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April 20, 2023

TO: California Coastal Commissioners and Interested Public

FROM: Dr. Kate Hucklebridge, Executive Director
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SUBJECT: **Final Draft of “Public Trust Guiding Principles & Action Plan”
Recommended for Adoption**

SUMMARY OF STAFF RECOMMENDATION

Staff is recommending **adoption** of new sea level rise planning guidance titled “Public Trust Guiding Principles & Action Plan.” A draft of the guidance document was released on June 9, 2022, followed by a 45-day public review period and coordination with California Native American Tribes and California State Lands Commission staff. Over 60 public comment letters were received (included in the Correspondence for this item), with most comments falling into categories related to: (1) State Lands Commission work and coordination, (2) California Native American Tribal consultation and coordination, (3) environmental justice, (4) the role and purpose of the Public Trust Guiding Principles & Action Plan, (5) shoreline protective devices, (6) exploration of alternatives for determining the mean high water elevation, and (7) locating the public trust boundary. A variety of edits were made to address these comments, as described in this staff report. Additional responses to common questions, concerns, or other recommendations are also provided. Although various edits were made to clarify, correct, add context, and emphasize certain portions of the document, the proposed final draft of the Public Trust Guiding Principles & Action Plan does not fundamentally alter the content or recommendations of the prior draft that was presented to the Commission in June 2022. This recommended final draft version of the Public Trust Guiding Principles & Action Plan is attached as **Exhibit 1** and is available on the Commission’s [website](#).

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EXHIBITS

[Exhibit 1 – Final Public Trust Guiding Principles & Action Plan](#)

I. MOTION AND RESOLUTION

Motion:

I move that the Commission adopt the “Public Trust Guiding Principles & Action Plan” pursuant to the staff recommendation.

Staff Recommendation of Approval:

Staff recommends a **YES** vote. Passage of this motion will result in the adoption of the “Public Trust Guiding Principles & Action Plan” as interpretive guidelines. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Approve the Guidance:

The Commission hereby adopts the “Public Trust Guiding Principles & Action Plan” as interpretive guidelines pursuant to Public Resources Code section 30620.

II. DISCUSSION

As the climate crisis and sea level rise threaten the future of public trust lands, uses, and resources, it is becoming ever more important to understand how the public trust doctrine influences the Coastal Commission’s work to advance sea level rise adaptation planning statewide. This item brings the Final Public Trust Guiding Principles & Action Plan to the Commission for consideration and adoption. The Public Trust Guiding Principles & Action Plan attached as [Exhibit 1](#) describes how the public trust doctrine relates to the Coastal Commission’s and local governments’ work on sea level rise planning under the Coastal Act and provides a series of guiding principles and next steps. This document complements the existing framework for reviewing projects and plans that raise sea level rise issues established by the Commission’s [Sea Level Rise Policy Guidance](#) (2018) and [Critical Infrastructure at Risk Guidance](#) (2021). The Public Trust Guiding Principles & Action Plan delves deeper into the policy, legal and coordination issues raised by the challenges of protecting public trust lands, uses and resources as sea levels rise. It also outlines a plan for next steps and research priorities to better inform the Commission, local governments, and other partners of the impacts of sea level rise on the public trust. The Guiding Principles portion of the document are interpretive guidelines, pursuant to Coastal Act section 30620, intended to assist the Commission, local governments, and members of the public in determining how to carry out the Coastal Act and address sea level rise in a manner that is consistent with the public trust doctrine. However, this document is not a regulatory document. The Action Plan section sets forth a suite of potential next steps and research priorities for the Coastal Commission’s work at the interface of the public trust doctrine and sea level rise planning, subject to availability of staffing and funding resources.

A. The California Coastal Act & Public Trust Doctrine

Under the public trust doctrine, the state’s tidelands, submerged lands, and navigable lakes, rivers, and streams are sovereign lands owned by the state but held in trust for the benefit of the public. As part of the trust, sovereign lands can never be sold and can only be used for public purposes consistent with the provisions of the common law public trust doctrine such as fishing, water-dependent commerce and navigation, recreational purposes, ecological preservation, and scientific study. On the coast, current tidelands – lands covered and uncovered by the ebb and flow of the tides – are generally subject to the public trust.¹ The public trust also covers most submerged lands and lands that were historically tidelands at the time California became a state in 1850 but have since been artificially drained and/or filled.

