

CAPISTRANO BAY DISTRICT  
AGENDA REPORT  
March 30, 2021

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*Old Business/Shoreline Protection*

## ITEM 9a

Update on Activation of Latent Powers  
Related to Shoreline Protection

Since the last Board meeting the Board has progressed to requesting the application form for soliciting LAFCO to activate the following authority/power (commonly referred to as a Latent Power, i.e., a power not vested in a District at the time the District was formed):

CAL. GOVT. CODE, TITLE 6, Div. 3, Part 3, Chap. 1 Authorized Services, Sec. 61100, subsection (r):

*"Plan, design, construct, improve, maintain, and operate flood protection facilities."*

District staff is currently working on completing the application and will be submitting the form with all requested documents, as soon as the letter is received from the City, approving the District's request – LAFCO requires such a letter from the city in which the District is located.

Letters regarding shoreline protection business (all attached on the following pages):

- letter from Jackson Tidus law firm attached
- letter from Alex Schwada law firm attached
- email letter from homeowner Bill Nassour, 35777 Beach Rd. attached
- most recent letter from the District to the Coastal Commission (3-12-21) attached

District progress on assisting property owners with shoreline protection matters

The District has replied to the Coastal Commission in the letter noted above but has not yet received a reply. The letter was sent on March 12<sup>th</sup> and the CCC has been taking up to six weeks to return comments.

In the meantime remember that the City has requested that property owners cease any further armoring on the beach until a solution is reached between owners and the CCC on the matter of the violations and what will be permissible as shoreline protection.

Expenses to Date

- Shoreline Protection Consulting      \$ 625.00 (consult on letters to/from CCC)
- Shoreline Protection Engineering      \$5644.00 (primarily liaison/support for OC Parks)



March 22, 2021

Direct Dial: 949.851.7491  
Email: [bhill@jacksontidus.law](mailto:bhill@jacksontidus.law)  
Reply to: Irvine Office  
File No: 9740-127423

**VIA EMAIL ONLY ([drussell@capobay.org](mailto:drussell@capobay.org))**

Board of Directors  
Capistrano Bay District  
35000 Beach Road  
Capistrano Beach, CA 92624  
c/o Donal Russell, Manager

**Re: Capistrano Bay District ("District") Lack of Authority to  
Negotiate with California Coastal Commission**

Dear Mr. Russell:

As you know, our firm represents the Tarr Family Trust ("Tarr Family") that owns the single-family home located at 35841 Beach Road. As you are aware, on February 12, 2021 we asked the District to cease negotiations with the California Coastal Commission ("CCC") on behalf of District homeowners due to the District's admitted lack of authority to carry out those negotiations.

Our review of the agenda for the February 23, 2021 Board meeting, the discussion at that meeting, a February 19, 2021 letter from the CCC and the Board's March 12, 2021 response evidence that the Board's decision to wade into uncharted waters contrary to its mission was unsupported and unwise. We do not believe that the Board should further pursue negotiations and especially not the formation of a GHAD under some unsupported claim of incidental or latent authority without a plan, without informed written consent and voluntary funding by the affected homeowners. We ask the Board to consider and address the following before further action.

1. Limited Incidental District Authority. It has been suggested that the Board can act under "incidental" authority. The Board's incidental authority appears to pertain solely to the construction of bridges, dams, culverts, gutters and drains "incidental" to the roads. Is the District currently planning to construct any bridges, dams, culverts, gutters or drains incidental to its roads, and if so, how does that impact the current CCC discussions? Does homeowner Coastal Act compliance have anything to do with construction of drainage works incidental to roads? If so, please give us examples of what a homeowner may agree to do with the CCC that would impact the District's assets?

Irvine Office  
2030 Main Street, 12th Floor  
Irvine, California 92614  
t 949.752.8585 f 949.752.0597

Westlake Village Office  
2815 Townsgate Road, Suite 200  
Westlake Village, California 91361  
t 805.230.0023 f 805.230.0087

[www.jacksontidus.law](http://www.jacksontidus.law)

2. Lack of District Authority for Community-Wide Infrastructure Projects. We are especially concerned that the District may be committing the homeowners to costly community-wide infrastructure projects (through a GHAD or otherwise) that would be better funded by taxpayers. In the February 19, 2021 letter from the CCC, it states:

"It was our understanding from statements of the District that the District was interested in taking comprehensive action, funded by the homeowners, and on behalf of the homeowners, in its capacity as the entity responsible for community-wide infrastructure projects, to resolve the violations, whether those violations were undertaken by the District or by the homeowners."

