



May 11, 2023

To: State Lands Commissioners

Delivered via email to Lieutenant Governor Eleni Kounalakis, Chair

Cc: Jennifer Lucchesi, Executive Director

Re: Emergency Shoreline Armoring by OCTA for Railroad in San Clemente Impeding Public Trust Resources

Dear Honorable Chair and Commissioners:

On behalf of Surfrider Foundation's South Orange County Chapter, our 18 other local chapters in the state, and over 250,000 supporters and members nationwide, we submit the following arguments for the protection of Public Trust Lands in San Clemente that are increasingly impeded by new shoreline armoring protecting the railroad in the Los Angeles-San Diego-San Luis Obispo ("LOSSAN") corridor. The Surfrider Foundation is a grassroots environmental non-profit organization dedicated to the protection and enjoyment of the world's ocean, waves and beaches for all people.

The Surfrider Foundation is gravely concerned with the emergency increase in shoreline hardened armoring on the south San Clemente shoreline, some of which is unregulated. This coastal armoring is due to Orange County Transportation Authority's ("OCTA") coastal defense strategy of aggressive use of boulders on the beach, just north of the San Onofre State Park. This shoreline armoring is a detriment to coastal public trust resources and impedes public beach access. **We therefore strongly urge the State Lands Commission ("Commission") to regulate such use of the public trust tidelands by charging rent for the lease of such lands in the short term and working toward eventual relocation of the railroad tracks in protection of public trust coastal resources.**

I. The management of Public Trust Tidelands for the People of California is Squarely within the Purview of the State Lands Commission

It is well-established that the State owns all lands below the ordinary high tide line and holds those lands, including the beach and submerged waters, in trust and for the benefit of the public.¹ As the United States Supreme Court announced over a century ago, the state holds public trust property "in trust for the people of the state that they may enjoy . . . freed from the obstruction or interference of private parties."² The Commission has jurisdiction to dispose of or lease those

¹ Cal. Civ. Code § 670; *People ex inf. Webb v. California Fish Co.*, 166 Cal. 576, 584 (1913); *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971).

² *Illinois Central Railroad v. Illinois*, 146 U.S. 452, 460 (1892).

lands, but must do so in accordance with the Public Trust Doctrine. Additionally, agencies have a duty to consider how the use of non-trust resources will affect public trust resources.³

The Commission oversees the management of sovereign Public Trust lands and resources granted in trust by California, including prime waterfront lands and coastal waters. The public's right to use California's waterways for commerce, navigation, fishing, boating, natural habitat protection, and other water-oriented activities is protected by the Commission under the common law Public Trust Doctrine.

Furthermore, in the California State Lands Commission 2021-2025 Strategic Plan, the Commissioners highlight the commitment to addressing climate change and enforcing the protections of the Public Trust Doctrine, stating, "Through its actions, the Commission secures and safeguards the public's access rights to natural navigable waterways and the coastline and preserves irreplaceable natural habitats for wildlife, vegetation, and biological communities."⁴ Strategic focus areas and goals include, "Leading Climate Activism" and "Meeting Evolving Public Trust Needs."⁵ The Commission pledges to address the "essential role of the Public Trust in enriching the lives of the public and protecting the environment for future generations."⁶ It is within the Commission's mandate and strategic focus to address the climate change impact to nearshore waters here, and work collaboratively with other agencies and stakeholders to plan for the future of California's public trust lands in light of the need for coastal railroad realignment.

II. As Trustee of Public Trust Tidelands, the State Lands Commission Must Protect Public Tidelands and Public Access

In San Clemente, the Orange County Transportation Authority has placed enormous boulders and riprap on a public beach in an effort to stabilize the railroad tracks near Cypress Shores and directly adjacent to Trestles Beach and the Cottons surf break at San Onofre State Beach. Since 2021, OCTA has received at least four emergency permits by the California Coastal Commission to drop over 26,500 tons of rock, along with an extensive bluff tie back system and has reportedly performed additional unpermitted work that appears to be outside of the allowed footprint. This extensive shoreline manipulation through the emergency permit system has evaded sufficient environmental review and public stakeholder input. The impact on coastal resources has caused alarm among beach advocates and the surfing community, as well as the general public.