The Coastal Act is an exercise of the Legislature’s public trust authority and responsibility. As such, it aligns with and implements aspects of the public trust doctrine, including through its emphasis on public access, ocean-related recreation, and coastal dependent uses like ports and fishing. Among other public access provisions, the Coastal Act recognizes the public’s right of access to tidelands and other navigable waters pursuant to Section 4 of Article X of the California Constitution. The Coastal Act applies in the coastal zone, which includes both public trust tidelands and additional public and private upland areas.

Public trust tidelands and adjacent uplands support a variety of ecological, socioeconomic, and cultural values. The beaches and wetlands that are public trust tidelands support public access and coastal recreational activities like surfing, sunbathing, birdwatching, and fishing. Coastal wetlands support biodiversity and perform a variety of important ecosystem services like buffering wave energy, filtering water, recycling nutrients, and serving as nursery habitat for fish species that fit into larger coastal ecosystems and support commercial and recreational fisheries offshore. Unlike much upland coastal property, tidelands are often open to all visitors at no or low cost and are thus critical from an environmental justice standpoint as an important resource to provide equitable coastal access. Public trust lands and related uplands also support maritime commerce essential for coastal economies, which in turn supports jobs and economies at all scales. They are also significant areas for coastal-affiliated tribes, tribal resources and practices.

Due to the critical importance of these public trust resources, it is important to carefully address looming threats to these resources from sea level rise. Although the Commission has long dealt with issues related to sea level rise, the Coastal Act was recently amended to explicitly require the Commission to “take into account the effects

¹ However, some tidelands are in private ownership. These include lands that were authorized to be sold by the Legislature prior to the 1879 California constitutional amendment and the United States Supreme Court’s 1892 ruling in *Illinois Central Railroad v. Illinois*, both of which made clear that sovereign lands cannot be sold.

of sea level rise in coastal resources planning and management policies and activities in order to identify, assess, and, to the extent feasible, avoid and mitigate the adverse effects of sea level rise” (Coastal Act § 30270). This policy reaffirms that sea level rise adaptation planning is a central goal and mandate for the Coastal Commission. Sea level rise is presenting unprecedented challenges for the California coast, which will only increase as sea level rise accelerates in the future. Sea level rise will cause new areas of the shoreline to be regularly inundated by tides, increased erosion of the shoreline, increased storm flooding, rising groundwater tables, and saltwater intrusion into coastal aquifers. These hazards will place both coastal development and coastal resources, including public trust resources, at risk.

B. Project Background

The Public Trust Guiding Principles & Action Plan (“Guidance”) was developed using federal financial assistance provided by the Coastal Zone Management Act, as amended, under award NA20NOS4190101, administered by the Office for Coastal Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The Guidance was also developed in coordination with staff from the California State Lands Commission as part of a joint, long-term public trust and sea level rise coordination project. The State Lands Commission has exclusive jurisdiction to lease and manage most public trust lands, and it must ensure that any such leases are consistent with, or at least do not significantly impair, public trust resources, uses, and needs. On September 19, 2019, Coastal Commission staff and State Lands Commission staff signed a Memorandum of Understanding (MOU) to encourage the exchange of information among staffs for project proposals requiring an approval by the Coastal Commission which may also implicate the State Lands Commission’s trustee interests under the public trust doctrine, among other issues. The Commissions’ staffs have coordinated on public trust and sea level rise issues over the course of many years and jointly developed several public trust fact sheets and documents. The State Lands Commission staff supports the Guidance and recognizes the ongoing role they will have in implementing several steps as part of ongoing coordination, subject to funding and staffing resources.

The Guidance is informed by many of the recommendations made in a report recently presented to the Commission entitled [Protecting Public Trust Shoreline Resources in the Face of Sea Level Rise](#) by Dr. Charles Lester, Director of the Ocean & Coastal Policy Center at the Marine Science Institute of University of California, Santa Barbara. This report discusses public trust issues relating to Coastal Commission planning and regulation of development on the immediate shoreline and adjacent uplands. It also includes a variety of legal, policy, management, and technical recommendations to address public trust tidelands and sea level rise based on tideland science and the public trust doctrine.

