34 states would lead to the lack of uniformity of regulation that Congress intended to preclude in [§ 10501\(b\)](#). Such a variety of localized regulations would likely have a “practical and cumulative impact” on rail operations throughout the national rail network. See *CSX Transp., Inc. v. Williams*, [406 F.3d 667, 673 \(D.C. Cir. 2005\)](#).

Federal Consistency Review under these circumstances would unduly restrict NCTD and BNSF from conducting their rail operations and would unreasonably burden interstate commerce in contravention of the ICCTA. Railroads must constantly maintain and upgrade their rail lines in order to provide service to their customers across the United States. Maintenance and upgrades take place on a daily basis in order to keep the rail lines operable and efficient. If a railroad had to obtain Federal Consistency Review every time it wanted to engage in this crucial rail work because of a federal action, its operations would come to a screeching halt. This review process could not possibly keep pace with a railroad’s needs to keep its operations in good working order. Railroads cannot anticipate all the maintenance or improvement projects it would need to conduct, as the condition of a rail line and the elements are everchanging like here where heavy rains washed out the rail bed. Therefore, because of the undue burden these CZMA review cases would

inevitably place on interstate commerce, a railroad would not be able to operate safely or at all in contravention of the ICCTA's purpose.

Additionally, if the Commission could require railroads to move their active rail lines as sought by Del Mar and supported in public comments by the Commission, the burden of this type of regulation on rail operations would be monumental. The movement of rail lines in densely populated areas like the County of San Diego would be financially and logistically impossible for most railroads. Therefore, if the Commission required NCTD to move its rail line as a condition of its federal review, this action could stop all service on the Line while NCTD attempted to comply with such an order. It also could financially burden NCTD and BNSF to the point that future rail operations may not be sustainable for intercity and commuter passenger service or competitive for freight movement, considering that planning studies estimate that the cost of constructing various tunnel alternatives ranges between \$2.5 and \$3.5 billion (in 2017 dollars) to complete. Moreover, these costs exclude ongoing operations and maintenance costs of a tunnel. As stated previously, NCTD's annual capital budget for FY 21 is \$39.5 million to fund the totality of all of its operations including bus and rail and has unfunded state of good repair needs that exceed \$1 billion.

As a result, Federal Consistency Review of rail maintenance and upgrade projects would so burden NCTD that rail operations would be nearly impossible. Also, allowing states to create a variety of complex regulations which could govern how and where a railroad in interstate commerce is operated would directly conflict with the goal of uniform national regulation of rail transportation. For these reasons, Federal Consistency Review here cannot be "harmonized" with the ICCTA.

CONCLUSION

For the foregoing reasons, the Board should issue the requested declaratory order.

/s/ Daniel Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006
(703) 863-9670

Counsel for NCTD

VERIFICATION

I, Matthew O. Tucker, Executive Director of the North County Transit District, do hereby verify under the penalty of perjury that, to the best of my knowledge, the foregoing Petition for Declaratory Order is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of the North County Transit District in connection with this proceeding before the Surface Transportation Board.

Executed this 26 day of August, 2020



Matthew O. Tucker
Executive Director
North County Transit District

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on August 28, 2020, I served a copy of this Petition for Declaratory Order on counsel known to represent the City of Del Mar and the California Coastal Commission by first-class mail and email as follows:

Leslie Devaney, Del Mar City Attorney
Devaney Pate Morris & Cameron LLP
402 W. Broadway
Suite 1300
San Diego, CA 92101
ldevaney@dpmclaw.com

Louise Warren, Chief Counsel
California Coastal Commission
455 Market Street, Suite 300
San Francisco, CA 94105
Louise.Warren@coastal.ca.gov

/s/Daniel R. Elliott

EXHIBIT A

**MEMO**810 Mission Avenue
Oceanside, CA 92054www.GoNCTD.com**Date:** December 5, 2019**To:** Key Stakeholders
NCTD Board of Directors
SANDAG Board of Directors**From:** Hasan Ikhata, SANDAG, Executive Director
Matthew O. Tucker, NCTD, Executive Director **Re:** Del Mar Bluffs Erosion and Stabilization

We are writing to provide you with an update on the Del Mar Bluffs. The recent severe rainstorms resulted in some erosion southwest of Sea Grove Park on the Del Mar Bluffs. The first location at railway Mile Post (MP) 244.3, was repaired on November 30, 2019. The second location at MP 244.25 is located in a section of the bluffs where reinforced concrete piles had previously been installed to protect the track bed from sliding. This location now requires further repairs that are anticipated to be completed in January 2020. In the interim, NCTD has reduced train speeds on this section of the track and has increased on-site monitoring.

NCTD and SANDAG are recommending an expedited approach to implementing stabilization improvements given the importance of the coastal railroad to our economic, environmental, and national defense interests. Key recommendations include:

1. Immediately provide funding up to \$5 million to support emergency repairs, including the repairs anticipated in January 2020 for MP 244.25.
2. Fully fund the Del Mar Bluffs Stabilization 5 Project in Fiscal Year (FY) 21 via Department of Natural Resources or State Transportation Improvement Program funding. This project includes the evaluation of seismic and static stabilization needs, drainage facilities, the addition of pilings and tie backs, replacement of old drainage structures, and localized lagging as bluff retreat accelerates. There is an estimated total cost of \$24 to \$30 million, of which \$6 million was already provided from the Department of Natural Resources in FY20 to support project design work, resulting in a need for \$18 to \$24 million in FY21.
3. Fully fund the Del Mar Bluff Stabilization 6 Project over FY22 and FY23 which will support the design and construction of additional stabilization measures, including bluff toe protection, bluff face stabilization, and lagging installation, while taking into consideration local coastal access. The Del Mar Bluffs Stabilization 6 Project design and construction phases are estimated to cost between \$70 and \$80 million.
4. Ensure a streamlined regulatory approval process that recognizes that Projects 5 and 6 will secure the bluffs for the next 20 to 30 years and will

allow federal, state, and local stakeholders to determine and implement the long-term plan for the region. If the environmental process is not streamlined, then the project implementation timeline could increase by three to four years.

NCTD and SANDAG can proceed with development of these projects assuming that the State of California commits to providing \$100 million to complete the necessary repairs for this critical transportation link.

The need to stabilize the Del Mar Bluffs has been well documented. Significant severe weather events have accelerated the need to advance the implementation of these improvements. SANDAG and NCTD need financial certainty to enter into contracts to support the required capital work. The time to advance funding is now before an event occurs that could result in an accident and/or the discontinuation of rail services. NCTD and SANDAG stand ready to provide supplemental information to assist our key stakeholders in understanding project needs to support the provision of the requested funding. Please contact Matthew Tucker at mtucker@nctd.org or (760) 967-2869 or Hasan Ikhrata at hasan.ikhrata@sandag.org or (619) 699-1900.

Site Photographs



MP 244.30: Wash Out Erosion SW of Seagrove Park



MP 244.30: Wash Out Erosion Repair SW of Seagrove Park



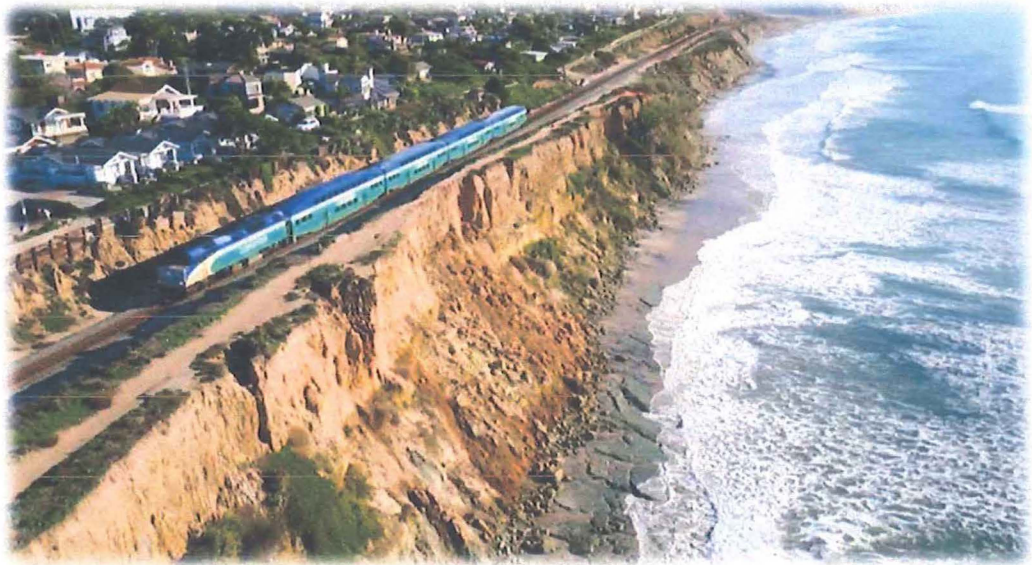
MP 244.25: Bluff Erosion west of Seagrove Park looking South



MP 244.25: Bluff Erosion west of Seagrove Park looking North



MP 244.25: Bluff Erosion west of Seagrove Park



A train crosses the bluffs in Del Mar in December. (Union-Tribune file photo by John Gibbins)

EXHIBIT B

Date	City	Case No	Fatal	Train	Milepost	Cause
4/15/10	Encinitas	10028907	Y	COASTER	237.9	Suicide
4/27/10	Del Mar	10031657	Y	COASTER	244.1	Accidental
5/18/10	Carlsbad	10035608	Y	BNSF	229.2	Accidental
5/30/10	Oceanside	10037857	Y	AMTRAK	228	Accidental
7/1/10	Oceanside	10043763	Y	COASTER	228	Suicide
8/16/10	Oceanside	10051959	N	BNSF	226.8	
8/19/10	San Diego	10052546	Y	BNSF	267	Suicide
9/19/10	Oceanside	10058330	Y	AMTRAK	225.9	Accidental
10/7/10	San Diego	10061937	N	COASTER	266	
10/25/10	San Diego	10065130	N	BNSF	261	
11/25/10	San Marcos	10070377	Y	SPRINTER	118	Suicide

Total 8

Date	City	Case No	Fatal	Train	Milepost	Cause
6/29/11	Oceanside	11131404	N	SPRINTER	101.6	
7/13/11	San Diego	11133810	N	BNSF	267.2	
7/17/11	Oceanside	11134574	Y	AMTRAK	228	Suicide
9/13/11	Carlsbad	11145199	Y	COASTER	229	Suicide
10/5/11	Oceanside	11149136	Y	AMTRAK	224.5	Accidental
10/28/11	San Diego	11153170	Y	AMTRAK	265.6	Accidental
11/9/11	Oceanside	11155279	Y	AMTRAK	228	Suicide
11/22/11	San Diego	11157432	N	BNSF	267	

Total 5

Date	City	Case No	Fatal	Train	Milepost	Cause
1/11/2012	San Diego	12101889	N	COASTER	265.55	
2/7/2012	Encinitas	12106996	N	BNSF	237.8	
2/8/2012	San Diego	12107006	Y	AMTRAK	266.4	Accidental
2/20/2012	San Diego	12109175	N	AMTRAK	247.1	
2/23/2012	Oceanside	12109689	N	AMTRAK	226.2	
3/18/2012	Encinitas	12114085	N	AMTRAK	240.7	
3/23/2012	San Marcos	12115007	Y	SPRINTER	114.5	Suicide
4/4/2012	Camp Pendleton	12117014	Y	BNSF	218	Suicide
4/8/2012	San Diego	12117872	Y	COASTER	263.6	Accidental
5/4/2012	Encinitas	12122606	Y	AMTRAK	235.7	Accidental
7/30/2012	Vista	12139229	N	SPRINTER	108	
8/16/2012	Del Mar	12142220	Y	BNSF	244.1	Accidental
8/19/2012	San Diego	12142867	Y	AMTRAK	261	Suicide
8/26/2012	San Diego	12144265	Y	AMTRAK	265.55	Accidental
8/31/2012	San Diego	12145149	N	COASTER	265.55	
10/11/2012	Carlsbad	12152689	Y	COASTER	234.5	Suicide
10/17/2012	Carlsbad	12153448	Y	AMTRAK	229	Accidental
11/8/2012	Encinitas	12158047	Y	COASTER	238.9	Suicide
12/4/2012	Carlsbad	12162449	Y	BNSF	229.5	Suicide
12/8/2012	Encinitas	12163304	Y	AMTRAK	239.8	Accidental

Total 13

Date	City	Case No	Fatal	Train	Milepost	Cause
1/18/2013	Oceanside	13103262	Y	BNSF	226.2	Accidental
2/7/2013	San Diego	13106729	N	COASTER	249	
3/5/2013	Encinitas	13111197	Y	AMTRAK	238	Suicide
3/25/2013	San Diego	13115087	Y	BNSF	246	Suicide
3/28/2013	Oceanside	13115457	Y	BNSF	227.2	Suicide
4/13/2013	Carlsbad	13118613	N	AMTRAK	229.1	
4/18/2013	Carlsbad	13119445	Y	AMTRAK	229.2	Accidental
6/25/2013	Oceanside	13132441	N	BNSF		Suicide
7/2/2013	Carlsbad	13133606	N	AMTRAK	229.1	
7/12/2013	Oceanside	13135610	Y	COASTER	228	Suicide
8/2/2013	San Diego	13139561	N	COASTER	226.9	
10/4/2013	Escondido	13151069	N	SPRINTER	120.4	
10/10/2013	San Diego	13152173	N	AMTRAK	237	
10/17/2013	San Diego	13153392	N	AMTRAK	249	
10/19/2013	Encinitas	13153696	Y	AMTRAK	236.15	Suicide

Total 15 7

Date	City	Case No	Fatal	Train	Milepost	Cause
1/3/2014	Del Mar	14100443	Y	AMTRAK	244.4	Accidental
1/21/2014	San Diego	14103543	Y	AMTRAK	266.9	Suicide
2/20/2014	Vista	14109335	N	SPRINTER	112	
3/4/2014	Carlsbad	14111431	Y	AMTRAK	233.3	Accidental
4/26/2014	San Diego	14121184	Y	AMTRAK	265.55	Accidental
6/26/2014	Carlsbad		Y	BNSF	232	Accidental
7/19/2014	Encinitas		N	AMTRAK	235.8	
8/7/2014	Carlsbad	14140146	Y	BNSF	229	Accidental
8/9/2014	Encinitas	14140387	Y	BNSF	238	Suicide
8/11/2014	County SD	14140793	Y	SPRINTER	112	Accidental
9/7/2014	San Diego	1.41E+10	Y	AMTRAK	246	Accidental
10/20/2014	Encinitas	14153415	Y	COASTER	236.3	Suicide
10/27/2014	Carlsbad	14154680	Y	AMTRAK	229.1	Accidental

Total 13 11

Date	City	Case No	Fatal	Train	Milepost	Cause
2/4/2015	San Marcos	15106074	Y	SPRINTER	114.5	Accidental
3/5/2015	Encinitas	15111457	Y	COASTER	236	Suicide
3/12/2015	Del Mar	15112601	Y	COASTER	244.1	Suicide
3/16/2015	Oceanside		N	AMTRAK	228	Vehicle
5/9/2015	San Diego	15123396	Y	AMTRAK	259.5	Suicide
6/10/2015	San Diego	15129589	Y	BNSF	267.5	Accidental
8/12/2015	Encinitas	15141360	Y	AMTRAK	235.8	Suicide
8/14/2015	San Marcos	NO CASE	N	SPRINTER	114	Bike-Trespasser
8/28/2015	San Diego	15144442	N	AMTRAK	265.55	Box truck
9/16/2015	San Diego	15147955	N	AMTRAK	266.4	Vehicle Strike
9/29/2015	Oceanside	15150667	Y	AMTRAK	228	Suicide
10/5/2015	San Diego	15151616	Y	COASTER	265.55	Suicide
11/12/2015	Carlsbad	15158642	Y	BNSF	229.4	Accidental
12/19/2015	San Diego		N	AMTRAK	258.9	Vehicle Strike

Total 14 9

Date	City	Case No	Fatal	Train	Milepost	Cause
1/18/2016	San Diego	16103043	N	AMTRAK	266.9	Vehicle Strike
2/9/2016	San Marcos	16107176	Y	SPRINTER	115.9	Suicide
2/24/2016	Del Mar	16110038	N	BNSF	244.1	Vehicle Strike
3/11/2016	Del Mar	16112937	N	AMTRAK	244.2	Accidental
4/15/2016	Del Mar	16119295	N	COASTER	244.3	Accidental
5/12/2016	Carlsbad	1634133	Y	AMTRAK	232.2	Suicide
5/22/2016	Vista	16125895	N	SPRINTER	112	Vehicle Strike
6/2/2016	Carlsbad	16127926	Y	AMTRAK	234.8	Suicide
6/4/2016	San Marcos	16128380	Y	SPRINTER	118.8	Suicide
6/14/2016	San Diego	16130076	N	AMTRAK	266.4	Vehicle Strike
6/27/2016	Oceanside	16132370	N	SPRINTER	106.9	Vehicle Strike
7/1/2016	Encinitas	16133215	N	COASTER	238	Suicide Attempt (2)
7/28/2016	San Marcos	16138170	N	SPRINTER	114.8	Accidental
9/5/2016	Encinitas	16145376	Y	PACSUN	237.8	Suicide
9/24/2016	Del Mar	16148981	Y	BNSF	244.2	Accidental
10/28/2016	San Diego	16155217	N	AMTRAK	266.6	Accidental
10/29/2016	Encinitas	16155529	Y	AMTRAK	236.2	Suicide
11/29/2016	Del Mar	16160708	Y	AMTRAK	244.1	Suicide
12/8/2016	Del Mar	16162446	N	AMTRAK	244.3	Accidental
12/20/2016	Encinitas	16164646	N	COASTER	240.5	Accidental

Total 20 8

Date	City	Case No	Fatal	Train	Milepost	Cause	Pax	PNA	ains Del	Time	Download
1/20/2017	Oceanside	17103422	N	SPRINTER	101.1	Accidental	30	0	0	0	
1/26/2017	Oceanside	17104599	Y	AMTRAK	227.6	Accidental	137	0	5	1+20	
2/4/2017	Del Mar	17106343	N	COASTER	244.1	Vehicle Strike	164	1	5	2+08	Y
2/14/2017	Oceanside	17108248	Y	AMTRAK	228.0	Suicide	232	2	7	2+06	
2/20/2017	Vista	17109284	N	SPRINTER	112.0	Vehicle Strike	32	0	5	1+14	
2/22/2017	Encinitas	17109710	Y	BNSF	236.27	Suicide	0	0	1	0+13	
3/15/2017	Encinitas	17113640	Y	AMTRAK	236.5	Suicide	163	0	12	1+39	
3/28/2017	San Diego	17116170	N	AMTRAK	261.25	Accidental	134	0	4	1+28	
3/31/2017	Oceanside	17116738	Y	AMTRAK	228.0	Suicide	179	0	7	3+02	
4/2/2017	San Diego	17117046	N	AMTRAK	259.2	Accidental	53	0	2	1+01	
4/3/2017	Carlsbad	17117292	Y	COASTER	229.6	Suicide	86	1	7	2+14	N
5/14/2017	Carlsbad	17125315	N	AMTRAK	229.1	Accidental	415	0	2	1+35	
5/28/2017	Oceanside	17128051	Y	AMTRAK	227.7	Accidental (1F/1NF)	43	0	2	2+43	
5/31/2017	Oceanside	17128460	Y	AMTRAK	226.6	Suicide	124	0	11	2+32	
6/22/2017	Encinitas	17132640	Y	AMTRAK	235.8	Suicide	194	1	10	1+30	
6/24/2017	San Diego	17133316	N	AMTRAK	266.9	Accidental	16	0	2	1+41	
6/25/2017	Oceanside	17133316	Y	COASTER	225.4	Accidental	0	0	2	1+42	N
7/7/2017	Del Mar	17135552	Y	COASTER	244.3	Accidental	140	0	9	1+09	N
8/3/2017	Vista	17140392	N	SPRINTER	108	Vehicle Strike	63	1	8	1+38	
8/8/2017	Encinitas	17141145	Y	COASTER	238.3	Suicide	296	0	12	2+20	Y
11/15/2017	Del Mar	17159787	Y	COASTER	244.5	Suicide	420	0	6	1+38	Y
11/19/2017	Oceanside	17160551	Y	AMTRAK	228	Suicide	300	0	6	1+41	
12/17/2017	Carlsbad	17165722	Y	AMTRAK	229.15	Accidental	190	1	5	2+13	
12/30/2017	Encinitas	17168032	N	AMTRAK	237.9	Vehicle Strike	96	0	2	2+33	
TOTAL		24	15								

Date	City	Case No	Fatal	Train	Milepost	Cause	Pax	PNA	ains Del	Time	Download
1/3/2018	Carlsbad	18100521	N	AMTRAK	229.3	Vehicle Strike	255	0	6	1+18	
2/11/2018	San Diego	18107802	Y	AMTRAK	248.8	Trespasser	33	0	0	2+09	
2/27/2018	San Diego	18110792	N	AMTRAK	267	Vehicle Strike	24	0	0	1+47	
3/19/2018	Carlsbad	18114788	Y	AMTRAK	230.5	Accidental	0	0	2	1+32	
4/8/2018	Del Mar	18118422	Y	AMTRAK	244.1	Accidental	233	3	10	2+15	
4/24/2018	Oceanside	18121458	Y	AMTRAK	225.94	Suicide	210	1	6	2+11	
5/5/2018	San Diego	18123373	Y	AMTRAK	249.8	Accidental	80	0	7	1+03	
5/10/2018	Encinitas	18124215	Y	AMTRAK	238.04	Undetermined	72	0	0	1+36	
5/15/2018	Encinitas	18125055	Y	AMTRAK	237.97	Suicide	18	0	7	2+35	
5/23/2018	Oceanside	18126650	Y	COASTER	225.94	Suicide	0	0	5	0+55	N
6/1/2018	San Diego	18128200	Y	AMTRAK	265.3	Accidental	49	0	6	1+54	
6/4/2018	Solana Beach	18128821	Y	COASTER	241.5	Suicide	97	0	6	1+39	N
6/20/2018	San Diego	18131701	N	COASTER	265.57	Accidental	112	0	6	1+25	Y
6/23/2018	San Diego	18132249	N	AMTRAK	253.7	Accidental	0	0	0	0	
7/13/2018	Encinitas	18135839	Y	AMTRAK	235.8	Accidental	252	0	3	0+58	
7/22/2018	Oceanside	18137419	Y	AMTRAK	225.2	Suicide	475	30	9	2+28	
7/23/2018	Carlsbad	18137560	Y	AMTRAK	233.23	Suicide	130	0	10	3+12	
7/26/2018	San Diego	18138194	Y	AMTRAK	266.93	Accident	122	0	3	1+06	
8/15/2018	Oceanside	18141888	Y	AMTRAK	225.94	Suicide	220	5	7	1+15	
8/25/2018	Oceanside	18143900	N	SPRINTER	100.3	Accident	26	0	6	1+34	Y
10/30/2018	San Diego	18156269	N	COASTER	264.2	Intentional	UNK	UNK	0	0+07	N
12/29/2018	Encinitas	18166704	Y	AMTRAK	238.8	Suicide*	36	0	4	3+23	

TOTAL 22 16 *Not Official

EXHIBIT C

Report to Congress

**National Strategy to Prevent Trespassing
on Railroad Property**



October 2018

Federal Railroad Administration
U.S. Department of Transportation

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National Strategy to Prevent Trespassing on Railroad Property

Table of Contents

Executive Summary	i
Introduction	1
Trespassing on Railroad Property	2
Definition	2
Types of Accidents	2
Complexities of the Problem	3
Scope of the Problem	4
Distance Between Trespassing Accidents and Grade Crossings	5
FRA Efforts to Address Trespassing	7
Costs and Effects of Railroad Trespassing	9
FRA's Field Survey - Site Review Teams' Executive Summaries	11
Contributing Factors	14
Conclusion	15
National Strategy to Prevent Trespassing on Railroad Property	17
The Four Strategic Areas of the National Strategy	18
Metrics for Success	20
Implementation Milestones and Timeline by Strategic Area	20

Abbreviations in this Report

AIS	Abbreviated Injury Scale
CRISI	Consolidated Rail Infrastructure and Safety Improvements
FRA	Federal Railroad Administration
FY	Fiscal Year
VSL	Value of a Statistical Life

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National Strategy to Prevent Trespassing on Railroad Property

Executive Summary

Trespassing on railroad property is the leading cause of all rail-related deaths in the United States. More people are struck and killed by trains each year while trespassing – illegally entering or remaining on a railroad right-of-way – than in motor vehicle collisions with trains at highway-rail grade crossings. Between 2012 and 2017, the annual number of trespass-related pedestrian fatalities increased 18 percent, from 725 people killed in 2012 to 855 in 2017. In calendar year 2018, 324 pedestrian trespass fatalities had occurred by July 31, 2018. Data indicates that the number of trespassing occurrences each year far exceeds the number of fatalities and injuries. This raises serious concern of the potential for even more trespasser accidents.