³ See Pub. Res. Code § 30211; *Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 435-37 (1983).

⁴ California State Lands Commission Strategic Plan, 2021-2025.

⁵ *Id.*

⁶ *Id.* at 24.



Image: January 10, 2023 by Rick Erkeneff

Public trust stewardship mandates allowance of public access to public trust resources. Increased armoring of the shoreline will limit both vertical and horizontal beach access. This curtailment of public beach access rights will infringe on the right to coastal access enshrined in the California Constitution Section X, Article IV. Californians also called upon the state to protect beach access and prevent privatization of the coast in the 1970s, a movement that inspired the Coastal Act and the preceding Coastal Conservation Initiative (Prop 20). California coastal law requires strong protections for public access to the coast and for the preservation of coastal lands and waters.⁷

The public trust not only encompasses traditional public uses such as navigation and commerce, but also extends to the preservation and enjoyment of tidelands “. . . in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”⁸ The public trust must be protected “whenever feasible” and cannot be abandoned to appease private interests.⁹ As such, the Commission cannot simply subordinate the public trust protections to appease OCTA and railroad industry interests.

⁷ See, e.g., Chapter 3 policies of the California Coastal Act, including Cal. Pub. Res. Code § 30210, 30211.

⁸ *Marks v. Whitney*, 6 Cal. 3d at 259-60; see also *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 521 (1980) (holding that public trust uses to include the right to “hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units”); *Nat’l Audubon Soc’y*, 33 Cal. 3d at 435 (concluding that protecting recreational and ecological values and uses, scenic views of a waterbody and its shores, and wildlife, are among the purposes of the public trust doctrine).

⁹ *Nat’l Audubon Soc’y*, 33 Cal. 3d at 446; *City of Berkeley*, 26 Cal. 3d at 521 (holding that the “administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties”).

a. *The Public is Deprived of the Benefit of Public Tidelands Due to OCTA Shoreline Armoring*

Shoreline armoring is detrimental to the beach environment. Adverse effects related to protective structures can include increased beach erosion, interference with natural sand supply, loss of public beach, and potential impacts on habitat and recreation as a result of encroachment by these protective structures on the beach environment. The south San Clemente area and north San Onofre State Park shoreline are known for its valuable and popular surfing resources with well-shaped waves. Coastal armoring in addition to sea level rise not only kills the beaches, but it also has a negative impact on waves since there will be refraction off the seawalls and other hard structures that compromises the natural wave shape and direction. The impacts of hardened armoring on access and recreation are too severe to be negated or compromised away, especially as this threatens very dangerous precedent statewide when managing coastal resources in the face of sea level rise.

Inevitably, with increasing sea levels, there is an increased demand to construct new sea walls and other shoreline protection devices to hold back the sea. Since shoreline protection stops the mean high tide line from advancing landward, it also prevents the landward movement of the public trust. However, the mean high tide line is measured in its unobstructed state as if shoreline protection did not exist.¹⁰

Hardened shoreline protection devices combined with sea level rise create a scenario that prevents the mean high tide line, and thus the public beach, from migrating landward. This scenario essentially eats away at the public trust lands available for all to enjoy with the public beach. However, the Ninth Circuit Court of Appeals created good precedent for public beach access and migrating intertidal lands with the *United States v. Milner* case. In *Milner*, beachfront property owners erected shoreline protection on the dry sandy portion of their property that intersected the mean high tide line when the beach eroded. As trustees for the Lummi Nation, the federal government brought claims against the property owners for trespass and violations of federal law. The court held that while littoral owners cannot be faulted for wanting to prevent their land from eroding away, the littoral owners cannot permanently fix the property boundary to the detriment of the tideland property owners.¹¹ The *Milner* court further held:

“Under the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume. The uplands owner loses title in favor of the tideland owner-often the state-when land is lost to the sea by erosion or submergence. The converse of this proposition is that the littoral property owner gains when land is gradually added

¹⁰ See *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978).