III. SUMMARY OF GUIDING PRINCIPLES & ACTION PLAN

The Public Trust Guiding Principles & Action Plan ([Exhibit 1](#)) describes how the public trust doctrine relates to the Coastal Commission's work on sea level rise planning and provides guiding principles and action steps for the Coastal Commission. The guiding principles and action steps are listed below, but more details and discussion can be found in the full document.

A. Guiding Principles

The Public Trust Guiding Principles & Action Plan provides the following principles to guide the Coastal Commission in its sea level rise adaptation work:

1. Climate change and sea level rise are moving the public trust landward.
2. Development decisions and sea level rise will impact public trust lands, uses, and resources.
3. The Coastal Act aligns with and implements aspects of the public trust doctrine.
4. Coastal Act decisions must incorporate protections for the public trust.
5. Coastal Act decisions must be guided by the anticipated impacts of development on current and future public tidelands.
6. Coastal Act decisions must be guided by the principle that owners of shorefront property may not unilaterally and permanently prevent the landward migration of public trust lands.
7. Coastal Commission findings will be informed by interagency coordination.
8. Public trust principles support the requirement that Coastal Act decisions advance environmental justice and access for all.
9. Coastal Act decisions must consider the adverse impacts of shoreline protective devices on public trust-related resources.
10. Encouraging the use of nature-based adaptation strategies can better support public trust uses and values.

B. Action Steps

The Public Trust Guiding Principles & Action Plan presents the following next steps that the Coastal Commission will prioritize over the next five years, as staff resources and funding allow:

1. Participate in the development of interagency principles on sea level rise and the public trust doctrine.
2. Consult and coordinate with California Native American Tribes on relevant public trust issues.
3. Continue working with local governments to update local coastal programs to address sea level rise and include considerations for public trust resources.
4. Conduct coordinated outreach, engagement, and public education on the purpose and role of the public trust doctrine in the management of California's lands and natural resources.
5. Continue to analyze the impacts of residential-related development on public trust resources, uses, and needs.
6. Identify development and decisions, such as boundary line agreements, that result in "coastal squeeze" leading to the loss of public trust lands.
7. Consider updates to Coastal Commission regulations relating to mitigation of the adverse effects of sea level rise on public trust lands.
8. Complete a GIS inventory of public tidelands.
9. Explore alternatives for determining the mean high water elevation used in determinations of the mean high tide line.
10. Evaluate new technologies for locating the boundary between public tidelands and private uplands.

IV. RESPONSE TO COMMENTS

The Commission received 61 comment letters during the public comment period, included in the Correspondence for this item. Commission staff also coordinated with California Native American Tribes and received two written comments on the Guidance from Tribes. In addition, Commission staff coordinated with State Lands Commission staff on changes related to the State Lands Commission's work. Comments were incorporated into the Guidance, as described below.

Most commonly, comments fell into several broad categories including: (1) State Lands Commission work and coordination, (2) California Native American Tribal consultation and coordination, (3) environmental justice, (4) the role and purpose of the Guidance, (5) shoreline protective devices, (6) exploration of alternatives for determining the mean high water elevation, and (7) locating the public trust boundary. Changes to the draft guidance related to these topics are discussed in the relevant sections below, along with broader responses to the questions, concerns, or other recommendations raised in the comment letters. In addition to changes made in response to comments, some

Principles and discussion were reorganized and condensed to make the document more user friendly.

Some comments raised issues that were already adequately addressed in the Guidance, as described at the end of this section, but may be appropriate for consideration in public outreach and education, and ongoing coordination among the Coastal Commission, other state agencies, local governments, asset managers, and other stakeholders.

Lastly, there were a limited number of comments that were outside of the scope of the Guidance either because of a lack of detailed information on the requested topic, or because the comment related to a particular project and did not provide comments specific to the Guidance.

Coordination with State Lands Commission

Commission staff coordinated with State Lands Commission staff throughout the drafting and public comment period of the Guidance, and this coordination resulted in several changes to the draft Guidance. These changes relate to the State Lands Commission's work and include: a new reference to the State Lands Commission's [AB 691 Synthesis Report: Proactively Planning for Sea Level Rise Impacts on Granted Public Trust Lands](#), which was published after the Draft Guidance was released in June 2022; identifying public trust resources and uses in Principle 9 that may be impacted by shoreline protective devices; discussion of leases issued by the State Lands Commission; clarifying that the State Lands Commission staff will work with Commission staff on a GIS inventory of public tidelands to the extent feasible; and other clarifications regarding the public trust boundary. In addition, Principle 6 was revised to incorporate a comment from the East Shore Planning Group to clarify that a lease from State Lands Commission may not be required for development located below the mean high tide line in areas where the fee title to the land is privately held.