- a. Did the District take any action to obtain homeowner consent for taking comprehensive action to resolve homeowner violations?
- b. Did the District take any action to obtain homeowner consent for funding comprehensive action funded by the homeowners?
- c. Is the District the entity responsible for community-wide infrastructure projects to resolve homeowner Coastal Act violations?
- d. Does the District have authority to spend monies on the formation of a GHAD? In Broad Beach, private parties funded the GHAD formation costs. Forming a GHAD seems to be clearly outside the scope of District powers.

3. Lack of District Authority for Resolution of Claims/Mitigation Measures. The February 19, 2021 CCC letter continues:

"This resolution would generally entail replacement of all unpermitted shoreline protective devices with appropriate short-term and long-term solutions, mitigation for the impacts of the unpermitted devices, and resolution of the Commission's claims for monetary penalties."

Although the District in its March 12, 2021 response to the CCC acknowledges that the District does not have authority to enter into such resolution of claims, including mitigation measures and penalties, the District still indicates its willingness to cooperate with the CCC in some unknown fashion regarding mitigation measures. How can the District hope to cooperate in a meaningful way with the CCC or facilitate resolution without a plan, without homeowner consent and with the CCC current position?

4. Unclear District Claim of Latent Flood Protection Authority. We note that on the February 23, 2021 agenda the Board was discussing latent powers for flood protection.

a. Latent powers are those that the District might already have that are currently unexercised. Where in the District's 1959 authorization are those latent powers found?

b. Does the District have a current inventory list of the latent powers reserved and approved by LAFCO. If so, please provide it to us.

c. Based on the past decision-making of the Board, is it the District's position that it can have latent powers that exceed the scope of its authority granted in the County 1959 Resolution?

d. What drainage works that the District controls and has sole responsibility for maintenance and replacement extend beyond the District-owned road and, if any, what is the description of the drainage works and where are they located?

e. Does the 1959 County Resolution provide a broad right for flood protection that extends beyond drainage works that might be incidental to District roads?

f. Does the 1959 County resolution provide for a broad right of flood protection that allows it to negotiate with the Coastal Commission on behalf of homeowners regarding shore protection?

g. Has the Orange County LAFCO performed any study or made any findings of District latent powers for flood protection?

h. Would exercise of District latent powers regarding flood protection require LAFCO authorization and approval?

i. Given that the Board only on February 23, 2021 authorized the Manager to seek LAFCO approval for latent power, on what basis did the Board make decisions to engage with the California Coastal Commission and spend District funds before such approval? Please send us copies of all correspondence and applications to LAFCO from the District, including any notification from LAFCO for meetings, from January 1, 2021 forward.

j. The President stated that the Board has been advised by legal counsel that they are allowed to spend funds monitoring any items or issues that may impact its assets (which is essentially Beach Road), including Sea Level Rise. The President also said that this monitoring by the District can include the monitoring of the defense and struggle between the violating homeowners and the California Coastal Commission to assess if the results of the discussions and disputes may impact the District's assets. On what basis does the District believe that monitoring allows the District to subsidize or position itself as an intermediary in the homeowners' efforts to defend themselves against the Coastal Commission onslaught? Certainly, latent power for monitoring, if any, does not include authority to be responsible for the



expenditure of millions of dollars on community-wide infrastructure projects on the homeowners' side of the road. Who will the District retain to monitor these issues? We would request that any fees invoiced as a "monitoring" expense category be billed under a separate accounting code from the consultant's other invoices if the consultant is tasked with more than one work effort.

k. Does any other government authority such as the Orange County Flood Control or the City of Dana Point have joint or sole authority over portions or all of flood protection within the District boundaries? And, if so, what collaboration, including costs sharing, needs to take place to "monitor" and plan for overtopping events if the overtopping increase in frequency and severity as the uncertain predictive models presently being used as a "standard" by the Coastal Commission state?

l. Irrespective of the violating homeowners issues, does the District plan to initiate and complete a Sea Level Rise impact study to assess if its only asset is presently designed to properly address the predicted sea level rise? If so when?

m. Are the sub-surface flood control drainage pipes and outlets on Beach Road controlled by the District and/or Orange County Flood Control through easements properly sized and designed to properly drain by industry standards of care, the overtopping ocean waters based on new predictive models? Is the Beach Road surface drainage designed to cope with the Sea Level Rise predictive model?