In its report on the fiscal year (FY) 2018 Department of Transportation appropriation,¹ the U.S. House of Representatives Committee on Appropriations requested the Federal Railroad Administration (FRA) study and identify the causal factors that lead to trespassing incidents on railroad property. The Committee also asked FRA to develop a national strategy to prevent trespasser incidents and submit it to the House and Senate Committees on Appropriations by August 1, 2018. This document responds to the Committee's request.

In October 2017, FRA formed a team of experts to study the problem of people being killed or injured while trespassing on railroad property. To help understand the problem's scope, the team analyzed the costs to railroads and society. The team found that trespass accidents during the five-year period from 2012 to 2016 cost society approximately \$43 billion.² The team also reviewed existing research and data related to railroad trespasser fatalities nationwide for the four-year period between November 2013 and October 2017. The team found that, of the 3,100 counties and county equivalents in the United States, approximately 14 percent of trespasser fatalities occurred in 10 counties in 4 different states.³ Moreover, 74 percent of all trespasser deaths and injuries in that four-year period occurred within 1,000 feet (less than ¼ of 1 mile) of a grade crossing.

FRA regional teams conducted field surveys in 6 of the top 10 counties to gather data related to rail operations, social demographics, and circumstances surrounding individual trespass incidents in those counties. FRA's research and field surveys identified several contributing factors, including the behavior and choices of individuals who trespass on railroad property and lack of knowledge and appreciation of trespassing dangers. FRA found that communities tend to focus

¹ U.S. House of Representatives, House Report No. 115-237, July 21, 2017.

² This cost includes the value of fatalities, injuries, and travel time delay due to trespassing incidents. It does not include indirect costs such as emotional distress or productivity losses.

³ In this report, FRA refers to these as the *top 10 counties*.

National Strategy to Prevent Trespassing on Railroad Property

their finite resources on higher-priority law enforcement issues, such as homicides, illegal drugs, and highway crashes. These issues often take precedence over the investigation and prosecution of trespasser offenses. As a result, even when railroad trespass violations are reported to law enforcement, the violations are rarely prosecuted, reducing the perceived negative consequences for trespassing. FRA also found that community-planning decisions (such as the location of bus stops in relation to safe crossing paths) might lead to trespassing.

FRA's past efforts to address the problem of people trespassing on railroad property have focused on outreach to the public, railroads, and law enforcement agencies. FRA's approach has not been a national, proactive approach to address the root causes of trespassing. Instead, FRA's historical approach has been dependent its regional staff and resources reacting to specific safety issues on a case-by-case basis.

FRA's current analysis demonstrates that it needs to do more than educate and facilitate mitigation measures when issues arise. To this end, FRA developed the National Strategy to Prevent Trespassing on Railroad Property. It focuses on four strategic areas: (1) data gathering and analysis; (2) community site visits; (3) funding; and (4) partnerships with stakeholders. The key elements of each of these strategic areas are listed below.

Strategic Area 1. Data Gathering and Analysis

- Transition to a data driven, centrally managed, regionally implemented program.
- Identify new data sources and explore statutory, regulatory, or other authorities to protect new data.
- Develop and use a trespasser risk model.
- Consider changes to railroad reporting regulations to improve the data available to FRA and other stakeholders.

Strategic Area 2. Community Site Visits

- Communicate information to FRA regional staff for targeted engagement.
- Develop standard operating procedures for conducting regional community site visits.
- Assign regional assets to identified hot spots to engage railroads, police, and local governments in partnerships using data to identify location-specific causal factors and assist with identifying and implementing mitigation strategies.

Strategic Area 3. Funding

- Work through the executive and Congressional budget cycles to identify funding to strengthen grant programs for trespasser mitigation, such as engineering solutions, law enforcement overtime, school resource officers, and outreach.

National Strategy to Prevent Trespassing on Railroad Property

- Include information on the availability of grants and other funding as part of FRA's survey and outreach program.
- Work through the executive and Congressional budget cycles to identify funding for a national trespasser public service announcement campaign.

Strategic Area 4. Develop Partnerships with Stakeholders

- Convene trespasser prevention summits with representatives from each of the top 10 counties for trespasser casualties to engage local community leaders, law enforcement, railroads, and the public.
- Collaborate with government agencies and other organizations, including the Substance Abuse and Mental Health Services Administration and Global Railway Alliance for Suicide Prevention, on targeted outreach to address suicides.
- Share trespasser hot spot data with advocacy organizations, such as Operation Lifesaver, Inc., so they can focus their activities to yield the greatest returns on investment.

The success of this national strategy is dependent on several factors outside of FRA's control. For example, gathering and analyzing the railroads' close call data⁴ would help FRA identify and target trespassing hot spots more effectively. However, FRA does not have specific statutory authority to protect this data from disclosure and use in judicial actions to determine damages or liability for trespasser accidents. FRA expects railroads would be more likely to share this information with such protection in place. Successful implementation of this national strategy will be best served by sufficient resources and cooperation of all stakeholders.

⁴ A trespassing *close call* is a situation in which a trespasser is almost struck by a train, but escapes without injury and the incident is captured by a locomotive camera and/or reported by a train crew.

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National Strategy to Prevent Trespassing on Railroad Property

Introduction

Trespassing on railroad property is the leading cause of all rail-related deaths in the United States. Annually, more fatalities and injuries occur due to trespassing on railroad property than motor vehicle collisions with trains at highway-rail grade crossings. Total annual trespass-related pedestrian fatalities have increased 18 percent from 725 in 2012 to 855 in 2017. In calendar year 2018, 324 pedestrian trespass fatalities had occurred by July 31, 2018.

In its report on the FY 2018 Department of Transportation appropriation, the U.S. House of Representatives Committee on Appropriations asked FRA to study and identify the factors that lead to trespassing incidents on railroad property and to develop a national strategy to prevent them. The Committee directed FRA to include milestones, timelines, and metrics to define success in its strategy. The Committee expects FRA to implement its trespasser accident prevention strategy within the specified timelines. The Committee asked FRA to submit the strategy to the House and Senate Committees on Appropriations by August 1, 2018. This report responds to this request and contains the results of FRA's research and field surveys.

FRA's analysis of available data for the period between November 2013 and October 2017 identified the ten counties in the United States where most pedestrian trespasser casualties occurred.⁵ Table 1 lists these counties from most to least casualties.

**Table 1: U.S. Counties with the Most Railroad Trespasser Casualties, Not Including Suicides
November 2013 to October 2017**

Rank	County	Casualties	Rank	County	Casualties
1	Los Angeles, California	110	6	Palm Beach, Florida	47
2	Cook (Chicago), Illinois	109	7	Fresno, California	46
3	San Bernardino, California	59	7	Riverside, California	46
4	Harris (Houston), Texas	52	9	Contra Costa, California	44
5	Broward, Florida	51	9	San Diego, California	44

Source: FRA analysis

⁵ Casualties include fatalities and injuries.

Trespassing on Railroad Property

Definition

Railroads own their rights-of-way and have a reasonable expectation of operating on their property without the presence or interference of unauthorized people. Any unauthorized person who enters or remains on a railroad right-of-way, equipment, or facility is trespassing.

Trespassing on private railroad property, including a railroad's right-of-way, is illegal.

Pedestrians and motorists are permitted on railroad property where an authorized crossing (either roadway or pedestrian) intersects with the railroad right-of-way at a grade crossing, provided highway traffic control signals and other signage are obeyed.

FRA distinguishes between trespass accidents and trespass incidents for its national strategy.

Trespass Accidents. When one or more trespassers is struck and killed or injured by a train or other means while on railroad property without authority. This report refers to individuals injured or killed because of trespassing on railroad property as casualties.

Trespass Incidents. When law enforcement, railroad personnel, or cameras observe one or more trespassers on railroad property. Instances of trespassing in which the trespasser is not struck by a train or otherwise injured or killed on railroad property.

Types of Accidents

FRA grouped trespass accidents into three categories for analysis and development of its national strategy.

Accidents Involving Trespass Casualties at Grade Crossings. This type of trespass casualty occurs when a pedestrian climbs either through a train stopped at a grade crossing or over or around gates or other physical barriers to enter a grade crossing when a train is approaching. FRA data shows 12 percent of trespassing pedestrian casualties, not including suicides, occur at grade crossings. About 2 percent (3,000 miles) of U.S. rail miles are at grade crossings.

Accidents Involving Trespass Casualties on All Other Segments of Railroad Rights-of-Way. The remaining 98 percent (137,000 miles) of U.S. route miles not at grade crossings are other segments of railroad rights-of-way. Although trespassing can occur anywhere along a right-of-way, 74 percent of trespassing casualties, not including suicides, occur within 1,000 feet (less than ¼ of 1 mile) of a grade crossing.

Suicides and Suicide Attempts. This type of trespass accident occurs when a person enters a railroad right-of-way with the intent of being struck and killed by a train. FRA data indicate that at least 30 percent of fatalities that occur on the rail system result from an intentional act of suicide. Similar to trespass casualties on segments of railroad rights-of-way other than grade

National Strategy to Prevent Trespassing on Railroad Property

crossings, 73 percent of suicide attempts occur within 1,000 feet of a grade crossing. When an accident is classified as a suicide, it is removed from the casualty data.

Complexities of the Problem

Trespassing on railroad property is a complex problem because of the differing priorities of individuals and the communities in which trespassing occurs. FRA's limited authority to address the issue and varying state laws affecting how a railroad or local authority may enforce trespassing laws are compounding factors. For FRA and many affected communities, a lack of sufficient resources and clear data are primary concerns.

Individuals. At its core, the problem of trespassing starts when an individual enters private railroad property without authority to do so. Most trespassers make this choice because crossing railroad property provides the most direct route to a desired destination. The person might be unaware of the dangers involved in trespassing on railroad property. The person could be distracted by another activity (e.g., hunting, bicycling, riding all-terrain vehicles, using a cell phone or earbuds). These circumstances can lead to deadly consequences.

Communities. From a community's perspective, public safety issues, such as homicides, illegal drugs, and highway crashes, can take precedence over investigating and prosecuting railroad trespass offenses. FRA found in each of the top 10 counties, over a four-year period, the number of railroad trespass casualties was less than two percent of the respective county's total homicides, drug-related deaths, and highway fatalities. Local and state governments often focus their finite resources on their higher-priority issues. In many instances, railroad trespassers are not prosecuted even when law enforcement is aware of the incidents.

Local land use decisions can affect the likelihood of trespassing on railroad property or rights-of-way. For example, community decisions regarding the placement of public buildings and services, such as homeless shelters, food pantries, and schools, or approval of new construction can affect the number of railroad trespassers.

FRA. In 2008, Congress directed the U.S. Department of Transportation to develop and maintain a comprehensive outreach program to address trespassing on railroad property and strengthen relevant enforcement strategies by improving communication among Federal, state, and local entities.⁶ FRA's efforts to mitigate trespassing on railroad property have focused on data gathering and sharing and outreach to the public, railroads, and law enforcement. FRA regulations require railroads to report deaths, injuries, and occupational illnesses arising from the operation of a railroad.⁷ This reporting requirement includes trespasser casualties. However, trespassing on railroad property is a law enforcement issue governed by state and local law,

⁶ United States Code, title 49, section 20151(b).

⁷ Code of Federal Regulations, title 49, part 225.

National Strategy to Prevent Trespassing on Railroad Property

which limits FRA's authority to address the issue. FRA, however, encourages railroads to consider the risks of trespassing accidents as part of their safety planning. When providing grants or other funding for new or existing railroads, when allowable, FRA conditions the funding on the railroad's consideration of mitigation of identified risks, including the risk of trespassing accidents.

State and Local Law Enforcement. Trespassing on railroad property is a law enforcement issue governed by state and local law. State and local law enforcement administer state trespass laws. Railroads (particularly Class I and commuter railroads) employ railroad police, whose duties typically include investigating incidents of trespassing and confronting trespassers they observe in the act of trespassing. Nationwide, railroads employ more than 1,200 railroad police personnel, whose duties include railroad employee safety, lading protection, theft investigation, and trespasser enforcement. Their status and authority as law enforcement officers varies from state to state, as does their ability to enforce state and local trespass laws.

Differences in state laws can hinder the efforts of state and local law enforcement officers, as well as those of railroad police, by making it difficult for railroads to enforce or legally address trespassing. In some states, a person who trespasses on railroad property could be guilty of a misdemeanor – punishable by a fine and/or imprisonment in state prison or county jail. Other states appear to have carved out “permissive use” or “frequent trespass” exceptions to the general rule. Under these exceptions, if the railroad has permitted the public to travel over its track at a specific location for a considerable period and a sizeable number of people have done so, the railroad could be liable for injuries to trespassers. Some states impose a knowledge requirement, i.e., a person who enters or remains on railroad property without the owner's consent must know that it is railroad property, to be guilty of trespassing. In other states, local law enforcement can address trespassing concerns on private property only when its department receives written authorization from the private property owner.

Scope of the Problem

Each day on average in the United States three people are killed or injured while trespassing on railroad property, including over 1,100 pedestrians in 2017. Approximately 800 railroads operate over 140,000 route miles and through 210,093 grade crossings to serve the communities and industries in which the U.S. population, more than 325 million people in 2017, lives and works.⁸ Railroads operate through diverse geographical areas, including congested urban centers and sparsely populated rural areas. Around major cities, the larger and denser populations result in increased passenger and freight train traffic to support that population. This increased train traffic increases the likelihood of trespassing accidents. In more sparsely populated rural areas,

⁸ FRA data and U.S. Census Bureau, *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, December 2017.

National Strategy to Prevent Trespassing on Railroad Property

local law enforcement officers and railroad police face challenges monitoring and enforcing trespassing activity along remote stretches of railroad right-of-way.

FRA presumes the number of reported trespassing accidents is a small fraction of the number of trespassing occurrences. Using data one Class I railroad shared voluntarily, FRA found the railroad's reported number of close calls⁹ was much larger than the number of casualties, excluding suicides, over the same timeframe. This difference indicates that the potential for additional trespassing casualties is significant.

In response to the House Committee's request to identify and study the factors that lead to trespassing incidents, FRA's experts from its Offices of Railroad Safety and Railroad Policy and Development studied available data. For the four-year period between November 2013 and October 2017, the team determined:

- Nationwide, excluding suicides, 4,242 pedestrians were killed or injured while trespassing on railroad property. With the 1,175 suicides included, the total rises to 5,417 people.
- Of the approximately 3,100 counties and county-equivalents in the United States, approximately 14 percent of all trespasser casualties occurred in 10 counties in 4 different states.
- In the top 10 counties, excluding suicides, 300 pedestrian trespassers were killed. With the 169 suicides included, the total increases to 469.
- 6 of the top 10 counties for trespasser casualties were in California and accounted for 7.9 percent of the U.S. total.
- The county with the most trespasser casualties, 110, was Los Angeles County, California, followed closely by Cook County(Chicago), Illinois, with 109 casualties.
- 74 percent of trespassing casualties occurred within 1,000 feet of a grade crossing.
- Slips, trips, and falls while trespassing caused 185 casualties, or 5 percent of trespassing casualties not at grade crossings.

Distance Between Trespassing Accidents and Grade Crossings

Approximately 73 percent of trespassing suicides and attempted suicide casualties and 74 percent of trespassing casualties excluding suicides occur within 1,000 feet (less than $\frac{1}{4}$ of 1 mile) of a highway-rail grade crossing. FRA global information system mapping data includes the locations of all reported pedestrian trespasser accidents, including suspected suicides and

⁹ A trespassing *close call* is a situation in which a trespasser is almost struck by a train, but escapes without injury and the incident is captured by a locomotive camera and/or reported by a train crew.

National Strategy to Prevent Trespassing on Railroad Property

attempted suicides that have occurred since July 2012. Table 2 below shows the percentage of suicide and attempted suicide trespasser accidents nationwide by distance from a grade crossing from November 2013 to October 2017. The cumulative percentage of casualties by distance from a grade crossing is also listed. Table 3 shows the number of non-suicide trespasser casualties and cumulative percentage nationwide and in the top 10 counties by distance from a grade crossing for the same period.

Table 2: Location of Suicides and Attempted Suicides, November 2013 to October 2017

Distance from a Highway-Rail Grade Crossing (feet)	Percentage of Suicides and Attempts	Cumulative Percentage of Suicides and Attempts
At a grade crossing	11 %	11 %
Within 50	7 %	18 %
50 to 100	6 %	24 %
100 to 200	10 %	34 %
200 to 300	9 %	43 %
300 to 400	7 %	50 %
400 to 500	5 %	55 %
500 to 1,000	18 %	73 %
1,000 to 5,000	24 %	97 %
5,000 to 10,000	2 %	99 %
More than 10,000	1 %	100 %

Source: FRA analysis

Table 3: Location of Pedestrian Trespasser Casualties, Excluding Suicides, November 2013 to October 2017

Distance from a Highway-Rail Grade Crossing (feet)	Casualties Nationwide		Casualties in Top 10 Counties	
	Cumulative Number	Cumulative Percentage	Cumulative Number	Cumulative Percentage
At a grade crossing	516	12 %	102	18 %
Within 50	853	20 %	27	23 %
50 to 100	1,116	26 %	29	28 %
100 to 200	1,608	38 %	56	38 %
200 to 300	1,973	46 %	49	47 %
300 to 400	2,232	53 %	42	55 %
400 to 500	2,462	58 %	31	60 %
500 to 600	2,658	63 %	20	64 %

National Strategy to Prevent Trespassing on Railroad Property

Table 3: Location of Pedestrian Trespasser Casualties, Excluding Suicides, November 2013 to October 2017

Distance from a Highway-Rail Grade Crossing (<i>feet</i>)	Casualties Nationwide		Casualties in Top 10 Counties	
	Cumulative Number	Cumulative Percentage	Cumulative Number	Cumulative Percentage
600 to 700	2,798	66 %	21	67 %
700 to 800	2,945	69 %	16	70 %
800 to 900	3,049	72 %	10	72 %
900 to 1,000	3,142	74 %	12	74 %
1,000 to 1,250	3,328	78 %	25	79 %
1,250 to 1,500	3,477	82 %	21	82 %
1,500 to 2,000	3,711	87 %	30	88 %
2,000 to 3,000	3,950	93 %	21	92 %
3,000 to 5,000	4,107	97 %	24	96 %
5,000 to 10,000	4,186	99 %	12	98 %
More than 10,000	4,242	100 %	11	100 %
Total Casualties	4,242		559	

Source: FRA analysis.

FRA Efforts to Address Trespassing

FRA has worked extensively with railroads; state, county, and local governments; and other organizations to raise awareness about the inherent dangers and consequences of trespassing. The paragraphs below describe some of the work FRA has done to address the issue. FRA's trespass prevention website¹⁰ contains many of the research and other documents referenced below.

Research. FRA research examines all aspects of trespass prevention with a focus on education, engineering, and enforcement. FRA researches new technology prototypes, systems, and components, and education and enforcement initiatives that have the potential to decrease or eliminate railroad trespassing. FRA research includes the demonstration and evaluation of new technologies and innovative safety treatments and technology transfer initiatives from other modes of transportation (e.g., use of artificial intelligence). These studies enable FRA to develop effective methods that, combined with local efforts, reduce railroad trespassing. In July 2018,

¹⁰ <https://www.fra.dot.gov/Page/P0846>.

National Strategy to Prevent Trespassing on Railroad Property

FRA published a report intended to provide a baseline measure of trespassing and suicide incident data from 2012 to 2014.¹¹

Data Analysis. FRA conducted national studies of demographic and market analysis of rail trespass fatalities in 2008 and a follow up study in 2013.¹² The objective was to establish a foundation to build an outreach or public education program and assist law enforcement to identify demographic populations most at risk. Results indicated that trespassers involved in fatal accidents are typically identifiable as white males, with an average age of 38, and with low socioeconomic status. These studies led FRA to conclude that many in this demographic might be intoxicated at the time of trespassing.

Community, Analysis, Response, and Evaluation Rail Trespass Problem-Solving Model. FRA in collaboration with Transport Canada developed and published the *Community Trespass Prevention Guide* (Guide) in 2003.¹³ This guide details a collaborative, systematic problem-solving approach for communities. Called the Community, Analysis, Response, and Evaluation rail trespass problem-solving model, the guide presents a non-regulatory approach to addressing railroad trespassing in local communities.

Collaboration with National Organizations. FRA promotes trespass prevention programs through cooperative efforts with public and private entities to encourage enforcement, educational, and engineering activities that effectively reduce trespass incidents and associated casualties. FRA collaborates with national organizations, such as Operation Lifesaver, Inc., for public outreach and education activities to increase awareness of the dangers of railroad trespassing. FRA has provided \$1 million annually through grants to Operation Lifesaver, Inc., which conducts public outreach and education activities to increase awareness of the dangers of railroad trespassing.

National Workshops. FRA hosted three workshops (in 2008, 2012, and 2015) to provide stakeholders updates on right-of-way fatality and trespass prevention activities and to solicit ideas for future actions and research priorities. The attendees generated more than 80 ideas ranging from expanded initiatives to new research projects. Their recommendations included increased signage, use of unmanned aerial vehicles, model state laws, and enforcement grants.

¹¹ FRA, *Characteristics of Trespassing Incidents in the United States (2012-2014)*, at <https://www.fra.dot.gov/eLib/Details/L19581>.

¹² <https://www.fra.dot.gov/eLib/details/L04702>.

¹³ <http://www.fra.dot.gov/Elib/Document/1265>.

National Strategy to Prevent Trespassing on Railroad Property

Law Enforcement Outreach. Through the right-of-way workshops and local activities, FRA learned that law enforcement wanted a state-by-state listing of trespassing laws. FRA issued the *Compilation of State Laws and Regulations Affecting Highway-Rail Grade Crossings* in 2013, which is also a mobile application downloadable to any handheld device.¹⁴

Costs and Effects of Railroad Trespassing

According to FRA's economic analysis, the benefits of reducing trespassing accidents can be measured in lives saved, injuries reduced, and train delays avoided. This analysis uses data reported to FRA over the five-year period from 2012 to 2016. The 9,363 reported trespassing accidents during this period cost society \$43.2 billion in fatalities and injuries (with an average cost of \$4.6 million per accident) and more than \$56.0 million in travel time delays. These calculations do not include unquantified costs to the economy, such as lost productivity, and society, such as emotional distress.

Fatalities and Injuries. The benefit of preventing a fatality or injury is measured by the value of a statistical life (VSL). VSL is the additional cost society is willing to bear for improvements in safety that reduce the expected number of fatalities by one. The U.S. Department of Transportation currently sets VSL at \$9.6 million.¹⁵ In cases of injury, a value is assigned based on a fraction of the VSL using the abbreviated injury scale (AIS). AIS categorizes injuries into levels of severity from AIS 1 (minor) to AIS 5 (critical) and assigns a dollar value to each category of injury. FRA calculated the values of the reported trespasser fatalities and injuries.

- The 4,291 reported trespasser fatalities equate to a value of fatalities over the five-year period of approximately \$41.2 billion.
- The 5,072 reported trespasser injuries equate to a value of injuries over the five-year period of approximately \$2.0 billion.¹⁶

Travel Time Delays. When a trespassing accident occurs, the train is required to stop at the accident site. One Class I railroad told FRA each time a train strikes a trespasser the initial investigation and restoration of traffic flow takes an average of four hours. During this time, passengers are waiting on the involved train. FRA estimated the value of this time by assuming

¹⁴ <https://www.fra.dot.gov/StateLaws>.