Coordination with California Native American Tribes

Commission staff coordinated with California Native American Tribes ("Tribes") by contacting all California coastal Tribal representatives listed with the California Native American Heritage Commission and by hosting two statewide listening session meetings. Two Tribes, the Federated Indians of Graton Rancheria and the Rincon Band of Luiseño Indians, submitted written comments as part of this coordination. The Guidance was revised in response to written comments and comments received during the listening sessions.

Additional discussion was added to the Introduction of the Guidance in response to comments that tribes are sovereigns with unique land and treaty rights associated with the coast, are stewards of this land since time immemorial, and continue to steward the coast today. Additionally, the Introduction was revised to include information regarding tribal consultation and coordination, and to include additional information regarding the

threat of sea level rise to traditional uses and tribal cultural resources located on tidelands.

Action Item 2 of the Guidance relating to tribal consultation and coordination was significantly revised in response to comments. This Action Item now includes additional discussion of archeological resources, sacred sites, and ethnobotanical resources located on tidelands that are at risk from sea level rise, and discussion of Executive Orders relating to tribal consultation. In particular, reference to [Executive Order N-15-19](#) was added to the Guidance, which acknowledged and apologized on behalf of the state for the historical violence, exploitation, dispossession and the attempted destruction of tribal communities that dislocated California Native Americans from their ancestral land and sacred practices. Action Item 2 was also revised to state that the Commission will coordinate and consult with Tribes as early as possible on relevant public trust issues, and that the Commission will consult with Tribes to assess the potential impacts of proposed actions on tribal interests. Lastly, Action Item 2 was revised to provide that the Commission will encourage local governments to consider the impacts of sea level rise on tribal interests by, for example, recommending that local governments coordinate with Tribes and consider impacts to tribal cultural resources in sea level rise vulnerability assessments and adaptation plans funded by the Commission's LCP Grant Program.

Principle 10 was also revised to state that nature-based adaptation strategies present an opportunity to advance social equity for Tribes who have experienced a legacy of discrimination in land use planning and development by, for example, encouraging projects that improve access and stewardship for Tribes.

There were several tribal coordination comments that were not incorporated into the Guidance because they addressed issues that are outside the scope of the Guidance and/or the Commission's authority, were already included elsewhere in the Guidance, or would require resources currently unavailable to the Commission. One comment recommended adding specific timelines and allocating funds to Action Items. The Guidance provides that the Commission hopes to accomplish the Action Items in the next five years, and the Commission is currently working on several of these Action Items. For example, as part of Action Item 4 (coordinated outreach, engagement and public education) Commission staff have developed a variety of resources available to the public on the Commission's [Public Trust website](#). The Commission is also working on several Action Items on an ongoing basis, including Action Item 3 (working with local governments to update LCPs), Action Item 5 (analyzing the impacts of residential-related development on the public trust), and Action Item 6 (working with the State Lands Commission to monitor and track existing CDPs and leases). Completion of some Action Items is dependent on the Commission being allocated additional funding for these activities; however, the Commission will prioritize existing funds and seek additional funds to accomplish these Action Items in the next five years, as feasible and as resources allow. A comment also recommended that the Commission work with Tribes to establish proactive land management plans to protect tribal cultural resources as sea levels rise. As a regulatory agency and not a land manager or owner, the Commission does not have authority to implement land management plans, but it will

continue to consult with Tribes as early as possible on proposed development and LCPs that may impact tribal interests and will encourage proactive planning to protect cultural resources located on tidelands.

The Commission expresses its gratitude to the tribal representatives who provided comments in response to the Guidance, and the Commission is committed to continuing to work together to address tribal concerns relating to the public trust as sea levels rise.