5. Unclear District Role as Facilitator. We are pleased that District counsel in its March 12, 2021 response to the CCC February 19, 2021 letter clarified that the District did not have authority to act on behalf of homeowners. We are still troubled that the District believes that it needs to extend and even expand its uncertain role as a facilitator on behalf of violating homeowners.

The homeowners made conscious decisions to take the actions fully understanding the inherent risks in the State of California. While we have empathy for their plight and believe there are potential pathways for successful results, non-violators should not be responsible for the costs of results of violator's decision-making. Please clarify what role, if any, the District intends to take going forward as a facilitator and how the District intends to obtain the consent of homeowners and fund that role so as to not burden the District taxpayers with a gift of public funds to the violating homeowners.

6. District Connection to Coalition. A February 22, 2021 letter to the District from Eric Schwada, a solo practitioner real estate attorney whose website lists no experience in Coastal Commission matters claims to represent an unknown entity entitled the "Coalition to Protect Capistrano Beach" and claims that the District's actions pertaining to the Coastal Commission are in response to that Coalition.

a. Please advise who or what that Coalition is. Does that Coalition really exist or is the attorney simply acting in concert with District counsel to create the impression of homeowner support? Is the Coalition comprised of members who support the Coastal Commission position or of Commission staff? Is it comprised of District homeowners? How many?

b. Are the assertions of the letter true that the District's actions such as hiring its current counsel and coastal engineer are in response to Coalition demands? If so, why does the District give so much weight to that Coalition and its positions?

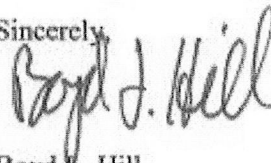
c. The letter appears to state that the District's should "focus its energy and efforts on shoreline protection." Does the District agree with that position? If not, why is the District spending such large amounts of resources on shoreline protection?

d. The letter appears to state that the District's mission is to "protect the Beach Road Community." Does the District agree with that position? If not, why does the District continue to act as if the District is the guardian of the Community?

e. The letter appears to take the position that the District should take the lead in seeking to have protective barriers along the shoreline and that such a solution would be cheaper for the homeowners than allowing the various state, local and federal interests with assets along the shore to implement shore protection with taxpayer dollars. The logic of that position is not apparent. How can undertaking the entire expense or a lion's share of the expense by the District taking on that burden on behalf of the homeowners be a better economic result than having taxpayers throughout the County, State and Country spread the burden for shore protection to protect their collective interests? Why should the District be placing the homeowners in that position by forming a GHAD? Does the District have the legal authority to form a GHAD? Can the District use District funds for the initial formation costs of a GHAD?

Please address these questions/issues before becoming further unmoored from your charter.

Sincerely,



Boyd L. Hill

cc: Michael L. Tidus, Esq.  
Steven H. Kaufmann, Esq.



SCHWADA  
— LAW —

11100 Santa Monica Blvd., Suite 780  
Los Angeles, California 90025

Telephone: 424.259.1878  
Facsimile: 424.208.1153  
[www.schwadalaw.com](http://www.schwadalaw.com)

Writer's Email Address:  
[alex@schwadalaw.com](mailto:alex@schwadalaw.com)

March 10, 2021

***VIA ELECTRONIC MAIL***

Board of Directors  
Capistrano Bay Community Services District  
35000 Beach Road  
Capistrano Beach, CA 92624  
Attn: Donal S. Russell, General Manager  
Email: [drussell@capobay.org](mailto:drussell@capobay.org)

Re: Capistrano Bay Community Services District (the “**District**”)

Dear Members of the Board:

As you know, this firm represents the Coalition to Protect Capistrano Beach (the “**Coalition**”). The Coalition believes that the District’s Board members (the “**Board**”) can take action to protect the Beach Road Community from continuing shoreline erosion.