¹¹ See *United States v. Milner*, 583 F.3d 1174 (9th Cir. 2009).

through accretion, the accumulation of deposits, or reelection, the exposure of previously submerged land.”¹²

The court reasoned that the owner of riparian or littoral property must accept that the property boundary is ambulatory, subject to gradual loss or gain depending on the whims of the sea.¹³ Consequently, the mean high tide line should be measured as if the shoreline protection did not exist for purposes of trespass and the Rivers and Harbors Act. According to the rationale in *Milner*, shoreline protection that fixes the mean high tide line essentially extinguishes the public’s right to erosion and could constitute a trespass upon public trust lands. Shoreline armoring obstructs public trust rights to navigation, public access, and recreation, and it is necessary to measure the mean high tide line as if the shoreline protection did not exist in order to preserve public trust rights in the public trust lands. Therefore, constructed shoreline armoring should not deprive the public of rights to land that would be tidelands in its natural state. Therefore, any shoreline armoring that impedes on public trust tidelands should be prohibited unless absolutely necessary and for any necessary, legally permissible armoring, the Commission should charge rental fees for a lease of land until such armoring can be removed.

Shoreline armoring is especially dangerous where sea level is rising and erosion is happening at an increasing rate. Our sandy beach resources or “towel space” will also disappear at an increasing and alarming rate. Rising sea levels will cover up existing beach area, narrowing the beach and impeding the public’s right to access and enjoy the coast. When the whole beach is covered at high tide, there is no longer room for runners to jog or children to play. Surfers are doubly harmed: beloved surf breaks are inaccessible at high tide because of beach loss and the quality of surf breaks declines as waves rebound off seawalls and change wave patterns.¹⁴ Seawalls can also provide a vertical barrier to the beach; unable to access the beach by climbing down dunes or bluffs, the public must travel around each seawall before finding an access point.¹⁵ When vertical access points are limited to areas on private property inaccessible to the public, attempting to reach the beach becomes even more challenging.

Coastal armoring impairs the public trust by placing a physical barrier that harms coastal ecosystems and inhibits the public’s ability to access the beach. Coastal armoring can also reduce the physical area of public trust land; when the beach erodes to such an extent that the waves crash directly into an armoring structure, the wet sand beach and tidelands disappear.¹⁶ Bluff retention devices, even if not built directly on the tidelands, affect public trust resources by

¹² Id at 1187.

¹³ The artificial-accretion rule in California holds that an upland or littoral property owner does not gain alluvion from unnatural conditions. This general holding was affirmed by the U.S. Supreme Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

¹⁴ See L. Benedet et al., *Impacts of Coastal Engineering Projects on the Surfability of Sandy Beaches*, 75 *Shore & Beach* 3, 13-15 (2007).

¹⁵ Griggs, Gary, *The Effects of Armoring Shorelines—The California Experience* (2010) at 81; Meg Caldwell & Craig Holt Segall, *No Day at the Beach*, 34 *Ecology L.Q.* 533, 540, 555 (2007).

¹⁶ Meg Caldwell & Craig Holt Segall, at 539-41.

eventually making the beach impassable at high tide and shrinking the physical footprint of the tidelands and tidal habitat. This curtailment of access to the tidelands and ocean also violates the state Constitution, which prohibits the obstruction of public access to tidelands. Cal. Const. art. X, § 4. Both residents and out-of-state travelers flock to California's coast, spending money in beachside communities. As the beach is lost and the shoreline hardened, the subsequent reduction in recreational and visual quality has the potential to cause substantial economic loss as visitors instead seek pristine beaches elsewhere.

b. The Commission Must Make a Delineation of the Mean High Tide Line and Charge for the Lease of Public Trust Lands to the Railroad until Rail Relocation Occurs