Environmental Justice

Commenters such as the Humboldt Baykeeper and Heal the Ocean recommended adding further discussion of the impacts of coastal flooding on environmental justice communities, including those located near hazardous sites, and further discussion of how the environmental justice impacts of sea level rise will be addressed by the Commission. A discussion of how sea level rise may threaten the health and safety of communities located near hazardous sites and contaminated soils was added to the Introduction of the Guidance to address these comments. Principle 10 of the Guidance was also revised to add a reference to an Ocean Science Trust report [Toward More Equitable Nature-Based Coastal Adaptation in California](#), published after the Draft Guidance was issued in June 2022, and to state that nature-based adaptation strategies present an opportunity to advance social equity for under-resourced communities and California Native American Tribes who have experienced a legacy of discrimination in land use planning and development. Principle 8 of the Guidance continues to provide that the Commission will implement and uphold the public trust doctrine consistent with its [Environmental Justice Policy](#), including by ensuring that coastal development on and near public trust lands is inclusive for all who work, live, and recreate on California's coast and provides equitable benefits for communities that have historically been excluded, marginalized, or harmed by coastal development. Additionally, Commission staff are in the midst of a multiyear effort to develop policy guidance that will integrate environmental justice and equity principles in sea level rise adaptation planning as part of a federal NOAA grant.

Role of the Guidance

Property owners, the mayors of the Cities of Del Mar and Newport Beach, and several nonprofit organizations and associations submitted comments regarding the role of the Guidance, private property rights, and whether decisions on development would continue to be made on a case-by-case basis. For example, the mayor of the City of Del Mar commented that the Guidance must be flexible and adaptive to afford local jurisdictions the ability to determine the best approach for adaptation in accordance with their certified Local Coastal Programs (LCPs) and raised concerns about potential future conflicts between the Guidance and portions of the City's certified LCP. On the other hand, some nonprofit and advocacy organizations commented that the Guidance should replace language stating that the Commission and local governments have flexibility in carrying out certain duties with more binding, mandatory language. Other comments characterized the Guidance as requiring managed retreat and removal of all shoreline protective devices, and stated that the Guidance amounts to an

unconstitutional taking of property without just compensation and would expose communities to flooding. Some comments recommended that the Guidance further consider the rights of private property owners. Lastly, the Alliance of Coastal Marin Villages commented that the Guidance amounts to regulatory action rather than interpretive guidance.

The Guidance is interpretive guidance proposed for adoption by the Commission consistent with subparts (a)(3) and (b) of Section 30620 of the Coastal Act. It establishes principles that the Commission and local governments can consider when making decisions that may impact public trust uses, resources and lands. The Guidance does not supersede, enlarge, or diminish the powers or authority of the Commission or any other public agency. Nor does the Guidance supersede certified LCPs or previously issued CDPs. Local governments should continue to implement their certified LCPs and look to the Guidance for direction on how to implement and amend LCPs consistent with the public trust doctrine as sea levels rise. The Commission and local governments with certified LCPs have flexibility under the Guidance to determine how to implement the Coastal Act in a manner that is consistent with the public trust doctrine. Because this Guidance is interpretive guidance under Section 30620(a)(3) of the Coastal Act, it does not require adoption through formal rulemaking processes. (See Coastal Act § 30333.)

The Guidance also does not establish a one-size-fits-all approach and does not mandate specific outcomes, such as managed retreat or the removal of all shoreline protective devices. Instead, it establishes guiding principles that the Commission and local governments should consider when making decisions that must reflect the local and site-specific characteristics of the development and policies at issue. For clarity, the Guidance was revised to state in Principle 9 that Coastal Commission decisions relating to the impacts of shoreline protective devices on public trust resources and their consistency with the Coastal Act and LCPs will, as always, be specific to the facts and characteristics of the particular development or LCP policies proposed. In addition, this Principle was revised to reflect that innovative approaches to adaptation that consider the unique characteristics and coastal resources of a particular place are necessary to appropriately protect communities and coastal resources over time, as is discussed further in the category below. The Introduction of the Guidance was also revised to include additional discussion of sections of the Coastal Act (such as 30001.5, 30210, and 30214) that recognize the need to protect the rights of private property owners while carrying out the Act's mandate to protect coastal resources and provide maximum public access. Additionally, Principles 3, 4, 5, and 9 and Action Item 3 were revised to elaborate on local governments' role in protecting public trust-related resources consistent with the Coastal Act.