¹⁵ 2016 Revised Value of a Statistical Life Guidance.pdf at <https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-on-valuation-of-a-statistical-life-in-economic-analysis>.

¹⁶ FRA used National Automotive Sampling System values to assign a monetary value to each individual injury type.

National Strategy to Prevent Trespassing on Railroad Property

200 passengers per train¹⁷ and each passenger's time on the train is worth \$20.40 per hour.¹⁸ If the involved train is carrying freight, FRA estimated the value of this time as \$637.26 per hour.¹⁹ In addition, the conductor or engineer on the involved train has a wage rate of \$31.57 per hour.²⁰ FRA used these assumptions to estimate the value of a reduction in train delays, if all expected trespass accidents were avoided.

- The value of passenger train delays over the five-year period is \$34.1 million.²¹
- The value of freight train delays over the five-year period is \$21.9 million.²²

Unquantified Economic and Societal Costs. FRA's analysis does not include other costs that trespasser accidents impose on the economy and society. For example, accident response and investigation can delay motorists and their passengers at highway-rail grade crossings. Similarly, commercial trucks carrying freight or providing services can incur delays. Other trains must be held until a trespass accident is cleared. Costs such as wages and expenses of law enforcement personnel who conduct the initial investigations and emergency responders who assist the passengers and trespasser(s) are not quantified.

Other unquantified costs include the negative effects on the trespassers and their families and the emotional distress of involved railroad personnel and emergency responders. One railroad representative told FRA that trespasser accidents often affect even the most experienced engineers to the extent they are unable to continue to work. The railroad then has to replace them with less experienced ones. The railroad's labor and training costs rise and safety could be adversely impacted as those more experienced engineers leave the workforce.

¹⁷ FRA estimate.

¹⁸ *2016 Revised Value of Travel Time Guidance.pdf* at <https://www.transportation.gov/office-policy/transportation-policy/revised-departmental-guidance-valuation-travel-time-economic>.

¹⁹ National Cooperative Highway Research Program, *Comprehensive Costs of Highway-Rail Grade Crossing Crashes*, Report 755.

²⁰ Surface Transportation Board, 2016, at <https://www.stb.gov/econdata.nsf/WageStatistics?OpenView>.

²¹ 2,035 passenger incidents * [(\$31.57 train employee wage rate * 1.75 burdened wages * 2 employees per train * 4 hours per delay) + (200 passengers per train * \$20.40 per passenger per hour * 4 hours per delay)].

²² 7,328 freight incidents * [(\$637.26 value of goods per hour * 4 hours) + (\$31.57 * 1.75 burdened wages * 2 employees per train * 4 hours per delay)].

FRA's Field Survey - Site Review Teams' Executive Summaries

Based on the data and analysis described above, FRA deployed four trespasser site review teams to six counties in California, Illinois, Texas, and Florida. The teams were composed of FRA regional grade crossing inspectors and went to six of the top 10 counties nationwide for trespasser casualties. Each team had maps, tools, and data and reported on the number of trains passing through the area; the number of trespass violations local authorities and railroad police submitted and prosecuted; the amount of time law enforcement dedicated to addressing the issue of trespassing on railroad property; and the locations where trespassing was occurring. The teams also identified how close trespassing locations were to homeless communities and shelters, food pantries, and schools. Finally, the teams interviewed trespassers to find out why they were trespassing, if they knew they were trespassing, if they knew trespassing was illegal, and to explain the dangers of trespassing. The teams gathered data for the period November 2013 to October 2017.

In summary, the site review teams found that individuals were often making conscious decisions to trespass as a matter of convenience and generally reported that they knew they were illegally trespassing. In one instance, FRA personnel observed schoolchildren and a school official trespassing on a railroad's right-of-way. The site review teams also found that some locations lacked fencing or other physical barriers to the railroad's right-of-way, while other locations had fences that did not effectively deter trespassers. In one instance, trespassers regularly climbed or crawled through the cars of stopped trains to get to the other side of the tracks. The teams identified examples of potential poor community planning (e.g., parking lots intended for a building on the opposite side of the track from the building), and where prevention and engineering controls, such as fences, had been installed. Tables 4 to 7 below highlight each team's findings by state.

Table 4: California Counties Reviewed by FRA Region 7 Grade Crossing Inspectors

County	Rank for Number of Casualties	Number of Casualties
Los Angeles	1	110
Riverside	7	46
San Diego	9	44

Contributing Factors

- Trespassing for convenience.
- Lack of deterrence, such as fencing, enforcement, or education.

National Strategy to Prevent Trespassing on Railroad Property

Table 4: California Counties Reviewed by FRA Region 7 Grade Crossing Inspectors

Considerations for Mitigation

- Trespassers interviewed said they knew they were illegally trespassing.
 - Railroad management reported frustration with ineffective education and enforcement efforts and stated that the next step is to explore the use of engineering solutions.
 - Railroads are using a tracking process to report homeless encampments on railroad right-of-way for targeted enforcement actions.
-

Table 5: Illinois County Reviewed by FRA Region 4 Grade Crossing Inspectors

County Name	Rank for Number of Casualties	Number of Casualties
Cook (focused on Chicago)	2	109

Contributing Factors

- Of 1,081 railroad trespasser violations, 435 (40 percent) were not prosecuted; 1,034 (almost 96 percent) were filed by railroad police.
- County or city police departments issued less than 50 trespasser violations.
- Chicago Police stated that less than 1 percent of their calls are directly related to railroad trespassing, and they divert those calls to railroad police.

Considerations for Mitigation

- A significant number of trespasser fatalities occurred near homeless shelters, schools, and food pantries.
 - Most track is railroad over grade (elevated track).
 - Fencing was already installed at all locations visited; the assumption is that trespassers are climbing fences.
-

National Strategy to Prevent Trespassing on Railroad Property

Table 6: Texas County Reviewed by FRA Region 5 Grade Crossing Inspectors

County Name	Rank in Number of Casualties	Number of Casualties
Harris (focused on Houston)	4	52

Contributing Factors

- Of 228 trespassing violations issued October 2013-November 2017, 1 was prosecuted.
- Trespassers regularly climb or crawl through the cars of stopped trains rather than wait or walk around.

Considerations for Mitigation

- City of Houston officials advocated for federal funding for cameras.
- High levels of trespassing near shelters and food banks.

Table 7: Florida County Reviewed by FRA Region 3 Grade Crossing Inspectors

County Name	Rank in Number of Casualties	Number of Casualties
Palm Beach County	6	47

Contributing Factors

- Trespass occurs for convenience allowing the pedestrian a most direct path to their desired location.
- Lack of grade crossings in large sections of track contributes to trespassing for convenience.
- Mid-block public bus stops between crossings were a contributing factor to trespass.
- Multiple groups of schoolchildren and a vice-principal were observed trespassing upon school dismissal.

Considerations for Mitigation

- Trespassers interviewed admitted they knew they were illegally trespassing.
- Moving public bus stops closer to grade crossings could be a viable mitigation strategy.
- Location specific mitigations (physical barriers) to create more resistance, and in others, a need to provide a safer path of least resistance.
- A more comprehensive and focused survey should be performed to identify specific areas and effective methods of mitigation. This survey should be guided by the railroads, and should include state/local officials, state/local police departments, state/county school boards, and county/city transportation boards.

Contributing Factors

FRA's analysis of previous research and field survey identified two primary factors that contributed to trespassing incidents on railroad property and rights-of-way. First, trespassing starts with an individual choosing to enter or remain on railroad property without authority to do so. Most trespassers make this choice because crossing railroad property provides the most direct route to a desired destination. FRA's survey teams found that trespassers often knew they were illegally on railroad property. Trespassers often do not have a sufficient understanding or appreciation for the dangers of trespassing on railroad property.

Individual Contributing Factors

- a) Personal convenience.
- b) Lack of knowledge of or appreciation for the dangers of trespassing.

Second, from a community's or local government's perspective, other law enforcement and public safety issues are often the focus of their resources. FRA found in each of the top 10 counties, over a four-year period, the number of railroad trespass casualties was less than two percent of the respective county's total homicides, drug-related deaths, and highway fatalities. As a result, many communities prioritized their resources in ways that limit their ability to address railroad trespassing issues either through engineering solutions or public outreach and education. FRA's field survey confirms that railroad trespassers are rarely prosecuted, thereby reducing the perceived negative consequences of trespassing. Finally, community decisions, such as putting bus stops too far from safe crossing paths, might contribute to an increased number of trespassers.

Community Contributing Factors

- a) No (or insufficient) dedicated resources (personnel or funding).
- b) Lack of physical deterrents, such as fences, natural or engineered barriers, or obstacles.
- c) Failure to prosecute trespassers by local judicial process.
- d) Public perception of the dangers of trespassing on railroad property.
- e) Poor community planning.

Conclusion

FRA's approach to the trespassing issue has not been national or proactive, but rather a program of national outreach and education. Regional FRA staff and resources react to specific trespasser issues on a case-by-case basis. FRA's efforts have focused on data gathering, sharing, and outreach to the public, railroads, and law enforcement. FRA has considered specific trespassing problems as local problems and regional FRA safety personnel assisting local authorities and communities as the best way to address these issues. Regional FRA safety staff work with these communities and railroads to facilitate solutions to specific, local trespasser issues.

FRA's current analysis demonstrates that it needs to do more than educate and facilitate mitigation when issues arise. Proactive use of current, relevant data and analysis to identify areas at systemically high-risk for trespassing incidents is the best way to develop and facilitate implementation of specific mitigation strategies with communities, local governments, law enforcement, and impacted railroads. Education and outreach are not enough. Engineering solutions (e.g., fencing, automated video detection systems) designed to prevent or discourage trespassing on railroad property can be utilized in conjunction with frequent and consistent enforcement of trespasser laws. FRA has developed the following national strategy, focusing on four strategic areas: (1) data gathering and analysis; (2) community site visits; (3) funding, and (4) partnerships with stakeholders.

The success of this national strategy depends on several factors outside of FRA's control. FRA's ability to gather and analyze railroad trespasser close call data is the cornerstone of this strategy. Railroads have been reluctant to share this information, because FRA does not have specific statutory authority to protect this data from disclosure and use in judicial or other actions to determine damages or liability for trespasser accidents. Without this data, FRA will be unable to understand fully this complex problem and target trespassing hot spots. Trespassing is generally a matter of state and local law, and enforced at each state and municipality's discretion. Higher-priority law enforcement and other issues compete for the resources of local governments to address trespassing on railroad property. Successful implementation of this strategy will depend on the availability of sufficient resources and all stakeholders working together.

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National Strategy to Prevent Trespassing on Railroad Property

FRA's national strategy to prevent trespassing on railroad property includes four strategic focus areas: data gathering and analysis, community site visits, funding, and partnerships with stakeholders. None of these focus areas alone is sufficient for preventing trespassing and a successful strategy must include a combination of approaches. Focusing on data gathering and analysis will enable FRA to target its resources to trespassing hot spots. Conducting community site visits will help FRA and other stakeholders build a pool of successful mitigation strategies. Requesting and providing funding will assist communities directly in securing solutions and resources they need to deter trespassing and build partnerships with communities, law enforcement, railroads and other organizations in addressing the trespassing problem. FRA will be able to leverage available resources, expertise, and local knowledge to combat the problem of trespassing.

Implementation of this strategy will transition FRA's trespasser prevention program from regionally managed reactive efforts, to a centrally managed, data driven program designed to evaluate the risks of trespasser incidents throughout the Nation's rail network. It will also help FRA work with communities and local law enforcement to identify and facilitate implementation of effective mitigation strategies.

The strength of this approach is demonstrated by the following examples, identified when FRA developed this strategy.

One Central Problem. FRA survey teams identified convenience as the most consistent problem across surveyed areas—trespassers simply take the most direct routes to their desired destinations—and a main cause of trespassing, regardless of geographic location.

Three Local Solutions. FRA teams visited three communities that data indicated were hot spots for trespasser activity. FRA personnel observed trespassers crossing railroad property to travel from a bus stop to a residential neighborhood in West Palm Beach, Florida. Moving the bus stop closer to an authorized, safer crossing could eliminate the current path of convenience. FRA personnel observed people from a homeless encampment trespassing across railroad property to go into town near Riverside, California. In this case, solutions could include physical barriers, enhanced law enforcement presence, or relocating the homeless population to a safer location. In Oceanside, California, FRA personnel observed trespassers crossing railroad property to travel from a residential neighborhood to the beach. Because neither the neighborhood nor the beach is a candidate for relocation, solutions to this problem could include physical barriers and additional enforcement.

FRA's initial focus on gathering and analyzing appropriate data to identify trespassing hot spots led the agency to send teams to conduct site visits. FRA identified mitigation strategies based on

National Strategy to Prevent Trespassing on Railroad Property

the specific local circumstances. FRA's next step is to engage with local partners at each location to examine the feasibility of implementing appropriate mitigation measures.

The Four Strategic Areas of the National Strategy

Strategic Area 1. Data Gathering and Analysis. FRA's strategy will be driven by reliable data. FRA will seek ways to improve the integration and presentation of this data into a more thorough picture of the trespass issue. FRA identified the 10 counties in the United States with the highest number of railroad trespassing casualties, yet FRA is missing a key piece of data that will enable it to identify geographical areas for the highest risk of trespassing incidents in the future.

FRA might not receive data related to trespassing incidents that do not result in death or injuries. A trespasser close call (or sometimes referred to as a *near-hit*) is a situation in which a trespasser is almost struck by a train, but escapes without injury and the incident is captured by a locomotive camera or reported by a train crew. This data is critical to identify the areas that are at high risk of trespasser accidents due to the number of trespasser close calls that occur in the area.

Obtaining trespasser close call incident data is essential to successful implementation of any data driven proactive approach to addressing the trespasser issue. Close call data would enable FRA to better identify trespasser hot spots and could be particularly beneficial in deploying law enforcement and railroad police more efficiently and determining what, if any, engineering solutions may be feasible in particular circumstances. Thorough analysis of close call data would allow FRA to direct our resources to areas of highest value and to share risk information with our partners.

Many railroads already collect trespasser close call data for their own use. Railroads have not been willing to share this information with FRA without specific statutory authority to protect the data from disclosure and use in judicial or other actions to determine damages or liability for trespasser accidents or incidents. However, federal law does not prohibit the use of this data as evidence in federal or state court proceedings or other actions for damages or to determine liability for trespasser accidents or incidents. Other operating administrations, such as the Federal Highway Administration, have statutory authority²³ to protect disclosure of data gathered for highway safety projects.

Strategic Area 2. Community Site Visits. FRA will send teams to conduct site visits in communities with high numbers of trespass incidents. These teams will learn more about the specific local factors that contribute to trespassing and will work with local partners to help them implement, and evaluate the effectiveness of, targeted mitigation strategies. Curtailment of trespassing in these areas will contribute to a pool of successful strategies for use in other

²³ United States Code, title 23, section 409.

National Strategy to Prevent Trespassing on Railroad Property

communities. FRA will use this data to develop a trespass risk model to identify the current and future risk of trespassing for communities across the country.

Strategic Area 3. Funding. Funding is an important part of the direct and tangible support necessary to help communities reduce the number of trespassing incidents. Funding is necessary to enable local communities to implement targeted trespasser mitigation strategies, such as engineering solutions, law enforcement overtime, school resource officers, or community outreach. In February 2018, FRA published a notice of funding opportunity for a law enforcement pilot grant program aimed at evaluating the effectiveness of local law enforcement activities intended to reduce trespassing on railroads.²⁴ This \$150,000 grant opportunity was open to state, county, municipal, local, and regional law enforcement agencies in communities with a demonstrated rail trespass problem. FRA received final applications in April 2018 and expects to award the grants in the fall of 2018. FRA will evaluate the programs over six-month periods of performance.

FRA will work to increase stakeholder awareness of other funding opportunities. For example, trespassing prevention projects, including grade crossing improvements and engineering solutions targeting trespassing (e.g., barriers), could be eligible for funding under the Consolidated Rail Infrastructure and Safety Improvements (CRISI), Restoration and Enhancement, or Federal State Partnership for State of Good Repair grant programs. Congress provided approximately \$960 million in FYs 2017 and 2018 for these grants, with some set-asides for specific priorities. FRA encourages potential applicants to contact FRA for technical assistance before applying for these programs, given the variation in program requirements.

Strategic Area 4. Partnerships with Stakeholders. FRA will continue to work with communities, local governments, law enforcement agencies, railroads, and other interested parties to combat the problem of trespassing. To maximize our reach and effectiveness, FRA will work with organizations whose goals align with ours, collaborating and breaking down silos to share knowledge and data, thematic with the Department's priorities on safety. This includes sharing information and meeting directly with leadership from groups such as Operation Lifesaver, Inc., to raise awareness in hot spot communities; the Global Rail Alliance for Suicide Prevention to share strategies to deter suicides by rail; the Substance Abuse and Mental Health Services Administration to reduce the number of suicides; International Association of Chiefs of Police to share ideas with law enforcement; the National Organization of Youth Safety to find ways to reach younger populations more effectively; and community groups and leaders who have in-depth knowledge of their local problem areas.

Transport Canada, the Department's counterpart agency, is considering options for addressing the railroad trespasser issue in Canada. Transport Canada is developing a document addressing the history of the trespassing issue, access controls, and policy options for consideration. FRA

²⁴ Federal Register, volume 83, number 7842, Feb. 22, 2018.

National Strategy to Prevent Trespassing on Railroad Property

reviewed Transport Canada's draft document, shared a draft of this report with Transport Canada, and held a teleconference to discuss both documents. Transport Canada's findings are similar to the findings in this report and FRA intends to continue collaborating with Transport Canada to share ideas and additional discoveries to create a stronger strategy for both agencies.

Metrics for Success

The success of this national strategy depends not only on FRA's actions, but also on the resources and actions of stakeholders. FRA will measure the success of this national strategy by the relative levels of stakeholder engagement on the issue and implementation of specific mitigation strategies that reduce trespasser accidents at identified hot spots. FRA will also measure the success of this national strategy by the change in the nationwide number of trespassing accidents.

Implementation Milestones and Timeline by Strategic Area

FRA expects to implement the national strategy, subject to the availability of resources, according to the following milestones in Table 8.

Table 8. Implementation Milestones and Timeline by Strategic Area

Milestone	Timeline
Strategic Area 1. Data Gathering and Analysis	
1. Transition from a regionally managed to a centrally managed, data driven program to support trespasser prevention activities.	Complete by January 2019
2. Identify, through independent analysis and collaboration with railroads and other stakeholders, known and new data sources that could better identify trespasser hot spots or risk factors that lead to trespassing.	Start by January 2019
3. Explore statutory, regulatory, or other authorities to protect railroad near-hit and close-call data from disclosure.	Start in FY 2019
4. Identify, through collaboration with railroads as appropriate, existing and potential new analytical tools (including risk models) to effectively analyze trespasser data.	Start by January 2019
5. Develop an FRA trespass risk model to identify current and future risk of rail trespassing in communities across the country (identify hot spots).	Complete by December 2019
6. Use developed risk model to perform initial risk assessments on identified hot spots	Complete by January 2020
7. Consider changes to accident and incident reporting regulations to improve rail trespasser data. Propose rule, if changes justified.	Complete by September 2020

National Strategy to Prevent Trespassing on Railroad Property

Table 8. Implementation Milestones and Timeline by Strategic Area

Milestone	Timeline
Strategic Area 2. Community Site Visits	
8. Develop system of communicating currently available data to FRA regions for targeted grade crossing and trespasser prevention program inspector and specialist actions.	Complete by March 2019
9. Develop standard operating practices and procedures for FRA community site visits, reporting, and monitoring effectiveness of any mitigation strategy employed.	Complete by June 2019
10. Assign regional assets to identified hot spots and arm them with data necessary to engage railroads, police and local governments in partnerships to identify location specific causal factors and assist with identifying and implementing mitigation strategies.	Start in July 2019
Strategic Area 3. Funding	
11. Work through the executive and Congressional budget cycles and reauthorization process to identify funds to strengthen grant programs that provide funding for trespasser mitigation, such as engineering solutions, law enforcement overtime, school resource officers, and outreach.	Start in FY 2019
12. Work through the executive and Congressional budget cycles to identify funds for a national trespasser public service announcement campaign. Develop a series of announcements for distribution in targeted areas with high number of trespassing accidents.	Start in FY 2019
13. Work through the executive and Congressional budget cycles to identify funds for advocacy organizations to develop focused surveys of communities where trespasser incidents have been a persistent problem. Additional funding will be used to develop forms to collect information from the surveys, establish a database, and prepare reports for the communities and FRA.	Start in FY 2019
14. Provide information on availability and process for applying for FRA grants and other funding (e.g., law enforcement and CRISI grants) during focused surveys and outreach.	As funding becomes available

National Strategy to Prevent Trespassing on Railroad Property

Table 8. Implementation Milestones and Timeline by Strategic Area

Milestone	Timeline
Strategic Area 4. Partnerships with Stakeholders	
15. Develop system of sharing trespasser hot spot data with advocacy organizations to focus their activities where they will yield the greatest returns on investment and establish communication and reporting procedures to share information and provide feedback on effectiveness of efforts.	Complete by April 2019
16. Collaborate and partner with government agencies, such as the Substance Abuse and Mental Health Services Administration, to develop and implement targeted outreach to address suicides by train. As appropriate, collaborate with international organizations, such as the Global Rail Alliance for Suicide Prevention, to share ideas on effective strategies to deter suicides by rail.	Complete by December 2020
17. Partner with law enforcement and other organizations (e.g., International Association of Chiefs of Police, National Organization of Youth Safety) to collaborate on effective trespass prevention and mitigation measures (e.g., enforcement of trespass laws, methods to raise awareness and more effectively reach younger population to prevent trespassing)	Complete by December 2019
18. Partner with the leaders of local communities to improve trespass prevention. Initially, FRA will communicate directly with the leadership of counties identified as having the highest number of railroad trespasser casualties.	Start by July 2019
19. Host trespasser prevention summits with representatives of the top 10 counties. Summits will include local community leaders, law enforcement, railroads and the public.	Complete by July 2020
20. Assist other agencies and organizations in developing and targeting trespasser prevention outreach campaigns to localities identified as trespassing hot spots.	Complete by July 2020

EXHIBIT D



CITY OF DEL MAR

April 21, 2020

Jack Ainsworth
Executive Director
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105

RE: Federal Consistency Review of SANDAG Emergency Repair to Del Mar Bluffs

Dear Mr. Ainsworth:

On behalf of the City of Del Mar City Council, please consider this request with respect to the California Coastal Commission's (CCC) Federal Consistency Review of the San Diego Association of Government's (SANDAG) emergency repair work along a section of coastal bluff in Del Mar southwest of Seagrove Park. While the City has expressed support for SANDAG's previous bluff stabilization projects, including most recently Phase IV, the emergency repair work should include mitigation for impacts to aesthetics and a commitment by the CCC for any future bluff stabilization project as outlined below.

The area of bluff failure and emergency repair work is entirely located within the City's Beach Overlay Zone (B-OZ), the Coastal Bluff Overlay Zone (CB-OZ), and the Open Space Overlay Zone (OS-OZ) all of which are Implementing Ordinances in the City of Del Mar's certified Local Coastal Program (LCP). The LCP is incorporated into the Del Mar Municipal Code (DMMC), in part, as Chapters 30.50 (B-OZ), 30.55 (CB-OZ), and 30.60 (OS-OZ). Accordingly, the Standard of Review for this emergency repair is the certified Del Mar LCP, which includes a Shoreline Protection Line (SPP) within the B-OZ that follows the approximate center line of the railway tracks as specified in Exhibit B of the B-OZ.