The Commission has broad discretion over leasing for all surface uses of all lands under the Commission's jurisdiction, except exploration and extraction of natural resources.¹⁷ This discretion includes the method or amount of rental that is appropriate and how rental should be adjusted, based on what the Commission deems is in the best interest of the state. The State Lands Commission generally leases submerged lands to riparian or littoral upland owners or use right holders. General lease uses include protective structures such as groins, jetties, seawalls, revetments, breakwaters, and bulkheads.¹⁸ Rent must be in the best interest of the state and may be calculated based on one or more listed methods.¹⁹

In fact, the State Lands Commission has set precedent for charging rent for shoreline armoring structures that occupy public trust lands. The Commission has recently charged rent for a concrete seawall with a wave deflection cap in Ventura County. The lease applicant owns the upland property, and the seawall has existed for many years, privately owned and maintained by the applicant. The staff report found that the proposed lease would not substantially impair public rights to navigation and fishing, would not substantially interfere with Public Trust needs, and that the lease was in the best interest of the state now and for the foreseeable term of the lease.²⁰

In another example, the Commission charged rent for a seawall constructed on private property in Santa Cruz to protect a home against bluff failure in 1986. This was a seawall that was later

¹⁷ Cal. Code Regs. Tit. 2, § 2000.

¹⁸ Cal. Code Regs. Tit. 2, § 2002.

¹⁹ Cal. Code Regs. Tit. 2, § 2003. These methods are: "(1) 9% of the appraised value of the leased land; (2) A percentage of annual gross income (the percentage being based on an analysis of the market for like uses and other relevant factors); (3) Comparison to rents for other similar land or facilities; (4) \$0.05 per diameter inch per lineal foot of pipeline, conduit, or fiber optic cable; (5) Benchmarks for regions where there are large concentrations of similar facilities (benchmark rental rate to be based on analysis of similar or substitute facilities in the local area)... (9) Other such methods or information that are based on commonly-accepted appraisal practices and principles; (10) For leases for a recreational pier or buoy, rent shall be based on local conditions and local fair annual rental values." Additional methods apply for salvage permit operations, archaeological permits, and forest management agreements. *Id.*

²⁰ See Staff Report 56, Kenneth and Tami Walker -Protective Structure Use (April 7, 2023 meeting)(charging annual rent of \$4,549 with an annual Consumer Price Index adjustment).

found to infringe on public trust lands in the repair, use and maintenance of the private residential seawall not previously authorized by the Commission. After examination of historical records and a determination that the mean high tide line (“MHTL”) had moved landward due to coastal erosion and that the existing seawall now encroaches on state sovereign land, so a lease is warranted.²¹

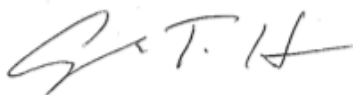
As Trustee of Public Trust Tidelands in South Orange County, the Commission must charge for the lease of lands to Orange County Transit Authority in San Clemente for their current armoring on public tidelands and should also encourage realignment of the railroad infrastructure away from public tidelands, where they infringe on public beach access rights and compromise public safety.

CONCLUSION

The State Lands Commission, with its strong mandate to manage and protect public trust lands, should act in a manner that deters increased armoring and sacrifice of our public coastal areas. The continued lack of oversight and management of shoreline public trust infringement will undoubtedly lead to increased unwarranted future armoring and further consumption of the public coastline by private property or business interests unwilling to adapt to a changing shoreline.

For the increasingly worrisome issue of the LOSSAN railroad tracks on the beach in south San Clemente, the Commission should strongly encourage swift realignment of the railroad to a location inland and away from public trust shoreline resources. To allow these train tracks to remain on the beach and receive increasing armoring for their viability is to essentially destroy public trust resources, including the beach and world premier waves at the Trestles surf break.

Sincerely,



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Surfrider Foundation

²¹ See Calendar Item C37, Philip and Sharon Lebherz – Repair, Use and Maintenance of Seawall (June 28, 2016).