May 5, 2023

Delivered via email

To: California Coastal Commissioners
Cc: Dr. Kate Hucklebridge, Executive Director,
Erin Prahler, Statewide Planning Manager
Ashley Reineman, Federal Programs Manager
Awbrey Yost, Climate Change Analyst

Re: W6e: Public Trust Guiding Principles & Action Plan

Dear Honorable Commissioners,

The Surfrider Foundation is a non-profit, environmental organization dedicated to the protection and enjoyment of the world's ocean, waves and beaches for all people, through a powerful activist network. With nearly 70 miles of coastline to protect, the Surfrider Foundation San Diego County Chapter is one of the largest and most active chapters in the world. In the spirit of the voters in 1972 who voted to establish the Coastal Commission, as well as the Coastal Act of 1976 which extended the Coastal Commission's authority indefinitely, we submit these comments on behalf of the beach-going public, whose voice is largely overshadowed by well-funded private property special interest groups. We thank the Coastal Commission for developing Public Trust Guiding Principles to address sea level rise in a manner consistent with the Public Trust Doctrine.

We start by voicing our complete support of the letter dated July 24, 2022 submitted on behalf of the Surfrider Foundation, Azul, EAC Marin, San Diego Coastkeeper, California Coastal Protection Network, and Coastal Environmental Rights Foundation regarding the draft Public Trust Guiding Principles & Action Plan. That letter is part of the correspondence in the agenda packet and we incorporate it herein by reference. As outlined in that letter, we support the Commission's proposed actions per the letter's guidance.

We have seen firsthand in Solana Beach how a lack of long term planning and the prioritization of private property over the public's beaches has slowly and surely destroyed our once-beautiful natural bluffs and beaches. Unfortunately this is representative of what happens throughout San Diego County and the state of California. Reckless development along our coast and on our beaches poses an existential threat to the public's beaches, a threat that only gets worse with accelerating climate change and sea level rise (SLR). As the oceans rise, it is crucial that we recognize that the high tide line is ambulatory, and that at some point this

high tide line will intersect private coastal armoring that may have originally been built on private lands. We applaud the guiding principles laid out in this action plan that reflect this unfortunate reality.

Specific to Solana Beach, despite the fact that Solana Beach either owns bluff faces outright or controls them under public access easements, Solana Beach itself has granted permits to build seawalls for the sole purpose of protecting private property. In some cases, Solana Beach went as far as quit-claiming public property to build private seawalls. In contrast, State Parks and Del Mar have disallowed seawalls for the protection of private property when placed on the public property under their control, even when the property in question is in Solana Beach. These permits denials have survived legal challenges as well[1].

The Public Trust Doctrine provides that tide and submerged lands are to be held in trust by the State for the benefit of the people of California. In coastal areas, sovereign lands include both tidelands and submerged lands, from the shore out three nautical miles into the Pacific Ocean and lands that have been filled and are no longer underwater. Tidelands lie between mean high tide and mean low tide.

California Civil Code §§ 670, 830 defines the boundary of tidelands as the ordinary high water mark. The United States Supreme Court has ruled that in tidal areas the boundary is to be located by identifying the intersection of the mean high tide line with the shore (*Borax Consol., Ltd v. Los Angeles* (1935) 296 U.S. 10).

This begs the question: where is the high tide line? Importantly, shore protection does not stop the formation of public trust land behind it had the shore protection not been present. Per a recent article "*Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*." Golden Gate U. Envtl. LJ 3 (2009): 243. United States vs Milner and other cases were cited to support the assertion that shore protection does not stop the formation of public trust land behind it had the shore protection not been present.

[1] Schooler v. State of California, 102 Cal. Rptr. 2d 343, 85 Cal. App. 4th 1004 (Ct. App. 2000). See also Scott v. City of Del Mar, 58 Cal. App. 4th 1296, 68 Cal. Rptr. 2d 317 (Ct. App. 1997) even though this permit was in Del Mar. See also CDP-6-00-009 Staff Report, March 2001 "However, the City notified the applicant that the City of Del Mar's zoning code prohibits the construction of shoreline protection devices more than five feet west of the "Shore Protection Area" (SPA) line."

Below is the relevant excerpt from "*Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*" on the Milner and related case law.

> *"Another artifact of sea level rise undoubtedly will be an increase in the construction of sea walls and other shoreline protection devices. Since shoreline protection stops water levels and the mean high tide line from advancing landward, it could also prevent the landward movement of the public trust. However, a recent federal-court ruling in United States v. Milner held that the mean high tide line is measured in its unobstructed state as if shoreline protection did not exist. Milner cited as authority the seminal case of Leslie Salt Co. v. Froehlke, in which the Ninth Circuit held that navigable waters of the United States, as used in the River and Harbors Act, extend to all places covered by the ebb and flow of the tide to the mean high water mark in its unobstructed, natural state. Therefore, the mean high tide line under certain federal laws is measured in its natural and unobstructed state.*
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> *"In Milner, littoral 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 the Rivers and Harbors Act and Clean Water Act. The court held that while littoral owners cannot be faulted for wanting to prevent their land from eroding away, we conclude that because both the upland and tideland owner have a vested right to gains from the ambulation of the boundary, the littoral owners cannot permanently fix the property boundary. The court reasoned that an 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. 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 (but not the Clean Water Act).*
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> *"Leslie Salt and Milner interpret federal law and therefore do not address the question of whether state jurisdiction and authority are subject to a similar rule. However, littoral and tideland owners in California may have statutory and common law rights to accretion and erosion. Since California courts have held that the mean high tide line is ambulatory, it could be argued under the rationale in Milner that shoreline protection that fixes the mean high tide line extinguishes the public's right to erosion and constitutes a trespass upon*

public trust lands. Moreover, it could also be argued that shoreline protection obstructs public trust rights to navigation, public access, and recreation, and that measuring the mean high tide line as if the shoreline protection did not exist would preserve those rights. Finally, California's artificial-accretion rule holds that an upland or littoral property owner does not gain alluvion from unnatural conditions, and California treats common law rights to erosion and accretion similarly. Therefore, a court could hold that artificial shoreline protection should not deprive the public of rights to land that would be tidelands in its natural state."

California's artificial-accretion rule 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).

In addition to the excerpt from the article above, we would like to quote the Milner case directly:

"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. [citations omitted]. 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 through accretion, the accumulation of deposits, or reelection, the exposure of previously submerged land."

Blufftop and beachfront property owners must be put on notice that SLR has placed an expiration date on their homes. We cannot let our beaches be squeezed to oblivion between rising tides and coastal armoring. Our beaches are at a tipping point, and the Coastal Commission should act now in a manner most protective of our precious coastal resources.

We all accept a certain amount of risk that is inherent in a natural setting. We don't blame the National Parks when there is a rockslide in Yosemite; we don't sue the Coast Guard if a storm sinks our ship and they aren't able to rescue us; we don't fault the state of California when there is an earthquake and our home is destroyed. These are all known risks we accept for living where we do. It has been a known fact that the coastline of California has been eroding for the last 11,000 years. People who choose to buy or build a house on an eroding blufftop or shrinking beach should accept

responsibility for their choice, and should not expect the public to bail them out by allowing them to indefinitely occupy our public lands.

Sincerely,

Kristin Brinner & Jim Jaffee
Beach Preservation Committee co-leads
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