Serra Siding Project – OCTA and Metrolink

Members of the Beach Road community received an email from the District on March 1, 2021, which reproduced materials prepared by a group named “Capo Cares” regarding the Serra Siding Project (the “**Project**”) being proposed by the Orange County Transportation Authority (“**OCTA**”) and Southern California Regional Rail Authority (“**Metrolink**”). The Capo Cares materials asked the District and its members to oppose the Project. The Coalition believes it was a mistake for the District to take this position. As the Coalition has noted in multiple previous correspondences to the Board, OCTA and Metrolink are obvious partners for the District and the Beach Road community in their efforts to combat shoreline erosion. Metrolink and OCTA can also help defray a significant amount of the future costs of coastal protection provided we work together. Accordingly, the District should not oppose the Project, and the Coalition welcomed the District’s reversal of its initial position in a March 3<sup>rd</sup> email. That said, the District should adopt a cooperative attitude towards OCTA and Metrolink to help garner those entities’ support as the District begins its negotiations with the California Coastal Commission (the “**CCC**”) and other key agencies regarding shoreline protection efforts and coastal development permitting.

OCTA clearly recognizes that sea level rise and the attendant shoreline erosion pose serious threats to OCTA and Metrolink rail line assets located throughout southern Orange County. In fact, OCTA prepared a report in January 2021 entitled *OCTA Rail Defense Against Climate Change Plan (Agreement No. C-8-2072)* (the “**Report**”). The Report can be found on the OCTA website, and a direct link to the Report is located below:

[https://www.octa.net/pdf/OCTA\\_RailDefAgainstCC\\_FinalReport\\_wAppendix.pdf](https://www.octa.net/pdf/OCTA_RailDefAgainstCC_FinalReport_wAppendix.pdf)

The Coalition urges the Board to read the Report in its entirety, especially the sections involving sea level rise, as it provides important insights into OCTA's strategy regarding the protection of its rail lines along the coast. Specifically, the Report notes that the OCTA seeks to protect its existing rail lines along the coast, as relocating rail lines inland is incredibly expensive. The proposed Project confirms that OCTA and Metrolink are invested in the rail lines in the Beach Road area. OCTA also states that its recommendations for coastal alignment include:

"Coordinate with regional beach nourishment efforts. Beach nourishment would be performed by other agencies and occur outside of the rail ROW, but OCTA may be able to assist with access and permit needs for these efforts."

Accordingly, OCTA is effectively stating that it wants to partner with local communities like the District to assist them in protecting their communities from shoreline erosion because OCTA views such efforts as helping protect Metrolink/OCTA rail lines. Given the proximity of the rail lines to the ocean and the Beach Road homes, the Coalition again urges the Board to pursue direct contacts with OCTA and Metrolink to discuss shoreline protection. As the Coalition has stressed repeatedly, bringing regional partners like OCTA and Metrolink will only help the District in its negotiations with the CCC. Moreover, the Board needs to recognize that by working with OCTA and Metrolink in a cooperative manner the District may be able to defray some of the costs associated with shoreline protection by taking advantage of OCTA/Metrolink funding sources. The Project provides the perfect opportunity for the Board to open a constructive dialogue with OCTA and Metrolink regarding shoreline protection along Beach Road – the Coalition urges the Board to take advantage of this opportunity.

#### GHAD

The Coalition urges the Board to form a Geologic Hazard Abatement District ("GHAD") to provide a District-wide solution to shoreline protection. A GHAD will also enable the District to obtain a funding mechanism to implement any District-wide shoreline protection strategy.

#### Latent Powers

The Coalition again urges the Board to work with its counsel to move as quickly as possible to obtain the approval of its exercise of the latent power of flood protection from the Orange County Local Agency Formation Commission (LAFCO).

Thank you for paying attention to the Coalition's requests, and for the renewed focus on shoreline protection. Again, the Coalition is appreciative of the Board's consideration of these issues and looks forward to working with the Board and the District on a path forward on the issue of shoreline protection.

Sincerely,



Alexander W. Schwada  
Attorney at Law

## Don Russell

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**From:** Sandy Nassour <wsnassour@yahoo.com>  
**Sent:** Tuesday, March 16, 2021 5:46 PM  
**To:** Don Russell  
**Subject:** Re: District Reply to Coastal Commission

Capistrano Bay District  
c/o Don Russell  
c/o Capistrano Beach Homeowners Board of Directors

Dear Don and CBR Board of Director's:

After reading Nossaman reply letter to the California Coastal Commission (CCC) dated March 12, 2021 I got the distinct impression that Nossaman was protecting Capistrano Bay District from liability and not nearly enough for the homeowners of Beach Road. In fact the letter from Nossaman seems to imply that this is not a District problem but a homeowners problem and that the CCC should deal with the homeowners individually. THIS WOULD BE A HUGE MISTAKE! This is exactly what the CCC wants, knowing full well they can beat down any individual homeowner on a one on one bases.