The emergency repair work included the construction of bluff stabilization devices (retaining walls) adjacent to the track bed for two sections of the failing bluff and the excavation of loose soil to provide a stable working area. However, the emergency repair resulted in exposed vertical walls visible from the beach below and the excavated soil was not replaced. While the repair did include shotcrete wall treatments intended to blend the wall face into the adjacent bluff, the City requests mitigation be required to cover the walls entirely with natural material including soil and native plantings. Under the certified Del Mar LCP (DMMC Section 30.50.060), the construction of a protective structure may be authorized if it meets a list of findings – in particular Finding G, which reads:

G. Will, if there is a vertical wall element in the proposed protective structure, have the seaward face of the vertical wall located within the Shoreline Protective Area only if there is no other feasible location for effectively protecting a principle structure; there is no feasible, less environmentally damaging alternative; **and feasible mitigation measures have been provided to minimize adverse environmental effects; but in no event have**

the seaward face of the vertical wall more than five feet westward of the Shoreline Protection Area line; (emphasis added)

As constructed, it is the City's position that the exposed vertical walls (albeit treated with shotcrete) are not consistent with the **bolded** section above and should include feasible mitigation to minimize adverse environmental effects to Aesthetics. This mitigation should be added as part of the CCC's Federal Consistency Review. This mitigation is further supported by the fact that the location of the walls are more than five feet westward of the SPP line (which follows the approximate center line of the railway tracks) and, although the wall location is justified to address the emergency, the walls should not be visible with the incorporation of feasible mitigation. Further, the completed grading does not appear to be consistent with the coastal bluff setback provisions in DMMC Section 30.55.080 and the City is unaware if a geotechnical report has been provided to the CCC to sufficiently address the requirements of DMMC Section 30.55.090.

While the City understands that permanent failure of the Del Mar Bluffs would severely impact the local and regional economy and be detrimental to passenger and freight movement along the Los Angeles – San Diego – San Luis Obispo (LOSSAN) Rail Corridor, the perpetual reliance upon long-term stabilization efforts along the Del Mar Bluffs must be reconsidered sooner than later. While the City understands that SANDAG is currently evaluating alternatives for an inland relocation of the rail corridor, the City requests a commitment by the Coastal Commission as part of this emergency repair Federal Consistency Review that any future bluff stabilization project proposed by SANDAG will:

- 1) Prepare a report and hold ample community meetings to solicit public feedback as a prerequisite to submitting a project for Federal Consistency Review:
 - a) The report shall outline what was presented, what feedback was heard, and how the project was modified as a result (or not modified with an explanation why);
- 2) Go through a full Federal Consistency Review process with ample public notice provided, including all interested parties and affected cities;
- 3) Be required to thoroughly analyze the project under the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) and make the draft documents available for public review and comment;
- 4) Include a comprehensive analysis of the long-term effects on sand supply and coastal processes resulting from the proposed use of bluff stabilization structures; and
- 5) Analyze feasible alternative designs for the permanent, inland relocation of the rail corridor including:
 - a) Anticipated funding sources;
 - b) Reasonable timeframe for construction; and
 - c) Use of NCTD bluff right-of-way post-relocation for purposes of public access, recreation, and open space.

Executive Director Ainsworth

April 21, 2020

Page 3

Thank you for your consideration of the City's request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ellie Haviland".

Ellie Haviland

Mayor

Attachments:

Exhibit A: Photos of Completed Vertical Wall

Exhibit B: SANDAG Bluff Repair Presentation (February 3, 2020)

Exhibit C: Del Mar LCP Beach Overlay Zone (DMMC Chapter 30.50)

Exhibit D: Del Mar LCP Coastal Bluff Overlay Zone (DMMC Chapter 30.55)

Cc:

Larry Simon, CCC

Gabe Buhr, CCC San Diego District

Bruce Smith, SANDAG

Allie DeVaux, SANDAG





EXHIBIT B

NORTH COUNTY
TRANSIT DISTRICT



LOSSAN

Coastal Rail Corridor

San Diego Segment

Los Angeles • San Diego • San Luis Obispo



Building Today. Boarding Tomorrow.

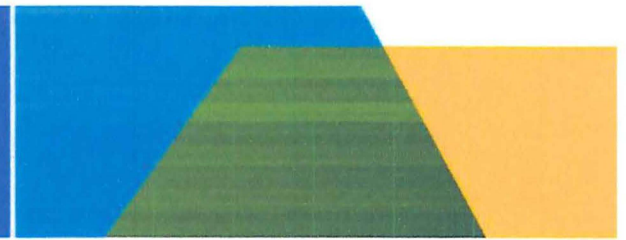
Del Mar Bluffs Emergency Project

November 2019

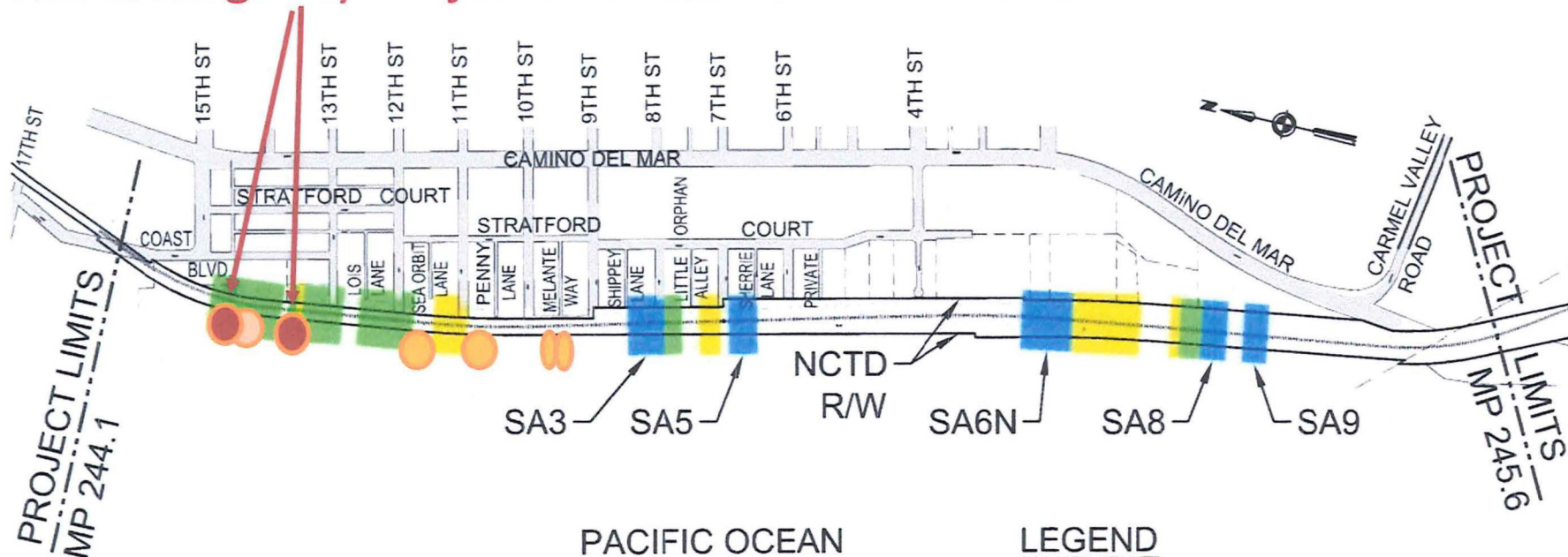
KeepSanDiegoMoving.com

Del Mar Bluffs Emergency Project

November 2019 Erosion



DMB Emergency Project: 14th-15th Street in 2019



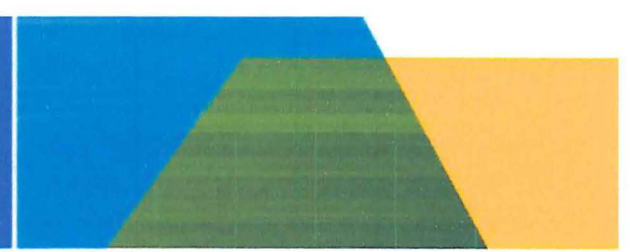
Del Mar Bluffs 2 and 3 – installed 230 piles and made drainage improvements

LEGEND

- DMB 2
- DMB 3
- DMB FUTURE
- RETREAT EVENTS 2018
- BLUFF EROSION NOV 2019
- SA STABILIZATION AREA

DMB Emergency Project

Storm Damage west of 14th Street



November 28-29, 2019

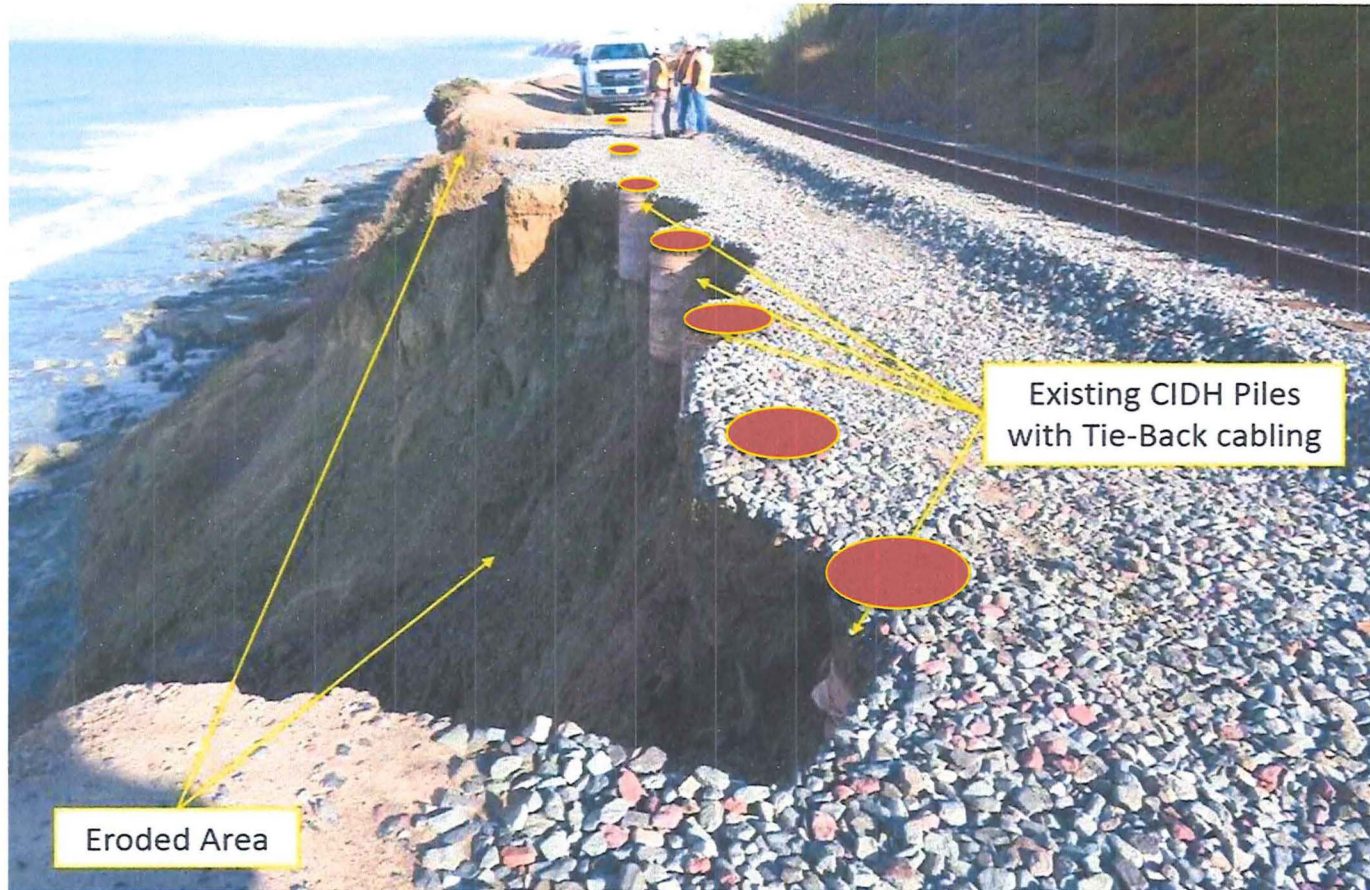
DMB Emergency Project Repairs

14th Street, Dec. 1, 2019



DMB Emergency Project Storm Damage

15th Street, December 1, 2019



Water running over bluff exposed the piles that are 3ft. in diameter and 40 to 60 ft. deep with 45 ft. long tie-back anchors. Piles designed to support track in case of bluff face slide or erosion

DMB Emergency Project Repairs

15th Street December 14 – 15, 2019



DMB Emergency Project

Completed Repair 15th Street

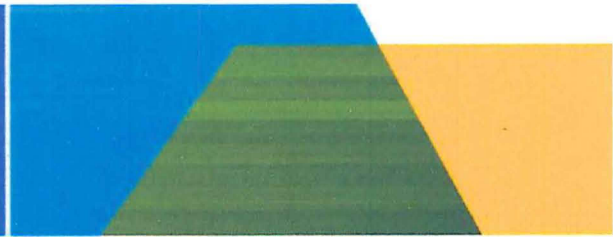


EXHIBIT C

Chapter 30.50

BEACH OVERLAY ZONE

Adopted as an Initiative on April 12, 1988

30.50.010 Purpose. The Beach Overlay Zone created by this initiative is established to regulate the uses of the Del Mar beach area, a distinct and valuable natural resource, for the benefit of present and future generations. The regulations contained herein shall be administered so as to protect public access to and along the shoreline, while promoting public safety, health and welfare, and providing for the protection of private property. [Ord. 722]

30.50.020 Zone Boundaries. The boundaries of the Beach Overlay Zone are as described in Exhibit A, incorporated herein by reference.

30.50.030 Permitted Uses. Permitted uses within the Beach Overlay Zone shall be those allowed in the underlying zone, subject to the regulations contained in the Beach Overlay Zone which shall prevail in the event of conflict with any other provisions of the City Code.

30.50.040 Definitions.

A. "Shoreline Protection Area" shall mean that area which is within the Beach Overlay Zone and is located from south to north along the shoreline of the City being more particularly described as follows: All lands located westerly of the line as described in Exhibit B, incorporated herein by reference.

B. "Development" shall mean the placement or construction of any solid material or structure on land, to include without limitation, any human directed alteration of the land and the planting, cultivation or maintenance of any vegetation.

C. "Protective Structure" shall mean any privately or publicly owned development designed to protect property inland from such structure from ocean flooding or wave damage.

30.50.050 Development Within The Shoreline Protection Area. No development shall occur within the shoreline area

except such privately owned protective structures, publicly owned protective structures, and publicly owned development authorized, constructed, and maintained in accordance with the regulations set forth in the City Code.

30.50.060 Authorized Protection Structures. The construction of a protective structure located within the Shoreline Protection Area may be authorized by the issuance of a Shoreline Protection Permit, if the City Council finds following notice and public hearing that the proposed protective structure:

A. Is 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 to local shoreline sand supply;

B. Will minimize risks to life and property in areas of flood hazards;

C. Will assure stability and structural integrity and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area, nor in any way substantially alter natural landforms along bluffs and cliffs;

D. Is in conformity with the certified Coastal Program after certification of the Local Coastal Program;

E. Is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act;

F. Has material and design which are consistent with good engineering practices;

G. Will, if there is a vertical wall element in the proposed protective structure, have the seaward face of the vertical wall located within the Shoreline Protective Area only if there is no other feasible location for effectively protecting a principle structure; there is no feasible, less environmentally damaging alternative; and feasible mitigation measures have been provided to minimize adverse environmental effects; but in no event have the seaward face of the vertical wall more than five feet westward of the Shoreline Protection Area line;

H. Will, if other than a vertical wall, meet all the conditions of Subsection G above;

I. Will, if there is a riprap element in the proposed structure:

1. Have the riprap extending no more than 20 feet westward from the Shoreline Protection Area line.

2. Have a westward slope beginning no higher than a 5.7 foot elevation (NGVD) at the Shoreline Protection Area Line, decreasing in height at a minimum rate of one vertical foot for every one and one-half feet of lateral distance, the riprap extends westerly of the SPA line.

30.50.070 Permit Application Procedure.

A. An application for a Shoreline Protection Permit shall be made to the City Manager on forms provided by the City. The applicant shall pay a fee determined by the City Manager to be sufficient to pay for the costs of notice and the processing of the application for City Council consideration to include prehearing CEQA processing and any consulting costs incurred by the City.

B. The application shall include the full description of the development and the applicant's proposal, together with supporting evidence on each issue raised by the application. Where deemed necessary by the City Manager, the application will include information as prepared by either a registered engineer or a land surveyor and an environmental consultant.

C. Following the required CEQA processing, the City Manager shall cause the application to be set for a noticed administrative hearing before the City Council. The City Manager shall cause to be published, at least ten days before the date set for the administrative hearing, a notice of application. The notice of application shall also be concurrently posted on the site of the subject development and mailed to each person who has filed a written request for such notice, giving their name and mailing address. The notice of application shall contain:

1. A description of the subject development;
2. The purpose of the application;

3. The date and time of the meeting at which the administrative hearing will be conducted;

4. A statement that the hearing will be open to the public and to public discussion.

30.50.080 Issuance Shoreline Protection Permit.

A. It shall be unlawful to construct or maintain a privately owned protective structure or maintain privately owned development within the Shoreline Protection Area without first having obtained a Shoreline Protection Permit from the City Council.

B. The City Council may issue a Shoreline Protection Permit authorizing the following:

1. The construction and maintenance of a privately owned protective structure in accordance with the regulations of this ordinance.

2. The maintenance of a privately owned protective structure or privately owned development constructed prior to and in nonconformance with the Beach Overlay Zone regulations for the duration of the amortization term established for such privately owned protective structure or privately owned development.

3. The private financing, construction and/or maintenance of a publicly owned protective structure authorized by the Beach Overlay Zone regulations.

C. A Shoreline Protection Permit shall:

1. Contain waivers, indemnification and hold harmless provisions as required by the City Council at the time of approval.

2. Contain such conditions as the City Council determines to be necessary to accomplish the purposes of the Beach Overlay Zone.

3. Shall require a reasonable user fee to be determined by the City Council.

4. Be recorded in a manner to bind successors in interest.

30.50.090 Emergency Reinforcement.

A. Where property inland from a protective structure is being immediately threatened by ocean flooding or wave damage, a shoreline protection permittee may temporarily increase the height and bulk of the protective structure. The permittee shall, within fifteen days from the end of the emergency condition, remove the temporary protection from the Shoreline Protection Area. Said emergency reinforcement shall be subject to other requirements contained in the California Coastal Act.

B. In the event such added temporary protection remains beyond April 15 in any year, the City shall remove such added structure within ten days and shall charge the owner the cost of removal, placing a lien on the property for such cost.

30.50.100 Shoreline Protection Area: Removal of Noncomplying Development.

A. Privately owned development within the Shoreline Protection Area constructed before the effective date of and in nonconformity to the Beach Overlay Zone regulations shall be abated immediately by the person or persons who constructed, now use and/or maintain such development; unless a Shoreline Protection Permit has been obtained establishing an amortization period of such development.

B. The following privately owned development within the Shoreline Protection Area shall constitute a public nuisance. In addition to other remedies provided by law, all direct and indirect costs, including legal expenses, incurred by the City of Del Mar in abating such nuisance shall become a lien on the property and a personal obligation of the person or persons who constructed, now use and/or now maintain such development, and shall be a special assessment against said property to be collected as ordinary municipal taxes.

1. Privately owned development which was constructed before the effective date of and in noncompliance with the regulations of the Beach Overlay Zone and thereafter is maintained either without or contrary to the terms of a Shoreline Protection Permit.

2. Privately owned development which is constructed and maintained after the effective date of and in noncompliance with the regulations of the Beach Overlay Zone.

30.50.110 Shoreline Protection Area: Determination of Noncomplying Developments, Amortization Term.

A. The City Manager shall investigate and identify within a period of no later than six months following the date of the enactment of this ordinance the existence of any development within the Shoreline Protection Area that is not in compliance with the requirements of the Beach Overlay Zone.

B. The City Manager shall prepare a preliminary recommendation identifying the noncomplying development, and designating an abatement procedure to include an amortization period calculated as follows:

For every \$5,000.00 of initial construction costs on each individual lot, the noncomplying development may remain for one year following its initial construction, not to exceed ten years. The City Manager shall determine the initial cost of construction based upon the best information available.

C. The City Manager shall cause a Notice of Preliminary Recommendation to be sent by certified mail, return receipt request, and by first class postage prepaid mail to the address of record listed in the County Recorder's office, and to such other address of which the City Manager has actual knowledge of the person or persons who constructed, now use, and/or now maintain the privately owned development. In addition, the Notice of Preliminary Recommendation shall be concurrently posted in a conspicuous location at the development site and shall be mailed to persons who have registered their names and addresses with the City indicating an interest in obtaining such notice. Further, the notice shall be published in accordance with the provisions of this ordinance at least 15 days prior to the administrative hearing thereon.

30.50.120 Notice of Preliminary Recommendation. The Notice of Preliminary Recommendation shall contain the following:

A. The preliminary recommendation.

B. The date and time of the City Council meeting at which an administrative hearing will be conducted.

C. A statement that the City Council, following the completion of the administrative hearing, will make a final determination of the foregoing matter and may record a Notice of Abatement against the property of persons found to be responsible for removing the development.

D. A statement that the hearing will be open to the public and to public discussion.

30.50.130 Determination of Noncompliance and Abatement.

A. Following the administrative hearing, the City Council shall reach a final determination as to whether the development is noncomplying, whether it constitutes a nuisance, and the final determination of an abatement procedure consistent with the terms of this ordinance. The City Council shall base its determination on any information presented during the administrative hearing that may be constitutionally considered.

B. After such final determination, the City shall give the notice, provided for in Section 12, C, notifying the noncomplying owner, notifying such persons that they have thirty days from the date of the notice to remove the noncomplying development; that upon a showing of good cause, this period may be extended for a longer period but not to exceed ninety days.

C. If the owner of the noncomplying development does not remove it within the required period, the City Council shall direct the City Attorney to take immediate action to abate the nuisance created by the development, including the taking of any necessary legal action to abate the same. The City will recover the expense of such actions as provided in Section 10, B.

30.50.140 New Construction or Reconstruction. No reconstruction or remodeling of a structure when 50% or more of the lot's permitted floor area is involved and no new construction shall be located within 15 feet east of the Shoreline Protection Area line. Patio and landscaping improvements not to exceed six feet in height, and which

provide adequate drainage of excess water resulting from storm and/or wave conditions shall be exempt from this section. Said drainage capabilities shall be reviewed and subject to approval of the City Engineer at the time of application.

30.50.150 Shoreline Protection Area: Publicly Owned Development. Within the Shoreline Protection Area, the City Council may authorize the construction and maintenance of lifeguard facilities.

30.50.160 Development of Shoreline Protective Structures Landward of the Shoreline Protection Area Line. Protective structures as defined in this Chapter may be developed on private property landward of the Shoreline Protection Area line, irrespective of any otherwise applicable setback requirements imposed by the Municipal Code. No variance shall be required for the same. [Ord. 543]

30.50.170 Application Procedure and Processing. The application procedure for such an application shall be the same as specified in this Chapter for shoreline protective structures on or seaward of the Shoreline Protection Area line, except that the application shall note that the project is to be constructed landward of said line, and such applications shall be processed in the same manner, provided that such applications shall go to the Planning Commission rather than the City Council for final approval. The decision of the Planning Commission shall be subject to appeal to the City Council in conformance with 1.12 of the Del Mar Municipal Code. [Ord. 543]

30.50.180 Criteria for Approval. Property owners shall have a right to construct protective structures on their private property landward of the Shoreline Protection Area line provided that the Planning Commission makes the findings specified herein in Section 30.50.060, provided that no portion of the structure or riprap, if any, may extend beyond the Shoreline Protection Area line. Such permits shall be subject to such conditions as the Planning Commission may reasonably impose, including conditions C(1), (2), and (4) of Section 30.50.080 of this Chapter. [Ord. 543]

30.50.190 Emergency Reinforcement. Emergency protective structures may be installed landward of the Shoreline Protection Area line in conformance with the same procedures

and criteria specified in Section 30.50.090 of this Chapter.
[Ord. 543]

30.50.200 Shoreline Protection Area: Removal of Noncomplying Development. Protective structures approved landward of the Shoreline Protection Area line shall not be deemed to be nonconforming for any purpose under any other provision of the City's General Plan, Zoning Ordinance, or Design Review Ordinance. The provisions of this Chapter 30.50 with respect to such projects shall prevail and supercede any other provisions of the Municipal Code which would otherwise apply to such applications. [Ord. 543]

[This Chapter of the Municipal Code forms a portion of the City of Del Mar Local Coastal Program Implementing Ordinances. The regulations found within this Chapter are not subject to "relief" through the Del Mar Variance process. Exceptions to, or relief from, the requirements found within this Chapter are limited to those specified within the language of this Chapter or found within other Chapters of the Implementing Ordinances. Where there is a conflict between the language of this Chapter and other portions of the Del Mar Municipal Code, the language of this Chapter shall take precedence.]