A number of comments highlighted the necessity of making decisions based on the specific circumstances of the proposed development or policy and surrounding area. For example, one comment noted that Humboldt Bay is experiencing the fastest rate of sea level rise in California. Adaptation to sea level rise will differ in regions like Humboldt Bay, where sea levels are rising at an increased rate and significant portions of the Bay remain undeveloped, and other places such as the largely developed

coastline of Southern California. The Guidance gives the Commission and local governments flexibility and guidance on how to implement the public trust doctrine consistent with the Coastal Act as sea levels rise.

Shoreline Protective Devices

The Commission received many comments relating to shoreline protective devices. Some property owners and other groups commented that shoreline protective devices protect private property and that removing this armoring may result in flooding. Several comments noted that not all shoreline protective devices negatively impact coastal resources, and that shoreline protective devices can provide safety and public access benefits. Some commenters recommended adding additional discussion to the Guidance relating to when Section 30235 of the Coastal Act permits shoreline protective structures for existing and coastal-dependent development.

The Commission made several revisions to Principle 9 in response to these comments. As revised, Principle 9 more clearly identifies the public trust uses and resources that hard shoreline protective devices often adversely impact, including recreation, coastal access, fishing and environmental preservation and restoration. Principle 9 was also revised to reflect that innovative approaches to adaptation that consider the unique characteristics and coastal resources of a particular place will be necessary to appropriately protect communities and coastal resources over time. The Coastal Commission Local Government Sea Level Rise Working Group has discussed approaches such as neighborhood-scale planning and phased adaptation that consider short- and long-term planning horizons. In line with these innovative approaches, Principle 9 was revised to note that there may be situations where shoreline protection strategies conflict with a Coastal Act policy but are permissible because, on balance, they are most protective of significant coastal and public trust resources like public access and recreation.² These situations are most likely to arise when temporary armoring is necessary to protect coastal resources (e.g., public roads providing coastal access); the armoring would have limited impacts on coastal or public trust resources; there are no other feasible alternatives; and the project is paired with other coastal resource protection measures, such as managed retreat and nature-based adaptation strategies, and with identified longer-term adaptation solutions.

In response to comments relating to Coastal Act Section 30235, Principle 9 was revised to state that Section 30235 authorizes the construction of shoreline armoring that is otherwise inconsistent with the Coastal Act if the armoring is required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, designed to eliminate or mitigate adverse impacts on local shoreline sand supply, and other impacts of the shoreline armoring are eliminated or mitigated.

Several comments related to the Commission's interpretation of "existing structures" in Section 30235 of the Coastal Act as meaning structures lawfully in existence prior to the

² Coastal Act § 30007.5.

effective date of the Coastal Act, and commenters questioned what this definition means for adaptation. The Guidance does not explore this issue in depth and reflects the Commission's previously adopted position on this topic as described in the Commission's Sea Level Rise Policy Guidance, which was first adopted in 2015 and updated in 2018.³ The Commission will continue to work with local governments and other stakeholders on a case-by-case basis to determine appropriate approaches for proposed shoreline armoring and for implementing Section 30235 and other policies.

The California Association of Port Authorities and some ports commented that critical infrastructure such as ports have unique characteristics and values, and that solutions for ports will need to be nuanced and flexible and may need to include hard armoring. Principle 9 of the Guidance addresses the unique role of ports. This Principle states that in some cases, shoreline protective devices serve public uses that are consistent with the Coastal Act and the public trust, such as bulkheads in ports and harbors that increase opportunities for fishing, boating, water-dependent commerce, and public access. The Principle states that the Commission's [Critical Infrastructure at Risk: Sea Level Rise Planning Guidance for California's Coastal Zone \(2021\)](#) provides additional information on the interplay between shoreline protection devices, the public trust doctrine, and protection of critical infrastructure. Principle 9 was revised to specifically call out ports as one example of critical infrastructure whose interplay with the public trust doctrine is further explored in the Critical Infrastructure at Risk Guidance. However, there may also be other situations where shoreline armoring will negatively impact some public trust resources but also serve public uses that are consistent with the Coastal Act and the public trust. In those situations, the Commission may consider competing trust interests when deciding whether to permit, and what mitigation to impose on, armoring proposals. See *Carstens v. Cal. Coastal Comm'n* (1985) 182 Cal.App.3d 277.