Here is what the CCC really wants:

- 1) Large monetary fines and large monetary permits.
- 2) Temporary permits only so they can keep coming back for more money for renewal or additional requirements.
- 3) They want to get rid of Capistrano Bay District and our private road. With a public Road the CCC can really take advantage of easements to the beach.
- 4) They want the homeowners to assume the responsibility of the public parking lot for maintenance and repair.
- 5) And finally because the CBR homeowners own approximately two miles of private beach which the CCC would love to have at all cost, the commission will NEVER give in but continue to make outrageous demands and will keep coming after the District and homeowners hoping we will just give up.

Therefore this is what I think we should do:

A) Form a homeowners coalition of all two hundred property owners (backed by monetary contributions as needed) where we are acting as ONE PARTY using our attorney's and any other agency to the challenges and demands of the CCC. We are all effected one way or another either by loss of the guard gate, our private road and of course our beach front and the constant erosion. Only large rocks will protect our homes nothing less will do. No one gets a free ride. We all have to assume the burden and responsibility.

B) Start establishing a "war chest of money" now! The only way the CCC will cooperate is when you challenge them in court and win. This is going to take time and money but you are protecting millions of property value.

C) Have Nossaman challenge the CCC on every letter and demand and get tough. The nicer you are to the commission the more they will run over you. They have nothing to loose....they want OUR beach PERIOD.

D) Beach Road Homeowners have no choice but to stick together as one solid unit. We are all in to this together no matter what. By all homeowners contributing to our legal expenses the burden won't be so bad and we can stand up to the CCC. Again as mentioned before this is going to take time and money before we can get a fair solution for all concerned.



E) Get a petition or whatever document is necessary for homeowners to sign-up for showing they are committed and willing to fighting the CCC. This way the board will know how many homeowners are willing to confront the commission and back it up with monetary means. This needs to be done NOW!

Thank you for your consideration in this matter and I would like to hear your thoughts. I know the board has been working very hard on this situation. My very best to you all.

Sincerely,  
William E. Nassour  
35777 Beach Road

Sent from my iPad

On Mar 12, 2021, at 3:02 PM, Don Russell <[drussell@capobay.org](mailto:drussell@capobay.org)> wrote:

Good Afternoon Beach Road Property Owners,  
Attached is the District's most recent letter of reply to the Coastal Commission, sent out today. I've also included the CCC's last letter to us from February 19<sup>th</sup> in case you may have misplaced your copy.  
If you have any question about the letter feel free to call me.  
Regards,

*Donal S. Russell, Manager  
Capistrano Bay District  
35000 Beach Road  
Capistrano Beach, CA 92624  
[drussell@capobay.org](mailto:drussell@capobay.org)  
cell: 714-206-4331  
Office: 949-496-6576  
Fax: 949-487-9224*

<District Reply to CCC 3-12-21.pdf>  
<CCC Reply to District Lttr 2-19-21.pdf>



ATTORNEYS AT LAW

777 South Figueroa Street  
34th Floor  
Los Angeles, CA 90017  
T 213.612.7800  
F 213.612.7801

Steven H. Kaufmann  
D 213.612.7875  
skaufmann@nossaman.com

Refer To File # -

March 12, 2021

Mr. Jordan Sanchez  
Enforcement Officer  
California Coastal Commission  
South Coast Area Office  
301 Ocean Boulevard, Suite 300  
Long Beach, CA 90802-4302

Violation File No. V-5-16-0064

Property Location: 35000 Beach Road, Capistrano Beach, CA 92624  
Lots Y and Z, Tract 797

Dear Jordan:

I write as special counsel to the Capistrano Bay District ("District") and in reply to your enforcement letter of February 19, 2021.

The District and Commission staff have enjoyed a good dialogue to date regarding the armoring issue, but the District was somewhat surprised by your most recent letter. While the District wishes to be cooperative as you attempt to resolve the enforcement matters cited in your letter, it wishes to underscore that it has not undertaken any unpermitted development and, therefore, has no liability here for any unpermitted development or responsibility for resolving any unpermitted development that may have been undertaken by individual homeowners. The District has no legal authority to act on behalf of those who may have undertaken unpermitted development.