EXHIBIT A

All land lying westerly of a line extending southerly from the northern City boundary along the westerly right-of-way line of Camino del Mar, then turning westerly along the northerly right-of-way line of 29th Street, then turning southerly along the westerly right-of-way of Ocean Front, then turning easterly along the southerly right-of-way line of 17th Street, then turning southerly along the westerly right-of-way line of Coast Boulevard, and then following southerly along the easterly right-of-way line of the AT&SF Railway to the southern City boundary.

EXHIBIT B

FOLLOWING IS THE DESCRIPTION OF A LINE KNOWN AS THE "SHORELINE PROTECTION LINE" AS IS DEFINED IN THE CITY OF DEL MAR ZONING ORDINANCE, BEACH OVERLAY ZONE, D.M.M.C. CHAPTER 30; SAID LINE EXTENDING FROM THE NORTHERLY CORPORATE BOUNDARY TO THE SOUTHERLY CORPORATE BOUNDARY OF THE CITY OF DEL MAR IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 1 OF MAP 6838, SAID POINT BEING LOCATED ON THE SOUTHERLY EXTENSION OF THE CENTERLINE OF SIERRA AVENUE AND ON THE NORTHERLY CORPORATE BOUNDARY LINE OF THE CITY OF DEL MAR:

1. THENCE WESTERLY ALONG SAID NORTHERLY BOUNDARY LINE NORTH 89 DEGREES 35'36" WEST, 458.98 FEET (RECORD - NORTH 89 DEGREES 49'32" EAST) TO THE "TRUE POINT OF BEGINNING;"
2. THENCE LEAVING SAID NORTHERLY CORPORATE BOUNDARY LINE DUE SOUTH A DISTANCE OF 362.08 FEET;
3. THENCE SOUTH 12 DEGREES 58'16.0" EAST, 182.66 FEET;
4. THENCE SOUTH 54 DEGREES 11'22.8" EAST, 60.01 FEET;
5. THENCE SOUTH 23 DEGREES 58'07.5" EAST, 90.00 FEET TO A POINT COINCIDENT WITH THE NORTHEASTERLY CORNER OF THE CITY OF DEL MAR SEA BLUFF PRESERVE;
6. THENCE SOUTHERLY ALONG THE EASTERLY BOUNDARY LINE OF SAID SEA BLUFF PRESERVE, SOUTH 23 DEGREES 58'07.5" EAST, 428.26 FEET;
7. THENCE LEAVING SAID EASTERLY BOUNDARY LINE OF SAID SEA BLUFF PRESERVE, SOUTH 13 DEGREES 50'16.1" EAST, 987.41 FEET TO A POINT ON THE EAST FACE OF A SEAWALL AS IT EXISTED ON JANUARY 11, 1986, SAID SEAWALL LOCATED SOUTHERLY OF THE SAN DIEGUITO RIVER;
8. THENCE SOUTHERLY SOUTH 8 DEGREES 26'48.8" EAST, 273.20 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986;

9. THENCE SOUTH 9 DEGREES 04'07.8" EAST, 269.57 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986;

10. THENCE SOUTH 8 DEGREES 59'16.2" EAST, 449.91 FEET TO A POINT ON THE EASTERLY FACE OF SAID SEAWALL AS IT EXISTED ON JANUARY 11, 1986; SAID POINT BEING LOCATED ON THE SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET AS SHOWN ON RECORD OF SURVEY 679,9056 & 9551;

11. THENCE WESTERLY ALONG SAID SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET, SOUTH 81 DEGREES 01'01" WEST, 0.89 FEET (RECORD - SOUTH 80 DEGREES 48' WEST);

12. THENCE LEAVING SAID SOUTHERLY RIGHT-OF-WAY LINE OF 29TH STREET, FOLLOWING A LINE PARALLEL TO AND 120.00 FEET WESTERLY OF THE CENTERLINE OF THE ALLEY KNOWN AS OCEANFRONT AS SHOWN ON RECORD OF SURVEY 9551, SOUTH 8 DEGREES 59'56.2" EAST, 440.00 FEET (RECORD SOUTH 9 DEGREES 10' EAST) TO A POINT LOCATED ON THE NORTH RIGHT-OF-WAY LINE OF 27TH STREET AS SHOWN ON RECORD OF SURVEY 9551;

13. THENCE EASTERLY ALONG SAID NORTHERLY RIGHT-OF-WAY LINE OF 27TH STREET NORTH 81 DEGREES 20'36.7" EAST, 10.21 FEET (RECORD - SOUTH 80 DEGREES 50' WEST);

14. THENCE LEAVING SAID NORTHERLY RIGHT-OF-WAY LINE OF 27TH STREET AND CONTINUING ALONG A LINE COINCIDENT WITH THE EASTERLY RIGHT-OF-WAY LINE OF A 20.00 FOOT WIDE ALLEY AS SHOWN ON MAP 1737, SOUTH 9 DEGREES 00'34.3" EAST, 480.02 FEET (RECORD - SOUTH 9 DEGREES 10' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 25TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 26, MAP 1737;

15. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF A 15 FOOT WIDE PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 9 DEGREES 00'34.3" EAST, 140 FEET (RECORD - SOUTH 80 DEGREES 50' EAST) TO AN ANGLE POINT, SAID ANGLE POINT BEING THE SOUTHWEST CORNER OF LOT 7, BLOCK 127, MAP 1450;

16. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF SAID PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 7 DEGREES 15'27.3" EAST, 102.13 FEET (RECORD - SOUTH 7 DEGREES 07' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 24TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 13, BLOCK 127, MAP 1450;

17. THENCE CONTINUING ALONG THE EASTERLY RIGHT-OF-WAY LINE OF SAID 15 FOOT PUBLIC SIDEWALK AS SHOWN ON MAP 1450, SOUTH 6 DEGREES 15'34.1" EAST, 690.00 FEET (RECORD - SOUTH 6 DEGREES 24' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 13, BLOCK 124, MAP 1450;

18. THENCE EASTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET, NORTH 83 DEGREES, 39'25.5" EAST, 20.10 FEET (RECORD - SOUTH 83 DEGREES 36' WEST);

19. THENCE LEAVING SAID NORTHERLY RIGHT-OF-WAY LINE OF 21ST STREET AND CONTINUING SOUTHERLY ALONG THE EASTERLY LINE OF LOT 22 AS SHOWN ON MAP 1277, SOUTH 6 DEGREES 15'32.2" EAST, 114.20 FEET (RECORD - SOUTH 56 DEGREES 24 FEET EAST) TO AN ANGLE POINT LOCATED ON THE WESTERLY LINE OF LOT 19, BLOCK 115, MAP 1277, A DISTANCE THEREON SOUTH 6 DEGREES 15'32.2" EAST, 19.00 FEET (RECORD - SOUTH 6 DEGREES 24" EAST) FROM THE NORTHWEST CORNER OF SAID LOT 19;

20. THENCE CONTINUING ALONG THE EASTERLY LINE OF LOT 22 AS SHOWN ON MAP 1277, SOUTH 3 DEGREES 20' 32.2" EAST, 293.20 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON A NORTHERLY RIGHT-OF-WAY LINE OF 20TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 11, BLOCK 115, MAP 1277;

21. THENCE ALONG THE EASTERLY LINE OF SAID LOT 22, SOUTH 3 DEGREES 20' 32.2 EAST, 820.25 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON THE NORTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SAID POINT COINCIDENT WITH THE SOUTHWEST CORNER OF LOT 11, BLOCK 113, MAP 1277;

22. THENCE ALONG THE SOUTHERLY EXTENSION OF THE EASTERLY LINE OF SAID LOT 22, SOUTH 3 DEGREES 20' 32.2" EAST, 60.00 FEET (RECORD - SOUTH 3 DEGREES 29' EAST) TO A POINT ON THE SOUTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SAID POINT COINCIDENT WITH THE NORTHWEST CORNER OF LOT 20, BLOCK 112, MAP 1277;

23. THENCE WESTERLY ALONG THE SOUTHERLY RIGHT-OF-WAY LINE OF 18TH STREET, SOUTH 86 DEGREES 39' 27.8" WEST, 7.00 FEET;

24. THENCE LEAVING SAID SOUTHERLY RIGHT-OF-WAY OF 18TH STREET SOUTH 3 DEGREES 20' 32.2" EAST, 350.00 FEET, TO THE NORTHERLY RIGHT-OF-WAY LINE OF 17TH STREET;

25. THENCE WESTERLY ALONG THE NORTHERLY RIGHT-OF-WAY LINE OF 17TH STREET SOUTH 86 DEGREES 39' 27.8" WEST, 11.72 FEET;

26. THENCE SOUTH 3 DEGREES 20' 32.2" EAST, 267.46 FEET;

27. THENCE SOUTH 7 DEGREES, 59' 14.8" WEST, 100.73 FEET;

28. THENCE SOUTH 6 DEGREES 02' 48.2" EAST, 1,133.67 FEET TO A POINT LOCATED ON THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS, SAID POINT BEING LOCATED ON AN APPROXIMATE 1,900 FOOT RADIUS CURVE, CONCAVE EASTERLY SAID POINT ALSO BEING ON THE WESTERLY PROLONGATION OF THE NORTHERLY LINE OF LOT 1 OF PARCEL MAP 10422, A DISTANCE THEREON, NORTH 72 DEGREES 34' 48.5" EAST, 256.59 FEET (RECORD - NORTH 72 DEGREES 33' 09" EAST) FROM THE NORTHEASTERLY CORNER OF SAID LOT 1;

THE FOLLOWING COURSES NUMBERED 29 THROUGH 35 ALL CONTINUE ALONG THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS AS IT EXISTED ON JANUARY 11, 1986;

29. THENCE CONTINUING ON THE APPROXIMATE CENTERLINE OF THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY TRACKS, THROUGH SAID 1,900 FOOT RADIUS CURVE, A CENTRAL ANGLE OF 6 DEGREES 44' 55.2", A DISTANCE OF 223.79 FEET;

30. THENCE SOUTH 11 DEGREES 34' 14.3 EAST, 947.56 FEET TO A POINT LOCATED AT THE BEGINNING OF A 5,500 FOOT RADIUS CURVE, CONCAVE EASTERLY;

31. THENCE THROUGH SAID CURVE A CENTRAL ANGLE OF 7 DEGREES 02' 53", A DISTANCE OF 676.56 FEET;

32. THENCE SOUTH 18 DEGREES 37' 10" EAST, 2,384.90 FEET TO A POINT LOCATED AT THE BEGINNING OF A 9,000 FOOT RADIUS CURVE, CONCAVE WESTERLY;

33. THENCE THROUGH SAID CURVE A CENTRAL ANGLE OF 6 DEGREES 20' 32", A DISTANCE OF 996.23 FEET;

34. THENCE SOUTH 12 DEGREES 16' 36.9" EAST, 1,767.95 FEET TO A POINT LOCATED AT THE BEGINNING OF A 2,400 FOOT RADIUS CURVE, CONCAVE EASTERLY;

35. THENCE THROUGH SAID 2,400 FOOT CURVE A CENTRAL ANGLE OF 8 DEGREES 46' 45.5", A DISTANCE OF 367.75 FEET MORE OR

LESS TO A POINT LOCATED ON A LINE BEARING NORTH 46 DEGREES 32' 16" WEST, SAID LINE BEING THE NORTHEASTERLY LINE OF THE PUEBLO LANDS OF SAN DIEGO, AS SHOWN ON MAP THEREOF MADE BY JAMES PASCOE IN THE YEAR 1870, A CERTIFIED COPY OF SAID MAP BEING FILED IN SAN DIEGO COUNTY RECORDER'S OFFICE AS MISCELLANEOUS MAP NO. 36, SAID POINT OF INTERSECTION ALSO BEING STATION 813 AS SHOWN ON SHEET 18 OF THE CITY OF SAN DIEGO ENGINEERING DRAWING 47281 ON FILE IN THE CITY ENGINEER'S OFFICES OF SAID CITY; AND SAID LINE ALSO BEING THE SOUTHWESTERLY CORPORATE BOUNDARY LINE OF THE CITY OF DEL MAR.

THE BASIS OF BEARINGS FOR THE ABOVE DESCRIBED LINE WAS DEFINED BY ESTABLISHING A LINE BETWEEN UNITED STATES ARMY CORPS SURVEY BENCHMARK NUMBERS DM590 AND DM560, LOCATED IN THE CITY OF DEL MAR, SAID LINE BEARING NORTH 6 DEGREES 15' 54" WEST.

THE FOLLOWING RECORD MAPS INCLUDED IN THE DESCRIPTION OF THE ABOVE SURVEY LINE ARE RECORDED IN THE COUNTY RECORDER'S OFFICE OF SAN DIEGO COUNTY:

MAP 6838 DEL MAR BEACH CLUB
MAP 1737 NORTH STRAND MAP
MAP 1450 DEL MAR SUBDIVISION NO. 3
MAP 1277 DEL MAR RESUBDIVISION NO. 2
MAP 10422 DEL MAR SUBDIVISION 80-02
RECORD OF SURVEY 679
RECORD OF SURVEY 9056
RECORD OF SURVEY 9551

EXHIBIT D

Chapter 30.55

COASTAL BLUFF OVERLAY ZONE

30.55.010 Purpose. The purpose of the Coastal Bluff Overlay Zone is to protect Del Mar's fragile coastal bluffs as a visual resource and avoid the risks to life and property associated with bluff failure and shoreline erosion. [Ord. 722]

30.55.020 Boundaries. Property within the Coastal Bluff Overlay Zone shall be designated by Ordinance to be depicted upon the City Zone Map.

30.55.030 Definitions.

A. For purposes of this Chapter, the following definitions shall apply:

1. "Coastal Bluff" shall mean a steep escarpment with a slope gradient equal to or greater than an average of one foot vertical to one foot horizontal and a vertical rise of 15 feet or more, and which is located in an area that is periodically subject to ocean wave action.

2. "Coastal Bluff Top" shall mean the top edge of a coastal bluff as delineated using the following criteria:

a. In cases where the coastal bluff involves a series of stepped vertical and horizontal planes, the bluff top shall be considered to start at the seaward edge of the topmost riser of the vertical plane of the coastal bluff.

b. In cases where the coastal bluff edge is composed of a continuous, rather than stepped, downward slope, the bluff top shall be considered to start at that point nearest the bluff, seaward of which the downward gradient of the land surface increases more or less continuously at an angle which is more vertical than horizontal until it reaches the general gradient of the bluff.

3. "Top Edge of Coastal Bluff" shall mean the same as "Coastal Bluff Top."

4. "Principal Structure" shall mean a building or structure in which the primary use of the lot on which the building is located is being conducted.

5. "Accessory Structure" shall mean structures accessory or incidental to the principal structures on lot including, but not limited to, pools, spas, storage sheds, gazebos, and above-grade decks or patios.

30.55.040 Allowable Uses. Unless specified herein, allowable uses in the Coastal Bluff Overlay Zone shall be those uses and accessory uses allowed by the underlying zone, subject to the regulations and restrictions of the underlying zone and of this Chapter.

30.55.050 Accessory Uses. [See underlying zone.]

30.55.060 Parking Requirements. [See Chapter 30.80.]

30.55.070 Development Review. Unless otherwise exempted by this Title, no building, improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered or enlarged; nor shall any lot or premises be excavated or graded for any purpose including, but not limited to, in-ground structures such as swimming pools or spas; nor shall clearance of vegetation occur until both a Conditional Use Permit and a Coastal Development Permit are obtained from the Planning Commission. In reviewing such applications for Conditional Use Permits and Coastal Development Permits, the Planning Commission shall apply the standards of review contained in this Chapter, as well as the applicable provisions of Beach Overlay Zone and the underlying zone for the property.

30.55.080 Setbacks from Coastal Bluffs.

A. Unless otherwise specified herein, all new or redeveloped principal or accessory structures, including new supporting foundations or supports for existing structures, shall be set back a minimum of 40 feet from the top edge of the coastal bluff as defined in this Chapter.

B. All new fences, windscreens, and benches shall be set back a minimum of ten feet from the top edge of the coastal bluff as defined in this Chapter. All such improvements, when providing less than the 40 foot coastal bluff top setback otherwise required in this Chapter, shall be constructed primarily above grade using light-weight materials and without the use of grading and/or continuous foundation components.

C. No grading shall be allowed within 40 feet of the top edge of a coastal bluff.

D. No grading or construction activities shall be allowed on the face of a coastal bluff unless approved as part of a Shoreline Protection Permit or Setback Seawall Permit issued in accordance with the provisions of this Title and when the Planning Commission or City Council, as the authorized review body for the project, makes a finding that the proposed grading has been minimized to the extent feasible to implement the authorized shoreline protection.

30.55.090 Application Submittals.

A. Applications for development of property which includes or lies in proximity to coastal bluffs as defined in this Chapter, shall include topographic maps, as necessary, to delineate the location of all coastal bluffs located on site or off site in proximity to the development proposal. Said maps shall indicate the alignment of the top edges of such coastal bluffs as defined in this Chapter. Maps required by this Section shall be of a scale not less than 1" equals 100' and shall delineate the topography of the site in two-foot contour intervals.

B. All applications for projects involving new construction on properties containing coastal bluffs shall be accompanied by a geotechnical report addressing: 1) existing conditions; 2) the suitability of the site for the proposed construction; and 3) the potential of the proposed development to affect bluff stability over a 70-year life span of the project; 4) the potential future need for shoreline protection during an expected 70-year life span of the project; 5) an analysis of bluff retreat and coastal stability for the project site, according to accepted professional standards; 6) an analysis of the potential effects on bluff stability of rising sea levels, using latest scientific information; 7) an analysis of the potential effects of past and projected El Nino events on bluff stability; and 8) an analysis of whether the affected section of coastline is under a process of retreat. The report shall also include recommended mitigation measures as they relate to avoidance of risks and preservation of fragile bluff systems. In the event that a submitted report recommends a coastal bluff top setback of a greater distance than otherwise minimally required in this Chapter, the greater distance shall be provided. In addition, for new development, the applicant shall acknowledge a waiver of all rights to future protective devices for the new development through recordation of a deed restriction as a condition of permit approval. [Ord. 733]

C. At the discretion of the Planning Director, the applicant may be required to provide funding for an independent, third party analysis of the information provided by the applicant pursuant to the application submittal requirements of this Section. The purpose of said third-party analysis is to ensure the project's consistency with the standards of review contained in this Chapter.

30.55.100 Grading Methodology and Practice.

A. In addition to the other provisions of the Del Mar Municipal Code, projects located within the Coastal Bluff Overlay Zone shall be subject to the following provisions:

1. All projects involving grading shall be subject to the submittal of an erosion and sedimentation control plan. Said plan shall ensure that all drainage from the impervious surfaces of the site will be collected and appropriately discharged in a manner which will prevent drainage and/or erosion related damage to the coastal bluff or any other properties or improvements in the vicinity. In addition, the plan shall include the provision of drainage facilities to convey all drainage away from any coastal bluff face and, where available, into existing developed storm drain systems capable of handling all anticipated drainage flows associated with the proposed project. Where an existing storm drain system is not available, the plan shall provide that drainage will be conveyed to a clearly defined, legal natural drainage course which can be shown to have adequate capacity to handle all required drainage flows without adverse impact to coastal bluffs. All designs and plans for drainage improvements shall be prepared by a licensed civil engineer and shall be subject to the review and approval of the City Engineer.

2. All projects requiring a Conditional Use Permit and a Coastal Development Permit pursuant to the provisions of this Chapter shall be subject to the submittal of a detailed landscape plan. Said plan shall ensure that native and other drought-tolerant plant species will be utilized in a manner that will minimize irrigation requirements and reduce the potential of slide hazards due to over watering of the bluffs. Said plan will ensure that no new irrigation systems will be installed within 40 feet of the edge of the coastal bluff top and that any existing irrigation systems located within said 40 foot bluff top setback will be removed as part of project implementation.

3. All projects involving grading shall be subject to the submittal of an erosion and sedimentation control plan. Said plan shall

ensure that the project will not result in an increase in peak runoff from the site over the greatest discharge expected during a 10-year, 6-hour frequency storm. Runoff control shall be accomplished by a variety of measures including, but not limited to, temporary and/or permanent on-site catchment basins, detention basins, siltation traps, energy dissipaters and the installation of landscape material. The required erosion and sedimentation control plan and any proposals to increase flows shall be subject to review and approval of the City Engineer.

4. All temporary erosion control measures proposed or required pursuant to the provisions of this Section including berms, interceptor ditches, sandbagging, hay bales, filtered inlets, debris basins, silt traps, or other similar measures shall be installed prior to the commencement of grading in the areas for which the erosion control measures are intended.

5. For projects involving a total of more than 25 cubic yards of cut and/or fill grading, no grading shall occur during the rainy season, identified for purposes of this Chapter as the period from November 15th to March 31st.

6. In addition to other erosion control measures required pursuant to this Chapter, all graded slopes shall be stabilized prior to the November 15th onset of the rainy season through the provision of vegetative erosion control. Vegetative erosion control may be achieved through measures such as: landscape planting, seeding, mulching, fertilization, and irrigation. The installation of vegetative erosion control shall occur with sufficient time to achieve landscape coverage prior to the November 15th start of the rainy season.

7. All permits shall be subject to the submittal of a polluted runoff control plan. The required plan shall incorporate the use of structural and non-structural Best Management Practices (BMPs), to the extent necessary, to minimize the discharge of pollutants carried by runoff from

urban development into surface water drainage, and to maintain post-development peak runoff rate and average volume at levels similar to pre-development levels. The plan shall include, but not be limited to the following Best Management Practices (BMPs), as applicable: silt traps, catch basins, oil/grit separators, street sweeping and cleaning program, low-maintenance landscape and pesticide management plan, solid waste management and public education program. Post-construction structural BMPs (or suites of BMPs) should be designed to treat, infiltrate or filter storm water runoff from each storm, up to and including the 85th percentile, 24-hour storm event for volume-based BMPs, and /or the 85th percentile, 1-hour storm event, with an appropriate safety factor, for flow-based BMPs. The plan shall include a monitoring component to ensure long-term maintenance of BMPs as relevant, and to allow for continued evaluation of the effectiveness of the polluted runoff control plan in meeting the goals of LUP regarding the protection and enhancement of sensitive resources. [Ord. 733]

30.55.110 Maintenance of Drainage and Erosion Control Measures.

A. Where the installation of erosion and/or drainage control measures is required pursuant to the provisions of this Chapter, the responsibility for maintenance of such measures shall rest with the applicant unless such responsibility is assumed by another agency or party found acceptable by the Planning Director.

B. The responsibility for maintenance of drainage and erosion control measures and a detailed maintenance program shall be included in an agreement(s) recorded against the deed for the property. The arrangements shall provide for the on-going repair and maintenance of approved control measures to ensure continued effective erosion/drainage control.

30.55.120 Retained Open Space/Conditions of Development.

A. Areas to be retained in their natural state pursuant to the provisions of this Chapter shall be subject to conditions to ensure the protection of the designated area(s) from future encroachment, disturbance, or degradation. Said conditions shall include the recordation of an open space deed restriction, conservation easement, or open space easement to ensure protection of the designated area and to serve notice to the property owner, subsequent owners, or interested parties of the restrictions in effect on such property.