Lastly, some comments recommend that the Guidance further address mitigation for shoreline protective devices. Surfrider recommended establishing a statewide Public Recreation Mitigation Fee and a tidelands lease fee in order to address existing and future encroachments on public trust land. The Mayor of the City of Del Mar and other comments suggested that the impacts to tidelands may be mitigated through programs and fees that enhance public access. Principle 9 was revised to state that, when permitted, shoreline armoring typically must fully mitigate its adverse impacts on the public trust uses and resources protected by the Coastal Act, such as beach recreation and access. The revised Principle states that adverse impacts may be mitigated in a variety of ways, including through imposition of beach recreation use and access fees. This Principle gives the Commission and local governments flexibility in determining what kinds of mitigation may be adequate to offset impacts to public trust resources and uses protected by the Coastal Act. Additionally, Principle 6 was revised to reflect that leases from the State Lands Commission for occupation of sovereign lands may require the lessee to pay rent.

³ https://documents.coastal.ca.gov/assets/slr/guidance/2018/0_Full_2018AdoptedSLRGuidanceUpdate.pdf.

Exploration of Alternatives for Determining the Mean High Water Elevation

The Commission received a number of comments relating to Action Item 9, which recommends exploring alternatives for determining the mean high water elevation. Some comments stated that this methodology would be biased against property owners, result in a taking, or be inconsistent with California law. Other comments suggested that the Commission does not have sufficient technical expertise to propose a new methodology for determining the mean high water elevation. Action Item 9 explains that the reason for exploring alternative methodologies is that the current National Tidal Datum Epoch (NTDE) used to determine the mean high water elevation is based on data from 1982-2001 that does not reflect for more recent changes in sea levels. This Action Item was revised to further clarify that the difference between using data from the current NTDE and more recent data from the last 19 years could result in the mean high tide line being identified in a significantly more landward location in some areas. Action Item 9 was also revised to highlight that the Commission would work with the National Oceanic and Atmospheric Administration (NOAA), the national expert on tidal datums, to determine any new methodology, in addition to working with the State Lands Commission, the land surveying industry, legal experts, and other partners.

NOAA currently uses a modified procedure to calculate tidal datums in some areas with anomalous rates of sea level change to reflect more recent sea levels.⁴ This modified procedure or other methodologies that use NOAA tide gauge data could be used as a starting place for this work. Action Item 9 proposes to explore the feasibility of using a new methodology to determine the mean high water elevation but does not commit the Commission to changing its methodology or to using any particular methodology. Additionally, the Guidance states that this effort will be informed by the legal rules governing property determinations and by the best available science; will use NOAA data; and will account for the impact of the lunar nodal cycle on the tides.

Locating the Public Trust Boundary

The Commission received a variety of comments relating to locating the public trust boundary. The Guidance was revised in response to some of these comments, and the Commission determined that no revisions were required for other comments that were adequately addressed in the first draft of the Guidance. Some comments state that the Guidance relies on the premise that sea level rise alone will push the mean high tide line (“MHTL”) landward without considering the impact of changes in sediment on the beach such as limited sediment supply caused by inland development and drought. The Introduction of the Guidance states that the extent and rate of the landward movement of the MHTL will depend on several factors, including both the rate of sea level rise and changes in accretion and erosion of the shore. To clarify, the Introduction was revised to

⁴ NOAA Center for Operational Oceanographic Products and Services (CO-OPS). 2014. *Technical Report NOS CO-OPS 068, Implementation of Procedures for Computation of Tidal Datums in Areas with Anomalous Trends in Relative Mean Sea Level*, https://tidesandcurrents.noaa.gov/publications/NOAA_Technical_Report_NOS_COOPS_68.pdf.

state that the extent and rate of the movement of the MHTL will depend in part on changes in shoreline sediment supply. Principle 9 also explores the impacts that hard shoreline protective devices often have on the amount of sediment on the beach. The Commission recognizes that the question of sediment supply is intertwined with determining where the public trust tidelands boundary is located. The Guidance commits the Commission to using the best available science and information to identify the area between the current MHTL and its most landward projected location during the expected lifetime of proposed development, which includes science relating to changes in sediment on the beach.