I thought it might first be helpful to provide you with the District's notes from its January 23, 2020 meeting with Dana Point staff and the September 25, 2020 video conference call which included the District, Commission staff and the Dana Point staff. The notes are attached. The theme of both meetings was Board's cooperation in identifying a short-term emergency solution for the homeowners. On both occasions, the Board was told that the homeowners' existing armoring could stay in place until a mutually acceptable solution is presented to them. Commission staff asked the District to hire a coastal engineer and have that engineer contact the Commission's engineer regarding that solution. The District hired Walt Crampton at TerraCosta to explore how to protect the District's assets (i.e., the road and gate) and asked him to follow-up

Mr. Jordan Sanchez  
Enforcement Officer  
California Coastal Commission  
March 12, 2021  
Page 2

with your staff engineer, Lesley Ewing, which he did on December 3, 2020. In neither meeting was there any mention of penalties regarding the unpermitted armoring. Consequently, at this point, the homeowners on Beach Road are under the impression that, perhaps with the help of your coastal engineer, a short-term solution without a penalty for the unpermitted armoring might be presented to them.

While the District's December 22, 2020 letter suggested a further videoconference in January to explore whether some long-term solution might be possible, its efforts to cooperate may have been misunderstood. The District is not a homeowners association. It is a Community Services District (CSD) and its jurisdiction and authority is limited by its charter. The charter does not give the Board of the District any authority to compel homeowners to remove any existing unpermitted armoring, or to require anyone to obtain a coastal development permit, or to negotiate terms, conditions, or other enforcement matters on behalf of the individual homeowners.

The District's authority also does not extend to the beach or to seawall improvements thereon. Importantly, the District does not own any properties on the beach side of the houses or any access path to the beach. It does not own the sandy beach to the mean high tide line or own, possess or control any seawall constructed by an individual homeowner.

Thus, the District is willing to continue its cooperation but with Commission staff's acknowledgment of the limitations of the District's legal authority or responsibility to do so. The District is naturally sympathetic to the homeowners, but also to the difficulty the Commission may have in dealing with so many homeowners in the absence of a point of contact. However, its efforts to date to facilitate should not be confused with any assertion that the District has undertaken any development or seawall construction or is responsible for addressing it.

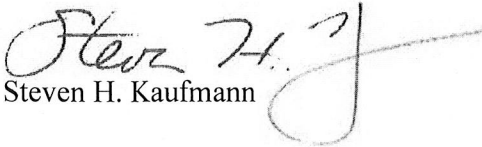
Your letter states that "the District has recently applied for an Emergency Coastal Development Permit to install an interim device to protect the homes, without removing the unpermitted devices." That is incorrect. In its December 22, 2020 letter, the District requested staff's consideration of such an interim solution, but the District has not applied for a CDP, emergency or otherwise. This may have been confused with a homeowner who recently made an independent application for CDP.

Finally, your letter suggests that the District work quickly with staff to authorize a comprehensive replacement of unpermitted seawalls with a temporary solution through a consent order process. As discussed above, this is not the District's function, nor is it within the District's legal authority. The District remains willing to cooperate and hopes for a win-win solution as between the Commission and the homeowners, but, as one public agency to another

Mr. Jordan Sanchez  
Enforcement Officer  
California Coastal Commission  
March 12, 2021  
Page 3

and to ensure the integrity of your enforcement process, we request acknowledgment that your enforcement efforts are not directed at the District itself.

Very truly yours,

  
Steven H. Kaufmann

CCs w/attachments:

Lisa Haage, Chief of Enforcement, CCC  
Andrew Willis, Enforcement Supervisor, CCC  
Karl Schwing, Deputy Director, CCC  
Shannon Vaughn, Coastal Program Manager, CCC  
Eric Stevens, Planning Supervisor, CCC  
Alex Yee, Planner, Sea Level Rise Team, CCC  
Christine Pereira, Coastal Program Analyst, CCC  
Brenda Wisneski, Community Development Director, City of Dana Point  
Jeff Rosaler, Planning Manager, City of Dana Point  
Johnathan Ciampa, Senior Planner, City of Dana Point  
Donal Russell, Manager, Capistrano Bay District  
Saeed Irani, President, Capistrano Bay District