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*Transmitted via electronic mail: [SLRGuidanceDocument@coastal.ca.gov](mailto:SLRGuidanceDocument@coastal.ca.gov)*

California Coastal Commission  
c/o Sea-Level Rise Work Group  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

**Re: California Coastal Commission Draft Sea-Level Rise Policy Guidance**

To the Sea-Level Rise Work Group:

We are grateful for this opportunity to provide comments to the California Coastal Commission (Commission) on its Draft Sea-Level Rise Policy Guidance (Guidance).<sup>1</sup> We support the Commission's continued commitment to helping California local governments prepare for sea-level rise, and welcome the Commission's development of this important document.

The Guidance contains a wealth of information and resources that will be valuable to local governments engaged in sea-level rise planning. In sum, we recommend that the Guidance could be enhanced by discussing the relationship between sea-level rise adaptation and relevant legal doctrines. In particular, the Guidance should provide additional information about relevant legal doctrines, adaptation measure selection and policy development, and legal vulnerability assessment. We also refer the Commission to our recent research on sea-level rise adaptation, which may serve as a valuable reference and resource for local governments.

**I. THE GUIDANCE SHOULD ADDRESS THE RELATIONSHIP BETWEEN SEA-LEVEL RISE ADAPTATION AND LEGAL OPPORTUNITIES AND CHALLENGES.**

The Guidance would benefit from acknowledgement and discussion of the law's significant interactions with local government sea-level rise adaptation planning and decisionmaking. The "Introduction" section of the Guidance states:

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<sup>1</sup> All references herein are to the Guidance, unless otherwise noted.

[T]his guidance does not address how sea-level rise may involve private property rights and takings issues in specific cases . . . . How to perform this evaluation is outside the scope of these Guidelines. Agencies implementing the Coastal Act should obtain legal advice regarding specific situations that raise takings concerns.

(pp. 20-21). There are virtually no other references to the legal landscape or legal questions in the Guidance. While the Guidance should not provide legal advice or discuss specific facts, information about the law and acknowledgement of the places where legal questions intersect with the local coastal program (LCP) development and coastal development permit (CDP) issuance processes would enhance the value of the Guidance to local governments.

To implement effective adaptation strategies, local governments must be aware of how the law enhances their adaptive capacity by providing them with the legal authority to engage in adaptation, as well as how the law potentially limits adaptation tools or renders local governments liable to private parties for the adverse impacts of adaptation actions or sea-level rise itself. Below, we highlight several instances where the Guidance would benefit from acknowledgement and discussion of the relationship between the current legal framework and sea-level rise adaptation.

#### **A. The Guidance Should Provide Additional Background Information About the Legal Framework for Sea-Level Rise Adaptation.**

The Guidance should present background information about relevant legal doctrines to help local governments understand the nature of the legal opportunities and challenges associated with sea-level rise adaptation. For instance, the Guidance could introduce the constitutional takings doctrine and its parameters so local governments understand broadly how takings and private property issues might interact with sea-level rise adaptation.

In our experience, although local government officials generally express significant concern about private property rights, they may have basic misconceptions of or lack knowledge about the takings doctrine and how it might interact with sea-level rise adaptation. While we agree with the general statement that “[a]gencies implementing the Coastal Act should obtain legal advice regarding specific situations that raise takings concerns,” the Guidance’s disclaimer about private property rights and the takings doctrine (pp. 20-21) may have unintended adverse consequences. For instance, the brevity of the disclaimer and lack of discussion of the law throughout the Guidance could suggest to local governments that questions of legal risk are unimportant and tangential to the adaptation planning process. Alternatively, the disclaimer’s implicit suggestion that private property rights and takings could present a significant obstacle to sea-level rise adaptation might influence local governments to misjudge legal risk or misunderstand the role that legal questions play in sea-level rise adaptation planning.

Similarly, background issues relating to implementation of specific provisions of the Coastal Act – which underlies the laws and policies that the Guidance seeks to further – are directly relevant to the planning process, as are issues relating to the Public Trust Doctrine’s application to coastal properties. Without background context on the potential relevance of these laws to sea-level rise adaptation planning, local governments might misjudge or misunderstand the relevance of related legal questions to the planning process.

Rather than explicitly avoiding any discussion of legal issues, the overall value of the Guidance would be enhanced by incorporating background information about the law and its relevance to sea-level rise adaptation. Background information about the law also would provide relevant context for our following

recommendations. Moreover, throughout the document, it would be helpful to tie any specific recommendations in the Guidance that are motivated, allowed, required, or constrained by statutory, regulatory, or other legal authorities to those authorities. This will help local governments and other stakeholders to understand how the Guidance incorporates or relies on those legal authorities and their underlying principles.