30.55.130 Additional Development Standards for Subdivisions.

A. No subdivision shall be approved unless the Planning Commission makes a finding that the proposed design of the subdivision and its improvements will be consistent with the criteria of this Chapter. Specifically, no subdivision shall be approved for creation of a lot(s) which would be incapable of either: 1) supporting the construction of a use allowed within the underlying zone and of supporting such use without the installation or construction of a shoreline protective device; 2) supporting such construction with provision of the applicable Coastal Bluff Top setbacks and other resource protection measures required pursuant to this Chapter; or 3) supporting such use without the installation or construction of a bluff or shoreline protective device. As a condition of recording the subdivision, a deed restriction shall be placed on all proposed bluff top parcels, which waives all rights to future protective devices for new development. In reviewing the subdivision proposal, the Planning Commission shall take into consideration, the probable impacts that the project, including subsequent development on the lot(s), will have on preservation of coastal bluffs and the avoidance of hazards.

[This Chapter of the Municipal Code forms a portion of the City of Del Mar Local Coastal Program Implementing Ordinances. The regulations found within this Chapter are not subject to "relief" through the Del Mar Variance process. Exceptions to, or relief from, the requirements found within this Chapter are limited to those specified

within the language of this Chapter or found within other Chapters of the Implementing Ordinances. Where there is a conflict between the language of this Chapter and other portions of the Del Mar Municipal Code, the language of this Chapter shall take precedence.]

EXHIBIT E

NEWS

State Coastal Commission says Del Mar train tracks need to move inland

 Workers repair erosion caused by a rainstorm in late November along the railroad tracks in Del Mar.

Workers repair erosion caused by a rainstorm in late November along the railroad tracks in Del Mar. (Union-Tribune)

Regional transportation officials say railroad tunnel is decades in the future

By PHIL DIEHL

AUG. 16, 2020 | 1:11 PM



The state's Coastal Commission signed off last week on emergency repairs made in December to the Del Mar bluffs, but the commissioners emphasized the need to move the railroad tracks away from the crumbling seaside location.

"I feel like nature is communicating in a very direct way that time is of the essence," said Commissioner Donne Brownsey at the Wednesday, Aug. 12, online meeting.

The Coastal Commission oversees all coastal development in California, from seawalls to high-rise hotels, and generally reviews projects long before construction begins. It approved an "after-the-fact consistency certification" Wednesday, Aug. 12, for the emergency work to safeguard the bluff-top tracks.

The repairs were needed after a Thanksgiving weekend storm sent rainwater over the tracks and caused significant erosion along the railroad bed near 13th and 15th streets in Del Mar, an area where the tracks are about 40 feet above the beach. Train traffic was temporarily halted for inspections and then continued at limited speeds until the

repairs, primarily the construction of new retaining walls, were completed about Dec. 15.

The San Diego Regional Association of Governments, a regional planning agency, applied retroactively for the commission to approve the emergency repairs.

The track has been on the bluffs in Del Mar for 100 years.

Coastal erosion eats away the edge of the bluffs at an average rate of 6 inches a year, studies show. However, sudden collapses, called episodic events, can occur at any time and bring the tracks ever closer to the beach.

“It is definitely a clear and present danger,” said Commissioner Linda Escalante. “It is urgent to move this thing landward.”

Construction is underway on the fourth phase of a six-phase effort to stabilize the tracks where they are. However, SANDAG’s long-term plan calls for rebuilding the tracks more than a mile inland on a new route through tunnels that will bypass the bluffs.

Construction costs for the tunnel route have been estimated at \$3 billion or more, and presently no money is available.

“It takes 10 to 20 years to fund a giant project like a tunnel,” said Bruce Smith, a principal engineer at SANDAG. “It’s a long-term effort, and it will take many years.”

The fifth and sixth phases of bluff stabilization projects are expected to be completed in the next four or five years, and are designed to keep the tracks safe where they are until 2050. Much of the planning has been done, but so far there is no money for construction.

“The key to meeting these deadlines is funding,” said commission Executive Director Jack Ainsworth. “There is going to be competition for that money across the United States. This is just the tip of the iceberg up and down this state with regards to rail lines. It is a huge, huge problem.”

The apparent increasing rate of sea-level rise has added urgency to the search for solutions.

Among the recent suggestions is one to build a railroad bridge over the beach that would allow bluffs to retreat without disturbing the tracks, the SANDAG official said. Environmental studies are needed to determine whether that would be practical.

“We are looking at all reasonable options,” Smith said.

The train tracks in Del Mar are a vital link in the only rail corridor between San Diego and Los Angeles and the rest of the United States.

Until this year’s pandemic curtailed travel, the route carried 7.6 million passengers a year and \$1 billion in goods and services.

Train traffic on the route is expected to roughly double by 2030, according to SANDAG.

— *Phil Diehl is a reporter for The San Diego Union-Tribune*

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Phil Diehl has been a reporter and editor in North County since 1989, and has written about city government, education, health care, military issues, nuclear power and more. He was the night city editor for the North County Times for about five years until it was purchased by The San Diego Union-Tribune. A graduate of West Virginia University, he began his newspaper career at the Parkersburg Sentinel in West Virginia. He lives in Carlsbad.

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MORE FROM THIS AUTHOR

NEWS

Developer pulls fairgrounds housing proposal for homeless vets

Aug. 6, 2020

EXHIBIT F

Mar and identified the need to continue with safe crossings while focusing on the long-term solution of getting the train off the bluffs. The San Diego Association of Governments (SANDAG) has finished their tunnel feasibility study and Council directed staff to coordinate a presentation from SANDAG on the topic.

IT WAS MOVED BY DEPUTY MAYOR DRUKER, SECONDED BY COUNCIL MEMBER SINNOTT, TO RECEIVE THE REPORT AND SUPPORT THE FOUR LOCATIONS TO BE INCLUDED IN THE SAFE RAIL TRAIL AND PEDESTRIAN CROSSING FEASIBILITY STUDY. (VOTE 4-0)

Ayes: Mayor Worden, Deputy Mayor Druker, Council Members Haviland and Sinnott; Noes: None;
Absent: Council Member Parks; Abstain: None

ITEM 17: NORTH COUNTY TRANSIT DISTRICT DEL MAR BLUFFS RAILROAD FENCING PROJECT (CLERK'S FILE NO. 1506-20)

Environmental Sustainability/Special Projects Manager Brown provided a presentation and updated the Council on North County Transit District's (NCTD) plan to hire a consultant to conduct a safety study prior to installing any fencing.

Mayor Worden opened the item to public comment and the following people spoke:

- 1) Camilla Rang, 159 10th Street, Del Mar, Spoke in opposition to fencing.
- 2) Robert Hajek- 828 Stratford Court, Del Mar- Spoke about the City of Ventura's fencing issue.
- 3) Dan Quirk- 23rd Street, Del Mar- Spoke in opposition of fencing, even with safe crossings.
- 4) Raymond A. Hedrick, 12982 Caminito Point, Del Mar presented a video with drone images.

Mayor Worden closed the item to public comment.

Council discussion focused on the City's need to be vigilant when working with NCTD and their safety consultant on this study and the need to continue to work on the long-term solution for removing the train tracks from the bluff while working on the short-term/medium-term solution of safe crossings. Council also discussed the possibility of the City hiring their own consultant, if needed.

Council Member Sinnott mentioned that, in addition to staff staying informed on the progress of the study, the Council should also consider assigning Council Liaisons or a subcommittee for this issue.

IT WAS MOVED BY COUNCIL MEMBER SINNOTT, SECONDED BY DEPUTY MAYOR DRUKER, TO GO ON RECORD TO OPPOSE FENCING ON THE BLUFF AND TO ENGAGE WITH NCTD WITH THE IMPLEMENTATION OF THE STUDY RELATED TO SAFETY ISSUES ON THE BLUFF AND FEASIBILITY/ALTERNATIVES ANALYSIS. (VOTE 4-0)

Ayes: Mayor Worden, Deputy Mayor Druker, Council Members Haviland and Sinnott; Noes: None;
Absent: Council Member Parks; Abstain: None

ITEM 18: ART APPROVAL PROCESS AND OPPORTUNITY MAP (CLERK'S FILE NO. 1202-5)

Senior Management Analyst Beld provided a presentation with Bonnie Grossman, Chair of the Arts Advisory Committee, on the proposed art approval process and art opportunity map.

Mayor Worden opened the item to public comment and the following people spoke:

- 1) Julie Maxey-Allison – 227 10th Street, Del Mar- Did not wish to speak, was in support of the recommended action

EXHIBIT G

ADOPTED FINDINGS FROM CC-0001-18 (SANDAG, EASTBROOK TO SHELL DOUBLE TRACK RAILROAD PROJECT, CITY OF OCEANSIDE, SAN DIEGO COUNTY)

C. COMMISSION JURISDICTION AND STANDARD OF REVIEW

The project triggers federal consistency review because SANDAG is required to obtain two federal permits from the U.S. Army Corps of Engineers: a Clean Water Act Section 404 permit and a Rivers and Harbor Act Section 10 permit. The Transportation and Resource Enhancement Program (TREP) component of the North Coast Corridor Public Works Plan and Transportation and Resource Enhancement Program (NCC PWP/TREP) functions as a master federal consistency certification to ensure the entire suite of rail, highway, transit, bicycle, pedestrian and other community and resource improvements described therein will be appropriately linked, phased, and implemented in a manner consistent with applicable Coastal Act policies.

However, given the long-term nature (30 - 40 year planning horizon) of the planning process for those improvements, many individual project components (such as the subject Eastbrook to Shell double-track project) were not described to a level of specificity allowing final determinations of consistency when the Commission concurred with the TREP Consistency Certification (CC-0002-14) in August 2014. That initial review was therefore explicitly proposed to be programmatic, such that when specific projects become more fully developed and proposed, further federal consistency review would be conducted. In other words, federal consistency review is to be phased as plans evolve, and to be triggered as future federal funding and federal permitting decisions are being made. The standard of review in these cases remains the Coastal Act, with the affected LCP(s) and the NCC PWP/TREP providing guiding policy and/or background information. To assist in these reviews, the NCC PWP/TREP identifies specific filing content requirements regarding future federal consistency submittals for projects included within the NCC PWP/TREP.

The Restoration Enhancement and Mitigation Plan (REMP) of the NCC PWP/TREP provides directions on mitigation for unavoidable resource impacts of projects within the NCC PWP/TREP and identifies potential restoration site locations available to conduct any necessary mitigation. If mitigation sites have been installed in advance and have achieved identified performance standards, then mitigation credits would be available at a 1:1 ratio. However, if these mitigation sites are not performing sufficiently at the time that impacts from an associated development occur, then more typical mitigation ratios from the Commission would apply (e.g., 4:1 for wetland impacts, 2:1 for impacts to upland environmentally sensitive habitat areas).¹ SANDAG states that it will implement mitigation for unavoidable project impacts in accordance with and as required by the REMP. SANDAG further states that prior to the start of EBSDT construction it will submit to the Commission, for its review and concurrence, a second consistency certification for the project mitigation plan, and that no project construction will occur until and unless the Commission concurs with the second consistency certification.

¹ December 1, 2014, letter to Linda Culp (SANDAG) from Gabriel Buhr (California Coastal Commission)

In reviewing past consistency certifications for SANDAG (and North County Transit District (NCTD)) LOSSAN corridor double-track and bridge replacement projects, the Commission has noted a historic jurisdictional disagreement between the rail proponents and the Commission over whether the projects were subject to the state law coastal development permit requirement, or whether state law was preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101 *et seq.* and past court decisions applying it. At the same time, the Commission historically agreed to “set aside” such disagreements where the projects are still reviewable through the federal consistency process and rely on that procedure. When the Commission concurred with the consistency certification for and certified the “PWP/TREP” (as discussed below in **Section D**) on August 13, 2014, the Commission essentially agreed to continue this procedural approach. While the subject project is one of the PWP/TREP Phase II-listed projects scheduled for construction between 2021 and 2030, SANDAG is requesting Commission concurrence with this consistency certification now in order to be in a “shovel-ready” position to apply for and obtain construction funding such that the project can move forward at the earliest possible time during the Phase II time period.

The standard of review under the federal consistency process for assessing consistency with the California Coastal Management Program is set forth in Chapter 3 of the Coastal Act (“Chapter 3”), Cal. Pub. Res. Code Sections 30200-30265.5.

EXHIBIT H

CZMA

FEDERAL CONSISTENCY

OVERVIEW

SECTION 307 OF THE
COASTAL ZONE MANAGEMENT ACT OF 1972

FEBRUARY 24, 2020

OFFICE FOR COASTAL MANAGEMENT
NATIONAL OCEAN SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION



U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office for Coastal Management
Silver Spring Metro Center, Building 4
1305 East-West Highway
Silver Spring, Maryland 20910

FEDERAL CONSISTENCY OVERVIEW

February 24, 2020

Office for Coastal Management (OCM)
National Ocean Service (NOS)
National Oceanic and Atmospheric Administration (NOAA)

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

CONTENTS

I. Introduction	3
II. Definition	4
A. Federal Actions	4
B. Coastal Effects	4
C. Enforceable Policies	5
D. Coastal Uses	8
E. Coastal Resources	8
III. Benefits	8
IV. National Interest Considerations	8
V. Basic Federal Consistency Procedures	10
A. Federal Agency Activities and Development Projects	10
B. Federal License or Permit Activities	12
C. OCS Plans	16
D. Federal Assistance Activities	17
E. Other Federal Actions	18
F. Mediation of Disputes	18
G. Appeals to the Secretary of Commerce	18
H. Interstate Consistency	21
I. Information in State Objection/Conditional Concurrence Letters	21
Appendix A - Summary of Federal Consistency Provisions	23
Appendix B - Federal Agency Activities Flow Chart	25
Appendix C - Federal License or Permit Activities Flow Chart	26
Contacts	27

I. INTRODUCTION

This document is an overview of the Coastal Zone Management Act (CZMA) federal consistency provision and is the principal educational material used in OCM's Federal Consistency Workshops. This overview is for general information and educational purposes only; it is not an enforceable document or intended to establish policy and should not be cited to for CZMA compliance purposes. The CZMA and National Oceanic and Atmospheric Administration (NOAA) regulations contain the information needed for CZMA compliance, *see* **CZMA § 307 (16 U.S.C. § 1456)** and NOAA's **federal consistency regulations, 15 CFR part 930**. This Federal Consistency Overview, the statute, the regulations, state and federal contacts and other information are located on OCM's Federal Consistency web page at:

<http://www.coast.noaa.gov/czm/consistency/>

The CZMA was enacted on October 27, 1972, to encourage coastal states, Great Lake states, and U.S. Territories and Commonwealths (collectively referred to as "coastal states" or "states") to be proactive in managing natural resources for their benefit and the benefit of the Nation. The CZMA recognizes a national interest in the resources of the coastal zone and in the importance of balancing the competing uses of those resources. The CZMA is a voluntary program for states. If a state elects to participate it develops and implements a coastal management program (CMP) pursuant to federal requirements. *See* CZMA § 306(d); 15 CFR part 923. State CMPs are comprehensive management plans that describe the uses subject to the management program, the authorities and enforceable policies of the management program, the boundaries of the state's coastal zone, the organization of the management program, and related state coastal management concerns. The state CMPs are developed with the participation of federal agencies, state and local agencies, industry, other interested groups and the public. Thirty-five coastal states are eligible to participate in the federal coastal management program. Thirty-four of the eligible states have federally approved CMPs. Alaska voluntarily withdrew from the program in 2011.

The CZMA federal consistency provision is a cornerstone of the CZMA program and a primary incentive for states' participation. Federal consistency provides states with an important tool to manage coastal uses and resources and to facilitate cooperation and coordination with federal agencies. Under the CZMA federal agency activities that have coastal effects are consistent to the maximum extent practicable with federally approved enforceable policies of a state's CMP. In addition, the statute requires non-federal applicants for federal authorizations and funding to be consistent with enforceable policies of state CMPs.

A lead state agency coordinates a state's federally approved CMP and federal consistency reviews. At the federal level, OCM, within NOAA/NOS, among other duties and services, oversees the application of federal consistency; provides management and legal assistance to coastal states, federal agencies, Tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel, Oceans and Coasts Section, assists OCM and processes appeals to the Secretary of Commerce.

NOAA's federal consistency regulations were first issued in 1979. The regulations were substantially revised in 2000. *See* 65 Fed. Reg. 77123-77175 (Dec. 8, 2000). The 2000 revisions were largely in response to the 1990 amendments to the CZMA, *see* Pub. L. No. 101-508 and related Conference Report, H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., 970-972 (Conference Report). The regulations were further revised in 2006 in response to *The National Energy Policy Development Group's Report* (May 2001) (Energy Report) and the *Energy Policy Act of 2005* (Pub. L. No. 109-58) (EPAct). *See* 71 Fed. Reg. 787-831 (Jan. 5, 2006) and 71 Fed. Reg. 75864-75865 (Dec. 19, 2006).

II. DEFINITION

Federal consistency is the CZMA provision that *federal actions* that have reasonably foreseeable *effects* on any *land or water use* or *natural resource* of the coastal zone (also referred to as coastal uses or resources, or coastal effects) should be consistent with the *enforceable policies* of a coastal state's federally approved CMP. These terms are described below.

A. Federal actions: There are four types of federal actions: federal agency activities, federal license or permit activities, outer continental shelf (OCS) plans, and federal assistance to state and local governments.

1. ***Federal agency activities*** — activities and development projects performed by a federal agency, or a contractor for the benefit of a federal agency. 15 CFR part 930, subpart C.

E.g., Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an OCS oil and gas lease sale by the Bureau of Ocean Energy Management (BOEM), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction;

2. ***Federal license or permit activities*** — activities performed by a non-federal entity requiring federal permits, licenses or other form of federal authorization. 15 CFR part 930, subpart D.

E.g., activities requiring Corps 404 permits, Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

3. ***OCS plans*** — BOEM approvals for OCS plans, pursuant to the Outer Continental Shelf Lands Act. The CZMA process is similar to federal license or permit activities. 15 CFR part 930, subpart E.

4. ***Federal assistance to state and local governments.*** 15 CFR part 930, subpart F.

E.g., Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, Housing and Urban Development grants.

B. Coastal Effects:

At the heart of federal consistency is the “effects test.” A federal action is subject to CZMA federal consistency requirements if the action will affect a coastal use or resource, in accordance with NOAA’s regulations. NOAA’s regulations, 15 CFR § 930.11(g), define coastal effects as:

The term “effect on any coastal use or resource” means any reasonably foreseeable effect on any coastal use or resource resulting from a federal agency activity or federal license or permit activity (including all types of activities subject to the federal consistency requirement under subparts C, D, E, F and I of this part.) Effects are not just environmental effects, but include effects on coastal uses. Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects

which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects are effects resulting from the incremental impact of the federal action when added to other past, present, and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions.

As described in the preamble to the 2000 revisions to NOAA's consistency regulations, the definition of the effects test is from the 1990 amendments to the CZMA. These amendments, in part, replaced the phrase "directly affecting the coastal zone," reflecting Congressional intent to overturn the effect of *Secretary of the Interior v. California*, 464 U.S. 312 (1984). See 136 Cong. Rec. H 8076 (Sep. 26, 1990). The 1990 CZMA amendments also clarified that all federal agency activities meeting the "effects" standard are subject to CZMA consistency and that there are no exceptions, exclusions or categorical exemptions from the requirement. Conference Report at 970-71; 136 Cong. Rec. H 8076 (Sep. 26, 1990). The Conference Report further informed NOAA's 2000 regulatory revisions by stating that:

The question of whether a specific federal agency activity may affect any natural resource, land use, or water use in the coastal zone is determined by the federal agency. The conferees intend this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

The effects test applies to activities and uses or resources that occur outside a state's coastal zone, so long as the uses or resources impacted are, in fact, uses or resources of a state's coastal zone. The burden for determining or demonstrating effects is greater the farther removed an activity takes place outside of a state's coastal zone. The test is whether it is reasonably foreseeable that impacts that occur outside of the coastal zone will affect uses and resources of the coastal zone. Merely showing impacts from an activity outside of the coastal zone should not be sufficient by itself to demonstrate that reasonably foreseeable effects extend to uses or resources of the coastal zone. As NOAA explained in its 2000 Final Rule amending the federal consistency regulations (65 Fed. Reg. 77130 (Dec. 8, 2000)):

[T]he effect on a resource or use while that resource or use is outside of the coastal zone could result in effects felt within the coastal zone. However, it is possible that a federal action could temporarily affect a coastal resource while that resource is outside of the coastal zone, e.g., temporary harassment of a marine mammal, such that resource impacts are not felt within the coastal zone.

C. Enforceable policies:

An enforceable policy is a state policy that is legally binding under state law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a state exerts control over private and public coastal uses and resources, and which are incorporated in a state's federally approved CMP. CZMA § 304(6a) and 15 CFR § 930.11(h). OCM has informed states that enforceable policies are given legal effect by state law and do not apply to federal lands, federal waters, federal agencies or other areas or entities outside a state's jurisdiction, unless authorized by federal law (the CZMA does not confer such authorization).

Early coordination and identification of applicable state CMP enforceable policies is key to ensuring that federal agencies and applicants address state policies and issues. Early coordination will also help determine what measures, if any, need to be taken so that the activity is consistent with the state policies.

OCM approves the incorporation of enforceable policies, and changes to enforceable policies, into state CMPs. *See* CZMA §§ 306(d) and 306(e). The program change process serves an important notice and review purpose in the CZMA state-federal partnership. In return for the federal consistency authority granted to states, federal agencies are provided with an opportunity to review and comment on the development of a state's CMP and on subsequent changes to the CMP. This also means that a policy should not become an enforceable policy of a state's CMP by "incorporation by reference." For example, OCM has approved the incorporation of enforceable policy "A" into a state's CMP. Policy A references another policy "B" that has not been submitted to OCM for approval. Policy B, even though it is referenced in policy A is *not* an enforceable policy of the state's federally approved CMP, because policy B has not gone through the program change approval process, giving OCM, federal agencies and the public an opportunity to comment. The incorporation of policy B into a state's CMP would have to be approved by OCM to become an enforceable policy of a state's federally approved CMP. OCM, using its program change regulations (15 CFR part 923, subpart H) evaluates states' proposed enforceable policies as described below. NOAA revised the program change regulations at 15 CFR part 923, subpart H in 2019. *See* 84 FR 38118-38135 (Aug. 6, 2019).

1. Policies are legally binding under state law and apply only to areas and entities within the state's jurisdiction. CZMA § 304(6a).

Approval Consideration: (1) A wetlands protection policy in a state statute, regulation or in a state's CMP program document is an enforceable policy if the statute or regulation contains a mechanism that imposes the policy on the public and private uses within the state's jurisdiction. This could be a state permit program or a provision in state law that requires all state agencies to apply the policy in their permit and enforcement actions. A policy in a state's CMP program document should also be linked to such a statutory or regulatory enforceable mechanism.

(2) The CZMA does not authorize states to establish regulatory standards for federal agencies. A state policy that would regulate or otherwise establish standards for federal agencies or federal lands or waters would not meet the CZMA's definition of "enforceable policy" (i.e., legally binding under state law). CZMA § 304(6a). States apply their federally approved enforceable policies through CZMA federal consistency reviews. Federal agencies are consistent to the maximum extent practicable and non-federal applicants for federal authorizations are fully consistent with the enforceable policies.

Applicability Consideration: Some state CMP consistency decisions are made by issuance or denial of state permits (the states' enforceable policies are contained within the standards of the states' permit programs). However, a state should not determine consistency by issuance of a state permit for federal agency activities under CZMA § 307(c)(1). Under NOAA's regulations, neither the CZMA nor OCM's approval of a state's enforceable policy or permit program authorize the application of state permit requirements to federal agencies. The federal agencies are consistent to the maximum extent practicable with the underlying enforceable policies of the state permit program, but do not have to apply for or obtain the state permit (unless another federal law requires the federal agency to obtain the permit). Non-federal applicants for federal license or permit activities would have to apply for and obtain the applicable state permit for state CZMA concurrence where the proposed activity is located within the state's jurisdiction.