Several comments stated that the MHTL is not indicative of the public trust boundary in most places along the California coast because of artificial influences on coastal sediment supply, such as dams and inland development. The Guidance notes that although the public trust tidelands boundary is generally ambulatory, it has been fixed in some places by boundary line agreements, court judgments, and fill or artificial accretion. Under California law, artificial accretion on public trust tidelands that is “directly caused by human activities in the immediate vicinity of the accreted land” does not change the public trust interest in that land. (*State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 56.) Less direct influences on sediment supply, however, such as dams and levees located upstream of rivers that empty into the ocean, generally do not fix the public trust tidelands boundary. (*Id.*) The Guidance was not revised in response to these comments because it accurately reflects that the public trust boundary along the California coast is often ambulatory and defined by the MHTL.

The applicability of the principle articulated by a federal court of appeal in *United States v. Milner*—that an upland owner cannot unilaterally and permanently fix the tidelands boundary with a shoreline device such as a seawall or revetment—was raised by several comments, which suggested that *Milner* does not apply in California. In particular, commenters stated that *Milner* is inapplicable because Coastal Act Section 30235 allows seawalls in some instances and that the California Constitution allows owners to protect their property. Principle 6 of the Guidance recognizes that California law does not specifically address how shoreline structures such as seawalls that artificially fix the shoreline and prevent landward movement of the mean high tide line affect property boundaries, if at all. However, as discussed in this Principle, the common law right that the *Milner* court relied on—the reciprocal right to an ambulatory tideland boundary—also applies under California common law. Section 30235 and the California Constitution do not alter this analysis. The Principle does not state that seawalls may never be permitted if they prevent the MHTL from moving; rather, it states that an upland owner may not *unilaterally and permanently* fix the tidelands boundary. Courts have found that coastal landowners do not have an absolute right to protect their property under California Constitution article 1 section 1; rather, the Commission may regulate proposed armoring to ensure consistency with the Coastal Act and protect public rights. (*Whaler’s Village Club v. Cal. Coastal Commission* (1985) 173 Cal.App.3d 240, 252-53.) Some comments stated that the principle that owners of shorefront property may not unilaterally prevent the landward migration of public trust lands conflicts with the common enemy doctrine. However, *Milner* specifically held that the common enemy doctrine does not apply in this situation because the sea is not acting

as a “common enemy”; any movement seaward or landward of the boundary is to the benefit of one party and the detriment of the other. The Guidance was not revised in response to these comments because it accurately reflects that *Milner* may be used as persuasive guidance on the question of whether an upland property owner can unilaterally and permanently fix the public trust boundary with a shoreline protective device.

Comments Addressed in First Draft of Guidance

In addition to the categories of comments addressed above, some comments raised issues that the Commission determined were adequately addressed in the Draft Guidance, and thus, did not require revisions. Most of these comments fell into three categories, including comments relating to how the public trust tidelands boundary is located (addressed in the section above), sea level rise projections and science, and more general comments supporting the Guidance.

A number of comments suggested that the sea level rise science supporting the Guidance was exaggerated or biased. The sea level rise science underlying the Guidance is laid out in greater depth in the Commission’s [Sea Level Rise Guidance](#) (2018), as well as the [Rising Seas in California: An Update on Sea-Level Rise Science](#) (2017) and the [State of California Sea-Level Rise Guidance: 2018 Update](#) by the California Ocean Protection Council (OPC). In addition, NOAA’s [Sea Level Rise Technical Report](#) (2022) reflects recent advances in the science and includes updated sea level rise projections. The Commission has developed and will continue to develop public facing materials to educate the public and local governments about sea level rise science, many of which are available on the Commission’s [Sea Level Rise website](#). The Guidance commits the Commission to using the best available science to make decisions relating to the public trust and sea level rise, and to conducting coordinated outreach, engagement, and public education on the role of the public trust doctrine.

A number of comments indicated support for the Guidance generally or for specific Principles or Action Items, such as Principle 10 which encourages the use of nature-based adaptation strategies to sea level rise and Action Item 4 which commits the Commission to conducting coordinated outreach, engagement, and public education, without specific recommendations for changes.

While the Commission determined that these comments did not require revisions to the Guidance at this time, the Commission recognizes the utility of this additional information and the Commission and its staff will continue to work with stakeholders on these and other topics as part of ongoing efforts to support coastal resiliency planning.

Outside of the Scope of this Document

Lastly, the Commission received a limited number of comments that were outside of the scope of the Guidance document, either because of a lack of detailed information on the requested topic, or because the comment related to a particular project and did not provide comments specific to the Guidance.