### **B. The Guidance Should Provide Information About the Adaptation Measure Selection and Policy and Ordinance Development Processes.**

Section IV of the Guidance outlines a six-step process for addressing sea-level rise in LCPs. Step 4 of that process, entitled “Identify adaptation measures to minimize risks,” presents measures that local governments should consider including in their LCPs. (pp. 49-62). The Guidance states that the expected outcome of Step 4 is identification of “a list of adaptation measures applicable to the LCP, and new policies and ordinances to implement the adaptation measures.” (p. 63). Similarly, Section V of the Guidance outlines a five-step process for addressing sea-level rise in CDPs, including Step 4: “Identify project design alternatives that avoid resource impacts and minimize risks to the project.” (pp. 77-79). The goal of Step 4 of the CDP development process is to identify, analyze, and select adaptation options. In contrast to the technical detail of Steps 1 through 3 in both the LCP planning process and CDP issuance process, however, the Guidance provides little context for what *adaptation measure selection* or *policy and ordinance development* entail. Additionally, the main text of the Guidance references no tools or resources for local governments seeking additional information about these processes.

We recommend that the Guidance offer a more detailed description of the adaptation measure selection and policy and ordinance development sub-steps of Step 4. In our experience, local governments engaged in sea-level rise adaptation planning find adaptation measure selection and policy and ordinance development particularly challenging to conceptualize and initiate, and would benefit from increased awareness of relevant methods and tools. Discussion of these tools will assist local governments with determining how to proceed, and will raise awareness of specific opportunities and strategies, as well as resources for developing and evaluating those opportunities and strategies, to accomplish Step 4. Moreover, as we discuss further below, the Guidance’s description of these sub-steps should acknowledge the value of legal vulnerability assessment as a tool to evaluate the suitability of adaptation alternatives.

### **C. The Guidance Should Contemplate a Role for Legal Vulnerability Assessment.**

The Guidance’s descriptions of the planning processes for addressing sea-level rise in LCPs and CDPs would be more useful and precise if they contemplated a role for legal vulnerability assessment. As stated above, the Guidance offers limited discussion of how local governments should evaluate the suitability of adaptation measures, and does not acknowledge that evaluation of legal opportunities and risks may play an important role in the selection of adaptation actions, along with economic, scientific, social, and other policy considerations.

Within Step 4 of both the LCP planning process and CDP planning process, the Guidance should explicitly recommend that local governments engage in a legal vulnerability assessment. Just as an assessment of local physical vulnerability enables localities to identify areas for adaptation and manage scientific uncertainty, so does a legal vulnerability assessment enable localities to make smart policy choices in the context of legal uncertainty. An effective legal vulnerability assessment discusses the extent to which a local government may be liable for failure to take adaptation actions and evaluates the relative legal risk of potential adaptation actions. While the adaptation measure selection process ultimately should incorporate other policy judgments in addition to legal risk evaluation, a thorough

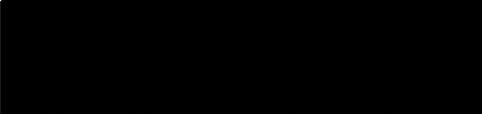
understanding of how law intersects with adaptation planning will enhance local governments' ability to prioritize and implement adaptation strategies. At the very least, the Guidance should alert local governments that, in general, it would be beneficial to evaluate how the law interacts with various adaptation alternatives identified in Step 4.

## **II. OUR SEA-LEVEL RISE ADAPTATION RESEARCH MAY SERVE AS A VALUABLE REFERENCE AND RESOURCE.**

Finally, we wanted to draw the Commission's attention to our recent publication regarding local government sea-level rise adaptation in California. Our article, *Combatting Sea-Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*,<sup>2</sup> broadly evaluates the risks and opportunities of potential protection, accommodation, and retreat adaptation strategies that local governments could deploy, focusing primarily on four categories of legal issues that may be implicated as localities plan for the impacts of sea-level rise: 1) the California Coastal Act, 2) the public trust doctrine, 3) the constitutional takings doctrine, and 4) the California Environmental Quality Act. Overall, we demonstrate how local governments can harness their existing regulatory authority to support aggressive sea-level rise adaptation strategies and, through proactive planning and smart decisionmaking, mitigate potential legal liabilities. The Commission may find it valuable to reference our article and include it as a listed resource in the "References" section of the document. We are also engaged in development of a model ordinance tool that will help local governments to understand how to incorporate specific adaptation measures into their LCPs to address sea-level rise. Our intention is that local governments may tailor our products to their particular LCP structure, substance, and policy choices.

Once again, thank you for the opportunity to submit these comments to the Commission. Please do not hesitate to contact us with any questions or concerns. Should you like to discuss a specific comment in greater detail, we would be pleased to provide additional information or resources. We look forward to working with the Commission as it takes further steps to facilitate sea-level rise adaptation in California.

Respectfully submitted,



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<sup>2</sup> Herzog, M. M. & Hecht, S. B. (2013). *Combatting Sea-Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, *Hastings West Northwest Journal of Env'tl. Law & Policy*, 19, 463-545, available at <https://www.usc.edu/org/seagrant/Publications/PDFs/HerzogHechtCombating%20Sea-LevelRiseinSouthernCalifornia2013.pdf>.