2. Policies are not preempted by federal law. *See* 15 CFR § 923.84(b) and 84 FR 38118-38135 (Aug. 6, 2019).

Approval Consideration: Federal preemption is the principle, derived from the Supremacy Clause of the

Constitution, that a federal law can supersede or supplant any inconsistent state law or regulation. Preemption applies to state law and not other federal law. OCM's long-standing interpretation of the definition of "enforceable policy" under the CZMA (16 U.S.C. § 1453(6a)) is that if a state policy specifically seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA. For example, North Carolina sought to regulate low level aircraft in flight by adopting policies that imposed minimum altitude and decibel levels, and other overflight restrictions. OCM denied the state's request to incorporate these policies into the North Carolina CMP because the policies were, on their face, preempted by federal law administered by the Federal Aviation Administration.

Applicability Consideration: Under the federal consistency authority, states apply NOAA-approved enforceable policies to federal actions. If a state's enforceable policies, as specifically described or applied, are not preempted, the state may apply them through CZMA federal consistency to a preempted field. It should be noted that whether state action is preempted is a fact-specific inquiry.

3. Policies should be applied to all relevant public and private entities and would not discriminate against a particular type of activity, or, even if neutrally written, against a particular federal agency. *Id.*

Approval Consideration: State policies should be based on effects to coastal uses or resources and not on a particular type of activity. This ensures that the policy is applicable to any type of activity that has coastal effects and will not discriminate against a particular user group. For example, a state was concerned with possible impacts from offshore oil and gas development on specific fishing areas and on discharges that might follow ocean currents and eddies into the state's estuarine areas. The state proposed oil and gas specific energy policies. OCM did not approve the policies because they imposed requirements on one user group, when other types of activities might have the same coastal impacts. The state re-wrote the policies to be based on coastal impacts and information needs to assess such impacts. Now the policies are applicable to all OCS energy projects and other activities having similar effects.

4. Policies are consistent with CZMA federal consistency requirements. *See* 15 CFR part 930 and 84 FR 38118-38135 (Aug. 6, 2019)..

Approval Consideration: When state policies are proposed to be incorporated into a CMP, a state should ensure that the CMP continues to balance the objectives of the CZMA and continue to give priority consideration to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation. *See* CZMA § 303(2)(D). Policies affecting these "national interests" have implications for federal consistency. For example, a state has a policy that opposes all offshore oil and gas development. OCM did not approve the incorporation of the policy into the state's federally approved CMP, because OCM determined the policy would affect the state's obligation to consider the national interest in energy facility siting.

Applicability Consideration: States should not require a federal agency to redefine an activity proposed by a federal agency. For federal agency activities under CZMA § 307(c)(1), states review activities and development projects that are *proposed* by a federal agency. 15 CFR § 930.36(a). *See also, e.g.,* 15 CFR §§ 930.35, .39(a), .46(a), .1(c), .11(d); 65 Fed. Reg. 77130, Col. 2-3 (December 8, 2000) (preamble to final 2000 rule). For example, a state proposed a policy that, when dredged material is not suitable for beach renourishment, would require a dredger to obtain suitable material from a location not related to the dredging to renourish the beaches. OCM did not approve the policy as written because it would redefine, in part, an Army Corps of Engineers dredging project to a beach renourishment project that is not related to the dredging. The policy was re-written to tie beach renourishment and the alternate source of material

to mitigate impacts to coastal uses or resources resulting from proposed dredging.

D. Coastal uses: Some examples of coastal uses include such activities as: public access, recreation, fishing, historic or cultural preservation, development, energy infrastructure and use, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration.

E. Coastal resources: Coastal resources include biological or physical resources that are found within a state's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc.

III. BENEFITS

Federal consistency is an important mandatory, but flexible mechanism to foster consultation, cooperation, and coordination between states and federal agencies. Federal consistency is more than just a procedural dictate; it helps ensure the balanced use and protection of coastal resources through state CMP policies.

To maximize the benefits of federal consistency, federal agencies should provide routine notification to coastal states of actions affecting the coastal zone, and coastal states should pay attention to proposed federal actions, develop adequate consistency procedures, and notify federal agencies, other state agencies, and others of a state's assertion of consistency. For example, states could make connections with the federal agencies, inform them of the federal consistency requirements, possibly develop memoranda of understanding (MOUs), ensure that the CMP obtains notice, and respond when the CMP does receive notice. In summary, federal agencies and others have an affirmative duty to comply with the federal consistency requirements, but states should take consistent and assertive steps.

Federal consistency provides federal agencies with an effective mechanism to document coastal effects and to address state coastal management concerns. Moreover, compliance with the consistency requirement complements National Environmental Policy Act (NEPA) compliance. Even though the CZMA effects test is different than NEPA investigations and the CZMA requires federal agencies to alter projects to be consistent with state CMP policies, NEPA is an effective delivery mechanism for federal consistency. (States do not review NEPA documents for consistency – they review the federal action a NEPA document evaluates, but NEPA documents often provide necessary background information.)

Early attention to federal consistency can provide the federal agency with state CMP and public support and a smoother and expeditious federal consistency review. Early consultation and cooperation between federal agencies and state CMPs can help federal agencies avoid costly last minute changes to projects in order to comply with state CMP policies.

States concur with approximately 93-95% of all federal actions reviewed. Maintaining this percentage means that states and federal agencies should know their consistency responsibilities and develop cooperative relationships to foster effective coordination and consultation.

IV. NATIONAL INTEREST CONSIDERATIONS

Federal consistency gives states substantial input into federal actions affecting the coastal zone. There

are, however, provisions that balance state objectives with consideration of federal objectives and mandates to ensure that the national interest in CZMA objectives is furthered. These considerations include:

Consistency must be based on coastal effects. While the federal consistency effects test covers a wide range of federal actions, federal consistency review is triggered when it is reasonably foreseeable that a federal action will have coastal effects, referred to as the “effects test.” Consistency does *not* apply to every action or authorization of a federal agency, or of a non-federal applicant for federal authorizations. For federal agency activities, a federal agency makes this determination of whether its activity will have coastal effects. Under NOAA’s regulations, a “function” by a federal agency refers to a *proposal for action* that has reasonably foreseeable coastal effects, and not to all tasks, ministerial activities, meetings, discussions, exchanges of views, and interim or preliminary activities incidental or related to a proposed action. For federal license or permit activities and federal assistance activities, state CMPs propose to review activities that will have coastal effects and OCM makes the determination of effects by approving the *lists* of federal authorizations and financial assistance programs that a state wishes to include in its CMP. In order to be on the list, the types of activities covered by the federal authorization or funding program should have reasonably foreseeable coastal effects on a regular basis. Federal agencies and other interested parties have input into OCM’s approval of such lists and additions to the lists. If a state wishes to review an *unlisted* federal license or permit activity, it notifies the applicant and the federal agency and seeks OCM approval to review the activity. OCM’s decision is based on whether the state has shown that an unlisted activity will have reasonably foreseeable coastal effects and, again, federal agencies and the applicant have an opportunity to comment to OCM.

Federally approved programs and state CMP enforceable policies. OCM, with the opportunity for input from federal agencies, local governments, industry, non-governmental organizations and the public, approves state CMPs and their enforceable policies, including subsequent changes to a state’s CMP.

Consistent to the maximum extent practicable (only applies to federal agency activities). NOAA’s regulations define “consistent to the maximum extent practicable” to mean a federal agency activity is fully consistent with the enforceable policies of a state’s CMP unless federal legal requirements prohibit full consistency. This ensures that federal agencies are able to meet their legally authorized mandates, even though the activity may not be consistent with a state’s enforceable policy. If a federal agency has the discretion to meet a state’s enforceable policy, then it should be consistent with that policy. However, a federal agency’s administrative record applying its legal mandates may dictate an action that is not fully consistent with a state’s policy. Thus, for federal agency activities under CZMA § 307(c)(1), a federal agency may proceed with an activity over a state’s objection if the federal agency determines its activity is consistent to the maximum extent practicable with the enforceable policies of the state’s CMP.

For example, this means that even if a state objects, BOEM may proceed with an OCS lease sale when BOEM provides the state with the reasons why the Outer Continental Shelf Lands Act (OCSLA) and BOEM’s administrative record supporting the lease sale decision prohibits BOEM from fully complying with the state’s enforceable policies.

Under NOAA’s regulations, the consistent to the maximum extent practicable standard also allows federal agencies to deviate from State enforceable policies and CZMA procedures due to “exigent circumstances.” An exigent circumstance is an emergency or unexpected situation requiring a federal agency to take quick or immediate action.

In addition, as part of its consistent to the maximum extent practicable argument, BOEM could proceed if it determined that its activity was *fully* consistent with the State's enforceable policies. See 15 CFR § 930.43(d). In either case, the federal agency provides the state CMP agency with a written notice that it is proceeding over the state's objection and explains why the activity is consistent to the maximum extent practicable.

Consistent to the maximum extent practicable and exigent circumstances refers to consistency with a state CMP's substantive requirements as well as the procedural requirements of NOAA's regulations. There may be times that a federal legal requirement or an emergency situation requires a federal agency to act sooner than the end of the 90-day consistency period. In such cases, the federal agency should consult with the state CMP as early as possible.

A federal agency should not use a lack of funds as a basis for being consistent to the maximum extent practicable. Thus, federal agencies are encouraged to consult early with state CMPs to ensure that the federal agency has budgeted for meeting state CMP enforceable policies.

Appeal state objection to Secretary of Commerce (only for Non-federal applicants). Non-federal applicants for federal license or permits and state and local government applicants for federal financial assistance may appeal a state's objection to the Secretary of Commerce. Appeals to the Secretary are not available for federal agency activities. The Secretary overrides a state's objection if the Secretary finds that an activity is consistent with the objectives or purposes of the CZMA or is otherwise necessary in the interest of national security. If the Secretary overrides a state's objection, then the federal agency may authorize the activity. The Secretarial appeal process is discussed in more detail later in this document. There is also a database of all appeals filed with the Secretary on OCM's Federal Consistency web page.

Presidential exemption (only for federal agency activities). After any appealable final judgment, decree, or order of any federal court, the President may exempt from compliance the elements of a federal agency activity that are found by a federal court to be inconsistent with a state's CMP, if the President determines that the activity is in the paramount interest of the United States. CZMA § 307(c)(1)(B). This exemption was added to the statute in 1990 and has been used once. In 2007, the California Coastal Commission objected to Navy's use of Mid-Frequency Active (MFA) sonar asserting Navy's mitigation measures were not adequate to protect marine mammals. This eventually resulted in President Bush, on January 15, 2008, using his statutory authority under the CZMA to exempt from compliance certain MFA sonar activities by the Navy that a federal court determined were not consistent with the State of California's federally-approved CZMA program.

Mediation by the Secretary or OCM. Mediation has been used to resolve federal consistency disputes and allowed federal actions to proceed. In the event of a serious disagreement between a federal agency and a state, either party may request that the Secretary of Commerce mediate the dispute. OCM is also available to mediate disputes between states, federal agencies, and other parties.

V. BASIC FEDERAL CONSISTENCY PROCEDURES

Two important things to keep in mind to facilitate consistency reviews is for the federal agency, state CMP, and applicant to discuss a proposed activity as early in the process as possible, and that state CMPs and federal agencies can agree, at any time, to more flexible consistency review procedures (providing public participation requirements are still met). See Appendix A for a chart summary of the consistency requirements, and Appendices B and C for flow charts for federal agency activities and federal license or permit activities.

A. Federal Agency Activities and Development Projects

Federal agencies proposing an activity should follow the requirements of CZMA § 307(c)(1), (2)(16 U.S.C. § 1456(c)(1), (2)) and 15 CFR part 930, subparts A, B and C. For example:

1. Federal “development projects” *inside* the boundaries of a state’s coastal zone are deemed to have coastal effects and a Consistency Determination should be submitted to the state CMP.
2. Federal agency determines if a federal activity (in or outside coastal zone) (and development projects outside the coastal zone) will have reasonably foreseeable coastal effects. States are encouraged to list federal agency activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify federal agencies when an unlisted activity should undergo consistency review.

For federal agency activities, the listed/unlisted provisions in NOAA’s regulations are recommended procedures for facilitating state-federal coordination. Whether or not an activity is listed, federal agencies provide state CMPs with Consistency Determinations (CDs) for federal agency activities affecting any coastal use or resource. Because federal agencies have an affirmative statutory duty to provide states with CDs for activities with reasonably foreseeable coastal effects and because the statute requires state CMP agencies to provide an opportunity for public input into a state’s consistency decision, a state should not relieve the federal agency or itself of consistency obligations by listing or not listing a federal agency activity. If a state and/or a federal agency believe that a type of federal agency activity should not be subject to federal consistency, then they may use the applicable provisions provided in NOAA’s regulations: general permits (§930.31(d)); *de minimis* activities (§930.33(a)(3)); environmentally beneficial activities (§930.33(a)(4)); general consistency determinations (§930.36(c)); negative determinations and general negative determinations (§930.35).

3. The federal agency should contact the state CMP at the earliest possible moment in the planning of the activity to ensure early state-federal coordination and consultation.
4. If coastal effects are reasonably foreseeable, then the federal agency submits a Consistency Determination (CD) to a state CMP at least 90 days before activity starts. A CD should include a detailed description of the proposed activity, its expected coastal effects, and an evaluation of how the proposed activity is consistent with applicable enforceable policies in the state’s CMP. The federal agency does not need to submit anything beyond that described in 15 CFR § 930.39 and may submit that information in any manner it chooses. Finally, federal agencies provide, and states review, CDs only for the federal agency’s proposed action for consistency — federal agencies should not provide, and states should not review, CDs for NEPA documents, ESA consultations, federal permits the federal agency may need, etc., that are related to the proposed activity. These items may, of course be useful to the federal agency and state as part of the background information the federal agency may provide with its CD, but they should not be the subject of a separate CZMA review.

Once a complete CD has been received by a state CMP, the state should not delay the start of the 90-day CZMA review period by requiring information that is in addition to the information required by §930.39 or that the federal agency apply for or obtain a state permit. If the state CMP agency believes that the information required by §930.39 has not been submitted, it should immediately notify the federal agency.

5. If no coastal effects, a federal agency may provide a Negative Determination. *See* 15 CFR § 930.35.

6. State CMP has 60 days (plus appropriate extensions) to concur with or object to a federal agency's CD. State CMP agency and federal agency may agree to alternative time period. Any such agreement should be set forth in writing so that it is clear there is a meeting-of-the-minds between a state and federal agency. Ideally, the written agreement should be one document that both parties sign. The written agreement should refer to a specific end date and should not be written to require a later event or condition to be satisfied.
7. State CMP should provide for public comment on the state's consistency review. A state should not rely on a federal agency notice, unless the federal agency notice specifically says that comments on the *state CMP's consistency review* should be sent to the state CMP agency.
8. State concurrence is presumed if the state does not meet time frames.
9. If a state CMP agrees with a CD, then the federal agency may immediately proceed with the activity. If a state objects, then the state's objection should describe how the proposed activity is inconsistent with specific enforceable policies of the federally approved CMP. In the event of an objection, a state CMP and federal agency should attempt to resolve any differences during the remainder of the 90-day period. If resolution has not been reached at the end of the 90-day period the federal agency should consider postponing final federal action until conflicts have been resolved. However, at the end of the 90-day period a federal agency may, notwithstanding state CMP objection, proceed with the activity if the federal agency clearly describes, in writing, to the state CMP how the activity is consistent to the maximum extent practicable.
10. If there is a dispute between a federal agency and state CMP, either party may seek mediation by OCM or the Secretary of Commerce (the Secretary's mediation is a more formal process).

B. Federal License or Permit Activities

A private individual or business, or a state or local government agency, or any other type of *non-federal* entity, applying to the federal government for a required permit or license or any other type of authorization, is subject to the requirements of CZMA § 307(c)(3)(A)(16 U.S.C. § 1456(c)(3)(A)) and 15 CFR part 930, subparts A, B and D. This includes American Indian and Alaska Native entities applying for federal authorizations.¹

There are essentially four elements for determining that an authorization from a federal agency is a "federal license or permit" subject to federal consistency review. First, federal law requires that an applicant obtain a federal authorization. Second, the purpose of the federal authorization is to allow a non-federal applicant to conduct a proposed activity. Third, the activity proposed has reasonably foreseeable effects on a state's coastal uses or resources, and fourth, the proposed activity was not previously reviewed for federal consistency by the state CMP agency (unless the authorization is a renewal or major amendment pursuant to §930.51(b)). These four elements are embodied in NOAA's regulations as discussed below:

¹ NOAA's regulations do not specifically include American Indians and Alaska Natives in the definition of applicant, *see* 15 CFR § 930.52. However, the statute has been interpreted by OCM and federal courts to apply to American Indians and Alaska Natives. *See Narragansett Indian Tribe of Rhode Island v. The Narragansett Electric Comp.*, 878 F. Supp. 349, 362-365 (D. RI 1995), *upheld on other grounds*, 89 F.3d 908 (1st Cir. 1996).

1. State CMP, with OCM approval, determines effects:
 - a. listed v. unlisted activity; and b. inside v. outside coastal zone.

All federal license or permit activities occurring in the coastal zone are deemed to affect coastal uses or resources if the state CMP has *listed* the particular federal license, permit or authorization in its federally approved CMP. The lists may be updated through OCM's program change process. Prior to submitting the updated list to OCM the state should consult with the relevant federal agency.

For a *listed* activity occurring *in the coastal zone*, the applicant submits a Consistency Certification to the authorizing federal agency and the affected state CMP(s). In addition to the Certification, the applicant provides the state with the *necessary data and information* required by NOAA's regulations at 15 CFR § 930.58. This information will usually be contained in the application to the federal agency, but may include other information described by a state CMP, if the information is *specifically included in the state's federally approved CMP document and identified as "necessary data and information."* If a state wants to require information needed to commence the six-month review period in addition to that described by NOAA in §930.58(a), the state should amend its CMP to identify specific "necessary data and information" pursuant to §930.58(a)(2).

For *listed* activities *outside the coastal zone*, an applicant submits a Consistency Certification to the state CMP and the federal agency if the activity falls within a *geographic location* described in a state's CMP for listed activities outside the coastal zone. For listed activities outside the coastal zone where a state has *not* described a geographic location, a state CMP may follow the unlisted activity procedure described below, if it wants to review the activity.

For unlisted activities, in or outside the coastal zone, a state CMP may notify the applicant, the relevant federal agency, and OCM that it intends to review an unlisted activity on a case-by-case basis. The state CMP makes this notification within 30 days of receiving notice of the application to the federal agency for an activity; otherwise the state waives its consistency rights. The waiver does not apply where the state CMP does not receive notice (notice may be actual or constructive).² OCM may approve the state's consistency review. The applicant and the federal agency have 15 days from receipt of a state CMP's

² For example, constructive notice may be provided if it is published in an official federal public notification document or through an official state clearinghouse. For either form of notice, the notices contain sufficient information for a state CMP agency to learn of the application for the activity, determine the activity's geographic location, and determine whether coastal effects are reasonably foreseeable.

A newspaper article containing the information required by 15 CFR § 930.54(a)(2) may provide notice. However, even assuming a newspaper article, or other similar form of notice, describes the activity and its location with sufficient specificity for a state to determine whether coastal effects are reasonably foreseeable, such notice should verify that an application was received by a Federal agency. For example, receipt of an application may be verified if a Federal agency spokesperson was quoted in the article stating that the agency had received the application for the federal authorization. Statements by other sources as to whether a Federal agency received the application could be speculative. If a statement by a Federal official is not in the article, then once the state CMP agency read the article, it could seek to verify whether the Federal agency received an application. The 30-day notification period could begin when a state CMP agency verified that a federal application was filed.

request to provide comments to OCM. OCM makes a decision usually within 30 days of receipt of a state's request. The basis for OCM's decision is whether the proposed activity will have reasonably foreseeable coastal effects. The federal agency may not authorize the activity until the consistency process is complete. The unlisted activity procedure is available for active applications. If an applicant, of its own accord, provides a state CMP with a consistency certification for an unlisted activity, then OCM's approval is deemed and the applicant is subject to all the relevant provisions of the regulations and the state CMP need not seek OCM's approval. (The authorizing federal agency should not require an applicant to provide a consistency certification if the applicant is not otherwise required to by NOAA's regulations.)

2. Applicant for any required federal authorization submits a Consistency Certification and necessary data and information to the state CMP. State CMP agency should document when this date occurs. State CMP agency has 30 days to notify the applicant and federal agency that the submission does not include the necessary data and information. If a state CMP agency does not respond within the 30-day period, the six-month review period begins when the state CMP agency received the applicant's initial CZMA submission, regardless of whether the submission contained all necessary data and information.
3. The six-month review period can *only* begin if an applicant has filed a formal application with a licensing federal agency *and* has submitted a Consistency Certification to the state CMP agency. When an applicant should submit its Consistency Certification and necessary data and information may vary depending on when information is available. For instance, an applicant may choose not to submit its Consistency Certification at the same time it files its application with the licensing federal agency, but will submit the Consistency Certification after filing the federal application later to ensure information the state needs is included (otherwise a state may choose to object for lack of information if the Consistency Certification is filed too soon). Under the CZMA, a Project applicant must provide the state with a Consistency Certification *within its application* for a federal license or permit. 16 U.S.C. § 1456(c)(3)(A). At the same time the applicant includes the consistency certification in its application, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. *Id.* The phrase, "within its application" does not mean that the Consistency Certification must be filed at the time the application is filed; rather that the application must at some time "include" the certification and shall provide the certification to the state "at the same time." This has been long-standing practice by states and applicants. Once the consistency certification and necessary data and information are received by a state, a state then has six months in which to review the Project for consistency with its coastal management program. *Id.*
4. State CMP has six months to respond, but notifies applicant if review will go beyond three months.
5. Applicant and state CMP agency may agree to stay the six-month review period.

A stay "tolls" the running of the six-month review period for an agreed upon time ending on a specific date, after which the remainder of the six-month review period would continue. Such agreements are set forth in writing so that it is clear there is a meeting-of-the-minds between the state and the applicant.

NOAA is providing states with this information for drafting agreements under 15 CFR § 930.60(b) to stay, or toll, the CZMA federal consistency review period for federal license or permit activities and outer continental shelf plans under 15 CFR part 930, subparts D and E.

The regulations at section 930.60(b) provide that State agencies, applicants and persons (under subpart E) “may mutually agree in writing to stay the six-month consistency review period. Such an agreement shall be in writing and state a specific date on when the stay will end. . . .The State agency shall not stop, stay, or otherwise alter the consistency review period without such a written agreement with the applicant.” Furthermore, the state must send a copy of any such agreement to the federal permitting agency, and that agency must recognize the stay by not presuming concurrence by the state if the state does not issue an objection within six months. Ideally, the written agreement should be one document that both parties sign. The written agreement for a stay must refer to a specific end date and should not be written to require a later event or condition to be satisfied to end the stay. *See* 71 FR 788, 796 (January 5, 2006).

OCM recommends that the parties to a stay agreement clearly articulate terms for revoking or modifying that agreement. Just as creation of a stay agreement requires mutual consent of the parties, revocation or modification (including extension) must be by mutual consent of both parties. If a state has agreed to delay the issuance of its decision to a date certain, in the absence of a term permitting it to do so, the state should not unilaterally issue its decision prior to that date without first seeking the consent of the applicant to revoke or modify the stay agreement. Should a state not adhere to an agreement (e.g., unilaterally issuing its decision during the stay period), it could be interpreted as a breach of contract. Stay agreements are enforceable contracts, and the courts have recognized that stay agreements are subject to NOAA review through the consistency appeal process. *Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 177 (D.D.C. 2006). OCM recommends that the parties specifically include a term in the stay agreement addressing whether the state may issue its decision prior to the end date of the stay agreement, and under what conditions, if any. OCM provides sample language below.

In summary, a stay agreement must be in writing, should be signed by both parties, and should include the following information and dates:

- Identify the State agency, applicant, federal agency, the project, and the type of license or permit and the applicable federal statutory citation.
- Contain the following paragraph:

The proposed project is subject to [State agency name] review pursuant to the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1466, and the CZMA’s implementing regulations at 15 CFR part 930, subpart D [or subpart E as applicable]. In accordance with 15 CFR § 930.60(b), and in consideration of the parties’ mutual interest that the State have additional time to fully assess the proposed project’s consistency with the state’s enforceable policies, the [State agency name] and [Applicant name] mutually agree to the following dates and to stay the [State agency name] CZMA six-month review period as specified herein.

- Contain the following dates:
 1. Date the state’s six-month review period commenced [the original six-month review period];
 2. Date the six-month period was to end [the original six-month review period];
 3. Date during the six-month review period that the stay begins;
 4. Date that the stay ends, at which time the remainder of the six-month review period, [insert number of months and/or days left in the six-month review period], shall commence; and
 5. Date the state’s decision is due. For example, the 6-month period was to end June 30 and a stay was executed beginning on June 1 and ending on September 1. There are 30 days left in the 6-month review period. Therefore, the state’s decision would now be due September 30

(30 days after the stay ends). Stays should not be written to require a later event or condition to be satisfied to end the stay. If a state objects to an applicant's project and the applicant appeals to the Secretary of Commerce, failure to follow these instructions could result in the Secretary overriding the state's objection because the state's objection was issued after the six-month review period due to an unsupportable stay agreement.

- Contain provisions requiring mutual consent of both parties for revocation or modification (including extension) of the agreement.
- NOAA recommends that, where appropriate, a stay agreement include the following sentence:

The [State agency name] and [Applicant name] mutually agree that the [State agency name] may issue its consistency decision during the stay period and before the end of the stay if the [State agency name] determines it has received sufficient information [or other appropriate condition].

- For all extensions of the first stay, the amendment to the stay agreement should include:
 1. Date the state's six-month review period commenced [the original six-month review period];
 2. Date the six-month period was to end [the original six-month review period];
 3. The following dates of all previous stays:
 - First Stay: Date the stay began, date the stay ended, date the state's decision was due.
 - Second Stay: Date the stay began, date the stay ended, date the state's decision was due.
 - Any additional stays: Date the stay began, date the stay ended, date the state's decision was due.
 4. Date that the new stay begins;
 5. Date that the new stay ends, at which time the remainder of the six-month review period, [insert number of months and/or days left in the six-month review period], shall commence;
 6. Date the state's decision is due; and
 7. Signature of both parties.
- 6. The state should provide for public comment (state can require applicant to publish notice or may combine notice with federal agency, if federal agency agrees).
- 7. State concurrence presumed if state does not meet six-month time frame.
- 8. If state objects, federal agency does not authorize the activity to commence. If a state issues a conditional concurrence and the applicant does not amend its federal application to include a state's conditions, a state's conditional concurrence automatically becomes an objection. (State conditions of concurrence are linked to the need to be consistent with specific state enforceable policies.)
- 9. Applicant may appeal a state's objection to the Secretary of Commerce within 30 days of the objection. If the Secretary overrides a state's objection, the federal agency may authorize the project. If the Secretary does not override a state's objection, the federal agency does not authorize the project. The Secretary's decision is final federal agency action for purposes of the Administrative Procedure Act. An applicant may also negotiate with a state to remove the state's objection.

C. OCS Plans

A private person or business applying to the U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) for outer continental shelf (OCS) exploration, and development and production

activities follows the requirements of CZMA § 307(c)(3)(B)(16 U.S.C. § 1456(c)(3)(B)) and 15 CFR part 930, subparts A, B and E. For example:

1. Any person who submits to BOEM an OCS plan for the exploration of, or development and production of, any area leased under the Outer Continental Shelf Lands Act, certifies that any activities described in detail in such OCS plans will be conducted in a manner consistent with the state CMPs. BOEM then sends the plan and consistency certification to the applicable state(s).
2. The process and requirements for this section generally mirror those of federal license or permit activities. State should notify applicant if state review will extend beyond three months, otherwise state's concurrence is presumed.
3. Determining whether a particular OCS oil and gas plan is subject to state CZMA review differs somewhat from federal license or permit activities in that, generally, states have not had to describe geographic areas in federal waters where OCS oil and gas plans would be subject to state CZMA review. This is because the CZMA mandates such reviews and initially OCS oil and gas projects were not far offshore. As the industry moves farther offshore, whether a state should have CZMA review may not be as easily determined. As described in the preamble to NOAA's Final Rule for the 2006 amendments to the regulations (71 Fed. Reg. 790 (Jan. 5, 2006)):

For OCS EP's and DPP's the CZMA mandates State consistency review. However, as with federal agency activities, a coastal State's ability to review the Plans stops at the point where coastal effects are not reasonably foreseeable. Whether coastal effects are reasonably foreseeable is a factual matter to be determined by the State, the applicant and BOEM on a case-by-case basis. If a State wanted to ensure that OCS EP's and DPP's located in a particular offshore area would be subject to State CZMA review automatically, a State could, if NOAA approved, amend its CMP to specifically describe a geographic location outside the State's coastal zone where such plans would be presumed to affect State coastal uses or resources. *See* 15 CFR § 930.53. Or, if a State wanted to review an EP or DPP where the applicant and/or BOEM have asserted that coastal effects are not reasonably foreseeable, the State could request approval from NOAA to review such plans on a case-by-case basis. *See* 15 CFR § 930.54 (unlisted activities). In both situations, NOAA would approve only if the State made a factual demonstration that effects on its coastal uses or resources are reasonably foreseeable as a result of activities authorized by a particular EP or DPP. Similarly, where the applicant or FERC has asserted that a proposed project located outside the coastal zone or outside a geographic location described in a state's management program pursuant to 15 CFR § 930.53, will not have reasonably foreseeable coastal effects, NOAA would not approve a State request to review the project unless the State made a factual demonstration that the project has reasonably foreseeable coastal effects.

D. Federal Assistance Activities

A state agency or local government applying for federal financial assistance follows the requirements of CZMA § 307(d)(16 U.S.C. § 1456(d)) and 15 CFR part 930, subparts A, B and F. For example:

1. States list in their CMPs the federal assistance activities subject to review. The state CMP may also notify an applicant agency and federal agency that it will review an unlisted activity. OCM approval is not required for the review of unlisted federal assistance activities.
2. NOAA regulations allow state CMPs to develop flexible procedures for reviewing and concurring

with federal assistance activities. State CMP review of the activities is normally conducted through procedures established by states pursuant to Executive Order 12372 -- intergovernmental review of federal programs, or through state clearinghouse procedures.

3. Federal agency does not authorize the use of federal funds until state CMP has concurred.
4. State or local government applicant agency may appeal a state objection to the Secretary of Commerce who may override the state's objection.

E. Other Federal Actions

The federal agency activity category, 15 CFR part 930, subpart C, is a "residual" category. A federal action that will have reasonably foreseeable coastal effects, but which does not fall under 15 CFR part 930, subpart D (federal license or permit), subpart E (OCS plans), or subpart F (federal assistance to state agency or local government), is a federal agency activity under subpart C. For example, if a federal agency is providing funds to a private citizen for disaster relief from a hurricane, and the funds will be used for an activity with coastal effects, then the federal agency follows the requirements for federal agency activities and provides the state CMP with a Consistency Determination.

F. Mediation of Disputes

In the event of a serious disagreement between a state CMP and a federal agency, either party may request that the Secretary of Commerce mediate the dispute. All parties agree to participate, agreement to participate is non-binding, and either party may withdraw from the mediation at any time. Secretarial mediation is a formal process that includes a public hearing, submission of written briefs, and meetings between the parties. A hearing officer, appointed by the Secretary, will propose a solution. Secretarial mediation is only for states and federal agencies. Exhaustion of the mediation process is not a prerequisite to judicial review.

The availability of Secretarial mediation or litigation does not preclude the parties from informally mediating a dispute through OCM or another facilitator. OCM has successfully mediated disputes and offers its good offices to resolve conflicts between states, federal agencies, tribes and others. Most disputes are addressed through this informal method. Both parties may request OCM involvement, and participation is non-binding.

G. Appeals to the Secretary of Commerce

The CZMA provides an administrative appeal to the Secretary of Commerce (Secretary) from a consistency objection by a coastal state. In the case of a federal license or permit, an OCS plan, or an application for federal financial assistance, an applicant may request that the Secretary override a state's objection if the activity is consistent with the objectives of the CZMA (Ground I), and/or is otherwise necessary in the interest of national security (Ground II). 16 U.S.C. §§ 1456(c)(3)(A),(B), and (d). Secretarial appeals are not available for federal agency activities. The requirements for appeals are found at 15 CFR part 930, subpart H. Both states and applicants should pay close attention to the consistency review time periods, six-month stay provisions, objection requirements and appeal procedures in the regulations; otherwise, the Secretary or NOAA may override a state's objection on procedural grounds or dismiss an appellant's appeal for failure to follow the appeal procedures.

The elements of Grounds 1 and 2 that an applicant/appellant must prevail on for the Secretary to override a state's objection include the following.

Ground I – Activity consistent with the objectives or purposes of the CZMA.

1. The activity furthers the national interest in a CZMA objective or purpose in a significant or substantial manner;
2. The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and
3. There is no alternative that is reasonable and available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's management program.

Ground II – Otherwise necessary in the interest of national security.

An activity is necessary in the interest of national security if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed.

If the requirements of either Ground I or Ground II are met, the Secretary overrides a state's objection. The Secretary's inquiry into whether the grounds for an override have been met is based upon an administrative record developed for the appeal. While the Secretary will review a state objection for CZMA compliance, e.g., whether the objection is based on enforceable policies or the state issued its objection within the six-month review period, the Secretary does not review the objection for compliance with state laws and policies.

If the Secretary overrides a state's objection the authorizing federal agency may authorize the permit or funding that was the subject of the objection. If the Secretary does not override a state's objection, the authorizing federal agency cannot authorize the permit or funding that was the subject of the objection. A Secretarial override does not obviate the need for an applicant to obtain any state or other federal permits or authorizations that may apply.

The Secretary appeal process is final federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation. See OCM's Federal Consistency web page at: <http://www.coast.noaa.gov/czm/consistency/> for a list of all CZMA appeals filed with the Secretary and decisions of the Secretary and the administrative records of ongoing appeals.

Factors influencing the appeal process time include: nature and complexity of the dispute, stays agreed to by the parties, public hearings, and briefing schedules. The Energy Policy Act of 2005 amended the CZMA mandating specific deadlines for the Secretary. As a result, in 2006 NOAA amended 15 CFR part 930, subpart H to allow the Secretary to meet the deadlines.

Coastal Zone Management Act Federal Consistency Appeal Procedures			
Day	Action Required (some actions not available for appeals of energy projects)		
0	• Notice of Appeal (NOA) received		
30	• Publish Federal Register (FR) Notice of Appeal. Notices <i>must</i> be published by day 30. • Public Comment Period (if applicable) and Federal Agency Comment Period opens • Appellant's Brief and Appendix due.		
60	• State's Brief and Supplemental Appendix due. • Public Comment period closes unless Public Hearing Request granted (non-energy project appeals only). • Request for Public Hearing must be received within 30 days of FR Notice (non-energy project appeals only).		
80	• Appellant's Reply Brief Due.		
60-Day Stay Granted		No Stay Granted	
250	• Day 250 is end of decision record period following publication of Federal Register Notice, if stay is granted. • Publish Notice closing Record; Record <i>must</i> be closed on day 250	190	• Day 190 is end of 160-day decision record period following publication of Federal Register Notice, without stay. • Publish Notice closing Record.
310	• Secretary issues Decision or publishes FR Notice re: No Decision—take additional 15 days.	250	• Secretary issues Decision or publishes FR Notice re: No Decision – take additional 15 days.
325	• Secretary issues Decision	265	• Secretary issues Decision

H. Interstate Consistency

Interstate consistency refers to: a) instances where a federal action occurring exclusively in one state (State “B”) will have effects on the uses or resources of another state’s coastal zone (State “A”); and b) the ability of State A to review the action. State A may review an action in State B if previously authorized by NOAA. Under NOAA’s regulations, states may submit to NOAA a list of those activities occurring in specific areas within State B that the state believes will result in coastal effects. NOAA may approve such activities for interstate consistency review, if it concludes such actions will have reasonably foreseeable effects on State A’s coastal uses and resources. *Interstate consistency* does not give State A authority to review the application of the laws or policies of State B. It only allows State A to review the *federal authorization* of an activity. The interstate consistency requirements combine with the requirements under the various types of federal actions. The interstate regulations are found at 15 CFR part 930, subpart I.

OCM’s interstate consistency regulations were established to provide a process for reviewing federal actions in another state that would involve greater coordination and consultation between states and federal agencies, as well as provide notice to neighboring states and federal agencies and applicants proposing federal actions in nearby states.

However, State A may, but is not required to, describe geographic areas within State B for the review of *federal agency activities* under 15 CFR part 930, subpart C in their CMPs. This is because, even if not described, a federal agency has a statutory responsibility to provide State A with a CZMA review for *federal agency activities* with coastal effects, regardless of location (including within the boundaries of State B). See 15 CFR §§ 930.33(c)(1), (d) and 930.155(a). Over the years, federal agencies have provided consistency determinations to states for *federal agency activities* occurring wholly within the boundary of another state.

See OCM’s Federal Consistency web page for a short history of interstate consistency as well as the status of interstate proposals submitted to and approved by OCM.

I. Information in State Objection and Conditional Concurrence Letters

State objection and conditional concurrence letters issued under the CZMA federal consistency provision should include the following information:

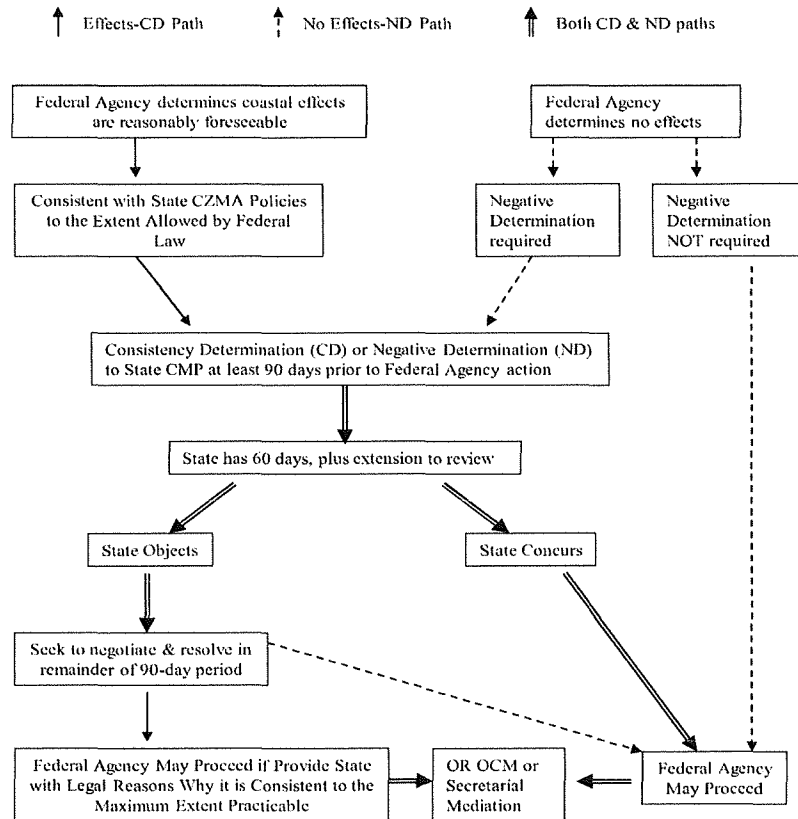
1. An opening paragraph that clearly states whether the state “objects” to the federal action or is issuing a “conditional concurrence.”
2. A description of *how* the activity is inconsistent with specific enforceable policies that are part of the state’s federally approved CMP. Conditions of concurrence should also be directly tied to the need to be consistent with a specific enforceable policy.
3. The objection/conditional concurrence should be received by the federal agency or applicant within the statutory/regulatory time frames. For example, an objection/conditional concurrence letter should document the following dates:
 - Date the complete Consistency Certification (CC) or Consistency Determination (CD) and necessary information was received by the state;
 - Date the state’s review period commenced (should be same date as receipt of the complete CC or CD unless alternative agreement);

- For federal license or permit activities and OCS plans, the date the state provided the 30-day “completeness” finding under 15 CFR § 930.60(a), if applicable;
 - Date the state’s original CZMA decision is due and the revised date, if applicable, based on an agreed-to extension (for federal agency activities) or stay (for federal license or permit activities);
 - Date that the state provided a three-month notice to the applicant for a federal license or permit activity or OCS plan describing the status of the state’s review; and
 - If an objection is based on a lack of information, the date(s) of the state’s written requests for the information made during the state’s CZMA review period.
4. For federal license or permit activities, OCS oil and gas plans, or financial assistance activities, an objection or conditional concurrence letter should advise the applicant, person or applicant agency, of the right to appeal the state’s objection to the U.S. Secretary of Commerce (with a copy to NOAA’s Office of General Counsel, Oceans and Coast Section) within 30 days of receipt of the letter and should provide the addresses for the Secretary and NOAA General Counsel that are described in NOAA’s regulations at 15 CFR § 930.125(d).
 5. If an objection is based on insufficient information, the objection letter describes the nature of the information needed, the necessity of having that information to determine consistency and the date this information was requested, in writing, during the state’s CZMA review period.
 6. An objection letter may include alternatives that would be consistent with the state’s CMP enforceable policies. Consistent alternatives should be described with as much specificity as possible to allow the applicant, or the Secretary of Commerce, to determine if the alternatives are available and reasonable.
 7. A conditional concurrence letter should state that if the conditions are not agreed to, pursuant to 15 CFR § 930.4, then the conditional concurrence automatically becomes an objection.
 8. An objection or conditional concurrence letter should be sent to the applicant, the appropriate federal agency, and the Director of OCM.

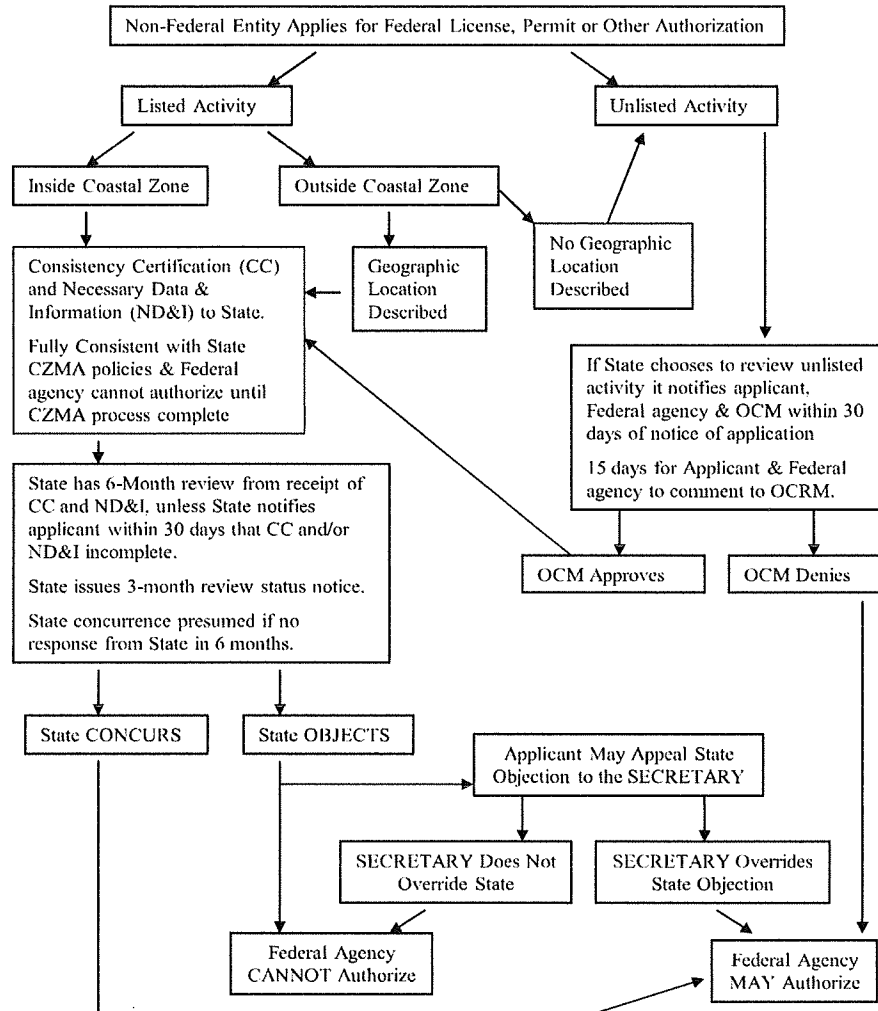
Appendix A – Summary of Federal Consistency Provisions		
	Activities by a Federal Agency (Subpart C)	Non-Federal Applicants for Federal Licenses or Permits (Subpart D), OCS Plans (Subpart E), and Federal Financial Assistance (Subpart F)
Who decides whether there are coastal effects?	Federal agency decides whether there are coastal effects.	State, with NOAA approval, decides whether there are coastal effects through “listing” and “unlisted” requirements for activities requiring federal authorization.
Who submits consistency determination or certification?	Federal agency submits consistency determination (CD) if coastal effects.	Applicant submits consistency certification (CC)
When is consistency determination or certification submitted?	Submitted at least 90 days before final action.	Submitted with or after license or permit application to Federal agency. For Subpart F, submitted through state clearinghouse or intergovernmental review schedule.
When does state review start?	Review starts when CD received (if complete).	Review starts when CC and “necessary data and information” received. For Subpart F, review starts pursuant to state clearinghouse or intergovernmental review schedule.
How long is the state review process?	State has 60 (plus 15) days to review. State and Federal agency can agree to a shorter or longer review period.	State has 6 months to review (with 3-month status notice). State and applicant can agree to “stay” the 6-month review period for a specified time, after which the remainder of the 6-month review period applies. For Subpart F, review period is pursuant to state clearinghouse or intergovernmental review schedule.
What is the applicable federal consistency standard?	Activity must be “consistent to the maximum extent practicable” (i.e., fully consistent unless federal law prohibits full consistency) as determined by the Federal agency.	Activity must be fully consistent as determined by the state.

What is the impact of the state's response?	If state concurs or concurrence is presumed, Federal agency may proceed. If state objects, Federal agency can proceed over objection if consistent to the maximum extent practicable.	If state concurs or concurrence is presumed, Federal agency may authorize the activity. If state objects, Federal agency may not authorize the activity, unless Secretary of Commerce overrides state objection on appeal by the applicant.
Are there administrative or judicial processes available if a state objects?	There is no appeal to the Secretary of Commerce for Federal agency activities. A state can challenge a Federal agency's decision to proceed over state objection in federal court and/or a state or Federal agency can seek non-binding mediation through the Secretary of Commerce or NOAA. If state litigates Federal agency decision to proceed and Federal agency loses in federal court, the President may exempt the activity from CZMA compliance if it is in the paramount interest of the United States.	Applicant may appeal state objection to the Secretary of Commerce (delegated to NOAA) who can override or sustain the state objection. An applicant must file an appeal within 30 days of receipt of a state objection. Under CZMA statutory requirements and NOAA's regulations, NOAA will issue a Secretarial CZMA appeal decision within 265-325 days from the filing of an appeal. The applicant or state can challenge the Secretary's decision in federal court.

**Appendix B: Federal Agency Activities Flow Chart
(CZMA § 307(c)(1); 15 C.F.R. part 930, subpart C)**



Appendix C: Federal License or Permit Activities Flow Chart
(CZMA § 307(c)(3)(A); 15 C.F.R. part 930, subpart D)



OCM Federal Consistency Contacts:

Mr. David W. Kaiser, Esq.
Senior Policy Analyst
Stewardship Division, Office for Coastal Management
National Oceanic and Atmospheric Administration
Coastal Response Research Center, UNH
246 Gregg Hall, 35 Colovos Road
Durham, New Hampshire 03824-3534
Phone: 603-862-2719 david.kaiser@noaa.gov

Mr. Kerry Kehoe, Esq.
Federal Consistency Specialist
Stewardship Division, Office for Coastal Management
National Oceanic and Atmospheric Administration
1305 East West Hwy., Room 11321
Phone: 240-533-0782 kerry.kehoe@noaa.gov